Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

207 VA 874

Record No. 6367

In the Supreme Court of Appeals of Virginia at Richmond

ROBERT E. LYONS

v.

GALANIDES, INCORPORATED

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

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of 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. 6367

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 2nd day of March, 1966.

ROBERT E. LYONS, Plaintiff in error,

against

GALANIDES, INCORPORATED, Defendant in error.

From the Court of Law and Chancery of the City of Norfolk
Walter A. Page, Judge

Upon the petition of Robert E. Lyons a writ of error is awarded him to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 7th day of October, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Herbert Johnson and Galanides, Incorporated, were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said Court of Law and Chancery in the penalty of three hundred dollars, with condition as the law directs.

RECORD

★ ★ ★ ★ ★

page 1]

★ ★ ★ ★ ★

MOTION FOR JUDGMENT

TAKE NOTICE that the undersigned hereby moves the Court of Law and Chancery of the City of Norfolk, Virginia, at the Courthouse thereof, for a judgment and award against you, and each of you, in the sum of FIFTY THOUSAND DOLLARS ($50,000.00), with interest and costs for the following, to-wit:

1. That on the 15th day of October, 1963, the plaintiff was then and there a member of the Police Department of the City of Norfolk, Virginia, and was then and there on duty and engaged in his activities as a Police Officer.

2. That on October 15, 1963, the defendant, Herbert Johnson, was then and there the servant and employee of the defendant, Galanides, Incorporated, and was actively engaged in carrying out his duties and the business of his said employer.

page 2]

3. That the plaintiff then and there attempted to place the defendants under arrest; that the defendants then and there resisted such arrest, and then and there assaulted and negligently, recklessly and unlawfully injured the plaintiff; and that as a result thereof, the plaintiff was permanently and seriously injured.

4. That these injuries to the plaintiff, and the shock resulting from the assault, have caused and are continuing to cause and will in the future cause to the plaintiff great pain and suffering, both mental and physical, and that said injuries have required the plaintiff to be hospitalized and to expend large sums of money for doctors, nurses and treatment; said injuries are continuing to cause and will in the future cause the plaintiff to expend large sums of money to effect a cure. Some of said injuries will have a permanent effect upon the plaintiff's health and have caused him to be sick, sore, lame, disfigured and disabled for a long time, and

probably for the rest of his life he will continue to be maimed and disfigured and will suffer great physical pain and mental anguish. The plaintiff has also been caused to lose time from work and engaging in any productive occupation, and has suffered and will continue to suffer loss of earnings. The said injuries will continue to permanently disable him from all other activities formerly associated with his person and station in life.

WHEREFORE, the plaintiff moves the Court for a judgment and award against you, and each of you, in the sum of FIFTY THOUSAND DOLLARS ($50,000.00), with interest as provided in the Code of Virginia, Section 8-223, together with costs aforesaid.

page 3]

ROBERT E. LYONS
By SAVORY E. AMATO
Of Counsel

★ ★ ★ ★ ★

Filed in the Clerk's Office the 4 day of June, 1964.

Teste:
W. L. PRIEUR, JR., Clerk
L. M. CALVERT, D. C.

★ ★ ★ ★ ★

page 9]

★ ★ ★ ★ ★

ANSWER AND GROUNDS OF DEFENSE

NOW COMES the defendant, Galanides, Incorporated, by counsel and for its answer and grounds of defense to a certain motion for judgment filed by the plaintiff, states as follows:

(1) The defendant, Galanides, Incorporated, denies that it is indebted to the plaintiff in any sum of money whatsoever.

(2) The defendant, Galanides, Incorporated, denies para-

graph numbered (1) of the motion for judgment.

(3) The defendant, Galanides, Incorporated, denies paragraph numbered (2) of the motion for judgment.

(4) The defendant, Galanides, Incorporated, emphatically denies paragraph numbered (3) of the motion for judgment.

page 10] (5) The defendant, Galanides, Incorporated, emphatically denies the contents of paragraph numbered (4) of the motion for judgment.

(6) The defendant, Galanides, Incorporated, further states that if the plaintiff received any injuries as alleged in his motion for judgment, said injuries were not received by the plaintiff as a result of any negligent, reckless or unlawful acts on the part of the defendant, Galanides, Incorporated.

(7) The plaintiff was guilty of contributory negligence.

(8) The plaintiff's injuries, if any, were proximately caused through his own negligent and unlawful acts.

(9) The plaintiff assumed the risk.

(10) The defendant, Galanides, Incorporated, reserves the right with leave of Court, to amend this pleading at any time prior to trial.

(11) The defendant, Galanides, Incorporated, denies that it is liable to the plaintiff in any sum of money and moves the Court to *dismisssaid* motion for judgment and award it such costs expended.

