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

209 VA 552

Record No. 6796

In the Supreme Court of Appeals of Virginia at Richmond

UNITED STATES FIDELITY AND GUARANTY COMPANY, ET AL.

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL.

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART TWO

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

This c
to be he
You v
Print

Record No. 6796

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

UNITED STATES FIDELITY AND GUARANTY COMPANY AND W. W. WARSING, Appellants,

against

HARTFORD ACCIDENT AND INDEMNITY COMPANY, THOMPSON'S READY-MIX, INCORPORATED, AND DORRIS McGUIRE LINK, ADMINISTRATRIX OF THE ESTATE OF FRANK WOODRUFF KELLY, DECEASED, Appellees.

From the Hustings Court of the City of Richmond, Part Two
William Eldridge Spain, Judge

Upon the petition of United States Fidelity and Guaranty Company and W. W. Warsing an appeal is awarded them from a decree entered by the Hustings Court of the City of Richmond, Part Two, on the 6th day of April, 1967, in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and Hartford Accident and Indemnity Company and others were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said hustings court in the penalty of $300, with condition as the law directs.

RECORD

* * * * *

page 1 }

* * * * *

PETITION FOR DECLARATORY JUDGMENT

* * * * *

Your petitioners, United States Fidelity and Guaranty Company, hereinafter referred to as U. S. F. & G., and W. W. Warsing, file herein their petition for a declaratory judgment under the provisions of Sections 8-578 through 8-585 of the Code of Virginia, and allege the following:

1. There is an actual controversy existing between the plaintiffs and the defendants herein.

page 2 } 2. Defendant, Doris McGuire Link, Administratrix of the Estate of Frank Woodruf Kelly, deceased, has heretofore filed an action for damages against W. W. Warsing, trading as W. W. Warsing Company, in the Circuit Court of Pittsylvania County in the amount of Thirty-five Thousand Dollars ($35,000.00), which action is now pending in said Court.

3. In said action, she alleges that on October 14, 1963, the plaintiff's decedent, Frank Woodruff Kelly, was a truck driver and employee of defendant, Thompson's Ready-Mix, Inc., engaged in unloading ready-mixed concrete at the site of a construction project being undertaken by W. W. Warsing as General Contractor, and that while engaged in said process, a cable on the boom of a crane owned by W. W. Warsing, and being operated by one of his employees, broke, causing a large bucket of concrete to fall on the said decedent resulting in his fatal injuries. A copy of said motion for judgment is attached hereto as exhibit "A" to this petition.

4. At the time of the accident, the said truck owned by Thompson's Ready-Mix, Inc. and operated by Frank Woodruff Kelly was insured under a standard Virginia automobile liability policy issued by Hartford Accident and Indemnity Company, hereinafter referred to as Hartford. The said policy provided, among other things, that "use of an automobile includes the loading and unloading thereof."

5. Also at the time and place of the accident, there was in force a Comprehensive General—Automobile Liability Policy issued by U. S. F. & G. to W. W. Warsing, which provided,

among other things, that the insurance thereunder page 3 } with respect to a loss arising out of the maintenance or use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance. A copy of the form of said policy is attached hereto as exhibit "B".

6. Although Hartford was seasonably requested on behalf of Warsing, to take over the handling of the claim and to defend the action brought on behalf of the Kelly estate against Warsing, Hartford has refused to provide any coverage to Warsing, and has refused to defend said action, contrary to its obligations under its aforesaid policy.

7. Since the accident occurred during the process of unloading the truck insured by Hartford, Warsing is by definition an "insured" under the Hartford policy issued to Thompson and is entitled to the benefits thereof as an insured thereunder.

WHEREFORE, in order to avoid circuity of action and establish their rights and liabilities, plaintiffs pray that this Court enter a declaratory judgment:

(a) Declaring that Hartford Accident and Indemnity Company is under a duty to defend W. W. Warsing in the aforesaid action brought against him by the Estate of Frank Woodruff Kelly and to pay any judgment rendered against him therein up to the limits of liability of its policy; and

(b) For such other and further relief as to the Court may seem proper.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
and W. W. WARSING

By W. F. HAZEN
Counsel

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

Teste:

CHAS. R. PURDY, Clerk
RICHARD S. McDONALD, D.C.

* * * * *

page 12 }

* * * * *

ANSWER

Defendant, Doris McGuire Link, Administratrix of the Estate of Frank Woodruff Kelly, deceased, for answer to the petition says:

1. That she believes the allegations of paragraphs 1, 2 and 3 of the petition to be correct, but states that the allegations of her motion for judgment are correct to the best of her knowledge, information and belief.

2. She has no knowledge of the matters and things alleged in paragraphs 4, 5, 6 and 7 of the petition and calls for strict proof.

