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Record No. 6334

In the
Supreme Court of Appeals of Virginia
at Richmond

W. REGNIER MILLER
v.
VAUGHAN MOTOR COMPANY, INC.

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.

Record No. 6334

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 18th day of January, 1966.

W. REGNIER MILLER, Plaintiff in error,

against

VAUGHAN MOTOR COMPANY, INC., Defendant in error.

From the Corporation Court of the City of Lynchburg
C. G. Quesenbery, Judge Designate

Upon the petition of W. Regnier Miller a writ of error is awarded him to a judgment rendered by the Corporation Court of the City of Lynchburg on the 14th day of June, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Vaughan Motor Company, Inc., was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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This day came the parties, by counsel, and the Court having maturely considered the motion of the defendant to set aside the verdict for the plaintiff, heretofore rendered in this action, and being of opinion that the verdict is excessive, for the reasons stated in the opinion contained in a letter addressed to Wm. Rosenberger, Jr., attorney for the plaintiff, dated April 28, 1965, which the Clerk shall file herein as part of the record in this action, the Court doth Order the plaintiff to remit $6,000.00, a part of his $12,500.00 recovery, as ascertained by the verdict of the jury on February 26, 1965, or else submit to a new trial on the issue of damages only, and it appearing that the plaintiff remits $6,000.00 of the verdict and accepts the reduced sum of $6,500.00, as ordered by the Court, under protest, as provided in §8-350 of the Code of Virginia, 1950, Replacement Volume 1957, it is therefore considered by the Court that the plaintiff recover of the defendant the sum of $6,500.00, with interest thereon at the rate of 6% per annum, from February 26, 1965, until paid, and his costs in this behalf expended, which the plaintiff accepts under protest, and the plaintiff, by counsel, duly objects and excepts to the action of the Court in ordering the remittur of $6,000.00 on the ground that the verdict was not excessive; it is supported by the evidence; and there is nothing to indicate that the jury was actuated by prejudice, partiality or corruption, or that they were misled by some mistaken view of the facts or the law of the case, but the verdict was reached in a fair and impartial trial.

Enter CGQ
Judge Designate
6/14/65

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TWENTY-NINTH JUDICIAL CIRCUIT

County of Amherst—County of Nelson—City of Waynesboro

WAYNESBORO, VIRGINIA

April 28, 1965

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Gentlemen:

When the Jury returned *it's* verdict in this case I was greatly surprised by the size of it and accordingly have given it considerable thought, since the trial day, in connection with the motion of the defendant, to set it aside.

Now there is no question about the liability here and so I don't think the verdict in its entirety should be set aside, but I do feel that it is so excessive that the plaintiff should be put on terms to accept a lesser amount.

The accident complained of was a slight one, the ladder struck Mr. Miller and did not knock him down, but knocked his hat off. He then picked up his hat and after swearing at the driver of the truck, went about his business for the day, although he did say he didn't feel so good.

Now the plaintiff's own Doctor, who's a reputable, highly regarded member of the medical profession, as well as another Doctor of like character, testified that Mr. Miller had completely recovered and had no residual injury.

The evidence of these two Doctors was contradicted to some extent by Dr. Novack, who came into the case, after Mr. Miller was discharged by his own physician.

page 34] Now the evidence of Dr. Novack is somewhat speculative to say the least and when you consider it in connection with the postive evidence of the plaintiff's own Doctor as well as the other Doctor who attended him, I do not feel that it is credible evidence upon which to base the large verdict.

Now Dr. Novack went on to say in the course of his evidence that probably Mr. Miller would have to have treatments the rest of his life. The manner in which this was said and the basis on which it was made, does not place it in the cate-

gory of reasonable medical certainty and I feel that this statement mislead and confused the Jury, as it obviously must have done in view of the verdict, which they returned.

In view of the foregoing it is my opinion that the plaintiff be put on terms to accept the sum of sixty-five hundred dollars ($6500.00) in settlement of this case or else I will grant a new trial. The matter again being submitted to a Jury only on the question of damages.

An order carrying these views into effect will be entered when tendered.

Very cordially yours,

C. G. QUESENBERY

Filed Jun 14 1965

GEO. W. MARTIN, Clerk

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: Honorable George W. Martin, Clerk of the Corporation Court for the City of Lynchburg, Virginia.

TAKE NOTICE, That pursuant to Rule 5:1, § 4 of the Rules of the Supreme Court of Appeals of Virginia, the plaintiff, W. Regnier Miller, by counsel, files his notice of appeal from the final judgment rendered in his favor against Vaughan Motor Company, Inc. in the amount of $6,500.00 by the Corporation Court for the City of Lynchburg, Virginia, on June 14, 1965, and within sixty days from the date of final judgment, and assigns error as follows:

(1) The action of the Court in setting aside the jury verdict for $12,500.00 and in ordering the remittur of $6,000.00 and rendering judgment for $6,500.00, on the ground that the

verdict was not excessive; it is supported by the evidence; and there is nothing to indicate that the jury was actuated by prejudice, partiality or corruption, or that they were misled by some mistaken view of the facts or the law of the case, but the verdict was reached in a fair and impartial trial.

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Filed: Jun 15 1965

GEO. W. MARTIN, Clerk

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The witness,

DR. B. KYLE MUNDY,

having first been duly sworn, on examination testified, as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Will you please state your full name?

A. B. Kyle Mundy.

Q. And, Doctor, do you have a specialty?

A. I practice orthopedic surgery.

Mr. Frost: I will concede his qualifications, if that will help.

Mr. Rosenberger: That will shorten it a little bit.

Q. Did you have occasion to see Mr. Regnier Miller on or about June 1st, 1963?

A. I did.

Q. And what history did you take at that time?

A. He told me that on June 6th —

Dr. B. Kyle Mundy

Q. Excuse me. Was June the sixth or June first?

A. June third, 1963.

Q. Was it June first, June third or June 6th?

A. June third, 1963. He told me that on Friday, the 31st of May, that he had been walking along Commerce Street and a truck bearing a ladder had struck his
page 5] head. At the time the accident occurred he was knocked down. He was not actually unconscious but he felt stunned. He complained of soreness along the parietal region of his head over his ear and of pain and soreness and stiffness in his neck. An examination made at that time revealed that his blood pressure was normal. A complete neurological examination revealed there was no abnormality of his reflexes or his pupillary action. There was definite soreness and tenderness along the trapezius muscle down the right side of his neck and there was limitation of motion of the neck to the right. An X-ray of his cervical spine was made in the office and also an X-ray of his skull, to be positive there was no linear crack through the skull. Examination of these X-rays did not show any injury to the bone. It did, however, reveal a moderately severe osteoarthritis of the fourth, fifth and sixth cervical vertebrae.

Q. At that time, Doctor, did you see any external injury on his neck?

A. No, sir.

Q. Did you see any bruises?

A. No, sir.

Q. Did you feel anything to indicate any bruising in the soft tissue here?

A. The only positive finding was a definite limitation of motion to the right and increased spasm of the trapezius muscle.

Q. Doctor, would you come down, please, sir, and if you would describe by this chart to the jury so we
page 6] will know what you are talking about. (Places a chart in front of the jury)

A. (The witness comes down in front of the chart and the jury)

Q. If you will take this (handing the witness a wand) and point to the trapezius muscle where you found the limita-

Dr. B. Kyle Mundy

tion of motion or spasm.

A. The trapezius muscle is not represented here except in this group here (indicating on chart). It is a very thin layer that runs here (indicating), the cross section. It lies here on your neck and goes down over your shoulder (indicating on his own neck and shoulder). The hypertrophic arthritis, which is in the fourth, fifth and sixth vertebrae is actually represented on X-ray by enlargement of the bony edges in that area (indicating on chart).

Q. All right, sir. Now, Doctor, if you don't mind, please take your seat again.

(The witness goes back to the witness stand)

Q. Was that muscle in spasm, Doctor?

A. It was; yes, sir.

Q. Now, would you describe to the jury what muscle spasm is?

A. It is a painful increase in tension in the muscle which is ordinarily constant, which persists.

Q. And is that something that nature creates to stop pain?

page 7] A. To immobilize an injured part.

Q. It is to immobilize an injured part?

A. Yes.

Q. Is that something voluntary or involuntary?

A. Involuntary.

Q. What do you mean by "involuntary?"

A. The patient cannot control it of his volition.

Q. Doctor, I notice from your statement at one place you have Saturday, June 1st, 1963, and then you have May 31st, 1963, as the date when the accident happened. Would you look at your report.

A. I believe, sir, that was an error of my secretary. I have got June the 3rd every place else.

Q. I see. Well, do you remember whether it was on Monday following this Friday, May the 31st, that you saw him?

A. I do not.

Q. You don't remember?

A. I do not.

Q. You do have one record —

Dr. B. Kyle Mundy

Mr. Frost: I object to the leading questions.
Mr. Rosenberger: All right.

Q. Would you refer to your report and see if you do have any record for any other date that you first saw him?
A. Of course I treated him back in 1960.
Q. Yes, sir, but I mean any other record.
page 8] A. June the 3rd is repeated here in about four different places and I believe it is accurate, sir.
Q. Now, after your first examination, what course of treatment did you prescribe for him?
A. Initially I attempted to just get him comfortable. I gave him some medicine for sedation and asked him to be pretty quiet at home.
Q. What was the purpose of this sedation that you gave him?
A. To alleviate the pain.
Q. And then what course of treatment did you give him in the office?
A. On June the 7th he came back and he had not improved or changed as far as the muscle spasm and limited motion. At that time I started him on a very small dose of cortisone, steroid hormone, to help alleviate the inflamation in his neck. At that time I started him on what we call intermittent cervical traction and this consists of putting his head in a halter and putting about 100 to 125 pounds of traction on his head for ten or fifteen seconds.

By The Court:
Q. That stretches his neck?
A. It does.

By Mr. Rosenberger:
Q. What is the purpose of that type of treatment, Dr. Mundy? Mechanically what does it do to the neck?
page 9] A. It helps to alleviate the muscle spasm and it helps also to align the vertebrae.
Q. Did I understand you correctly to say that that muscle spasm was nature's way of immobilizing the part?
A. It is.

Dr. B. Kyle Mundy

Q. Why is it you want to undo what nature has immobilized?

A. Because muscle spasm itself is a painful condition.

Q. Now, do you know how long you continued those muscle spasm treatments by neck stretching?

A. Initially the treatment was carried out two times per week and then, as he improved, it was reduced to just once a week. On July the 26th, 1963, it was felt that his condition was satisfactory and he was discharged, to come back if any further difficulty should occur.

Q. Then did he return to see you, Dr. Mundy?

A. On October the 16th, 1963, he did come back.

Q. And what type of treatment did you give him — First, what did you find when he came back then?

A. He had a recurrence of the painful condition and it had been present for about two weeks.

Q. And what treatment program did you start?

A. The exact same program was started again.

page 10] Q. Doctor, what does the cortisone do, the hormone treatment? Tell me what kind of medicine that is.

A. It is an arthritic preparation that is to alleviate inflammation in the synovial lining of a joint.

Q. Now, when you took these X-rays on June the 3rd, he had this arthritic condition shown in those X-rays at that time?

A. He did.

Q. All right. Will you explain to the jury what effect, if any, the bump of the ladder on his neck had to do with the subsequent condition that you found with regard to the osteoarthritis?

A. Well, of course, the knowledge of arthritis is not very complete and there are several things we know about arthritis that are pretty definite. An arthritic involvement includes an increased inflammation and thickening of a synovial lining to a joint. A synovial lining to a joint can become inflamed and thicken as a result of an accident. In a person who does not have arthritic involvement, this inflammation in the joint subsides rather quickly. In a person who has a present disposition to arthritis, it takes a longer time. The synovial lining tends to be thickened for a long time.

Dr. B. Kyle Mundy

The cortisone steroid will alleviate the thickening within ten days to two weeks usually.

Q. Now, when he returned to your office for treatment, did you find it necessary to use the traction again?

A. I did; yes, sir.

page 11] Q. Why was that necessary?

A. Well, of course, this was what we consider to be a pretty standard treatment for this type of pain. He had responded successfully to it prior to this and we continued with that program.

Q. How do you account for the fact that you get some relief from it — and he had not been to you since July — and then he came back in October? Is that typical of this sort of condition?

A. Of course over half of the people that I see with this condition do not have any injury connected with it. As I had treated Mr. Miller in 1960 for this exact same condition, it is also impossible for us to tell after the first four months is past whether an injury of this nature has predisposed to this second flare-up or whether it just comes in the ordinary course of living. In his instance, as in very many people that have this type of condition, a prolonged trip in a car will often precipitate it. Of course there are some other things that will precipitate it. Often a cough or hard sneeze will cause it.

Q. Then, Doctor, you continued to treat him, I believe, through *Janury* 3rd, 1964, is that correct?

A. That's right, sir.

Q. Now, will you look at your office notes and tell us what condition you found there on December 12th, 1963?

A. On the 12th of December, — and I believe

page 12] this is the only time that he complained actually of a nerve root pain — on this particular day he had pain going down his arms.

Q. And how is it that you account for the pain going down the arms from trouble in the neck?

A. This is when the inflammation becomes so severe that it actually presses against a nerve.

Mr. Frost: If Your Honor please, I would like to make a

motion in the absence of the jury right now in regard to Dr. Mundy's testimony.

(The Court and Counsel retire to the Judge's Chambers)

Mr. Frost: I understood Dr. Mundy to testify it was impossible to tell whether an injury such as Mr. Miller had could cause this second episode or whether it would come on in a normal course. The reason I wanted to do this out of the presence of the jury, I feel like any evidence now going into the second episode by Dr. Mundy, in view of his testimony, is inadmissible and it could not be connected with the original accident.

Mr. Rosenberger: He did not say it couldn't be.

Mr. Frost: He said it was impossible to tell.

Mr. Rosenberger: He said that in many instances it is impossible to say. He did not say this was true in this case.

The Court: He has to say that with reasonable medical certainty it is the result of the injury. If he can-

page 13] not do this, it should go out.

Mr. Frost: He testified already it is impossible to tell.

Mr. Rosenberger: We have another doctor who will follow him and we will be in a position to tie this all in.

The Court: I will let you proceed with the understanding you tie it in. If you don't, I will ask the jury to disregard it.

Mr. Frost: It is already in the minds of the jury. It seems to me he has committed himself as well as he could that it is impossible to tell.

The Court: We will get Dr. Mundy in here.