GALANIDES, INCORPORATED
By: AUGUSTUS ANNINOS
Of Counsel

★ ★ ★ ★ ★

Court of Law and Chancery Filed 6-24-64

By W. H. McCRORY, D.C.

★ ★ ★ ★ ★

page 42] In the Court of Law and Chancery of the City of Norfolk, on the 7th day of October, 1965.

★ ★ ★ ★ ★

ORDER

This day came again the parties, the plaintiff, in person and by counsel, and came as well the defendant, Herbert Johnson, in person and by counsel, and pursuant to adjournment came again the same jury heretofore impaneled, and now having heard all the evidence, the defendant, Herbert Johnson, by counsel renewed his motion heretofore made to strike the plaintiff's evidence and enter up summary judgment in his behalf, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendant, Herbert Johnson, by counsel, duly excepts.

Now, the jury having heard all the evidence and argument of counsel returned a verdict in the following words, "Verdict in favor of Plaintiff with no renumeration, C.W.B.," and "Against the defendant with no renumeration C.W.B."

Thereupon the plaintiff, by counsel moved the Court for a new trial on the issue of damages only, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the plaintiff, by counsel, duly excepts.

Thereupon the jury inquired of the Court as to the amount of the plaintiff's special damages proven by the evidence and their inquiry was answered by the Court, over page 43] the objection and exception of counsel for the defendant. Whereupon the jury retired to its chamber to further consider its verdict, and after sometime returned into Court with a verdict in the following words, amended as to the form by the Court, without objections or exceptions by counsel of the parties, "On the Plaintiff Lyons' motion for Judgment We the jury find in favor of Plaintiff Lyons and fix his damages at $800.00," and "On the defendant, Johnson's Counter Claim We the jury find Against the defendant."

Thereupon the Court on its motion polled the jury as to their verdict, to which poll the aforesaid jurors replied that the said verdict herein recorded was his verdict.

Thereupon the plaintiff moved the Court to set aside the verdict of the jury, on the grounds that the said verdict is inadequate, and grant the plaintiff a new trial on the issue

of damages only, the further hearing of which motion is continued.

★ ★ ★ ★ ★

page 49]

★ ★ ★ ★ ★

THIS DAY came again the parties, by counsel, on the motions heretofore made by the plaintiff to vacate and set aside the summary judgment heretofore granted to the defendant, Galanides, Incorporated, and to set aside the verdict of the jury in favor of the plaintiff against the defendant, Herbert Johnson, on the ground that said verdict was inadequate, and to grant the plaintiff a new trial on the issue of damages only, which motions, after having been fully heard and maturely considered by the Court, are as follows:

The motion of the plaintiff to set aside the summary judgment in favor of the defendant, Galanides, Incorporated, is overruled, to which action of the Court the plaintiff, by counsel, duly excepts.

The motion of the plaintiff, by counsel, to set aside the verdict of the jury as to the defendant, Herbert Johnson, and to grant the plaintiff a new trial on the issue of damages only, is sustained, to which action of the Court, the defendant, Herbert Johnson, by counsel, duly excepts on

page 50] the grounds that the verdict was not inadequate that if a new trial is awarded, it should be awarded on the issue of liability and damages as well.

ORDERED, final judgment is hereby rendered in favor of plaintiff on the counter claim of the defendant, to which action of the Court the defendant excepts.

Enter this 2nd day of November, 1965:
W.A.P.
Judge

★ ★ ★ ★ ★

Ernest M. Towe

page 51]

★ ★ ★ ★ ★

NOTICE OF APPEAL
AND ASSIGNMENTS OF ERROR

To: The Honorable Judges of the Aforesaid Court:

ROBERT E. LYONS, by his counsel, hereby gives notice of his appeal from a judgment entered in the above styled case on the 7th day of October, 1965, and assigns the following errors:

ASSIGNMENTS OF ERROR

1. The Court erred in granting summary judgment in favor of the defendant, Galanides, Incorporated.
2. The Court erred in overruling plaintiff's motion for a summary judgment against the defendant, Galanides, Incorporated.

ROBERT E. LYONS
By ROBERT S. COHEN,
Of Counsel

★ ★ ★ ★ ★

Court of Law and Chancery Filed 12-1-65

By: H. E. S....., D. C.

★ ★ ★ ★ ★

page 22]

★ ★ ★ ★ ★

ERNEST M. TOWE,
called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Amato:
Q. Would you please state your name and your occupation?
A. Ernest M. Towe, police inspector, City of Norfolk.

Ernest M. Towe

Q. Mr. Towe, were you connected with the Norfolk City Police Department on October 15, 1963?

A. I was. I was a police inspector at that time and also assigned as chief of operations.

Q. Did you have occasion to see or talk with Herbert Johnson, who sits at the counsel table with Mr. Wormington and Mr. Anninos?

page 23] A. I did.