3. That she believes that under all the circumstances of the case, the petitioner W. W. Warsing and the
page 13 } petitioner United States Fidelity and Guaranty Company, as the insurer of Warsing, are liable to her under the Virginia statutes covering actions for Wrongful Death, for the death of Frank Woodruff Kelly, and therefore so alleges.

4. She says that decedent was at the time he met his death an employee of Thompson's Ready-Mix, Incorporated, and in the course of his employment at such time, and on information and belief proper proceedings have been had under the Workmen's Compensation Act to procure the payment of Compensation thereunder by the employer, and further that Hartford Accident and Indemnity Company is the Workmen's Compensation insurer for the employer and is as such liable for and is in fact paying compensation pursuant to such Act on account of the death of said decedent.

Respectfully,

DORIS McGUIRE LINK,
Administratrix of the Estate of
Frank Woodruff Kelly, deceased

By Counsel

EDWARD A. MARKS, JR.
SANDS, ANDERSON, MARKS & CLARKE
10th Floor, American Building
Richmond, Virginia

Filed June 24, 1964.

Teste:

CHAS. R. PURDY, Clerk
By RICHARD S. McDONALD, D.C.

* * * * *

page 14 }

* * * * *

ANSWER

Defendants, Hartford Accident and Indemnity Company and Thompson's Ready-Mix, Incorporated, say in answer to the petition herein, as follows:

1. They admit the allegations of paragraphs 1, 2 and 3 of the petition.

2. They admit the allegations of paragraph 4 of the petition insofar as same refers to insurance carried by Hartford Accident and Indemnity Company in favor of Thompson's Ready-Mix, Incorporated, but say that the policy of insurance was not a standard Virginia automobile liability policy, but was in fact a Comprehensive General-Automobile Liability Policy, bearing number 42C-583995, a copy of which is attached hereto as Exhibit A.

page 15 } 3. They have no knowledge as to the terms and provisions of such contracts as United States Fidelity and Guaranty Company may have had in force in favor of W. W. Warsing, and call for proof thereof, and for the production of all original policies of insurance in force on October 14, 1963, covering the operations of W. W. Warsing.

4. They deny that W. W. Warsing or anyone in his behalf made report of the accident of October 14, 1963, or delivered suit papers in the action of Link, Admx. v. Warsing, to Hartford Accident and Indemnity Company, but admit that after the claim was made upon W. W. Warsing and his employee, United States Fidelity and Guaranty Company did request Hartford Accident and Indemnity Company to assume responsibility for the same.

5. They deny that the alleged accident gave rise to any duty on the part of Hartford Accident and Indemnity Company to assume defense of or liability asserted against W. W.

Warsing or his employees, or to pay any judgment recovered against him by the co-defendant, Link, Admx., and specifically deny that Warsing or any employee of Warsing or United States Fidelity and Guaranty Company are entitled to claim the benefit of any policy of insurance issued by it to Thompson's Ready-Mix, Incorporated, either as an insured or as a beneficiary thereunder.

6. They allege that at the time and place of his death, Frank Woodruff Kelly was an employee of Thomp-
page 16 } son's Ready-Mix, Incorporated, and was then and there in the course of his employment as such; and further that due proceedings have been taken under the Workmen's Compensation Acts of Virginia to secure an award of compensation pursuant thereto on account of his death, and that such award has been made and is being paid on behalf of said employer by Hartford Accident and Indemnity Company as compensation insurer.

7. They specifically deny:

a. That the accidental death of Kelly arose from any instrumentality insured under any policy of insurance issued by Hartford Accident and Indemnity Company to Thompson's Ready-Mix, Incorporated.

b. That any loading or unloading provisions of any such policy apply under the facts.

c. That Warsing was "using" the Thompson's vehicle at the time of the accident or was "legally responsible for the use thereof".

8. They allege:

a. That under its terms and provisions said policy of insurance issued by Hartford Accident and Indemnity Company to Thompson's Ready-Mix, Incorporated, does not provide coverage for the death of Kelly, in favor of any insured, whether named or additional or omnibus.

b. That the policy of insurance issued by United States Fidelity and Guaranty Company to Warsing provides primary coverage for the claim arising from the death of Kelly and should assume the full burden with respect thereto.

c. That in any event United States Fidelity and Guaranty Company must provide a defense to Warsing in the case of *Link, Admx.* v. *Warsing,* and cannot escape such obliga-
tion.
page 17 } d. That Hartford Accident and Indemnity Com-
pany has no obligation to defend Warsing in such action.

Accordingly these defendants pray that if this court takes jurisdiction hereof, it will declare the rights of the parties hereto as follows:

1. That the policy of insurance issued by the Hartford Accident and Indemnity Company to Thompson's Ready-Mix, Incorporated, does not cover or apply to the claim of Link, Admx. against Warsing.

2. That the policy of insurance issued by United States Fidelity and Guaranty Company to W. W. Warsing does cover and apply to such claim.