(Dr. Mundy comes into the Judge's Chambers)

By The Court:

Q. Let me ask you this question, Dr. Mundy. On this flare-up in December, which started in October, can you say with reasonable medical certainty that the flare-up in October or the condition in December was a result of this accident?

A. No, sir, I can't say with definite certainty that it was.

Q. With reasonable medical certainty?

Dr. B. Kyle Mundy

A. That is what I was trying to bring out to the jury. I can't say definitely one way or the other about it.

Mr. Rosenberger: All we are asking him now is to tell what condition he found in December so that we
page 14] may know what his condition was.

The Court: But you can't do that because he says that he can't say with reasonable medical certainty it was the result of it.

Mr. Rosenberger: Let me get this in the record.

By Mr. Rosenberger:

Q. Dr. Mundy, would you state what condition you found to be existing there on December 12th, 1963? Would you look at your notes.

A. He had an acute flare-up again, which in this instance involved pain down his arms.

Q. I believe you told us that that was due to pain being so great that it affected the nerve.

A. From pressure on the nerve, yes.

The Court: Also he said this could come from an extended trip in a car. I don't think that the line of evidence is proper.

Mr. Rosenberger: We object and except to the ruling of the Court in that regard.

(The Court and counsel return to the Court Room)

(The witness, Dr. B. K. Mundy, returns to the stand)

By Mr. Rosenberger:

Q. Dr. Mundy, would you tell us if this bill of $127.00 is accurate?

A. It is accurate; yes, sir.

page 15] Mr. Rosenberger: We offer this bill as "Plaintiff's Exhibit No. 1."

Mr. Frost: My objection to that is that it includes the other visits. Now, I have a bill here which I understand the Court has ruled out.

Dr. B. Kyle Mundy

The Court: At this time the amount through July the 26th would be the proper amount.

Mr. Rosenberger: All right. We offer that as "Plaintiff's Exhibit No. 1," if the Court would mark it "refused."

(The bill which was offered as "Plaintiff's Exhibit No. 1" was marked "refused" by the Court.)

Mr. Rosenberger: I object and except to the Court's ruling out the Exhibit No. 1.

CROSS-EXAMINATION

By Mr. Frost:

Q. Dr. Mundy, this is another bill dated August 14th, 1963, for your treatments, I believe, from June until July. What is the amount of that bill, sir?

A. $60.00.

Q. And at that time you discharged him, on July 26th?

A. Yes.

Mr. Frost: I want to file that bill as "Defendant's Exhibit C."

page 16] (The bill was received in evidence and marked for identification as "Defendant's Exhibit C.")

Q. I understand you treated Mr. Miller in 1960.

A. I did.

Q. For the same condition?

A. I did.

Q. And you speak about the arthritic condition for the fifth and sixth cervical, I believe you said. Would you point out where that is on me?

A. It begins here (indicating on Mr. Frost's back) and goes to there.

By The Court:

Q. A distance of four inches or so?

A. It is closer to three inches.

Dr. B. Kyle Mundy

By Mr. Frost:

Q. Now, the soreness you found was up above that, is that correct?

A. Below and to the right.

Q. Below and to the right of it? Let me see if I understand you. Would you put your finger down here where it would be, where you said it was.

A. The pain characteristically radiates into this area from there (indicating on Mr. Frost's back).

By Mr. Rosenberger (interposing):

page 17] Q. The pain radiates further than the three inches?

A. Oh, yes.

By Mr. Frost:

Q. And when you saw him June the 3rd you said his blood pressure was normal.

A. It was.

Q. And the pupils were equal and active.

A. Yes.

Q. And reflexes were all normal.

A. Yes.

Q. So that we will have a little idea about reflexes, how do you test the reflexes, Dr. Mundy?

A. By hitting a tendon with a percussion hammer. There are other reflexes that are stimulated by skin pressure.

Q. Now, did I understand you to say over one-half of the people have this situation without any injury?

A. Of the patients that I treat with this particular syndrome, approximately half of them do not have a history of injury.

Q. And you say it is impossible to tell after four months whether it was caused through an accident or whether it was caused through the normal processes of his condition, is that correct?

A. It is impossible to make an absolutely definite statement about it. It would be my opinion that after

page 18] four months the damage due to the injury was all gone; it was over.

W. Regnier Miller

Q. You say that could be caused by a prolonged trip in an automobile.

A. Or many other things.

Q. How about bending down?

A. Oh, a great many people find that a cold draft blowing on the neck will precipitate this thing.

Q. How about hunting?

A. I suppose it could, if you jumped across a creek or something like that.

The Court: Are you trying to find out what not to do? This is like a fishing expedition.

Mr. Frost: That is all.

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Doctor, could you tell us whether or not many people have osteoarthritic spurs in their neck and have absolutely no pain?

A. Oh, yes, and of course it is an intermittent condition. This condition comes and goes and the X-ray picture looks exactly alike, whether the neck is painful or not.

Q. I don't believe I asked you but did you have an opinion with reasonable medical certainty that the time he got struck on the neck with that truck had anything to do with the way you treated him in June and July?

page 19] A. Oh, yes, sir.

Q. All right. Thank you, sir.

The witness is excused.

The witness,

W. REGNIER MILLER,

having first been duly sworn, on examination testified as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. You are W. Regnier Miller?

W. Regnier Miller

A. Yes, sir.

Q. You are the plaintiff in this case?

A. Yes.

Q. On Friday, May the 31st, about 10:30 A.M., did you have occasion to go down to Vaughan Motor Company on Commerce Street in this city?

A. I did.

Q. All right. Would you tell us what side of the street you parked your automobile on?

A. I parked it on the right-hand side, facing east, and maybe a couple of parking meters from the corner.

Q. That would be on the south side of Commerce Street, wouldn't it?

A. Yes.

Q. After you parked your car, what did you do?

A. I walked across the street and there were three trucks — two trucks backed over the sidewalk and I
page 20] was up the street far enough that I had to walk around the truck and then on, headed to go in the building.

Q. All right, sir. Did there come a time you got over to the sidewalk or at the Vaughan Motor Company step?

A. I was on the sidewalk within one step, one step forward to step on the rock that you see in the picture.

Q. And what happened to you then?

A. The truck — I don't know where it came from — the truck that backed into me struck me here in the right side of my head (indicating).

Q. Which way were you facing, Mr. Miller?

A. I was facing to go in the building.

Q. You were going into the building?

A. Yes, sir.

Q. And when the truck hit you in the back of the head, what happened to you?

A. It knocked me to the street sideways and I jumped up and brushed myself off. I had no idea what had happened at the time. By that time the two boys had gotten out of the truck and said, "Did I hurt you?"

Q. All right. Did it hurt you?

A. It almost knocked me out but when they said, "Did

it hurt you?", I replied — I said, "What in the hell do you think? If somebody knocks you in the head, do you think it would hurt?" They laughed at me.

page 21] Q. Then where did you go?

A. Well, they said they were sorry it happened and after a minute or *to* I walked inside and the first man I saw I asked if he had a little small knob for a window air conditioning unit. I had been referred there from the Twelfth Street store. They said if they had it it would be there. They did not have it. I came out and went across the street and got in the car and sat there about fifteen minutes.

Q. What did you sit there for?

A. Trying to get my faculties back.

Q. Then subsequently did you get in touch with Dr. Mundy's office?

A. After getting back to the office I called his office and they said he was late or he was operating that morning and they had more patients than they could see. I made an appointment for the following Monday.

Q. Friday was May the 31st and then Monday would be June 3rd.

A. June the 3rd. That's right.

Q. And you went to see Dr. Mundy then?

A. Yes, sir.

Q. Before you went to see Dr. Mundy, did you take anything?

A. I took sedatives and just kept quiet from Friday, through Saturday and Sunday. I could not wait

page 22] for 2:00 o'clock Monday to come to see him.

Q. Now, Mr. Miller, Dr. Mundy spoke of the fact he had treated you for some trouble with your neck in 1960. Is that correct?

A. He did but as far as I know, I just woke up with that one morning. He asked me about the history of it, what had happened to me in the past week or two weeks, and I told him that I remember slipping on some steps at "C" Street and Hancock Street one night about midnight. The steps were covered with ice. That had been several days before and he said, well, that could have caused it but nothing was ever put in the records.

Q. How long did he treat you at that time, Mr. Miller?

A. It must have been approximately two months.

Q. Did you get any treatment from anybody else?

A. Later on. When you go to Dr. Mundy, he will treat you and give you a course of treatments and then he will say, "This is about all I can do." That is how I was discharged the first time.

Q. What I want you to do is get back to this 1960 thing. Did anybody else give you any treatment?

A. No one at all.

Q. Other than Dr. Mundy?

A. Dr. Mundy was the only one. Following that I went to Dr. Cronk, a chiropractor on Memorial Avenue.

Q. How long did Dr. Cronk treat you?

page 23] A. Five or six treatments.

Q. And after that time did you have any trouble with your neck?

A. None whatever.

Q. Then around to this day that the truck hit you in the neck, had you had any trouble at all?

A. None whatever.

Q. Then when Dr. Mundy started treating you the second time, I believe you say you went there on June the 3rd. Will you tell the Court and jury whether or not you took the medicine he gave you?

A. Yes, I did. The day that he treated me, that he examined me, first he took X-rays and then examined my neck and back and so forth, and he said, "You are too tense, too sore to do anything else. I'm going to give you a couple of prescriptions." He gave me two prescriptions, two types of drugs. He said I was to take those.

Mr. Frost: I want to object to what Dr. Mundy told this patient because that is hearsay.

The Court: Tell what he did to you.

By Mr. Rosenberger:

Q. Then he gave you a prescription, I believe, that day?

A. He said to come back Friday.

W. Regnier Miller

Q. You went back on Friday and then what did you do?

page 24] A. Then he examined me again and started out the treatments he just described with traction.

Q. Well, now, about that traction, how much of a lift was it? How much was your head pulled up?

A. You are sitting in a chair like this and they pull you until you are two or three inches from the chair and you are held there.

Q. Is that done once a day?

A. They do that and stretch your neck, push your shoulders down, then turn your head to your right, to the left and then after that they take the halter off, push your head to the left, to the right, front and back.

Q. Now, at the conclusion of that course of treatment, had you gotten some relief at that time?

A. I had gotten some relief but he told me the course of treatment was over; it just could not keep on and for me to try to live with it. He told me if I needed him night or day, to call him.

Mr. Frost: I again object to what the doctor told him.

Q. Try not to tell what the doctor told you.

A. I thought they wanted to know.

Q. Did you have anything happen to you in between July and October?

A. No, sir; nothing at all.

page 25] Q. How did your neck get before you went back to Dr. Mundy? Why was it you finally went back to him?

A. Because of the pain which *reoccurred* and the numbness; the pain *starting* shooting down in my arms and I couldn't rest at night at all.

Q. How many treatments did you take then?

Mr. Frost: As I understand it, the second episode has been ruled out.

The Court: As far as medical testimony is concerned.

W. Regnier Miller

Mr. Rosenberger: We want him to tell what he himself did.

Mr. Frost: It would be confusing to the jury, when we have ruled it out, and then to tell about his suffering from October on around.

The Court: He said he quit the treatments but the thing continued.

Mr. Frost: We object and except to this further question about the October episode.

Q. Because of additional pain you went back to him, I believe you said October the 10th or 16th.

A. That's right.

Q. And then how long did you continue going to him for that pain?

A. About twelve or fifteen treatments.

page 26] Q. Now, which arm was it that had gotten numb?

A. It was in my neck, my back and shoulders and right arm.

Q. Your right arm?

A. Yes, sir.

Q. In addition to the pain, was there any other sensation there?

Mr. Frost: I don't want to be persistent but under the Court's ruling, he is going into the second episode which Dr. Mundy said he couldn't tell came from the accident.

The Court: It is a question of what the jury believes. The doctor says he could not say with medical certainty it was caused by the accident. Often times people describe injuries that are not a result of the accident. It is for the jury to decide, based on the medical testimony.

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

Q. After you got through with that course of treatment, did your pain completely subside at that time?

A. No, the second time was just like the first course of treatment when it was completed. He said, "If you need me, call me."

W. Regnier Miller

Q. Then did it come a time you found you needed to go to somebody else?

A. I did.

page 27] Mr. Frost: I object to the leading questions.
The Court: Don't lead him.

Q. What did you do about any other medical treatment?

A. Several friends —

Q. Don't tell what the friends told you. What did you do?

A. I went to see Dr. John Novak.

Q. Then what kind of treatment did Dr. Novak give you?

A. He had me X-rayed the first thing before any treatment and just took a history of what happened. From there I went on to physical therapy at Lynchburg General Hospital ever since.

Q. What kind of physical therapy treatment was given you? What form of treatments did you have over there?

A. They started out with heat for about 20 to 25 minutes. They have a pad about 12 by 12, a heating pad on your back and neck. This is followed by electric vibration massage and then followed by the traction, the same as Dr. Mundy had given me.

Q. How often have you been going there?

A. To begin with I went three times a week and later on it was cut back down to two visits a week.

Q. Are you still going there?

A. I was there yesterday morning.

page 28] Q. How many treatments have you had at Lynchburg General Hospital?

A. Eighty-three.

Q. About how many times have you been to see Dr. Novak?

A. Five or six.

Q. Mr. Miller, will you tell me what difference it is in what you are able to do in connection with your work in regard to what you did before this accident happened and what you have to do now?

A. Well, for the first month I was supposingly off; I mean I did not work; I was disabled. Since that time I have been doing about 50 per cent of the duties that I normally do.

W. Regnier Miller

Q. Well, are you able to do any embalming now?

A. Not over two cases since this happened.

Q. Are you able to do any lifting?

A. Very little.

Q. Now, tell me what you did in those regards prior to the time you were hurt?

A. I did everything that the men there do; went on calls to hospitals, homes, wherever they might be, out on the highway; I helped with funerals from the church to the chapel, in the home, wherever they may be; at the cemetery, etc. It is considerable lifting involved in the funeral business in everything you do.

Q. Did you do the lifting before this accident?

page 29] A. Yes, I did.

Q. Why is it now you don't go on calls to homes?

A. Because it aggravates this condition.

Q. What do you have to do if you go on a call to the home?

A. Well, someone is dead in the home and you would have to take in the stretcher and place the body on the stretcher, bring it back to the place, take it off the stretcher; prepare the body and place it in the casket; move it in the proper place; take it to the home or church.