Q. Where did you see him, sir?

A. In the First Precinct bullpen or the desk sergeant's office.

Q. Can you relate to the court and jury what conversation, if any, you had with Herbert Johnson?

A. Yes, sir. I went there to talk with him, as it was my duty to look into matters where police officers were injured or where an assault was made. When he was brought in I went down and talked to him at approximately 1:15.

Q. Now, you are referring to Herbert Johnson, are you not?

★ ★ ★ ★ ★

page 24]

★ ★ ★ ★ ★

By Mr. Amato:

Q. Mr. Towe, tell the court and jury then what conversation you had with Herbert Johnson?

A. I asked him what happened and he told me that he had the green light, that the officer told him he was wrong when he came through the yield sign and that he felt that he was right and that was the reason he resisted the officer, because he felt he was right. And he said later since he had — since it happened, they had brought him downtown, he knew he was wrong, but he thought he was right.

★ ★ ★ ★ ★

page 58]

★ ★ ★ ★ ★

L. C. Daughtry

L. C. DAUGHTRY,
called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Amato:

Q. Would you please state your name and your occupation?

A. L. C. Daughtry, detective, Norfolk Police Department.

Q. Mr. Daughtry, were you connected with the Norfolk City Police Department on October 15, 1963?

A. I was.

Q. Did you have occasion on that day to see Officer Robert E. Lyons in the vicinity of Tidewater Drive and Virginia Beach Boulevard?

page 59] A. Yes, sir, I did.

Q. Will you — how did you happen to be in that particular area?

A. It was between twelve and one and I was on the way to the detective bureau headed west on Virginia Beach Boulevard and a car directly in front of me had some people in it, young fellows, and a car on my left had two adults in it. The people in the car on my left hollered over to the car on my right and said, "Look, boys. Go take him." So I looked in that direction to see what was happening, and I saw Officer Lyons on the ground over there and saw this man tussling with him on top of him, so then I immediately got out of my car and went over, and his boss was there then — I don't know *that* his name was, but he referred to him as his boss — and he had taken him off of him.

Q. Taken who off of who?

A. This man off of the officer, and the officer was stumbling around trying to get up, and he never did get on his feet while I was there. So I asked him if he wanted me to take the man to headquarters and he told me yes. And so the man didn't want to go.

Q. Now, you say the man?

page 60] A. This man sitting here. I don't even know his name.

The Court: Indicating the defendant Johnson.

L. C. Daughtry

By Mr. Amato:

Q. Herbert Johnson?

A. Yes, sir.

Q. Now, you say he did or did not want to go?

A. He didn't want to go, said he hadn't done nothing, said that's why he — well, later I asked him, I said, "Well —"

Q. Now, where did you have this conversation?

A. On the way in I told him, I said, "We can't settle nothing on the street." I said, "The crowd is going to gather and cause a lot of trouble." I said, "Let's go on to headquarters."

Q. Was there a crowd there then?

A. Beginning to gather. It was no crowd there then. Mr. — a man from Tait was there and three or four people there was all I saw there.

Q. I see. All right, sir. Then you took him in your car?

A. Yes, sir. And on the way I asked him, I said,

page 61] "Why didn't you show the man your driver's license?"

Mr. Wormington: Excuse me one moment, Mr. Daughtry. May I for the record, Your Honor, make the same objection I did with reference to Galanides insofar as the effect of this testimony.

The Court: As to the conversation in the vehicle out of the presence of anyone who was employed by your defendant, that's correct.

Mr. Wormington: On the way to headquarters.

The Court: But not as to the previous part?

Mr. Wormington: No, sir, and I do not so object.

The Court: I understand.

By Mr. Amato:

Q. Now, what conversation did you have with the defendant Herbert Johnson on the way in your car?

A. On the way in?

Q. Yes, sir.

A. I asked him — I don't know if it is going to be the same question.

page 62] Q. You go ahead.

A. I asked him why he didn't show his driver's

license and he said, "Well, I didn't have to," he said, "I hadn't done nothing." I said, "Well, you can't settle it on the street," I said, you have to settle things like that in court." So he said, "I hadn't done nothing and I wasn't going to show him a G D thing." and that was the attitude he had, that he told me that he had the green light, and I told him, I said, "Well, there's a yield sign there," and he said, "Well, I had the green light." That's all he said: "I had the green light."

Q. All right sir. You have been summoned to appear here today, have you not?

A. Yes, sir.

Q. You had not been assigned to this case; you just happened by?

A. Not at all, no, sir.

Mr. Amato: All right, sir. You answer these gentlemen's questions.

★ ★ ★ ★ ★

page 73]

★ ★ ★ ★ ★

ROBERT E. LYONS,

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

DIRECT EXAMINATION

By Mr. Amato:

page 74] Q. Mr. Lyons, I want you to turn to the jury now and when you answer questions respond to them and not to me. I know you have a cold, but I ask that you speak just as loudly as you can and as distinctly as you can. State your name and your address and your occupation?