3. That Hartford Accident and Indemnity Company is under no obligation to defend Warsing in the case of *Link, Admx.* v. *Warsing,* and that United States Fidelity and Guaranty Company has such obligation.

4. That all further needful relief herein be granted these defendants.

Respectfully,

HARTFORD ACCIDENT AND INDEMNITY COMPANY and THOMPSON'S READY-MIX, INCORPORATED

By Counsel

EDWARD A. MARKS, JR.
SANDS, ANDERSON, MARKS & CLARKE
10th Floor, American Building
Richmond, Virginia

Filed June 24, 1964.

Teste:

CHAS. R. PURDY, Clerk
By RICHARD S. McDONALD, D.C.

* * * * *

page 49 }

* * * * *

ORDER

This day came the defendants, Hartford Accident and Indemnity Company and Thompson's Ready-Mix, Incorporated, after notice to the plaintiffs who appeared by counsel, and the said defendants tendered their special plea based on matters which are alleged to have occurred since the filing of this suit, praying leave to file the same, which leave being granted, said special plea is Ordered filed; and plaintiffs are granted leave to file responsive pleadings within 21 days.

Whereupon all defendants, by counsel, moved the Court for leave to withdraw their Motion to Dismiss, filed herein on June 24, 1964, which leave is granted and the said Motion to Dismiss is withdrawn.

Enter: 9/7/65.

M. RAY DOUBLES
Judge Designate

I ask for this:
/s/ EDWARD A. MARK, JR.
Counsel for Hartford Accident & Indemnity Company and Thompson's Ready-Mix, Incorporated

Seen: and objected to and wish to be heard.
/s/ W. F. HAZEN

Counsel for complainant

* * * * *

page 50 }

* * * * *

SPECIAL PLEA

The defendant, Hartford Accident and Indemnity Company, respectfully shows unto the Court the following matters which have occurred since the filing of this suit:

1. That on the 17th day of September, 1964, in the case styled Doris McGuire Link, Administratrix of the Estate of Frank Woodruff Kelly, Deceased, v. W. W. Warsing, trading as W. W. Warsing Company, before the Circuit Court of Pittsylvania County, Virginia, the plaintiff recovered judgment against the defendant for the sum of $18,000 and the costs, which said judgment was apportioned $11,400.00 to Hartford Accident and Indemnity Company under its right of subrogation arising from its payment to the widow and children of said decedent under the terms and provisions of the Virginia Workmen's Compensation Act as insurer for Thompson's Ready-Mix, Incorporated, decedent's employer, copy of judgment order being annexed.

page 51

2. That plaintiff as liability insurer for W. W. Warsing, trading as W. W. Warsing Company, has paid said judgment, including that portion thereof awarded Hartford Accident and Indemnity Company.

3. That Hartford Accident and Indemnity Company refused to participate in or otherwise deal in or with the matters and things involved in said action, or to take any part therein, save only to collect its proper share of the judgment obtained by the plaintiff against the said W. W. Warsing.

4. That in permitting the entry of judgment and paying the same the plaintiff acted as a pure volunteer, and assumed by its voluntary act to waive valid defenses based on the terms and provisions of the Virginia Workmen's Compensation statutes and otherwise.

Wherefore, defendant says that plaintiff has waived any right to claim against them in this action and is *estopped* to seek any recovery over against the defendants on account of its voluntary payment as hereinabove set forth, wherefore defendants pray judgment in their behalf on this special plea.

HARTFORD ACCIDENT &
INDEMNITY COMPANY
and
THOMPSON'S READY-MIX,
INCORPORATED

By Counsel

EDWARD A. MARKS, JR.
SANDS, ANDERSON, MARKS & CLARKE
10th Floor, American Building
Richmond, Virginia

Filed September 7, 1965.

Teste:

IVA R. PURDY, Clerk
By DOROTHY M. JACOBS, D.C.

* * * * *

page 53 }

* * * * *

ANSWER TO SPECIAL PLEA

* * * * *

Plaintiffs, by way of answer to special plea filed on behalf of Hartford Accident and Indemnity Company, state and allege:

(1) That allegations in paragraphs numbers 1 and 2 of the special plea are admitted, but it is affirmatively alleged that the said judgment arose out of a compromise settlement which was submitted to the Court for approval and division of the proceeds amongst those entitled.

(2) The allegations in paragraphs numbers 3 and 4 of the special plea are denied.