Q. Are you able to do that sort of thing?

A. Only in cases of emergency.

Q. Now, when you do do it, what happens to you?

A. It aggravates this condition and I am two or three weeks getting over it.

Q. Now, what about your work around the home? Did you ever do any work around your home?

A. I used to do everything that a handyman will do around the home, yard, etc. Now everything that has to be done like painting or little repair jobs or lawn work, and so forth, I have to hire someone to do it. I do ride a riding mower.

Q. How does this affect your sleep?

A. Well, you are worn out about 4:00 or 5:00 o'clock in the afternoon and whenever you get to sleep you will get a couple or three hours sleep but from then on

page 30] it is just short naps, from then until daylight.

Q. How much medication do you take?

W. Regnier Miller

A. Every night that it bothers me, I take two pills, three pills a day, like I am doing now, and at night when needed.

Q. What are those pills you take during the day? How do they affect you?

A. They give you muscle relaxation and ease pain to a certain extent.

Q. And you say you are taking those right now?

A. That's right.

Q. Now, can you turn around and point out to the jury about where you pain is in your neck?

A. Well, it starts here (indicating on the back of his neck), comes down into my back, shoots down into my arms and all the way down to my wrist.

Q. Have you had any complete relief from this pain from the time you got hit by this ladder on until now?

A. If I am occupied with something, I might forget about it but I have it every day and every night.

Q. Does being occupied help you get your mind off of it? Does that help some?

A. It does.

Mr. Rosenberger: You may examine.

CROSS-EXAMINATION

By Mr. Frost:

page 31] Q. Mr. Miller, how old are you, sir?

A. Fifty-six.

Q. Fifty-six? What is your height?

A. Five feet ten and a half to eleven inches.

Q. Now, after the accident, you did report to Diuguid, as I understand, your place of business, did you?

A. I went back to the office; yes, sir. That is where I called the doctor from.

Q. I mean within that period of time that you said you were not doing too much work, you were at Diuguid's?

A. Oh, on a part-time basis. I would come in and out and answer the telephone. It was over thirty days before I did anything.

Q. You did not lose your salary or anything?

A. No, sir, they were nice enough to give me that, to take care of that.

Q. What are your duties at Diuguid's? What time do you report to work?

A. 8:00 o'clock in the morning or anytime I am needed.

Q. I mean normally you would go in at eight unless you are called at other times.

A. 8:00 o'clock.

Q. How long do you stay there?

A. Until everything is done for the day. 6:00 o'clock.

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Q. Now, does it happen every day in the week?

A. No, sir. There are scheduled changes every other day and over every other weekend. You still have to work when you are busy.

Q. You work one day from eight until six and then the next day, when it is a schedule change, what are your hours?

A. Suppose I am on duty that night. I work from 8:00 A.M. until 6:00 P.M. or 5:00 P.M. and get dinner. Then I am at home and they know exactly where I am that night and all the next day until 6:00 P.M. Then I should be free from 6:00 P.M. the second day until eight the next morning, unless needed.

Q. You are on call all the time?

A. Subject to call all the time.

Q. All the time?

A. Yes, sir.

Q. And you work then from 8:00 A.M. to 6:00 P.M. if there is no particular business at that time. I call the business funerals or anything. You go on home then and you would be free that night or still be subject to call?

A. I am subject to call the nights I am free.

Q. The nights you are free you are subject to call?

A. If they need me they call me.

Q. What nights are you regularly there?

A. It changes every week.

Q. What hours?

page 33]

A. I would like to start out this way. We will start out on Monday morning. I was supposed to have been off for the weekend and I will come in Monday

at eight and work through the day. I am on call Monday night and work Tuesday. I am supposed to be free Tuesday night until Wednesday morning at 8:00 o'clock. Wednesday night I am on call again and I am off Thursday night and Friday night, working Thursday and Friday but off those nights. I work the weekend, from Saturday at eight until Monday afternoon at six. I am supposed to be off every other weekend.

Q. Sometimes you work every weekend?

A. I do.

Q. What average calls do you get in the nighttime?

A. Most of them.

Q. I mean what does it average? How many a week would you say you got?

A. It all depends on the business. Since the first of this year we have had eighty or more calls.

Q. During the night?

A. No, sir, a total of death calls. I would say at least forty of them came in from 8:00 o'clock at night until 7:00 o'clock the next morning.

Q. You mean if a call comes in at 2:00 o'clock you get dressed and have to go?

A. Indeed we do.

Q. And you say about forty of the eighty calls
page 34] this year you think came in between what hours?

A. 8:00 o'clock at night and 7:00 o'clock the next morning.

Q. Now, when you get a call in the night at 2:00 or 3:00 o'clock or something, does that mean that you are going from then on?

A. It takes three of us. It takes one to look after the information, two to go to the home or the hospital, wherever it may be. It involves three people every call and sometimes more.

Q. What I am trying to find out, if you get a call at 2:00 o'clock in the morning, can you get back home and get to bed again?

A. Most of the time you can.

Q. How long a gap is it in there?

A. It usually takes a minimum of two hours.

Q. And then if you are supposed to go to work the next morning at 8:00 o'clock, you go to work regardless of being called at night?

A. That's right. We never take that into consideration at all.

Q. That has been the system ever since May 31st, 1963, has it?

A. Yes, sir, but they don't call me as much at night, as many times at night. I am speaking about the man in general.

page 35] Q. I see. I understood you to say this year you had about forty calls at night.

A. The company has.

Q. I meant your percentage of calls. You said it takes three to four men to work. Is this alternated? Do you get one one night and then another the next night?

A. That's right.

Q. In other words, they try to save all of you, not necessarily Mr. Miller but the other people who get the calls.

A. It all depends on who is on call that night. That is true.

Q. Actually you are on call every night, aren't you?

A. That is true, if needed.

Q. Now, you do some embalming, don't you?

A. I have embalmed over 13,000 people in thirty-five years. I have done very little of it in the last two to three years.

Q. In difficult cases they call you in, do they not?

A. That's right, sometimes just for consultation.

Q. Now, Diuguid's owns Parr's Funeral Home in Amherst, is that correct?

A. Yes.

Q. And it owns some place in Piney River?

page 36] A. No, sir.

Q. Is it any other place but Amherst?

A. No other.

Q. When they have a funeral from Amherst, do you go over there and help with that funeral?

A. Occasionally.

Q. How many funerals have you officiated at in 1965?

A. I guess I have been on half of them.

Q. Well, you were on every one for a week in there, Mr.

W. Regnier Miller

Jester, Judge Burks, and others.

A. Yes, sir.

Q. You were on Mrs. Stokes's funeral? George Jones, were you on that one?

A. No, sir.

Q. You and Mr. McKee divide those, do you not, as a rule?

A. We try to divide them.

Q. Now, in regard to your actual duties if a person dies. You are called we will say and you go to the home and get the information.

A. That's my job.

Q. That is your job?

A. Yes, sir.

Q. How is the body taken? Do you call for them?

page 37] A. Two of the other men from the place will go to the home, if you are speaking of night or day.

Q. Then the embalming is done. Then what happens? Then do you arrange about the sale of the caskets?

A. Any one of us are capable of doing that.

Q. How many employees are there on duty usually at one time at Diuguid's?

A. In the daytime it is around eight if we are busy; if not, two of them are all. The man who works at night is off the next day. Now we have five men who take turns in the building. The man who worked last night is off today.

Q. How many employees do you have?

A. Eight whites and two colored.

Q. As far as the white employees are concerned, each one can do the same thing that the other can do?

A. Five of us can.

Q. Five of you?

A. Yes, sir.

Q. Have you any idea how many funerals you held within 1964?

A. Offhand?

Q. You estimated at one time.

A. Close to 50 per cent of them, I would say.

Q. One hundred and eighty-five? That is what you estimated

when we took your deposition. Is that about right?

page 38] A. We had 350. I am quite sure I attended about half of them.

Q. Did Mr. John McKee have the other half?

A. Frequently we will have two funerals at the same hour or maybe three going on within a couple of hours, different ones going on different funerals.

Q. Have you any idea how many funerals you have had since the first of the year?

A. I mentioned just now approximately 80.

Q. Didn't you paint the kitchen on this Royal Blvd. home you had?

A. Yes indeed.

Q. When did you paint that, sir?

A. We built the home in 1954. It was 1955 or 1956, something like that.

Q. Didn't you paint it in 1963?

A. In 1963 we had the carport taken into the kitchen and Hesson Construction Company looked after the whole business. That was in the spring.

Q. You did not do any work after they had completed their work in the spring, did you?

A. No, sir.

Q. Now, Mr. Miller, you have been on some hunting trips, haven't you?

A. I have been twice, November of 1963 and 1964.

page 39] Q. Did you go deer hunting?

A. I go up the river to Blankenship's cabin.

Q. Mr. Ralph Gray was on one of those trips, was he not?

A. Mr. Ralph Gray, Mr. Jimmy Vaughan and the other Vaughan boy. It was Ralph Gray, Jimmy Vaughan, Conway Vaughan. It is two years that the three of us were there each time.

Q. Mr. John Blankenship and Mr. Joe Kennedy and Dr. Parker Lee?

A. We went deer hunting but got in the car. You ride until you find a stand and stay. Each and every time I came back in the afternoon late.

Q. They don't allow dogs to hunt deer in Amherst?

W. Regnier Miller

A. That's right. We do not walk either.

Q. Who runs the deer?

A. We just let somebody else make some noise to get them up, shoot a gun or something.

Q. Now, on the day of the accident, you parked your car, as I understand, on the south side of Commerce Street and went out this street — I don't know whether you have seen those pictures or not (showing two large pictures to the witness). Let's see. Here is Vaughan Motor Company. This is downtown (indicating) and here is Dabney Foundry. Come on down in front of this drawing.

(The witness goes down in front of a drawing)

page 40] Q. This drawing is not to scale. If you had rather use the pictures, it is all right. Let me get around here so I can see what you are doing.

A. Here is the street right here on this side (indicating on drawing). I parked my car right along here, three parking meters, I believe, back of this. This is where you go in John P. Hughes. I walked across the street here. There were two Vaughan Motor Company trucks parked back across the street where it says "No parking." I walked around this one to this one. I did not run at any time. I was ready to put my foot on this step when the truck struck me from the back. (Indicating points on pictures)

Q. Didn't you see this pickup truck come by when you were getting out of your car?

A. No indeed.

Q. You did not see it back around at all? Do you ever recall seeing the pickup at any time?

A. After I got up off of the sidewalk.

Q. That is the first time you saw it?

A. I heard something going by. I didn't know it was going in my direction.

Q. You did not hear any truck operating or backing?

A. I heard the truck going on the street. Several cars passed.

Q. You do not recall ever seeing the pickup truck until

after the accident?

page 41] A. Until I got up off of the sidewalk.

Q. Now, you were walking, as I understand according to your testimony, in a northerly direction, were you not?

A. I walked from this point here (indicating). I walked from this point here across the street to where two trucks were parked here. I walked around down in the street and walked across and was up on the sidewalk, fixing to go in the door.

Q. When you walked around this truck over here you pointed to, were you not facing in an easterly direction?

A. I was facing this door right here after I went around the truck.

Q. Before you went around the truck you had to look at it?

A. It was nothing coming anywhere.

Q. You did not see any truck?

A. I don't know what direction this truck came from.

Q. I see. Do these pictures show the situation?

A. Yes.

Mr. Frost: I would like to introduce these pictures as "Defendant's Exhibits A and B" and this rough drawing as "Defendant's Exhibit D."

The Court: He was talking about the picture and pointed out where his car was parked.

Mr. Frost: That is all.

page 42] (The exhibits were received in evidence and marked for identification as "Defendant's Exhibits A, B and D.")

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. So we can all see this, will you come down before the jury again?

A. (The witness goes down in front of the jury)

Q. Can you give us some idea how wide the sidewalk is

over in front of the Vaughan building shown on Defendant's Exhibit A?

A. I would guess eight to nine feet.

Q. That is your best estimate?

A. That would be my estimate.

Q. Does it look as wide as eight to nine feet in the Defendant's Exhibit A?

A. Does it? Looking at the picture, it doesn't, but it is at least eight to nine feet wide.

Q. Now, is this rock that is shown here below this opening into the end of the building, is that what you refer to?

A. That's right.

Q. Is that what you call the step here in Defendant's Exhibit A?

A. That is the step.

Q. You were about to do what?

page 43] A. Put my foot up like this on the step when I was struck here.

Q. When you were about to put your foot on the step, which way were you facing?

A. Facing the door, fixing to go up.

(The witness goes back to the witness stand)

Q. Now, about the deer hunting. Where were you hunting?

A. We were up in the Elon district of Amherst County. You go to Camden's Store and turn left and come down to the river.

Q. Where is John Blankenship's cabin?

A. It is known as the old Johnny McCarron property. He had four cottages up there.

Q. Is that where you went to go deer hunting?

A. Where we went. We stayed there and went out in the morning. John Blankenship's little acreage up there is 65 or 70 acres. A couple or three people stay there and go elsewhere.

Q. Now, did you walk from there to where you went to hunt?

A. We rode up in a car or a jeep and just took a stand.

Q. Then after you got on the stand did you get out and

fly around like you do when you are bird hunting?

A. No, you just stay quiet.

page 44] Q. Now, Mr. Frost went into a great deal about your officiating at a funeral. Is officiating at a funeral any more than being there and operating the car and speaking to people?

A. Lots of times it is so-called officiating at a funeral when you are a driver. We furnish two family cars with practically every funeral. You drive one or the other of the two cars or drive the hearse, the lead car.

Q. Do you do any lifting when you are officiating at a funeral?

A. Not unless you have to.

Q. Have you done any since May 31st, 1963?

A. I have had to and suffered from it.

Q. How many times can you remember you have done it?

A. Maybe a dozen or two dozen times.

Q. Have you done it in any of the 80 funerals you have officiated in this year?

A. Several times, about half of them that I officiated at.

Q. When you get up at night when there are three of you on these calls, do you go out to get the body or go out for any other purpose?

A. You go to get the information. Suppose someone passes away at the Baptist Hospital and they call and say the family are there in the Prayer Room at the Hospital. I would go to the Prayer Room and see them and do what

page 45] was necessary and then see them the next morning.

Q. That is what your duty is?

A. That is my duty.

Q. Now, will you tell the jury whether you still have pain or not?

The Court: You have been over all of that.

Mr. Frost: Can I ask two questions?

The Court: Yes.