A. My name is Robert E. Lyons. I live at 950 Brentwood Drive and I am a Norfolk Police patrolman.

Q. On October 15, 1963, what was your occupation?

A. A police officer in the City of Norfolk.

Robert E. Lyons

Q. And how long had you been a police officer?

A. Approximately four years.

Q. When you started out did you go through the regular routine as a probationary police officer for a certain period of time?

A. Yes, sir, I went through one year's probationary period.

Q. Now, on October 15, 1963 what particular department had you been assigned — or were you assigned?

A. I was assigned to the traffic bureau.

Q. And on that day what were you operating? How were you carrying out your duties?

page 75] A. I was assigned to a motorcycle number 7 on normal traffic patrol.

Q. How long had you been on motorcycle patrol or in the motorcycle squad in traffic?

A. I had been there approximately four and a half to five months.

Q. And when you first went on was there any special training that you received on the — for the operation?

A. When a new motorcycle officer is assigned to a motorcycle he is assigned with an experienced motorcycle officer for approximately three weeks and he rides patrol with the other officer.

Q. Well, were you assigned to another officer for approximately three weeks?

A. Yes, sir, I was assigned to another experienced motorcycle officer for approximately three weeks.

Q. Now, on the 15th of October '63 were you or were you not in uniform?

A. Yes, sir, I was in full-dress uniform.

Q. And was your badge displayed on that uniform?

page 76] A. Yes, sir, it was displayed above the left pocket on my shirt.

Q. Now, I want you to tell the court and jury what street you were on and the circumstances surrounding your stopping the defendant Herbert Johnson?

A. I was operating my motorcycle north on Tidewater Drive in the right-hand lane. As I approached the intersection of Tidewater Drive and Virginia Beach Boulevard I attempted to make a right turn to travel east onto Virginia

Beach Boulevard. As I looked to my right as I made the turn I saw a truck coming on a near collision course with my motorcycle.

Q. Where was this truck on the highway or with respect to the highway?

A. This truck was being operated on the feeder road.

Q. Well, now, on the feeder lane in the direction in which you were going is there or was there at that time or not any yield sign?

A. Yes, sir, there was.

Q. For what traffic?

A. For the feeder road traffic.

Q. And would that be the same direction that this truck was proceeding?

page 77] A. Yes, sir, it would.

Q. All right, sir. You were — both you and the truck then were proceeding in the same direction?

A. Yes, sir.

Q. All right, sir. Now, you say — go on follow on with what you said?

A. I looked over my right shoulder and observed the truck on a near collision course with my motorcycle. I turned my motorcycle to the left to avoid the collision and applied the brakes and slowed down, coming to a near stop. As the truck pulled alongside of me I motioned for the driver of the truck to pull to the right-hand curb, and he did so. I parked my motorcycle at the rear of the truck and walked to the cab and asked the driver had he seen the yield-the-right-of-way sign on the pole. His answer to me was he didn't have to see the sign, he had the green light. I asked him again did he see the sign on the pole. His answer was again he didn't have to see the sign; he had the green light. I asked him for his driver's license and his registration card. His answer was he didn't have to show me a D thing. I then told the driver, which was Johnson, that he was under arrest

page 78] for failing to yield right-of-way, no driver's license, no registration card, to come down out of the truck. He made no move to come down out of the truck. He sat there for several seconds.

Q. How long did you wait then after you told him he was

under arrest and to come out of the truck? Do you know in point of time?

A. Not actually how many minutes or seconds passed, no, but it was a reasonable amount of time.

Q. All right, sir. Now, what happened after that?

A. He made no move to come from the cab of the truck. I opened the door of the truck and placed my hand on his left elbow and told him to come down out of the truck, that he was under arrest.

Q. Now, Mr. Lyons, why did you put your hand on his arm? You said you put your hand on his arm. What's the idea of that?

A. This is the instructions that we receive when we go to recruit school, that if you place your hand on the person that this is a technical arrest.

Q. All right, sir. Now, what happened after that?

page 79] A. Johnson came down, he stepped down out of the cab of the truck and proceeded with me to the rear of the truck, where I had my motorcycle parked. When we reached the motorcycle I asked him again for his driver's license and his registration card and he asked me who did I think I was. I told him that I was a police officer. I had the right to see his driver's license and his registration card. After I answered his question he became belligerant; started using profane language in a very loud tone of voice. I asked him one more time for his driver's license and his registration card and during this time he was still using profane language in a very loud tone of voice, seemed to me that the man was losing control of himself. He was going like he was a wild man. I told him then to step to the rear of the truck, place his hands up on the door of the truck. I was going to search him for any weapons that he might have had. I took him to the rear of the truck, placed his hands on the back door. I proceeded to search him. I found no weapons on him. I then took my handcuffs and was going to handcuff his hands together. When I reached for his hand he turned off of the truck, grabbed me by the shirtfront and my tie and started pulling me toward him. I told him to let go.

page 80] Q. How much do you weigh, Mr. Lyons?