(3) It is affirmatively alleged that Hartford Accident and Indemnity Company, through its attorney, Edwin B. Meade, Esq., not only participated in the settlement, but actively took the leading role in negotiations for said settlement and in the conduct of the action brought against Warsing by Doris McGuire Link, Administratrix of the Estate of Frank Woodruff Kelly.

page 54 } (4) Hartford Accident and Indemnity Company was at all times kept advised of the settlement negotiations by its counsel. Although numerous requests were made to Hartford's counsel to state the position of said company with respect to settlement negotiations, said company refused to state any position, knowing that the trial of the tort action was imminent unless a compromise settlement was effected. By its silence and refusal to state its position, Hartford Accident and Indemnity Company is *estopped* to claim that United States Fidelity and Guaranty Company has waived any defenses or has acted as a volunteer or has in

any way prejudiced its rights in this declaratory judgment action. In making said compromise settlement, United States Fidelity and Guaranty Company was acting not only for its In making said compromise settlement, United States Fidelity own protection, but also for the protection of Hartford Accident and Indemnity Company, in reducing its potential liability to the decedent's administratrix.

(5) The said compromise settlement was fair and reasonable under all the circumstances, was made in good faith and was not excessive.

(6) In addition to the sum of $18,000.00 paid by United States Fidelity and Guaranty Company in said settlement, the said company incurred attorney's fees, costs and expenses in the amount of $1,258.64, which sum is fair and reasonable.

WHEREFORE, for the reasons stated in the petition for declaratory judgment, plaintiffs respectfully pray that this Court enter a judgment in favor of United States Fidelity and Guaranty Company against Hartford Accident and Indemnity Company in the amount of $19,258.64 plus interest from September 17, 1964 and the costs of this action.

page 55 }

UNITED STATES FIDELITY
AND GUARANTY COMPANY
and W. W. WARSING

By W. F. HAZEN
Counsel

W. F. HAZEN, p.q.
TAYLOR, HAZEN & LASTER
1115 East Main Street
Richmond, Virginia 23219

Filed Sep. 24, 1965.

Teste:

IVA R. PURDY, Clerk
By R. H. McDONALD, D.C.

* * * * *

page 56 }

This day came the parties, by their attorneys, and the Court having heard the testimony of witnesses at the bar of

the Court, having read and examined the transcript thereof, and the exhibits filed, and having heard the argument of counsel and considered the briefs filed, being now advised of its judgment, being of opinion:

1. That the obligation of Thompson's Ready-Mix, Incorporated, and Frank Woodruff Kelly, respecting delivery of ready-mixed concrete to the job of W. W. Warsing in Pittsylvania County, Virginia, as to all or any part thereof, terminated at such time as the said concrete had been removed from the mixer truck owned by Thompson's Ready-Mix, Incorporated, and driven by Kelly, at a point upon the site of the work accessible to the said truck over passable roads, in this case into the concrete bucket provided by W. W. Warsing.

2. That no unloading of the truck owned by Thompson's Ready-Mix, Incorporated, was in process at the time Frank Woodruff Kelly was fatally injured, said injury having occurred after sufficient ready-mix concrete had been unloaded from the said mixer truck to fill said concrete bucket, and after W. W. Warsing, through its servants and
page 57 } employees, had taken delivery of the unloaded concrete, taking dominion and control over the same.

3. That neither W. W. Warsing nor William S. Davis, the operator of the crane owned by W. W. Warsing, were using the mixer truck owned by Thompson's Ready-Mix, Incorporated, or responsible for its use, at the time of the said injury to Frank Woodruff Kelly.

4. That at the time of his fatal accident Frank Woodruff Kelly was under the evidence in this case working in the trade, business or occupation of W. W. Warsing, under the direction of Graham Evans Hayes, who was the superintendent of construction at the job site for W. W. Warsing, and that he was, therefore, a statutory employee of W. W. Warsing, and a statutory fellow-servant of William S. Davis at the moment of his accident, and for such reason the exclusive remedy for his death was under the provisions of the Workmen's Compensation Act of Virginia.

5. That neither W. W. Warsing nor William S. Davis, nor any other employee of W. W. Warsing, were additional insureds or entitled to coverage as such under the policy of motor vehicle Liability insurance written by Hartford Accident and Indemnity Company upon the vehicles owned by Thompson's Ready-Mix, Incorporated, including that operated by Kelly with respect to the accident in which Kelly was fatally injured.

6. That W. W. Warsing was insured with respect to the said accident by the policy of insurance covering the operations of said corporation "at Crewe, Virginia, and elsewhere in the State of Virginia" issued by United States Fidelity and Guaranty Company.

7. That it was the obligation of United States Fidelity and Guaranty Company to defend the action brought by Kelly's Administratrix against W. W. Warsing, and to pay
page 58 } any judgment rendered in favor of the plaintiff in such action; and that Hartford Accident and Indemnity Company had no obligation either to defend such action or to pay such judgment.

8. That in settling the claim of Kelly's Administratrix against W. W. Warsing in the manner in which it did, United States Fidelity and Guaranty Company discharged an obligation which it had assumed, and not an obligation for which it could lawfully demand indemnity from Hartford Accident and Indemnity Company.

9. That for such reasons the United States Fidelity and Guaranty Company and the said W. W. Warsing are not entitled to recover any sum herein from the defendants.