RE-CROSS-EXAMINATION

By Mr. Frost:

Q. The forty funerals you are talking about, you would

drive the cars there, wouldn't you?

A. Yes.

Q. At St. Paul's you have got steps and you help the pallbearers get the casket down?

A. No, sir, we help them through the door and take the casket up the aisle from the altar, then from the altar back to the door. The pallbearers do the lifting.

Q. That is your regular duty?

A. That's right.

The witness stands aside.

The witness,

DR. JOHN G. NOVAK,

having first been duly sworn, on examination testified, as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

page 46] Q. Dr. Novak, will you please state your full name?

A. John G. Novak.

Q. Where did you receive your medical training?

A. University of Pittsburgh.

Q. When did you graduate?

A. I graduated with an undergraduate degree and also a medical degree in 1937.

Mr. Frost: We concede his qualifications.

By The Court:

Q. You are a neurosurgeon?

A. I am not a neurosurgeon; I am a neuropsychiatrist.

By Mr. Rosenberger:

Q. Doctor, after you received your medical degree, where did you go for training?

A. I trained in several areas, Pittsburgh, Philadelphia, New York, Washington, D. C., and post graduate training

Dr. John G. Novak

leading to qualifying in my specialty in the American Board of Neurology and Psychiatry.

Q. Then, when were you qualified before that Board?

A. December, 1944.

Q. And what Board is that?

A. American Board of Neurology and Psychiatry.

Q. Is that just an honorary thing or is that something you have to pass an examination for?

page 47] A. This is both oral and written examination.

Q. You have been a Fellow of Neurology and Psychiatry since when?

A. I have been a member of the Academy or a diplomate since December of 1944.

Q. Following that time where did you practice?

A. I practiced when I was in the army, at the time I took that examination. I served sixty-two months in the army as a neuropsychiatrist and then went on to Newark, New Jersey, where I practiced from 1946 to 1960. In 1960 I came to Lynchburg and I have been in practice here since that time.

Q. Did you have any connection with Lynchburg before you came here?

A. I visited here a great deal and married a girl from Lynchburg.

Q. And you have been living here since 1960?

A. Yes, sir.

Q. All right. Now what kind of practice do you do now?

A. My practice is confined entirely to nervous and mental diseases dealing with what is technically known as neurology and psychiatry, dealing with diseases of the emotional system of the mind and diseases of the nervous system, whether injury, tumor, blood vessel difficulty, infection, any of this.

Q. Doctor, when you speak of injury to the

page 48] nervous system, do you refer to nerves as in a nervous person or an anatomical part?

A. Anatomical part, consisting of the brain and central nervous system or spinal cord, the peripheral nervous system, the nerves that extend into the arms or legs, the other parts of the body, which have to do with the various functions of the different parts of the body; motor functioning; walking; most of the hand sensations; the ability to appreciate

various sensations of pain, touch, temperature change.

Q. Now, in the course of that practice have you had occasion to deal with and treat injuries to the neck or cervical spine?

A. I have.

Q. Now, did there come a time when you saw Mr. Regnier Miller?

A. Yes, sir, I did.

Q. When did you see him?

A. Mr. Miller was first seen in my office on March 25th, 1964.

Q. At that time did you take a history from him?

A. Yes, sir, I did.

Q. What history did you take?

A. At that time he advised me of the following. He said that he came to see me or he was referred to me by other patients I had been seeing. He came for evaluation and treatment of the aches and pain in his neck and shoulders. These occurred after he was involved in an accident on May the 31st, 1963. He told me that on that particular day he was walking on the sidewalk at 13th and Commerce Streets. He was going to get a part in a building there when a truck backed in. The ladder protruding from the truck struck him on the back of the head, on the right side over this area (indicating). He said he was knocked to the street but he was not knocked unconscious but he was "stunned and saw stars." However, he was able to get up on his own and said that he had a knot on the side of his head and he felt sick.

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Q. Now, Doctor, did he tell you about any treatment he had gotten from any other doctor?

A. He told me that same day he tried to see Dr. Mundy, Dr. Kyle Mundy, but was unable to do so. He was given an appointment for the following — for June the 3rd. He told me in retrospect May the 31st, 1963, which was a Friday, and that would make June the 3rd a Monday. He said that he had a good deal of pain in his neck over that weekend. He saw Dr. Mundy the following Monday and he said he was given two treatments because he was "so sore and tense." He was also seen the following Friday and started the course of treatment consisting of stretching and manipulation of the neck muscles. This was done in Dr. Mundy's office. He

Dr. John G. Novak

went on to say he had been treated on a twice-a-week basis and that after a course of treatment he was given a rest of somewhere between four to six weeks, then a sec-
page 50] ond course of similar treatment was given. He mentioned that the second course of treatment ran from October 16th, 1963, to January 3rd, 1964. He had with him a statement from Dr. Mundy's office, so he was able to give these dates. His last treatment, according to his history, was at the end of January and it had been at this time when I saw him, March 25th, approximately six weeks since he had seen Dr. Mundy. He stopped taking the medication that had been given to him and at the time when I saw him first he told me the pains that he had in his neck and shoulders occurred particularly in the mornings and evenings and that because of this discomfort his ordinary activities were restricted. In addition he suffered from the "dizziness and unsteadiness." The pains in his shoulders as well as the pains over the side of his neck are described as "a hurting with occasional shooting pains." These pains extended into his left arm. He volunteered the information that when the pains extended down his left arm, he was scared, the implication being this may have something to do with his heart. My questioning revealed during the previous five or six months he had been awakening between 3:00 and 4:00 A.M. with neck pain and following this awakening he would usually doze off but would arise and get out of bed around seven in the morning. In his daily activities he noticed that around 4:00 to 6:00 o'clock in the evening he became quite tired and the neck pains would begin again. He is also aware of having neck pains whenever he is not preoccupied by other things. He admitted he had been worrying about the
page 51] situation. He felt that his condition was worse rather than better. He admitted by the end of the day he was quite tense. Further inquiry on my part revealed he had X-rays made in June of 1963 and these were repeated in December, 1963, and that Dr. Mundy told him that he had "a sprained neck." More recently he was told that he had "arthritis of the 3rd, 4th, 5th or 6th vertebrae." He admitted he also had been advised an operation may be indicated. He told me that four or five weeks before he consulted —

Mr. Frost: Just a minute. If Your Honor please, he is reading in the paragraph right here and I think probably it

shows something in this next paragraph which would not be appropriate (referring to a letter).

The Court: The next paragraph will not be appropriate.

The Witness: I will go on to the last paragraph. Inquiring in to his background, his past history, he told me that some four or five years before he had awakened one morning with pains in his neck. This had occurred after he fell down some icy steps. At that time he saw Dr. Mundy for a period of time and he later saw Dr. Cronk, who I understand is a chiropractor. The latter took X-rays and gave him twelve to fifteen treatments. Some six weeks before I had seen him for the first time, he saw Dr. Parker Lee to have his eyes checked. He had a feeling — He described it as "a feeling of something flying in the right peripheral field over in here." He said Dr. Lee gave him a "slightly stronger lens." I learned by questioning that he was very sensitive and aware of any changes in weather. Now at that first visit I did a neurological examination, a complete one, and I found that there was some restriction in the movement of his head and this was particularly so when he turned his head to his right shoulder. If he would turn it this way (illustrating), it was restricted to about here and if he had to lay his head over towards the left he was not able to lay it over as far as he could on the opposite side or as far as we usually see it done. At the first visit I referred him for some X-rays of the neck. I gave him some medication consisting of muscle relaxant, Emperin and antidepressant. Then after I received the report on the X-rays, I reviewed the findings and made my recommendations. The recommendations, of course, were to continue the medication and also I talked with Mr. Young at the Lynchburg General Hospital, the physiotherapist, and arranged for Mr. Miller to have a course of treatments there. Now during the time I followed Mr. Miller he has been receiving treatment at the Lynchburg General Hospital. Mr. Young has been giving this treatment under my direction. We attempted to establish some maintenance of cutting down the treatment to the less frequent period of time that was necessary so that he was reasonably comfortable and could carry on with a reasonable improvement in this marked spasm and tenderness and soreness in the muscles of his neck and shoulders. I have reports of this from Mr. Young. During the time I

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followed him I have seen him at periodic intervals
page 53] in the office and have rechecked him. I have seen
him from time to time while he has been at the hospital for treatment. The last time I saw him or the most recent time I examined him was on February 18th, 1965.

Q. What did you find at that time, Doctor?

A. Well, there is an interval history and I could say the interval history has shown that there have been times when there has been improvement and there have been other times that there has been a return and an intensification or aggravation of the discomfort that he had. He would relate this to whatever he was doing, whatever it was necessary for him to do in his work. I have details of that in my written record. The last time I saw him in the office to examine him was on February 18th and I felt it was some restriction in what we speak of as the associated movements of the upper extremities. If I may demonstrate, Your Honor.

The Court: Yes.

The Witness: As we walk without thinking about it we swing our hands (illustrating). This is a natural thing. We speak of this as associated movement. In observing him there was less in his right upper extremity (illustrating). I will talk toward the jury. He had this without being aware of it. (Illustrating) This is as I recall it. He would walk more like this on this last visit, keeping the right arm more to his side
side and not swinging it. He continued to have
page 54] some restriction on turning his head to the right
and again could not turn it as far to the right as he could to the left. Now at that time I also found some changes in the ability to appreciate pain in certain areas of the neck and shoulders. This is done by testing with a needle or a pin and comparing one side with the other side. I found that there was a decrease in the distribution of certain of the nerves that come out of the neck and supply the skin area. This was on the right side. I continued him on medication. I felt during the course of treatment that he was very judicious, very careful in the use of the medicine, and would take it as necessary. He never exceeded the limitations that I put on it. This is very carefully checked because all my prescriptions are restricted and then can only be filled a certain number of times, a certain number of pills. I can calculate from what the patient tells me how they are taking this. From time to time he would need more and at other times he did

not. This again depended on how much discomfort he had.

Q. Doctor, with this type of injury, what is the usual course? Does it continue on on a certain level or vary one way or the other?

A. This is a variable thing. It depends on certain factors. I think it depends, number one, on the activities of the particular person, the age of the particular person, and I think these are factors that make a difference.

Q. Now, after taking this history and after making these findings on your examination, did you arrive at
page 55] a diagnosis of his condition?

A. Yes. Part of my diagnosis, of course, is based on what the X-rays showed and I felt there we were dealing with a couple of things. I felt, number one, he had a very definite emotional response to his lack of continued improvement. This I know definitely affected his mood and I also felt that he had osteoarthritis. This is based on X-ray data and I felt that this arthritic state was certainly aggravated or related to the injury that he had had the end of May, 1963. During the course of time when I had been rechecking him and following him, I have felt from time to time he has had some involvement of these nerves that come out of the bones of the neck and extend down into the arms. This is varied.

Q. Now, Doctor, would you be able to explain that better by a chart to the jury?

A. You had another chart there, I think, Mr. Rosenberger, which I was looking at when the jury was excused, the one on bones.

(The chart is placed in front of the jury)

Q. Did you look at the other one up here?

A. I just have these two. The one on the bones would be the one to use. (The witness goes down in front of the jury) This is an anatomical illustration that is made as though the head and neck were cut right down through the center, so we are looking on one-half of it. We are interested
page 56] and concerned particularly with these bones and spaces between these bones (indicating) in the

Dr. John G. Novak

neck. These are known as the cervical vertebrae and there is, as you will notice, a little space and cushion between each of these. This is the body of the vertebra (indicating) and this sort of lies in front, as you see. This is the surface of the neck, the front of the neck (indicating). Here is the windpipe (indicating). This is the back of the neck (indicating) and the muscles that you can feel on either side. If you put your fingers right in the center of your neck, you will find little bony protuberances. These are called spinous processes of these bones. This is illustrated in this section here (indicating). Now, the spinal nerves—We will use this other illustration for just a moment — come off of this part in here. Up here (indicating) you see the brain is divided into various parts and this is the spinal cord. It is the main telegraph center, if I can use this illustration or this way to express it. It carries the messages to and from the brain, down through the center of the back. This is sort of the main trunk line. It sends out little nerves to the arms, muscles, various part of the body. They branch off and come out onto the surface of the body through these spaces or between these spaces here (indicating) and they supply these muscles, certain of these muscles which are shown in this section (indicating).

Now, if I may look at the other chart. (The other chart is put up on the board) It is a little hard to see. These are these yellow lines, if I may express it that way, page 57] which show the nerves coming off between these bones. I don't know whether you gentlemen can see that from where you are sitting but I can point out the various bones or the bones we were looking at in the other illustration which are shown right in here, with these nerves coming off between these processes in the back (indicating). As you will see, some of them come down here to supply the skin and the muscles here and others go to the arm (indicating). These are the main nerves which come down through this part into the arm, called the greater proplexus. They run through the rest of the body. We are concerned with these that supply these muscles here.

From this condition in his neck there has been a narrowing of the spaces, certain of the spaces between these bones, and, of course, when they narrow they will pinch on these nerves.

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This pinching on these nerves, the tightness in the muscles from the spasm, is what causes the discomfort and the pain and the changes that have occurred are present in bones of the neck and make for a flattening of these bones, one on top of the other, in that they flatten out and pinch the nerves. Also, they restrict the motion of the head. There is less motion there than ordinarily. I think that illustrates it. (The witness goes back to the witness stand)

Q. What, if any, relationship is there between the pain that runs down the arm and the pain that is in the shoulder and the injury to the neck?

page 58] A. I believe this is due to the involvement of certain of these nerves that come out here (indicating). These are numbered according to the inner space or space between the vertebrae. We call them cervical nerves C-2, cervical 3, 4, cervical 5, 6, 7, and cervical 8. Then we get down to the chest and call these thoracic 1 and 2 and they supply the muscles and the sensation in the arms. (Indicating all of these points) I believe that the pain he has had in his arms is due to pressure on certain of these nerves that come down into the arm. More specifically, C-3 and C-4 and, I believe, possibly C-5 are what caused this. (The witness goes back to the witness stand)

Q. Now, Doctor, would you tell us generally what osteoarthritis is?

A. Osteoarthritis is a degenerative condition or degenerative disease, if you wish, involving the bones and it involves certain parts of the bone. It is not an uncommon type of condition.

Q. Now, if that were shown up in the X-ray right following the accident, then of course he had that condition before the accident, didn't he?