Robert E. Lyons

A. Approximately 167 or 168 pounds.

Q. All right, sir. Now go on.

Q. I told him to let go. It was getting to the point where the shirt collar was getting tight on my throat and I couldn't breathe and I told him several more times to let go. He still didn't let go. I struck him in the center of the forehead with my hand cuff and he did let go of my shirtfront and tie then. I turned around and I told him to put his hands back up on the truck doors. He did, turned around and he put his hands back on the doors. I reached up, put one handcuff on his left hand, brought his left hand down along the left side of his body. When I reached up for his right hand he had taken hold of the door handle on the rear of the truck and refused to let go of the truck door handle. I attempted to free him, pull him free of the door handle, but he still refused to let go of it. I told him to let go of the door handle. He still didn't let go of the door handle.

Q. What was his attitude or demeanor or behavior all during this time and his language, if any?

page 81] A. He was still very belligerent and still using profane language, very loud tone of voice. He didn't have any control over his temper. Anything that I told him to do he simply refused to do it.

Q. All right, sir. Go ahead.

A. When I tried to free his right hand from the door handle on the truck he still refused to let go. I put my right hand around his chest and tried to pull him free from the door handle, and after a brief period he let go of the handle, at the same time put his left leg around back behind of my left leg and threw his weight entirely against me, knocking me to the ground. When I fell to the ground he came down on top of me. I landed on my back. He was on my chest on his back. When I fell to the ground I heard and felt at the same time a popping noise and a sharp pain shooting pain go down through my right knee. While we were on the ground we continued to tussle a little bit and wrestle around. At this time Mr. Galanides arrived and pulled Johnson off the top of me and about the same time Detective Daughtry also arrived there and helped me finish handcuffing the prisoner and Detective Daughtry took him in his radio car down to the

page 82] precinct station. At the same time of the arrest and at the time Mr. Galanides arrived the only persons I can remember seeing there were Mr. Galanides, the Detective Daughtry, the defendant, Mr. Johnson, and there were several people who were across the street on the opposite side of Virginia Beach Boulevard who were walking across the boulevard coming over to where we had been.

Q. Mr. Lyons, getting back to the scene just for a moment. When you were in the act of turning from Tidewater Drive into Virginia Beach Boulevard where was your vehicle with respect to the feeder lane when you saw that the truck was going to come out of the feeder lane? Where was your vehicle then when you saw that was going to happen?

A. My vehicle had partially entered the intersection already.

Q. Well, what do you mean by the intersection?

A. There is a dividing island that separates Tidewater Drive from the feeder road. I had passed the dividing island, had come up to where the road starts to curve around to go into the circle onto Virginia Beach Boulevard.

Q. And did the truck then stop at the —

page 83] Mr. Anninos: Object to the leading question.

By Mr. Amato:

Q. Well, what did the truck do then as it proceeded along the feeder lane then before it entered the circle sort of?

A. He continued in a forward motion. He did not slow down and he did not stop. He entered the intersection.

Q. Now, did you have in your possession at that time a book with which to write a summons?

A. Yes, sir, I did. I had a traffic summons book with me.

Q. Mr. Lyons, in order to write a summons for a violation of failure to yield, what information did you have to have?

A. You have to have the driver's name, driver's address, and a license number of the motor vehicle he was operating. Also you must have the operator's license number.

Q. And did the defendant Johnson ever give you this information?

A. No, sir, he never did.

Robert E. Lyons

Q. Or did he ever show it to you?

A. And he never showed me a driver's
page 84] license or a registration card.

Q. Now, then, did you go with the defendant Johnson to the station from the point where his truck was?

A. No, sir, I was taken by a police vehicle to Norfolk General emergency room.

Q. All right, sir. Did you go back to duty or work that day?

A. No, sir. After I was released from the emergency room I went back to the traffic bureau at the police headquarters and wrote a letter to the chief of police explaining the circumstances of the incident and then I was taken to Dr. Hollins's office in the Medical Tower and examined by Dr. Hollins.