10. That it is accordingly unnecessary to consider and pass upon any of the other issues raised herein by the parties.

On consideration whereof, it is adjudged and ordered that the plaintiffs recover nothing of the defendants in this action, but that the defendants do recover of the plaintiffs their proper costs, to all of which action of the Court the plaintiffs saved due exception upon all grounds urged in support of their claims.

I ask for this:
EDWARD A. MARKS, JR.
Counsel for defendants

Seen, objected to and excepted to:
W. F. HAZEN
Counsel for plaintiffs

Enter 4/6/67. W. E. S.

* * * * *

page 61 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO THE CLERK OF THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II:

United States Fidelity and Guaranty Company and W. W. Warsing, plaintiffs herein, by counsel, hereby give notice of appeal from the final order of the Court in this case, entered April 6, 1967, and set forth the following assignments of error:

The Court erred:

1. In holding that the Thompson's Ready Mix, Incorporated truck was not in the process of being unloaded at the time of the accident.

2. In holding that neither W. W. Warsing nor his employee, William S. Davis, were using the Thompson truck nor responsible for its use at the time of the accident.

3. In admitting into evidence the testimony of witnesses Carl Torrence, Gordon S. Maynard, Jr., Vaster Hatchett, Graham Evans Hayes, and W. W. Warsing, and Defendants' Exhibits Nos. 3, 4, 5, 6 and 7, pertaining to the question of whether Frank Woodruff Kelly was engaged in the "trade business or occupation" of W. W. Warsing at the time of his accidental death.

page 62 } 4. In holding that at the time of the accident, Thompson's employee, Frank Woodruff Kelly, was engaged in the trade, business or occupation of Warsing and was, therefore, a statutory employee of Warsing.

5. In holding that Warsing was not an additional insured under the policy of insurance written by Hartford Accident and Indemnity Company covering Thompson's truck involved in the accident.

6. In holding that it was the sole obligation of United States Fidelity and Guaranty Company to defend the action brought by Kelly's Administratrix against Warsing and pay any judgment rendered therein, and that Hartford Accident and Indemnity Company had no such obligation.

7. In holding that when United States Fidelity and Guaranty Company settled the claim of Kelly's Administratrix it discharged an obligation which it had assumed and for which it could not demand indemnity from Hartford Accident and Indemnity Company.

8. In refusing to declare that in connection with this accident Warsing was an insured under the respective policies of both companies, and that the coverage of the policy of Hartford Accident and Indemnity Company was primary and the coverage of the United States Fidelity and Guaranty Company was excess.

9. In refusing to hold that United States Fidelity and Guaranty Company is entitled to recover from Hartford Accident and Indemnity Company the sum of $19,258.64, representing its loss and attorney's fees, plus interest and costs.

UNITED STATES FIDELITY
& GUARANTY COMPANY

By W. F. HAZEN
Counsel

W. F. HAZEN, p.q.
TAYLOR, HAZEN AND LASTER
700 East Main Street
Richmond, Virginia 23219

Filed June 5, 1967.

Teste:

IVA R. PURDY, Clerk
By R. H. McDONALD, D.C.

* * * * *

page 4 }

* * * * *

WILLIAM S. DAVIS, a witness of lawful age, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hazen:

Q. Mr. Davis, will you please state your name, your age, and tell us where you live.

William S. Davis

A. William S. Davis. I am twenty-nine years old. I live at Route 3, Virgilina, Virginia.

Q. What is your occupation?

A. Crane operator.

Q. For whom?

page 5 } A. W. W. Warsing.

Q. How long have you operated cranes?

A. Approximately eight years, give or take a year or two.

Q. How long have you worked for Mr. Warsing?

A. About six or seven of them.

Q. Are you still working for him now?

A. Yes.

Q. Directing your attention to the accident of October 14, 1963, will you tell us whether you were operating a crane that was involved in an accident at that time?

A. Yes, sir, I was.

Q. I believe it has been stated there was an access road being built from the highway to Corning Glass Works near South Boston, is that correct?

A. That's right.

Q. Mr. Davis, what is the nature of Mr. Warsing's business, generally speaking?

A. He does contracting work for the state mostly. It is possible he does some private. Not too often.

Q. What was his connection with this job where the accident occurred?

A. You mean what he was doing?

Q. Yes.

A. He was building a bridge and also moving the

page 6 } dirt for this—

Q. Was he the general contractor there?

A. That's right.

Q. And I assume his contract was with the highway department, is that right?

A. That's correct.

Q. Now, on that job, I believe it has been indicated that Thompson's Ready-Mix, Incorporated owned the truck that was involved at the time, is that correct?

A. Right.

Q. Mr. Kelly was one of their drivers?

A. Yes, sir.

Q. He was killed?

A. (Indicating in the affirmative).

Mr. Hazen: If you have no objection to that, I want to introduce this.