A. Yes, sir. As a matter of fact, it is generally conceded most everybody when we get to be forty or forty-five, certainly fifty, have this to some extent. It is felt, I believe, most everybody has it once they get to be in their late forties.

By The Court:

page 59] Q. It is the condition of your age?

A. Yes, sir, it is basically.

Dr. John G. Novak

By Mr. Rosenberger:

Q. Do many people have it without knowing it or do all who have it know it?

A. All of us in this immediate circle would probably have it and not know it until it was picked up by X-ray or something resulted in our having to have X-rays and it showed up.

Q. What, if any, effect did this ladder striking the neck have on arthritis?

A. Trauma is a very definite factor aggravating osteoarthritic conditions and it is many times some type of trauma or injury which will be the thing that precipitates knowledge on the part of the person there is something there. Injury is a very common cause, causing discomfort and bringing these things to the surface. It is very common.

Q. All right. Now, do you have an opinion with reasonable medical certainty as to what is causing his need for the treatment all the way down to this time?

A. Yes, I believe that the osteoarthritic condition of these neck bones, the cervical vertebrae specifically pinching on these nerves, because of the narrowing of the spaces I spoke about, has a great deal or has everything to do with the pain and discomfort and the muscle spasm. Of course, page 60] whatever activity he undergoes, whatever he does, will be a factor here too, so if he is doing anything that would aggravate this in any way, he is going to have more discomfort and more pain.

Q. What, if any, connection is there between the collision or the accident of May 31st, 1963 and this condition causing his trouble?

A. Of course I had a history of his having had some previous trouble with the neck. This I also testified to. I had also a history that he had no discomfort or pain after the courses of treatment that he had with the two doctors and was free of any trouble until this accident on May the 31st. Beginning with that accident, he has had a pretty constant history of pain and discomfort that has necessitated fairly continuous treatment. I do believe that the accident caused this, as very definitely the discomfort, the pain and his present state is very

definitely related to the injury.

Q. I see. Now, Doctor, do you have an opinion as to how long he will have to undergo these physiotherapy treatments?

A. I told Mr. Miller when I was following him, after the initial response to physiotherapy, that if we could find a sustaining level of treatment, for example if he was able to get along reasonably well and be reasonably comfortable on one treatment a week or one every two weeks, I thought this would be excellent. I felt he was going to have to have treatment over an indefinite period of time. As a matter of fact,

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I recall telling him I thought he was going to have to learn to live with it and that if he could find a maintenance dose, so to speak, on his physiotherapy and medication that I was using, which seemed to be helpful, I felt it would be a matter of learning to live with the condition. I felt the natural probability would be that he would have to have treatment the rest of his life but how much or how little would depend on what he did, because this seemed to be a very definite aggravating factor. We were able to get him down to a maintenance dose of maintenance level of treatment and then he had more discomfort and pain and then we started up with treatment again and we are again trying to level off on that. I will have to refer to Mr. Young's reports to me in terms of dates and numbers. The first report Mr. Young sent to me, at my request, was under date of February 10th, 1965.

Mr. Frost: Don't read that report.

By Mr. Rosenberger:

Q. Don't read his report. All you want to do is find out what his level of treatment is, I believe.

A. We were able — and I have this on my own notes. I don't have to refer to anybody's notes for that. This will take a minute for me to look up. We started him off on three treatments per week and gradually I cut this down from March or early April into June of 1964. About the middle of June he went along for two-week period and then we started him back about once per week, then once every couple of weeks,

page 62] depending on how much pain or discomfort he had. In the fall, specifically in October, the middle of October when I saw him, he had had a good deal of discomfort following when I had seen him at the hospital. This is from my office record here. He was doing very well until the time of the hurricane Cleo, which was August 31st to September 9th, in that period, and then he began to have a good deal more discomfort and he had developed a cold and the possibility of some allergy, and with the cold and coughing this pain became worse. We started him back on a couple of times a week treatment.

Q. Do you think he can be maintained by one treatment a week at this time?

A. I would say that would be the minimal.

Q. Doctor, could you give us the amount of your bill for services to him to date?

A. Inadvertently I forgot. I telephoned the secretary and she tells me the total bill is $100.00, which I understand has been paid.

Q. All right, sir.

CROSS EXAMINATION

By Mr. Frost:

Q. Doctor, you stated that he seemed to be worrying some when you saw him now in last May. He weighs 224 pounds, does he not?

A. Yes, sir.

page 63] Q. And he had gained some 12 or 14 pounds.

A. He lost and then he gained. He went from 224 pounds in March to 219 in June. Then he went from 221 in October and 224 in February.

Q. You want him to lose, don't you?

A. I suggested to him that it would be a helpful thing if he did take some weight off.

Q. Ordinarily when a person worries they don't gain weight, do they?

A. I have to laugh. There are two extremes. You either have a marked gain or have a marked loss and in my practice of over twenty-five years in this specialty I would not attempt

to guess which a person would do. I would have to take the history from them as to what was occurring.

Q. Now, Doctor, you stated something about emotional responses. That is due to the fact he wants to get well. That is what he seems to have on his mind. Is that what it is?

A. Well, this is one way of putting it. My estimation was that he was quite concerned about his condition and he felt frustrated. He had been following directions and doing what he was told to do as far as his treatment was concerned. He did not feel he was getting any better. This was certainly chronic at this point, May to March, almost a year, and I felt that the frustration and concern over lack of improvement, the lack of understanding as to what was the nature of his condition, he reacted like any other human being would react and in my experience to react and be depressed over a thing of chronic nature is not unusual, certainly in the age period he is in, which is the middle fifties. I think this is probably one of the most common illnesses all of us get in this period of life if we have any frustrations, chronic pain, anything disturbs or bothers us over a period of time, this is very common.

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Q. Well, Doctor, a cold could cause an aggravation of an arthritic condition, could it not?

A. Quite frequently cold weather is a factor.

Q. Cold weather is a factor? I don't know whether you were in Court when Dr. Mundy testified about prolonged rides in automobiles.

A. I was in Court but very frankly I was not listening to the testimony.

Q. Now, you did not see Mr. Miller, as I understand, until March 25th, 1964. Now I take it you are basing your opinion that you have expressed today merely on the history and what you yourself found since March 25th, 1964, is that correct?

A. Yes, sir, this is what I have testified to.

Q. Now you did not consult with Dr. Mundy, who had been treating him, did you?

A. No. As a matter of fact, I never find that it is very helpful to consult with the particular gentleman so I did not consult with him.

page 65] Q. I don't know whether you heard Dr. Mundy testify on this or not. The second episode, the October trip back to him in 1963, in his opinion he did not think was related to the accident.

Mr. Rosenberger: I was in the Court Room and I did not hear that. The doctor did not say that.

Mr. Frost: He said after four months —

The Court: With reasonable medical certainty that it was.

Mr. Rosenberger: He couldn't possibly say.

Mr. Frost: He did later on say after four months he was of the opinion that he would not say it was related to the accident. I wrote the words down in the tablet.

The Court: That is the last thing he said. Yes, sir.

By Mr. Frost:

Q. Apparently you don't agree with him, do you, Doctor?

A. I testified before that I was in the Court Room but I was not listening to the doctor's testimony, so I will have to take it from the record. If the record is read, I will be happy to give some opinion in keeping with what my thoughts are.

Q. Your opinion, of course, is based on his history prior to March 25th, 1964, which you got from him, is that correct?

A. Yes, sir.

page 66] Q. Now, Doctor, Dr. Mundy is an orthopedic surgeon, is he not?

A. Yes, sir.

Q. I noticed another thing and I wanted to see if I understood you correctly. The arthritic condition, as I understood your testimony, depends upon whatever activity you happen to be doing, is that correct?

A. No, I don't recall testifying to that. I believe I testified that any pain or discomfort or symptoms resulting from the osteoarthritic condition would be related to the activity and would be also related to weather. I mean the pain and discomfort rather than the basic condition.

Q. In other words, the pain then is related to the activity but the arthritic condition is, of course, something that we have or we don't have. We know about it or we may not know about it.

A. The arthritis and the extent of it, what soft tissues it

involves, such as the nerves and the tendons, will have a great deal to do with the pain and discomfort. This in turn is also related to the activity and to the weather.

Q. Now, the arthritic condition that obtained prior to May the 31st, 1963, that you mentioned — This was not the one (indicating drawing). Anyway, the one I was talking about was the drawing that showed the vertebrae and the arthritis. When you have it, as I understand, there is a spurring, page 67] is there not, which makes the space between them closer?

A. Actually the arthritic process involves, I think, the edges and the surfaces of these vertebrae. One sits on top of the other. Also the spurring occurs out from the body of the vertebrae. I have the X-rays here that show it very nicely.

Q. That is what I was saying. The arthritic condition is a narrowing of the space between the several vertebrae. That's correct, is it not?

A. This will occur, definitely.

Q. That of necessity, whether you have an accident or don't have an accident, will eventually lead to pressure on the nerves, will it not?

A. It may or may not. It depends on how much there is.

Q. Then it depends, of course, as you have testified on the activity of the individual.

A. Yes.

Q. And also weather?

A. Yes, I said weather and then I had also in my original testimony spoken of trauma.

Q. That is one of the many causes?

A. One of the very definite aggravating factors.

Q. I don't believe you ever told the jury what you mean by trauma.

A. Trauma is an injury, like anything — How page 68] shall I express it? It is an accident. It is funny because it is an everyday thing but I am at a loss for words how to explain it. It is an accident, anything that comes in contact with the body that causes injury to the body or discomfort.

Dr. John G. Novak

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Doctor, what is the relation if you have an arthritic condition and have no pain, between this and the injury that is superimposed on those narrow places? Why does the injury cause the flare-up that wasn't there before?

A. Would you repeat your question?

Q. What does the injury to the soft tissue cause? How does it cause an arthritic condition to flare up? What is the process in there?

A. I don't know that I can exactly answer that. There is a disturbance to the usual physiology. Because of the degenerative changes in the bone, it apparently disturbs or irritates these and gets things stirred up and activated. This is just my own thinking.

Q. What does the irritation to the soft tissues?

A. A blow to some of the tissues will invariably cause swelling. It is as though you get a good bump on any part of the body and you get a soreness and swelling and sometimes bleeding into the tissues. Then it takes time for that swelling from the tissue fluid and bleeding to be absorbed and, as it is being absorbed, there is a good deal of discomfort. All of us have bumped into things and bruised ourselves and know sometimes you end up with bruises which are quite painful and black and blue, that sort of thing.

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Q. What, is any, connection is it between the swelling and that situation and the narrowness of the space caused by the already pre-existing arthritic condition?

A. As I indicated, my own thinking is this action is an irritant or irritation or reactivates or speeds up or accelerates, if you wish, the arthritic process which is already there; aggravates it.

RE-CROSS-EXAMINATION

By Mr. Frost:

Q. I have one question. Cold weather sets up the same irritation, does it not?

A. Yes, I think the mechanism here is in the muscles over-

lying these bones are not as relaxed as ordinarily, so with a degree of spasm cold will also aggravate this condition.

The witness is excused.

FRANK D. SMITH, JR.,

The witness, Frank D. Smith, Jr., having first been duly sworn, on examination testified as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Will you please state your full name?

A. Frank D. Smith, Jr.

Q. Where are you employed?

A. W. D. Diuguid's.

page 70] Q. How long have you been there?

A. I was there once before. I was away ten years but I have been back since 1960, March the 14th.

Q. You were employed there on May the 31st, 1963?

A. Yes, sir.

Q. Are you familiar with Mr. Miller's usual activities around the mortuary there, the things he did before and after May 31st, 1963?

A. Yes, sir.

Q. Could you tell us generally what Mr. Miller did prior to May 31st, 1963?

A. Mr. Miller did duties that the rest of the funeral men and embalmers there did, which consisted of lifting, directing funerals, arranging for funerals with families, etc., but since that time he has not done much lifting except in extreme emergencies. He has not done much lifting there except in extreme emergencies. He has not done much lifting there except in emergencies and it has been very light. At night if we get a call, we hesitate to ask Mr. Miller to go into the home to do any lifting because it aggravates him.

Q. Have you noticed any difference in him, the way he saves himself in what he does?

Mr. Frost: I object to the question as being leading.

Frank D. Smith, Jr.

By Mr. Rosenberger:

Q. What other differences have you observed
page 71] in the way he handles himself?

A. He is slower in his movements and doesn't turn as easy as someone would.

Q. Will you tells us how he does when he turns?

A. If someone was over here and called me, I would turn and look up but he would turn completely around.

Q. In other words, when you turn you turn your head.

A. I turn my head.

Q. When he looks does he turn his head?

A. No, he turns his whole self.

Q. Has it been any difference in his disposition?

The Court: You are leading the witness again.

Mr. Rosenberger: You may examine.

CROSS-EXAMINATION

By Mr. Frost:

Q. What is your connection with them?

A. Funeral Director and Embalmer.

Q. You have been employed by them since 1960?

A. Yes, sir.

Q. Who is in charge?

A. John McKee.

Q. What is his official position?

A. President and Manager.

Q. What is the connection of Ford McKee with
page 72] Diuguid's?

A. Secretary-Treasurer.

Q. What is the position Mr. Miller has with the Company?

A. Assistant Manager.

Q. Who is the Manager, John McKee?

A. John McKee.

Q. Then actually Mr. Miller, I take it, is in a position in *senority* above your position which you have with the Company.

A. Yes, sir.

Q. Is Mr. McKee here this morning?

A. No, sir.

Q. Either John or Ford McKee?

A. Neither one.

Q. As a matter of fact, Mr. Miller still directs funerals like he did prior to May, 1963, does he not?

A. Yes, sir.

Q. He still drives the family car, picking up the family, carrying them to the church or cemetery as the case may be, does he not?

A. Yes, sir.

Q. He still goes to the home or wherever the family may be, obtains the necessary factual information that is needed for the purposes of your records, etc., does he not?

page 73] A. The information only; yes, sir.

Q. As a matter of fact, isn't he in a position that does not require him as virtue of his duties to be involved in picking up the body, putting it on the stretcher, carrying it to the hearse?

A. He has done it.

Q. That is when he was in a lesser position?

A. He has been in the same position since he came there according to my understanding.

Q. You say according to your understanding. You have been there since 1960 so you don't know what his position was or his duties were prior to that time.

A. The only thing I know is what Mr. McKee told me.

Q. So you don't know of your own knowledge?

A. Just since 1960.

The witness is excused.