★ ★ ★ ★ ★

page 90]

★ ★ ★ ★ ★

CROSS EXAMINATION

By Mr. Anninos:

★ ★ ★ ★ ★

page 102]

★ ★ ★ ★ ★

Q. All right. Now, Mr. Lyons, at that time you asked him to produce his license and registration card?

A. No, sir. First I asked him did he see the yield-the-right-of-way sign.

Q. All right. Now, actually, is that what you asked him?

A. Yes, sir, I asked him had he seen the yield-the-right-of-way sign on the corner. He said —

Q. That sign doesn't say — didn't say then yield right-of-way?

A. There's a sign on the pole on the corner that
page 103] says — it is a yellow triangular sign that says yield.

Q. All right. Yield. But it doesn't say yield right-of-way?

A. No, not right-of-way on it. Just plain yield.

Q. Just plain yield. All right. Now did he — what did he say?

A. His answer to my question was he didn't have to see the sign; he had the green light.

Q. All right. And he told you that how many times, that he had the green —

A. Twice.

Q. Twice?

A. Twice, yes, sir.

Q. And then you asked him for his license?

A. His driver's license and the registration card.

Q. While he is still in the truck?

A. Yes, sir, he is still seated.

Q. And he was, you say, still in the truck when you asked him for the driver's license and registration?

A. Yes, sir.

Q. Okay. When he was telling you that he had
page 104] the green light, in fact, he did have the green light, didn't he?

A. Yes, sir, he did.

★ ★ ★ ★ ★

page 126]

★ ★ ★ ★ ★

HERBERT JOHNSON,

defendant, called as an adverse witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Adverse)

By Mr. Amato:

Q. You are Herbert Johnson?

A. Yes, sir.

Q. Herbert, where do you live?
page 127] A. 67 —

Q. I can't hear you.

Herbert Johnson

A. 6709 Pierce Street.
Q. How old are you?
A. Fifty-two.
Q. You work for Galanides, Incorporated?
A. Yes.
Q. How long you been working for them?
A. Thirty years.
Q. You were driving one of their trucks on October 15th?
A. Yeah.
Q. What did you do for them that day? What were you doing?
A. Making deliveries.
Q. To different places?
A. Yes, sir.
Q. Had you made some deliveries that day?
A. No.
Q. Just load up and going to make a series of deliveries?
A. Yes, sir.

A Juror: Could you speak up, sir.

By Mr. Amato:

Q. I am sorry, how far did you have to go page 128] in your deliveries?

A. To Williamsburg.

Q. Sir?
A. Williamsburg.
Q. Williamsburg?
A. Yes.
Q. Well, now, Herbert, on that day you—the light was green facing you, wasn't it?
A. Yes, sir.
Q. And there was a yield sign there?
A. Yes, sir.
Q. And you felt like that the officer was wrong and that you were right in — the officer was wrong in stopping you because you had the green light, didn't you?
A. Yes.
Q. And you felt that it wasn't right for him to stop you and hold up the deliveries that you had to make for your boss, didn't you?

Herbert Johnson

A. No, sir.
Q. Hum?
A. No, sir.
Q. Well, didn't you feel like that when he stopped you that was holding up your deliveries?
A. Yeah, holding up my deliveries.
page 129] Q. Well, was that right?
A. No, it won't right because he stopped to hold me up.

Mr. Amato: All right, sir. That's all.

★ ★ ★ ★ ★

page 130]

★ ★ ★ ★ ★

Mr. Amato: Well, I think the situation is a little bit changed now. I think that it is now indicated that what
page 131] the defendant Herbert Johnson was doing was in furtherance of his employer's business, to wit: to deliver these goods, and what disturbed him, according to the evidence now, is the fact that he was being held up in carrying out his employer's work to deliver these goods, and that's what disturbed him, and he thought he was, of course, right in the fact that he had a light, but it also disturbed him, according to his evidence, the fact that he wasn't able to — that he was being delayed or prevented from carrying out his employer's work. So the whole thing was in furtherance of his employer's activities, and I think this is a continuous, uninterrupted situation.

(There was a brief interruption.)

Mr. Amato: Judge, continuing what I said, this is a continuous, uninterrupted chain of events, because the first thing happened was that this man was objecting to being stopped because he had the green light, and I don't have to see the yield sign because I had the green light, getting back to the time, because he said he was right and it was
page 132] wrong to stop him, because he couldn't deliver his employer's goods as he was supposed to. The

whole thing is completely unbroken, and I think it is a thing that should go to the jury.

As a matter of fact, my thought is that it is a legal matter for Your Honor to rule that it was within the scope of the agency, but the least I feel that we would be entitled to would be let the jury decide. The burden, incidentally, is on the principal to prove. When the agency is established the burden is on the principal to prove by the decided cases, and that was *United Brotherhood* versus *Humphries,* that where the agency relationship is established the burden is on the principal to prove the agent was not acting within the scope of his authority. The burden would really be theirs.

The Court: Well, the *Abernathy* case says that the doctrine of *respondeat superior* rests upon the relation of master and servant. A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, that is, the agency —

page 133] Mr. Amato: We have proved that.

The Court: And also that the servant was then about his master's business and acting within the scope of his employment. I don't think there is any question about the fact under the law that once you show agency exists that then there is a presumption that the act was done in the course of the employment and about the master's business. Then of course it is a matter of proof, but the burden of proving the case, the final burden, this is a matter of shifting burdens, who goes forward with the evidence. The burden rests with the plaintiff to show that it was, I think, on the master's business and within the scope of his employment. I think the question is really whether or not it comes within this *Abernathy* case, which of course distinguishes from the Tri-State.