Mr. Marks: Unless this gentleman is personally familiar with it, I can't—

Mr. Hazen: You have a representative here. He sent you a copy of it. If you deny the validity of it—

Mr. Marks: No, I don't deny the validity of it.

Mr. Hazen: If Your Honor please, I would like to offer the contract between Ready-Mix Corporation and W. W. Waring on this job.

page 7 } Mr. Marks: That is perfectly satisfactory by agreement, not by the witness.

Mr. Hazen: No, not by the witness.

The Court: Introduced by consent, the contract will be marked Plaintiff's Exhibit No. 1, and initialed.

NOTE: The above-referred-to contract is marked and filed by the Court as Plaintiff's Exhibit No. 1.

Q. Now, Mr. Davis, I would like to show you a picture.

Mr. Hazen: If Mr. Marks has no objection, we will have it marked for identification.

Mr. Marks: Just one question about it before we do it, because I think we can put them all in by agreement without regard to proof.

NOTE: An off-the-record discussion is had.

Mr. Hazen: Suppose we have these marked.

The Court: All right. Plaintiff's Exhibits 2, 3, 4 and 5 are introduced by agreement to show the crane, boom, bucket, cables, and so forth, but not in the location at the time of the accident.

Mr. Marks: And there is a new boom cable weaved in there since the accident.

The Court: As put back into condition after the accident.

Mr. Marks: May I add if you care to that it is agreed to between Mr. Hazen and myself that these pic-

page 8 } tures, if they had been taken before the accident, would show substantially the condition of the crane as it then was.

Mr. Hazen: That's right.

William S. Davis

The Court: And it is agreed between counsel that had these pictures been taken prior to the accident they would have shown the equipment in the condition that it existed at that time.

Mr. Hazen: I am going to have Mr. Davis show certain things to His Honor on these pictures, if you would like to come around (speaking to the witness).

NOTE: Counsel and the witness approach the bench.

By Mr. Hazen: (Continued)

Q. Mr. Davis, referring to Plaintiff's Exhibit No. 2, I will ask you if that is a picture of the crane that was involved in the accident?

A. Yes, sir.

Q. This picture was taken after the accident?

A. That's right.

Q. Will you point out to His Honor and explain how these trucks were unloaded, show the bucket on it, and point to them on here so he will have a clear picture as to what took place.

A. Well, this bucket here is placed behind the
page 9 } mixer truck, and they have a chute that pours the
concrete into the bucket, and after it is poured in there, well, I am the operator, I pick up the bucket with this cable here, and I swing the crane around to wherever they are going to pour the concrete, then I might have to raise and lower this boom to get it in right position. And this cable here operates raising and lowering the boom, also holds it in place.

By The Court:

Q. That is the cable, the last one that goes through what I would call pulleys?

A. That's right.

Q. Is that the one that broke?

A. Yes, sir. See all those cables here.

By Mr. Hazen:

Q. As a preliminary question, on this morning of the accident, did one of those cables break?

A. Yes, sir.

Q. What happened to the boom?

A. The boom failed instantly.

Q. As you picked up the bucket, did you clear the ground?

A. That's right. I just cleared the ground within probably a foot or a little more?

Q. As the bucket here was being loaded from the truck, was it sitting in a pit or at ground level?

page 10 } A. That's right. It was sitting probably about a foot or eighteen inches below the level of the truck.

Q. You say you just cleared the ground?

A. That's right.

Q. Now, will you point again to where the cable was located that actually broke.

A. This is the cable here (indicating). All these, it runs through all these sheaves.

Q. No, sir. Is it correct—I am leading you, but—

Mr. Marks: Go ahead.

Q. (Continued) Is it correct that this cable, one end of it is anchored down here in the crane, itself, and that then it is a continuous cable which runs through these sheaves, rather than a series of cables?

A. That's right, one.

Q. The other end of it hooks to a drum by rigs and lowers the boom?

A. That's right.

Q. The boom appears to be at more than a 45 degree angle. At the time of this accident, approximately what was the angle of the boom above the ground?

A. I would say probably forty to fifty degrees.

Q. That would be out this way a little more, is that correct?

A. That's right.

page 11 } NOTE: An off-the-record discussion is had.

Q. Now, between the boom cables and the boom, there appears to be a single cable. I will ask you what that single cable is?

A. Well, this is the cable that operates this bucket, that raises and lowers it.

Q. That is attached to the drum and to the crane?

A. That's right.

Q. Now, also, on the other side, there appears to be two cables that are sort of loosely attached. What was the purpose of those?

William S. Davis

A. They are extra cables for driving piling and operating a clamshell, and other things.

Q. They would not be in operation, I take it, when you are simply operating this bucket?

A. That's right.

Q. And the only cable that broke was in this area here, is that correct?

A. That's right.

By The Court:

Q. Indicating the cable that raises and lowers the boom, is that correct?

A. That's right.

NOTE: An off-the-record discussion is had.