Mr. Rosenberger: I have two bills which I would like to introduce as "Plaintiff's Exhibits 2 and 3." Plaintiff's Exhibit 2 is the bill of Dr. Waters and Dillard for $25.00. Plaintiff's Exhibit No. 3 is the Lynchburg General Hospital bill of $328.00 for eighty-four therapy treatments.

(The bills were received in evidence and marked for identification as "Plaintiff's Exhibits Nos. 2 and 3.")

THE PLAINTIFF RESTS

page 74] EVIDENCE INTRODUCED ON BEHALF OF THE DEFENDANT.

DR. JACQUES E. BOTTON,

The witness, Dr. Jacques E. Botton, having first been duly sworn, on examination testified, as follows:

DIRECT EXAMINATION

By Mr. Frost:

Q. Will you please state your full name and specialty?

A. My name is Jacques Botton; I am a neurosurgeon.

Q. What training did you have before you specialized in neurosurgery?

A. After medical college you mean? After medical school I trained mostly at the Medical College of Virginia, Richmond, four years and then I came to practice in Lynchburg in 1961.

Q. I see. At my request I think you examined Mr. Miller, did you not?

A. Yes, sir, I did.

Q. What date was that examination?

A. It was in January, January 27th, 1965.

Q. Now, when he came to see you —

By The Court:

Q. Let me ask you this question. What is the difference between neurosurgery and neuropsychiatry?

A. A neurosurgeon deals with the surgical treatment of diseases of the nervous system. The nervous system is the brain, spinal cord and the nerves. We deal mostly page 75] with the surgical treatment of the illnesses.

Q. What is the difference between a neuropsychiatrist and just a psychiatrist?

A. A psychiatrist deals purely with mental disorders, nothing physical at least that you can see. A head injury he will not treat but purely mental disorders of an individual. A neuropsychiatrist, in addition to that, will also have knowledge into neurological disorders and physical.

By Mr. Frost:

Q. Referring to your notes, when you saw Mr. Miller on

Dr. Jacques E. Botton

January 27th, what did he complain of? Did he have any complaints at that time? You may refer to the letter.

A. Well, as I said, I saw him January 27th, 1965. At the time he was fifty-six years old on May the 31st, 1965. He was hit over the right side of the neck with a metal object, which was apparently protruding from a truck. This happened while he was walking towards a store downtown. When he was hit he did not lose consciousness. In other words, he did not lose his faculties and stayed awake. He did feel dizzy and dazed several minutes.

Q. Can you talk just a little louder?

A. After this blow he was not rendered unconscious; he was dazed and dizzy a few minutes. Further questioning revealed that he never had any difficulties in the past except that he had been treated by Dr. Mundy about five years ago, five years from now, in other words 1960 he was treat-
page 76] ed by Dr. Mundy for neck pain and neck difficulties. Otherwise than that he had been in good health prior to this injury.

Mr. Miller, when he came to my office complaining of continuous headaches with neck pain, told me he was first seen by Dr. Mundy and later on by Dr. John Novak. He had continued to complain of headaches, neck pain and pain down both arms. He also said he was quite nervous. They were the complaints.

Q. All right, sir. Now, when you made your examination, what did you do then?

A. Well, with a neurological examination I try to see the condition of the nervous system. That would involve examining his head, his neck, his arms, his reflexes, etc.

Q. Did he seem to be in any acute distress at the time you examined him?

A. No, he was not. My neurological examination, if you divide it in two, one part would be what a patient complains about, what you may call subjective difficulties, and the other part will be objective findings. I will make this regardless of what the individual will say. I just mention the subjective complaints. Objectively what I could find on my own, I could not find anything abnormal neurologically.

Q. All right, sir. Let me ask you this. I heard you say

something about dividing the examination in two parts, objective and subjective, didn't you?

A. The subjective complaints I just mention.

page 77] Now these will be his complaints. Objectively means the things I would find without the patient's statements. These were normal. I did not find anything abnormal on objective examination. That would be absent reflexion, loss of muscular tissue, fractured area. It was nothing I could find objectively.

Q. What do you mean by "head configuration?"

A. The bones of the head.

Q. Now, did you check the pupils of his eyes?

A. Yes, sir.

Q. What was the result of that examination?

A. Well, they were normal pupils and reacted well to light.

Q. What do you mean by "fundi?"

A. That is the fundus. It means the bottom of the eye, looking inside of the eye it was nothing abnormal.

Q. Did you check the remainder of the cranial nerves to see?

A. Yes, sir, I checked what should be checked and did a neurological examination. I did not find anything abnormal. The neck seemed to be quite supple.

Q. What do you mean by being "quite supple?"

A. He could move his neck in every direction without any difficulty.

Q. Did you find any limitation of motion in any direction when you checked his neck?

page 78] A. I did not, sir. On hitting the neck gently I could not reproduce any pain in percussion of the neck and shoulders.

Q. Did you check his strength in both arms?

A. He had good strength in both arms and legs, normal reflexes.

Q. Was there any evidence of any muscular atrophy, loss of sensation anywhere?

Mr. Rosenberger: He is leading the witness.

The Court: He is even with you now.

Dr. Jacques E. Botton

The Witness: All of the points in the neurological examination were normal.

Q. When you speak about neurological examination, tell us briefly some of the things you check for the benefit of the Court and jury.

A. I said the shape of the head was normal. The neck could be moved in every direction and it did not seem to be any decrease in muscular volume. Sometimes the muscles thin down. There was good musculature in his neck. On percussing his neck gently with a hammer, I could not make him feel uncomfortable. He had good strength in arms and legs. The knee jerks, arm jerks, etc., were all normal, equal and good. He could see well and the pupils were normal. He could stand up with his eyes closed without falling to one side or the other. There was no difficulty with his balance or equilibrium and could walk straight with his eyes closed. This is a good sign of good balance. That is about it.

page 79] Q. All right, sir. Now, as a result of your objective findings, what did you say was the result of your objective findings?

A. Well, I just said the objective findings were absent, nothing abnormal, but you have to put the findings with the history. It was my impression Mr. Miller probably suffered arthritis in his neck probably this arthritis was there five, six or ten years and he may have been aggravated by the above mentioned injury of May 31st, 1963. That was my feeling that he had probably gotten over it physically.

Q. What did you say?

A. That he may have gotten over it. It was already two years time. It has been two years since then when I saw him and I did not believe this was really anything much left of that injury. It was probably an aggravating factor to the pre-existing arthritis. I think he cleared this condition.

Q. Did you have any objective findings which would justify the complaints he was making to you?

A. No, I did not.

Q. All right.

Mr. Frost: You may take the witness.

Dr. Jacques E. Botton

CROSS-EXAMINATION

By Mr. Rosenberger:

Q. Doctor, you took a history from Mr. Miller as to what his trouble was?

page 80] A. Yes, sir.

Q. Then he told you about his different pains, did he not?

A. Yes, sir.

Q. Then when you examine a patient do you take a history and ask them what is wrong and try to find out what you can from them?

A. Yes, sir.

Q. That is part of every examination, isn't it?

A. Yes, sir.

Q. And you generally accept what they tell you as being true, don't you?

A. Yes.

Q. When you did the neurological examination, that is the test for troubles in the spinal cord, to the nerves and even into the brain, isn't it?

A. Yes, sir.

Q. You can have a definite brain injury existing and the neurological examination will be negative, wouldn't it?

A. Yes, sir.

Q. Now, I am not finding fault. That is one of your examinations, the neurological examination. After you completed your entire examination, you expressed the opinion that the injury which he got on May the 31st, 1963, probably did aggravate his difficulties with pain in the neck and occasional extension down his arms.

page 81] A. Yes, sir.

Q. That is your opinion.

A. Yes, sir.

Q. Now, you also went further and thought that the physiotherapy and a collar would help his pain, did you not?

A. Yes, sir.

Q. Now, do you agree when you have this pain which goes down your arms that it involves the nerve that runs down the arm?

A. Yes, sir, it would be the only way you could explain the pain.

Q. There is some connection between an injury in the neck and the pain you have down the arm, which is from this nerve.

A. Yes, sir.

Q. And the difference between the neurologist and the neurosurgeon is that you go in and cut and he merely diagnoses the trouble and treats it.

A. No, that is wrong.

Q. He treats it by other means.

A. You are not just technicians, cutting on people without talking to them first.

Q. I am trying to talk about your surgery. I don't mean you operate right away.

page 82] A. I don't do that. I examine him. When you speak of a neurologist and a neurosurgeon, you can't disassociate one from the other. We have to first examine them before —

The Court: Dr. Rosenberger would be a very dangerous man to go to.

By The Court:

Q. What is your accent?

A. I am originally from Turkey. I probably have a French accent.

By Mr. Rosenberger:

Q. You went to the Medical College of Virginia?

A. It was a residency in neurosurgery.

Q. Where did you go to medical school?

A. Geneva, Switzerland.

The witness is excused.

EDWARD BROOKS, JR.,

The witness, Edward Brooks, Jr., having been first duly sworn, on examination testified as follows:

DIRECT EXAMINATION

By Mr . Frost:

Q. Will you please state your name, your age and address?

Edward Brooks, Jr.

A. Edward Brooks, Jr., twenty-one.

Q. By whom are you employed?

A. Vaughan Motor Company.

Q. On May the 31st, 1963, about 10:15 A.M., page 83] where were you?

A. In the warehouse at Thirteenth and Commerce.

Q. And which way were you looking? Were you looking towards the street or in the building?

A. I was looking out of the building.

Q. Tell us, without me asking questions, what happened down there that you saw.

A. I was uncrating a range, electric range, to be delivered, and I heard Vaughan's truck come down the street. As I looked up I saw Mr. Miller across the street beside his car and as the truck went by Mr. Miller run across the street as if it were a car coming or something, you know, and he wanted to get out of the way. I got down on my knees to get the bottom bolts out of the range and I looked up again and I saw the ladder hit Mr. Miller's head and his hat come off.

Q. What happened then?

A. He went down. I don't know whether it knocked him down or whether he bent down to pick up his hat or what. I didn't pay that much attention to it. The next time I saw Mr. Miller, he was in the office after a part.

Q. Was Mr. Miller walking across the street?

A. No, he run.

Q. He was running across the street?

A. Yes.

Q. Do you know where Mr. Miller was when page 84] he was struck in relationship to the sidewalk or step inside the building where he was?

A. I think he was about — It was a sidewalk, the step and then another step. He was about middle way on the middle step.

Q. Could you come down here and look at Defendant's Exhibit A.

A. (The witness comes down in front of the jury)

Q. Could you point out to the jury the step you are talking about?

A. Right here (indicating on picture).
Q. I will let you mark it there.
A. (The witness marks the point on picture)

By Mr. Rosenberger (interposing):
Q. He was on that when he got hit?
A. Yes.

Mr. Frost: I am tendering a picture that he placed the truck on at the position it was when the accident occurred.

The Court: That is Exhibit E.
Mr. Frost: Also the position of the ladder.
The Court: Defendant's Exhibit E will be refused.
Mr. Frost: We except to the ruling of the Court in refusing the picture.

CROSS-EXAMINATION

page 85] Q. Mr. Brooks, were you in this building? Come down here and show us where you were
A. (The witness comes down in front of the jury) I was back over here (indicating on a picture).
Q. You were back as far as this door inside?
A. Yes.
Q. Well, you were looking out the front door then?
A. Right.
Q. I see. And you could see Mr. Miller when he parked his car over on this side of the street?
A. Yes, sir.
Q. And had the truck gone by before he went across the street?
A. Yes, sir, the truck had gone by.
Q. Your truck had gone on by?
A. Yes, sir.
Q. You say when he ran across the street it looked like he was trying to get out of the way of some other car?
A. That is the impression I got.
Q. The impression you got was he was trying to get out of the way of traffic?
A. Yes, sir.
Q. I don't guess he had to run all the way across the street.

Edward Brooks, Jr.

A. I didn't see him go all the way across the street.

page 86] Q. You just saw him get out?

A. When he got out.

Q. He was in sort of a hurry for a little bit like a pedestrian will do to avoid a car?

A. Yes, sir.

Q. The next time you saw him, he was on the step coming in the building?

A. Yes, sir.

Q. He was facing into the building?

A. Yes, sir, and that is when the truck hit him.

Q. Then this truck backed across the sidewalk and hit him in the back of the head?

A. The truck was there about the same time he was.

Q. Well, if it was facing into the door the ladder had to be there at the same time to hit him in the back.

A. That's right.

Q. That knocked him down.

A. I don't know whether it knocked him down or not. I saw him bend over that way.

Q. He disappeared from your view?

A. I thought he bent over to pick up his hat.

Q. You did not see anything more?

A. No, sir.

(The witness goes back to the witness stand)

RE-DIRECT EXAMINATION

page 87] By Mr. Frost:

Q. Did you see him come in the building?

A. No, sir, I did not see him come in the building.

Q. Did you see him any more in the building?

A. I saw him later in the office, in the parts office.

Q. Could you tell whether his head hit the ladder or whether the ladder ran into the back of his head?

A. I couldn't tell really. I know the ladder hit him. I don't know whether he was raising his head up or the ladder moved and his head bounced.

Mr. Frost: I have a picture which is designated as "Defendant's Exhibit F," showing the truck with the ladder.

The Court: Let him identify that.

By Mr. Frost:

Q. You placed the truck there and that's the way the ladder was as far as you remember?

A. As far as I can remember.

RE-CROSS-EXAMINATION

By Mr. Rosenberger:

Q. Mr. Brooks, Mr. Miller wasn't backing out of the building, was he?

A. No.

Q. He was coming in the building.

A. Yes.

page 88] Q. That is all I want to know.

(The picture was received in evidence and marked for identification as "Defendant's Exhibit "F.")

★ ★ ★ ★ ★

The witness,

SAMUEL CARTER,

having first been duly sworn, on examination testified as follows:

DIRECT EXAMINATION

By Mr. Jester:

Q. Please state your name.

A. Samuel Carter.

Q. How old are you?

A. Twenty-one.

Q. By whom are you presently employed?

A. Glamorgan Pipe and Foundry Company.

Q. On May the 31st, 1963, by whom were you employed?

A. Vaughan Motor Company.

Q. In what capacity were you employed?

A. What do you mean?

Q. What kind of work were you doing for Vaughan?

A. Working in appliances.

Q. Do you mean by that you were doing main-
page 89] tenance work on appliances?

Q. No, just delivering them.

Q. On the day of May the 31st, 1963, did you happen to be driving in or rather driving a truck for the Vaughan Motor Company?