Mr. Amato: I certainly think it is a question for the jury.

Mr. Ryan: It grows out of the course of his employment being a truck driver, Your Honor.

The Court: There isn't any question

page 134] about the employment.

Mr. Anninos: That's admitted.

Mr. Amato: They hadn't started a new fracas. It wasn't a new argument.

Mr. Ryan: Just didn't want that truck held up.

Mr. Wormington: Whoa, whoa.

Mr. Ryan: I mean the legal effect. I don't say I quote him

directly, but that is the legal effect.

Mr. Amato: He was being stopped when it wasn't right to be stopped because it held him up.

Mr. Wormington: He was held up more by being physically arrested than if he had accepted the summons.

Mr. Ryan: He asked him if he didn't think it was right to hold up deliveries. He finally admitted he didn't think it was. He was out there legally protecting, fostering, and promoting his boss's business.

(At this point the reporter read the defendant Johnson's adverse testimony as requested.)

The Court: Well, the case, of course,
page 135] cites at length, the *Abernathy* case, from the Tri-State and it cites this language from page 305 of the *Tri-State* case: "Had the turn been wholly negotiated into State Street, thus avoiding the real or apparent danger of collision, and Mooney had then abandoned the business of his master and committed the tort solely to gratify his personal feelings and not to accomplish or effect his insistence upon his right of movement, it would not have been within the scope of his employment, but here it was committed in the very act of negotiating the turn." And then in the *Abernathy* case it goes on to say here the accident had occurred and the controversy which ended in the scuffle was over who caused the accident. But participating in the fracas Allen abandoned the business of his master and engaged in an independent venture of his own to gratify his personal feelings and the relation of master and servant was for the time suspended. That seems to be the pertinent language of the case as it would affect these facts to me.

Mr. Amato: That's why I think this
page 136] man was doing everything that he could through the whole transaction to protect his boss's right, to make these deliveries and not to be held up. He had this green light and that's all there was to it, and this is his first statement right from the very beginning of the thing. He doesn't think of this afterwards. This is when he is stopped initially.

Mr. Ryan: Judge, in the —

★ ★ ★ ★ ★

page 137]

* * * * *

The Court: And the occurrence really which gave rise to all of it had in effect terminated.

Mr. Amato: No, sir.

Mr. Ryan: No, sir. That's what I want to answer.

Mr. Wormington: One at a time. Where are we going to draw the line, judge? Suppose he had gotten in the police car and then hauled off clobbered the plaintiff? Or suppose they were on the way to the station and he clobbered the plaintiff? There's got to be a line drawn somewhere, and I say it was drawn when that officer put his arm — his hand on his elbow and said you are under physical

page 138] arrest or under arrest, then the question of about who is right and who is wrong as to whether he had a right to proceed or not is elemental and beside the point From there on it is a personal matter between the officer and the defendant Johnson.

Mr. Ryan: Now can I answer?

Mr. Wormington: Yes, sir. I am finished.

Mr. Ryan: Your Honor, in the bus turning case the theory there is that so long as the bus driver is trying to protect his boss's property he is furthering the interest of his boss. If the thing is once ended, true. The law is clear if it is ended that's the end of it. There was no end here, because even if this fellow Johnson had some personal animosities, even if that was mixed with his interest of furthering his boss's interest, and if he felt all along that he was right and he was provoked and if he felt all along the deliveries ought not to be delayed, then there was at least a mixed representation of personal feeling and feeling for his boss that the deliveries were being delayed. Right? And that he didn't — the whole thing was he was outraged for

page 139] two reasons: he had the green light, he felt bad about it personally, and he felt bad about it because his boss's deliveries were being delayed and he admitted it. And in the truck when he wouldn't do anything, when he got out, when he went to the back, when he tripped the man up, when he was doing all those things that was a continuous chain of events, of sequences, to he is not treating me right and he is not treating my boss right by holding

up his deliveries. So the desire to further the interest and promote the interest of his boss had never ended at the time of this injury.

★ ★ ★ ★ ★

page 140]

★ ★ ★ ★ ★

Mr. Ryan: We couldn't get it, Your Honor, until we put him on as cross-examination and —

★ ★ ★ ★ ★

page 142]

★ ★ ★ ★ ★

Mr. Amato: You are arguing the weight, and in the *Abernathy* case —

Mr. Anninos: The *Abernathy* case said as a matter of law —

Mr. Amato: — the argument over who had caused the collision had ended and a new fracas started. This argument that the man was being delayed in making his shipments and had a green light had never ended. He continued to say it even when they brought him to the station house. In the station house he told it. That's the prime thing. Counsel doesn't like the idea now that he said he was disturbed by the fact that his employer's goods or the shipment of his employer's goods was being delayed or held up or whatnot, but that's what he did say, and we can put reasons into his mind other than what he has said on that stand under oath. The court can take judicial notice if he hadn't said that, anyone — not him, anyone would be —

Mr. Ryan: You can't take judicial notice of people's emotions.