Mr. Hazen: May we have those marked, 6, 7, 8
page 12 } and 9.

The Court: A series of four photographs received by agreement and marked Plaintiff's Exhibits 6, 7, 8 and 9, respectively.

NOTE: The above-referred-to photographs are marked and filed by the Court as Plaintiff's Exhibits No. 6, 7, 8, and 9, respectively.

By Mr. Hazen: (Continued)

Q. Before we get to those, Mr. Davis, let me ask you if Plaintiff's Exhibits 3, 4 and 5 are also pictures of this crane, the same as Exhibit No. 2 that you referred to?

A. That's right.

Q. It shows the various component parts as they were just prior to the accident, is that correct?

A. That's right.

Q. Now, I don't know if I asked you. At the time of the accident, were you in the process of moving the boom up or down at all?

A. No, sir. I just picked the bucket up.

Q. Only the bucket cable was being moved?

A. Uh huh.

Q. Now, let's look at Plaintiff's Exhibit No. 6. Can you tell us when and where this was taken?

A. You mean at the job?

Q. No. When and where this picture was taken
page 13 } with reference to the accident.

A. That was taken in Danville on this job that the accident happened.

Q. Do you know how long after the accident it was taken?

A. I don't know exactly. I would say maybe an hour, hour and a half.

Q. Had the man been moved at that time?

A. Yes, sir.

Q. In the process, was it necessary to move this boom sideways to get it off his body?

A. Well, if we had had some way of lifting it straight up, we could have got it.

Q. How was it moved?

A. Front end loader.

Q. You mean it was pushed over by the front end loader?

A. It was picked up and eased over.

Q. Now, it appears this boom is buckled here. What caused that?

A. That's where it fell across the concrete bucket.

Q. Now, is this the concrete bucket behind these two men in the picture?

A. That's right.

Q. Is it true then that when the boom came to
page 14 } rest it was over the top of this bucket, is that correct?

A. That's right.

By Mr. Marks:

Q. May I interject: The bucket in the picture had not been moved, had it?

A. I don't think it had right then.

By Mr. Hazen: (Continued)

Q. Now, this trestle shown in the background of Plaintiff's Exhibit No. 6, was that the one you were working on, or was it a temporary structure?

A. We built that before. We weren't working on that particular trestle at the time of the accident.

Q. Now, I will ask you about Plaintiff's Exhibit No. 7. Is this another picture of it taken about a hour or so after the accident?

A. That's right.

Q. Does this picture show the portion of the structure on which you were working at the time of the accident?

A. That's right.

William S. Davis

Q. Will you point out to His Honor where, if you can see it on here, you were going to pour this concrete?

A. Well, this is—this is the bottom of the bridge, and we was pouring concrete on top of this. This held up the concrete by form work and steel beams, and this is the slab that we was pouring.

page 15 } Q. It is correct then that after you got the bucket picked up from this point you would swing the boom over to the area and lower the bucket again, is that correct?

A. That's right.

Q. What kind of trip device did this bucket have, do you recall?

A. It's got a handle on the side. You can see it in this photograph. You pull it, and the two doors at the bottom open, and the concrete—

Q. Dumps out the bottom?

A. Right.

Q. Did you actuate those doors on the bottom, or is that someone else's job?

A. No, sir, someone else's.

Q. Do you pull a handle that would actuate the doors?

A. That's right.

Q. I ask you to look at Plaintiff's Exhibit 8 and Plaintiff's Exhibit 9, and I ask you to state to His Honor what those pictures depict?

A. This is a picture of the sheaves that—

Mr. Hazen: He is referring to No. 8.

A. (Continued) The sheaves that hold the boom and also raises and lowers it. There is another set of sheaves too.

Q. Can you identify from Plaintiff's Exhibit No.

page 16 } 2 where that particular sheave was before the accident?

A. That is located here.

The Court: Indicating the top upper one.

Q. What happened when the sheave failed?

A. The tension in the cable threw it over to the side down —well, off to the side of the boom where the boom rests.

Q. And it landed on the ground, is that right?

A. That's correct.

Q. Did Exhibits No. 8 and 9 correctly portray the condition of it immediately after the accident?
A. That's right.
Q. Do they show the cable that broke?
A. That's right.

By The Court:
Q. Actually, it was one cable, only one cable, wound many times around the sheave, wasn't it?
A. Yes, sir.

By Mr. Hazen: (Continued)
Q. Can you tell us from looking at the picture No. 6 where this sheave was on the ground? Does it appear in there or not?
A. I can't see it there.

Mr. Hazen: I think that's all for now. If you will take your seat.

page 17 } NOTE: The witness resumes the witness stand.