A. Yes, sir.

Q. I will ask you whether or not you know this gentleman seated here, Mr. Miller.

A. No.

Q. Did you see him on May the 31st?

A. Yes.

Q. Now, as I understand it, you are telling the jury you did not know him personally but you do identify him as being the man you saw that day.

A. That's right.

Q. Where was he when you first saw him?

A. Getting out of his car on Commerce Street.

Q. Getting out of the car? Where was the automobile?

A. Going down Commerce he was on the right-hand side.

Q. Now, when you say "going down Commerce," where abouts on Commerce Street?

A. Right across from the warehouse.

Q. I believe the warehouse is between Twelfth
page 90] and Thirteenth Streets.

A. That's right.

Q. And across the street from the warehouse in another warehouse used by John P. Hughes Motor Company?

A. Right.

Q. Now, on which side of the street was his vehicle when you first saw him?

A. On the John P. Hughes side.

Q. Then it would have been on the opposite side from the Vaughan Motor Company.

A. Right.

Q. Was the car in motion or was it parked when you first saw it?

A. It was parked.

Q. Where abouts was it parked?

A. Middle of the warehouse, straight across the street from Vaughan's.

Q. I show you here an exhibit which has been identified as "Defendant's Exhibit A," and ask you to examine that photo-

graph and first state whether or not you recognize the location that it portrays?

A. It was right there (indicating on picture).

Q. Well, is that the picture of where the Vaughan Motor Company is?

A. Yes.

page 91] Q. Is that a picture of where John P. Hughes is?

A. Yes.

Q. Come down in front of the jury, please, sir.

A. (The witness come down in front of the jury)

Q. Now, you have got to hold this picture so all the members of the jury can see it. Now, when you first saw Mr. Miller, where was his vehicle at that time?

A. Parked right here (indicating), right in this parking space.

Q. You are holding your finger on an area right by a parking meter?

A. Right.

Q. Are you telling the jury that is the spot his car was parked?

A. That is the spot.

Q. All right. Take your seat back up there again.

A. (The witness goes back to the witness stand)

Q. Where was the vehicle you were in at that time?

A. I was across the street.

Q. Were you driving a Vaughan Company truck?

A. Yes.

Q. Was that the truck that had a ladder on it which it is said Mr. Miller bumped into?

A. That's right.

Q. All right. Now, where abouts with reference

page 92] to Thirteenth or Twelfth Street were you when you first noticed the Miller car?

A. I was coming down Commerce Street. I put on the left-hand signal to give the signal I was going to stop, going to back into the door into the warehouse. I saw the man getting out of the car as I was going down Commerce Street.

Q. You are going to have to talk louder.

A. I was going down Commerce Street. I seen this car was parked. I seen him start to get out. I stopped and started backing into the warehouse. That is the last time I seen him.

Q. In which direction were you going on Commerce Street? Were you coming from Ninth toward Thirteenth?

Samuel Carter

A. Right.

Q. Or were you going from Thirteenth toward Ninth?

A. I was coming from Ninth to Thirteenth.

Q. You were going in a generally easterly direction on Commerce Street?

A. Right.

Q. Was he actually in the act of getting out of the car or sitting in the car when you observed him?

A. In the act of getting out.

Q. Getting out of the car. All right. When you say you give a signal to back or pull in such a position you could back into the Vaughan Motor Company, in what part of Commerce Street was your vehicle then? Was it on the right-
page 93] hand side or was it on the left-hand side of Commerce Street in the direction in which you were going?

A. See, I was pulling on the left-hand side. I was on the left-hand side. I made a little swing to back in there and keep from blocking traffic.

Q. When is the last time you saw Mr. Miller?

A. Well, the first and last time was down there.

Q. With reference to your movement to back your truck into the Vaughan Motor Company, when is the last time you saw him?

A. I got out of the truck and I seen him picking up his hat. That was it.

Q. Before you backed the vehicle did you ever see him crossing the street?

A. No, I didn't see him.

Q. Did you ever see him get out of his vehicle?

A. No, I didn't see him get out. I seen him in the position or in the motion of getting out. He was in the motion. I did not see him get out.

Q. The next time you saw him he was where?

A. Standing over on the sidewalk.

Q. Sitting or standing?

A. No, standing on the sidewalk.

Q. Now, with reference to this photograph which has been called "Defendant's Exhibit B," come down in
page 94] front of the jury, if you will, please.

(The witness comes down in front of the jury)

Samuel Carter

Q. There appears to be two doors in this warehouse. Which one of those doors was this closest to?

A. This one right here (indicating).

Q. This one with the sign over it which has "Vaughan's Appliance Service Center?"

A. Yes.

Q. When you saw him after you had backed your vehicle over there, what attacted your attention to him? What made you notice he was back there?

A. I did not know he was back there.

Q. What did you *say* him back on the sidewalk?

A. I heard the noise. The boy with me turned around and said, "What happened?". I told him I had hit the warehouse, like that.

Q. Did he ask Mr. Miller anything?

A. He asked the man, "Did we hit you?". He said, "What the hell do you think?".

Q. You tell us the exact language.

A. He said, "What in the hell do you think?".

Q. Who said that?

A. Mr. Miller.

Q. All right. That is the statement Mr. Miller made in response to the question that the other boy asked him?

page 95] A. Yes.

Q. Who was the other boy?

A. Roger Wade.

Q. Was he in the truck with you?

A. Right.

Q. All right, sir. I show you another photograph which has been introduced as "Defendant's Exhibit F," which appears to be the photograph of a truck. Is that a fair portrayal of the vehicle that you were driving on the day in question?

A. It has got the same body and everything.

Q. Is the ladder on this vehicle arranged as the ladder on the vehicle you were driving that day?

A. That's right.

Q. Would the ladder on this vehicle be in the same position the ladder was on the vehicle you were driving that day?

A. Yes.

Q. What would be the difference between the height of the ladder on this vehicle and the one you were driving?

A. None, I don't reckon.

Q. None?

A. No.

Q. Approximately at what speed did you drive this truck as you backed it into the position there of the Vaughan Motor Company door?

page 96] A. It couldn't have been over one or two miles. I just was moving just enough to, you know, — just moving.

Q. You are chewing off your sentences. You say not more than what?

A. A mile or two an hour.

Q. A mile or two an hour?

A. Right.

Q. What were you doing while you were backing? What were you watching?

A. I was looking back in my rear view mirror on my side view mirror to see if I was going in the door right. I didn't see no one.

Q. Were there any other vehicles of Vaughan's parked there in close proximity to where you were backing in?

A. I ain't sure. I thought there was one there but I don't know, it's been so long.

Q. Were going to back your vehicle so it was perpendicular to the building?

A. Right.

Q. All right.

CROSS EXAMINATION

By Mr. Rosenberger:

Q. Sam, do you want to come down here and talk to these gentlemen about these pictures so we will know we are talking about?

page 97] A. Yes. (The witness comes down in front of the jury).

Q. Sam, I understand that Mr. Miller's car was parked over on the Main Street side of Commerce Street when you saw him getting out of the car.

A. I didn't testify to that.

Q. Well, isn't that on the Main Street side of Commerce Street? Isn't that closer to Main Street than the side Vaughan is on?

A. I would say it would be.

Q. My understanding is pretty correct, isn't it?

A. Yes, I think so.

Q. I don't want you to say anything you don't know. I don't want you to upset Mr. Jester any more than I have to. Did you back your truck back towards this door?

A. I did.

Q. You did not see this man from the time you saw him when you were passing him, is that right?

A. Right.

Q. You were driving east when you went by him.

A. Yes.

Q. He was getting out of the car?

A. In the motion of getting out of the car.

Q. He was getting out of the car and the next time you saw him he was bent over or he had fallen over

page 98] on the sidewalk here.

A. I seen him when he reached over to get his hat. That is all.

Q. You saw him pick up his hat?

A. Yes.

Q. When you were driving this truck you could not see out of the back of the truck, could you?

A. Yes, we have got mirrors. I looked on my side.

Q. Where is the mirror that you have that you use when backing?

A. Well, there is one on one side and one on the other side.

Q. You didn't look in the one on the right side where you have got the ladder sticking out, did you?

A. The other boy—We usually watch. He didn't see no one. He is bound to have come—

Q. He was driving too?

A. No, I was driving.

Q. You let him watch for you and you couldn't look from where you were seated over to the mirror on the right side.

A. I looked before I come in the warehouse and no one was there.

Q. How much does the ladder extend back beyond that truck?

page 99] A. I don't know. About two or three feet.

Q. And is that one ladder or two ladders or just one extension ladder?

A. That is an extension ladder.

Q. An extension ladder. All right. You put it in gear and backed so the back end of your truck was across the sidewalk and you were going to get up to the door so you could move an appliance right out of the door right into the truck, is that right?

A. That's right.

Q. You were going to cover the entire sidewalk with the truck?

A. That's right, we got the right of way for it.

Q. It is the way you were driving anyway, wasn't it? Now, you say you heard a noise and you thought that the truck hit the warehouse.

A. I thought the ladder had.

Q. But when you got back there you found you hit Mr. Miller, is that right?

A. He said that. I don't know.

Q. You didn't doubt it, did you?

A. I don't doubt nothing but I didn't see it.

Q. Didn't the boy with you ask him, "Did it hurt you?"

A. He asked did it hit him. He said, "What in page 100] the hell do you think?"

Q. Why was he asking him? Was it any doubt about hitting him?

A. He reached down and got his hat.

Q. You never did see this man when you were backing.

A. When I was backing? No.

Q. Did you think the ladder had hit the warehouse or the truck had hit the warehouse?

A. I thought the ladder had.

★ ★ ★ ★ ★

The witness,

ROGER ALLEN WADE,

having first been duly sworn, on examination, testified as follows:

DIRECT EXAMINATION

By Mr. Frost:

Q. What is your name?

A. Roger Allen Wade.

Roger Allen Wade

Q. Who do you work for?
A. I am in the United States Army.
Q. Are you on furlough now?
A. Yes, sir.
Q. On May the 31st, 1963, by whom were you employed?
A. Vaughan Motor Company.
Q. Were you in the truck with Samuel Carter?
page 101] A. Yes.
Q. When you came up the street from Twelfth towards Thirteenth, do you know whether or not you saw the car of Mr. Miller's?
A. Yes, sir, I saw the car.
Q. Was that car parked at the time?
A. Yes, sir.
Q. Did you see Mr. Miller or pay attention to Mr. Miller?
A. No, I didn't pay no attention to Mr. Miller.
Q. What happened to the truck you were in?
A. We pulled up like we always do and backed into the warehouse.
Q. Did you look behind you?
A. Yes, sir.
Q. Did you see anybody behind you at all?
A. No, sir.
Q. Did you hear any noise of any kind?
A. Yes, sir, I heard the rattling of the ladders like it hit the back of the warehouse.
Q. The ladder rattled?
A. It rattled.
Q. What did you do, get out?
A. I opened the door and got out. I saw Mr. Miller picking up his hat off of the ground and brushing it off.
page 102] Q. Did you have any conversation with him?
A. I asked, "Did it hurt you?"
Q. What did he say?
A. "What the hell do you think?"
Q. Then what happened? Did he go in the store or stay outside?
A. He went on in and talked to Bob.
Q. He talked to somebody inside? Then did you see him any more after that?
A. Well, he come outside and asked the driver his name. That is the last time I saw him.

Roger Allen Wade

Q. That is the last time you saw him?

A. Yes, sir.

Q. Did he give any indication to you that he was hurt in any way?

A. No, sir. I didn't think he was hurt. He walked on inside and all it did was knock his hat off it looked like to me.

Q. Do you know how far that truck was backed?

A. I would say the truck was just about going up the little ramp. It is a little ramp, a little ditch just about on the ramp.

Q. Could you estimate how many feet?

A. I couldn't estimate how many feet.

Q. Could you pick out anything in this room page 103] here to give us some idea about the distance?

A. Well, let me see. It was about the distance from here to this (indicating the table), about three feet I guess.

Q. About three feet?

A. About three feet.

CROSS-EXAMINATION

By Mr. Rosenberger:

Q. Well, Roger, if you didn't see him when he got hit, how do you know exactly where the back of the ladder was at the time he got hit?

A. I said I heard the noise. That is the reason I opened the door and got out.

Q. You heard the noise? It sounded like it hit the warehouse to you, didn't it?

A. That's right.

Q. And you asked the man if it hurt him? You didn't ask him if it hit him; you asked if it hurt him.

A. That's right.

Q. He answered you pretty positive, didn't he?

A. That's right.

Q. That is all.

The witness stands aside.

The witness,

ROBERT J. RAMSEY,

having first been duly sworn, on examination, testified as follows:

DIRECT EXAMINATION

page 104] By Mr. Frost:

Q. You are Mr. Robert J. Ramsey?

A. Yes, sir.

Q. By whom are you employed?

A. Vaughan Motor Company.

Q. What is your position with Vaughan?

A. Service Manager.

Q. On May the 31st, 1963, did you hold that position?

A. Yes, sir.

Q. And where is the place of your employment?

A. 1228 Commerce Street.

Q. In this building that is shown on the picture here?

A. Yes, sir.

By The Court:

Q. Some refer to it as Vaughan Motor Company and some refer to it as Vaughan's Appliance. Which is it?

A. It is Vaughan Motor Company. We sell appliances, TV's, and so forth. It is warehouse service operation.

By Mr. Frost:

Q. Now, on the day of this accident, May the 31st, 1963, did you see Mr. Regnier Miller?

A. Yes, sir.

Q. How did you see him? Where did you see

page 105] him?

A. He was coming in the office, looking for a part.

Q. Did you see the accident in any way?

A. No, sir.

Q. He came in the office and looked for a part?

A. Yes, sir.

Q. Did you try to wait on him?

Robert J. Ramsey

A. Yes, sir.

Q. Did he say anything to you about the accident, about being hurt in any way?

A. No, sir.

Q. When did you find out about it?

A. Later on in the day, in the afternoon.

Q. Do you recall the conversation you had with Mr. Miller?

A. Not too clearly. He wanted a part for something that we did not have I don't remember much of the conversation. He did not stay long.