★ ★ ★ ★ ★

page 144] The Court: The language, of course, in these two cases — I think you have to read them both, because this one makes a distinction between the Tri-State

one, but it appears to me that everything in this case of Abernathy draws a distinction of something that is continuing and something that is ended, and that's really what it gets down to, as I read it. It uses the language "accomplish or effect the insistence upon the right of movement." Here it had been accomplished, it had been effected. Both of them had moved. There was no accident in this particular case, that's true, but it appears to me that the evidence here is that this case of Abernathy is right in line with this case and that the motion of Mr. Wormington is proper. I am going to sustain it and enter summary judgment as to your defendant.

★ ★ ★ ★ ★

page 212] PETER D. GALANIDES,

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

DIRECT EXAMINATION

★ ★ ★ ★ ★

page 214]

★ ★ ★ ★ ★

By Mr. Anninos:

Q. What did you do?

A. I persuaded the defendant Herbert Johnson to submit to letting his other hand be handcuffed by the officer who was crouched above him. At that time he got up and I helped Officer Lyons to his feet and Detective Daughtry was coming across the street. He took Herbert Johnson into custody and they walked across to Detective Daughtry's

page 215] car. In the meantime I stayed there with Officer Lyons and held him on his feet until additional policemen came on the scene, because he was apparently unable to stand and he was out of breath and couldn't say anything.

★ ★ ★ ★ ★

Peter D. Galanides

CROSS-EXAMINATION

By Mr. Amato:

Q. Mr. Galanides, you said Officer Lyons was unable to stand?

A. Officer Lyons was.

Q. I thought you said that.

A. Yes, he was crouched over Herbert Johnson and once he had completed getting the other handcuff on his right arm he seemed like he wasn't able to get on his feet and I helped him to his feet and stood there holding onto his arm until some help came.

Mr. Amato: That's what I thought you said. Thank you very much.

★ ★ ★ ★ ★

page 227] JUDGE'S CERTIFICATE

I, Walter A. Page, judge of the Court of Law and Chancery of the City of Norfolk, State of Virginia, who presided over the trial of the case of *Robert E. Lyons, plaintiff,* vs. *Herbert Johnson and Galanides, Inc., defendants,* on October 6 and 7, 1965, do hereby certify that the foregoing is a true and correct transcript of the trial of said cause, including all the evidence adduced, all the exhibits offered in evidence, as well as all of the objections to the evidence or any part thereof offered, admitted, rejected, or stricken out, together with all motions and objections of the parties, all rulings of the court thereon, and all exceptions of the parties thereto, together with all other incidents of the trial of said cause.

As to the original exhibit introduced in evidence as shown in the foregoing record, to wit: Plaintiff's Exhibit 1, which has been initialed by me for the purpose of identification, it is agreed between the attorney for the plaintiff and the attorney for the defendant that it shall be transmitted to the Supreme Court of Appeals of Virginia as a part of the record in this case in lieu of certifying to the said court copies of said exhibit.

page 228] I further certify that this certificate has been tendered to and signed by me within the time pre-

scribed by section 8-330 of the Code of Virginia for tendering and signing bills of exception and certificates of record, and that reasonable notice in writing has been given to the attorneys for the of the time and place at which said certificate has been tendered.

This record was tendered to me on the 2nd day of December 1965.

Given under my hand this 2nd day of 1965.

WALTER A. PAGE
Judge

page 229] CLERK'S CERTIFICATE

I, W. L. Prieur, Jr., clerk of the Court of Law and Chancery of the City of Norfolk, State of Virginia, do hereby certify that the foregoing is a true and correct copy of all the testimony, exhibits, and other incidents of the trial of the case of *Robert E. Lyons, plaintiff,* vs *Herbert Johnson and Galanides, Inc., defendants,* together with the original exhibit referred to, duly initialed and authenticated by the judge who presided over the trial of said cause, and that the same was lodged and filed with me as clerk of said court on the 2nd day of December 1965.

W. L. PRIEUR, JR.
Clerk

By L. M. CALVERT, D. C.

★ ★ ★ ★ ★

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	page
Writ of Error Awarded	1
Record	2
Motion for Judgment	2
Answer and Grounds of Defense	3
Judgment — October 7, 1965	4
Order — November 2, 1965	6
Notice of Appeal and Assignments of Error	7
Witnesses:	
Ernest M. Towe	7
L. C. Daughtry	9
Robert E. Lyons	11
Herbert Johnson	18
Peter D. Galanides	25
Proceedings	20
Certificates	26