Q. How close is your office in that warehouse to this door that was open at the time he came in?

A. Oh, I don't know.

Q. Could you estimate it in feet?

A. Fifty feet. Forty or fifty feet. Maybe forty-five.

Q. Mr. Ramsey, did you measure from the page 106] ground to the lower part of the ladder?

A. Yes, sir.

Q. What measurements did you find that to be?

A. Six feet four inches.

Q. Six feet four inches?

A. Yes, sir.

Q. That is all.

CROSS-EXAMINATION

By Mr. Rosenberger:

Q. Mr. Ramsey, you did not measure the distance between the sidewalk and the ladder with the wheels of the truck down in the curb, did you? You did not measure the elevation of the ladder above the sidewalk there, did you?

A. No, sir.

Q. And when you heard about it later in the afternoon, then is when Mr. Gray called you about it, after Mr. Miller had reported it to him.

A. Yes, sir.

Q. Mr. Gray is Vice-president, I believe, isn't he?

A. Yes, sir.

Q. That is all. Thank you.

The witness is excused.

David Ralph Gray

The witness,

DAVID RALPH GRAY,

having first been duly sworn, on examination, testified as follows:

page 107] DIRECT EXAMINATION

By Mr. Frost:

Q. Will you state your name, please?

A. David Ralph Gray.

Q. By whom are you employed?

A. Vaughan Chevrolet and Cadillac.

Q. Are you an officer in the Vaughan Motor Company?

A. No, sir, I am not.

Q. Mr. Gray, I will ask you whether or not you went on any hunting trips with Mr. Miller.

A. Yes, sir, we were on a deer hunting trip together the first day of the hunting season of 1964, I guess.

Q. What month?

A. I guess it would be November 15th, I think when it first starts. I believe November the 15th was the opening day of the season and we went up on a Sunday afternoon, whatever date that was.

Q. Where were your headquarters for this?

A. John Blankenship's cottage.

Q. Who else was along?

A. We had Mr. Miller, Joe Kennedy, Mr. Jimmy Vaughan, Dr. Parker Lee and I believe John Blankenship. Of course John Blankenship was there.

Q. Will you tell us from the time you got up page 108] there how long you stayed up there?

A. We were there from Sunday evening through late Tuesday.

Q. What was the plan? What were you hunting?

A. Mainly deer.

Q. All right. What was the plan? What did you do? Did you have any dogs with you?

A. No dogs. Dogs are not allowed in that area. Early that morning we got up at 5:00 or 5:30 and had breakfast and

David Ralph Gray

then paired off together. I was with Dr. Lee and I believe Mr. Miller and Jimmy Vaughan were together in his car. I think Mr. Blankenship and Mr. Kennedy were together in their car.

Q. All right. When you went in the cars, how far did you drive?

A. We went, I would say, approximately three or four miles and stopped and stayed there possibly half of the day.

Q. Then when you got out did any of you walk around or go looking for any deer?

A. I would say we probably walked a quarter of a mile, getting to a proper stand, or something in that area.

Q. How long did this last, all day?

A. At noon we came in and had lunch and then went back out again. There again I was with Dr. Lee and I think Mr. Miller and Jimmy Vaughan were together that same day.

Q. Did you have occasion to observe Mr. Miller page 109] on this trip? You were with him at night.

A. I was with him at breakfast and lunch and the evening meals but not during the actual course of hunting, except on the second day, when he was with us that afternoon and apparently everything was all right.

Q. Did you notice anything abnormal in any way about him?

A. No, sir, not at that time.

Q. How long have you known Mr. Miller?

A. About ever since I have been in Lynchburg, approximately ten years.

Q. That afternoon when you were with him the second day, did he do any walking there?

A. No, sir, at that time we were in the jeep and we drove all the way up to the particular point we were going. He walked some distance from the jeep, however he was out of my sight.

Q. What kind of terrain would you walk on? Was this woods, fields or what?

A. This was wooded area.

Q. Level or hilly or what?

A. A combination of both I would say.

Q. He said something about having a platform or stand.

David Ralph Gray

Did you have any platform or stand?

A. There is no actual platform. The stand would
page 110] be considered as any area you might pick out.
It is not an actual platform.

Mr. Frost: You may take the witness.

CROSS-EXAMINATION

By Mr. Rosenberger:

Q. Mr. Gray, how long have you known Mr. Miller in years?

A. Approximately nine to ten years, something like that.

Q. Did he report to you that this truck of yours, of Vaughan Motor Company, with the ladder had backed into him and hit him and knocked him down?

A. It seems I recall he did. I think at that time I called Mr. Ramsey to find out what the situation was.

Q. And if Mr. Miller, based on what he told you and your knowledge of him, told you that you have no reason to doubt that, did you?

A. Well, as I say, it was not my corporation, so to speak, and therefore it was the responsibility of the personnel at that store to handle whatever was necessary on it. I more or less forgot about it. I just reported it to the proper authorities and dropped it from there.

Q. Now, if Mr. Miller says he has pain in his neck, do you know him well enough to say that you would believe him or not?

page 111] A. Well, I would assume anyone who has a
pain in the neck would say something about it.
However, I have not discussed it at any great length with him.

Q. Now, Mr. Gray, on this trip you did not see Mr. Miller take any great amount of exercise in any particular way; you didn't see him carrying anything heavy.

A. Well, he did the same thing that all the rest of us would do.

Q. He got in the car and rode three or four miles and then got out and walked fifteen hundred feet to a stand, stood there, then went back and ate and came back out again?

A. That's correct. That is approximately right.

Q. Wasn't it sort of instead of walking three or four miles you rode it?

A. That is true; yes, sir.

RE-DIRECT EXAMINATION

By Mr. Frost:

Q. Did you carry anything with you?

A. Well, you'd have of necessity your hunting gear, your gun, shotgun, etc. I believe Mr. Miller was carrying a shotgun.

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page 112] The witness,

J. R. VAUGHAN,

having first been duly sworn, on examination, testified as follows:

DIRECT EXAMINATION

By Mr. Frost:

Q. You are Mr. J. R. Vaughan?

A. Yes, sir.

Q. Are you connected with Vaughan Motor Company, Incorporated?

A. Yes, sir.

Q. What is your connection?

A. I am Treasurer of Vaughan Motor Company.

Q. Mr. Vaughan, your name has been mentioned as being on a hunting trip with Mr. Miller.

A. Yes, sir, I was on two with Mr. Miller, one in November, 1963, and also November, 1964.

Q. How long did the 1963 trip last?

A. Two days. Of course we'd go up on Sunday and generally come back late Tuesday.

Q. Who were you paired off with? Who did you hunt with on the 1963 trip?

A. I spent most of my time with Mr. Miller.

Q. On the 1963 trip?

A. Yes, sir.

Q. Just tell us what happened on this trip; how you got started and what you did.

page 113] A. Well, we rode to the general area we were going to hunt in and then we left our vehicles and walked and each took a position. During the morning we didn't do a whole lot of walking but in the afternoon Mr. Miller and I did right much walking that year.

Q. You did a lot of walking?

A. In the afternoon. We didn't do a whole lot in the morning.

Q. How about the second day, did you have the same procedure?

A. We didn't do a lot of walking. We used the vehicles more the second day.

Q. What kind of vehicle were you and Mr. Miller riding in?

A. We were riding in Mr. Miller's station wagon.

Q. Station wagon?

A. Yes, sir.

Q. What make or what kind was it?

A. It is a Falcon.

Q. What was the terrain? What was the nature of the ground you were walking on there?

A. Well, it was just a normal area of ground. Some was flat, some hilly, and it was mostly wooded area.

Q. Did you have any creek to get over, any streams through there?

page 114] A. I don't recall crossing any while walking; no, sir.

Q. Do you know what equipment you people carried?

A. Mr. Miller was carrying a shotgun and I was carrying a rifle.

Q. I will ask you how long you have been knowing Mr. Miller.

A. I have known Mr. Miller several years from a business standpoint. That is the only occasion I have ever been with him, was the two trips we were hunting.

Q. I will ask you whether or not it was anything abnormal about his ability to keep up with you or work with you?

J. R. Vaughan

A. No, sir.

Q. Did you hear any complaints of any kind?

A. No, sir.

Q. Now, about November of 1964. Were you with him that year?

A. Yes, sir.

Q. You were paired off with him that year?

A. Yes, sir.

Q. What happened that year?

A. Well, we did a little more vehicle traveling that year and a little less walking. We covered more territory but we covered most of it riding.

Q. Well, I will ask you whether or not Mr. Miller
page 115] kept up with the rest of the crowd up there? Was
he doing anything that anybody else did?

A. Yes, sir.

Q. Did you notice any complaints there about any trouble he was having?

A. No.

Mr. Frost: You may take the witness.

CROSS-EXAMINATION

By Mr. Rosenberger:

Q. The most you were doing the second time was getting in and out of the car and driving around?

A. In 1964; yes, sir.

Q. That is all. Thank you very much.

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Mr. Rosenberger: The plaintiff by counsel moves the Court to strike the evidence of the defendant on the grounds that the evidence shows that the plaintiff is entitled to recover as a matter of law.

Mr. Frost: Your Honor, I oppose the motion on two grounds. The only care that the driver of the truck is required to exercise is reasonable care and I think the question
page 116] of what is reasonable care is a jury question.
Also, I have a second ground. I think the jury

should be the arbiter of whether the plaintiff himself was exercising reasonable care under the circumstances.

The Court: What evidence is there of contributory negligence?

Mr. Frost: The only evidence I can think of right now is the fact that Eddie Brooks testified that he (Mr. Miller) ran across the street. That is No. 1. The other is that by his own testimony he walked around a truck which was already parked on the side of the street, which of necessity would mean he would have to be facing in the direction in which the Vaughan truck was backing, and if he saw or should have seen it, of course all that he had to do was step aside and let the truck come in.

The Court: His running across the street is not connected in any way with the accident. That is too remote in the first place. It is no connection that I can see between it. The boy saw him start to run across the street and then he lost sight of him and the next thing he saw was Mr. Miller picking up his hat, so I don't see that there is any contributory negligence.

Mr. Rosenberger: If you are walking in a building and have got an eight to nine-foot sidewalk, then something hits you in the back, how that can be contributory negligence I don't know.

The Court: Here is the sidewalk and he is
page 117] backing across that. That puts him on notice that pedestrians are bound to be there.

Mr. Jester: Let me point this out. If I understood the driver's contention, he saw Mr. Miller in the act of preparing to get out of the car. Now the running from one side of the street to the other, while it is not evidence as to the width of the street, we are all familiar with that street and know it is not too wide and that would necessarily have put him in a position wholly contrary to where the driver of the vehicle had seen him at the last time, where he was in a place of safety.

The Court: Most of us run across these streets when we see a car coming. It is a matter of self preservation. I think that I should sustain Mr. Rosenberger's motion and submit the matter only on the question of damages.

Mr. Frost: We except to the ruling of the Court for the reasons stated.

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INSTRUCTION NUMBERED 1 OFFERED ON BEHALF OF THE PLAINTIFF (GRANTED):

"The Court instructs the jury that you should
page 118] find for the plaintiff and you may award such damages as to you seems fair and just compensation for the injuries and damages sustained by him as a proximate result of the collision, but not to exceed the amount sued for, and in arriving at the amount of the verdict, you may consider any of the following items of damage that you believe have been established by a preponderance of the evidence:

(1) Any bodily injury sustained, the nature and extent thereof;

(2) Any disability caused by the injuries;

(3) Any physical pain and mental anguish suffered and and that he will probably suffer in the future; and

(5) Any expense for medical treatment and drugs and any that will probably be incurred in the future treatment of the injuries sustained."

INSTRUCTION NUMBERED 2 OFFERED ON BEHALF OF THE PLAINTIFF (GRANTED):

"The Court instructs the jury that you should find for the plaintiff, and the defendant is responsible for all the ill-effects which, considering the condition of health in which the plaintiff was when he received the injury, naturally and necessarily follow such injury. The liability of the defendant is in no way lessened by reason of the fact that the injury 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 was not in good health."

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page 121] INSTRUCTION LETTERED "E" OFFERED ON BEHALF OF THE DEFENDANT (GRANTED):

"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, and if you believe from a preponderance of the evidence that it is just as probable that some of the injuries complained of were the result of causes not connected with the accident as they were a result of the accident in question, then the said plaintiff has failed to carry the burden of proof in regard to such injuries, and you must not consider these in your deliberations."

INSTRUCTION LETTERED "F" OFFERED ON BEHALF OF THE DEFENDANT (GRANTED):

"The Court instructs the jury that the plaintiff can recover against the defendant only for such injuries which he has proven by a preponderance of the evidence with reasonable certainty."

INSTRUCTION LETTERED "G" OFFERED ON BEHALF OF THE DEFENDANT (GRANTED):

"The Court instructs the jury that it is not sufficient that the plaintiff prove that he has suffered or may, at some future date, suffer from causes which, as a mere possibility, resulted from the accident, since the defendant is not liable for damages that possibly resulted from the accident."

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page 122]

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Mr. Frost: The defendant by counsel objects and excepts to the action of the Court in giving Instruction Numbered 1 for the plaintiff, on the ground that there is no evidence of any future physical pain or mental suffering and no evidence of any discomfort or inconvenience that will probably be suffered in the future. There is no evidence of any expense for future treatment of the injuries and it will be left to the jury to guess what the future expense would be.

The defendant by counsel objects and excepts to the action of the Court in giving Instruction Numbered 2, as there is no evidence of any aggravation of the condition shown.

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The Court: Gentlemen of the jury, as you know by now at the conclusion of the evidence in every case it is the Court's responsibility to give you some instructions applicable to the case. In this case we have simplified the matter to some extent in that I have ruled as a matter of law that the plaintiff under the plaintiff's evidence should recover. In other words, it was negligence on the part of the truck driver and he is liable for whatever damages may be found against page 123] him, so I will only instruct you on the question of damages. That is the only point you have to consider. With that in mind, you are instructed that you should find for the plaintiff and may award such damages as you see fit.

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Mr. Frost: The defendant by counsel moves the Court to set aside the verdict on the following grounds: For admitting evidence over the objections of the defendant; for failure to admit evidence presented by the defendant; for giving instructions of the plaintiff over objections of the defendant; for failure to give instructions offered by the defendant; because the verdict is excessive and also for errors committed during the trial, as we objected to the striking of the evidence.

The Court: Certainly the verdict is higher than I would have given if I were on the jury but I don't know that it is excessive. I will think about the motion. If I want to hear anything from you gentlemen, I will let you know.

Mr. Frost: Do you want the record written up?

The Court: Not now. I want to think it over.

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A Copy—Teste:

H. G. TURNER, Clerk.

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