Q. Mr. Davis, what was the size of this cable that broke?
A. Three-quarters inch.
Q. What is it made of?
A. It is made of wire, rope. It is steel. I don't know the exact metals that are in it.
Q. It appears that those are twisted strands in the picture.
A. That's right.
Q. Do you have any idea as to the normal breaking strength of a cable of that dimension?
A. I don't know about that particular cable, but, ordinarily, a cable, I think, in those books, you know, that advertise the cable, it says the breaking strength is about twenty-three and a half tons. That is a single strand. You know, one cable. But, when you—like it was on the crane, it was ten part lines, so it should have been ten times as strong.
Q. Do you know what would be the effective load that you had on it at the time this broke?
A. No, sir, I wouldn't.
Q. It would depend on the angle of the boom, would it not?
A. That's right.
Q. Now, had you previously unloaded one truck
page 18 } that morning?

William S. Davis

A. That's right.

Q. Approximately how much concrete does one of those concrete mixer trucks hold?

A. They hold from, I think it is five to seven yards. I don't remember how many yards those trucks had on them.

Q. How many yards would the bucket hold?

A. A yard and a half.

Q. So you would make four or five trips to unload one truck?

A. That's right.

Q. Was this the first bucket for the second truck of Thompson's?

A. Yes, sir.

Q. Was Mr. Kelly driving the other truck or someone else?

A. You mean—

Q. The first truck.

A. No, someone else.

Q. Do you recall how long Mr. Kelly was there at the site of work with his truck before you started unloading it?

A. No.

Q. How did you give him a signal as to when to put the concrete into the bucket, or did you give him a signal?

page 19 } A. Well, no, I didn't give him a signal. We always place the bucket where we want the mixer to come, then the superintendent tells when he is ready for us. If he wants him to wait, he will tell him to wait.

Q. He will tell the truck driver?

A. That's right.

Q. The superintendent in this case was Mr. Graham Hayes?

A. That's right.

Q. When do you start to lift the bucket? Does someone tell you when they are ready or not?

A. Not ordinarily. Sometimes they will, sometimes they won't. When they fill the bucket and move the chute, I usually know they are ready.

Q. That is the driver you are speaking of?

A. That's right.

Q. Had Mr. Kelly operated the chute on this particular occasion?

A. That's right.

Q. How does that work, now? When he has filled the bucket, how does he operate it? Does he have his own controls?

A. That's right. It is controls on the rear of the mixer.

Q. Then, what does he do to the chute when the bucket is full?

page 20 } A. He swings the chute around.

Q. Is that by hand?

A. Right. Swinging the chute around from over the bucket.

Q. Around to what, the side of the truck?

A. That's right.

Q. Who did that in this case?

A. He did.

Q. Where was he standing when you started to pick up the bucket?

A. He was standing at the rear of the truck where the controls are for the mixer.

Q. Would that be on the side or back of the truck?

A. It would be on the side, but near the back.

Q. Near the back. Did you have any previous warning of any trouble, or did this thing happen suddenly?

A. Just happened suddenly.

Q. Did you know what had happened immediately? Could you tell us, and, if so, why?

A. I suspected it, but it just, you know, when the boom fell, it was all of a sudden.

Q. Could you see any cable?

A. And the cable was flying when the boom fell.

Q. What did you do as it started to fall?

A. I hollored. I guess maybe the boom was close

page 21 } to the ground before I did, though.

Q. Was there anyone else there in the immediate vicinity?

A. It was one of the other drivers there.

Q. One of Thompson's drivers?

A. That's right. Another truck waiting.

Q. Did he get out of the way in time?

A. Yes, sir.

Q. Now, these drivers for Thompson's, and, specifically, Mr. Kelly, what actually did they do when they brought their trucks to the job site? Just describe exactly what they did, if anything.

A. Well, they only backed the truck in position to unload, unload the concrete and pour it into the bucket or form.

Q. Did they prepare any other function in connection with this job?

A. No, sir.

Q. Did Thompson have any superintendent or foreman there at the job, as you know?

A. You mean at the time of the accident?

William S. Davis

Q. Yes.

A. I don't think so. I am not sure about it.

Q. The only other person was another truck driver, then, is that correct?

A. That's right.

page 22 } Q. For Thompson. How old was this crane at the time of the accident, do you know?

A. I say about four years old.

Q. From your experience in working with cranes, if a cable is about ready to break, or worn, would this be visible to the person who looked at it?

A. I think so, yes, sir.

Q. What evidence would there be to you that a cable was dangerous?

A. When the strands started to breaking in it.

Q. These are the outside strands?

A. That's right. Ones you can see.

Q. There was mentioned about the dumping of the small sample first into the bucket, and the superintendent would see whether it was okay or not. Is that a correct statement? You probably heard Mr. Marks' description of it?

A. Yes, sir, ordinarily. I don't remember whether he might have did it with the first employee. He could have that load, too. I don't remember that.

Q. You don't know specifically, but, in any event, that was the practice that he would look at it to see whether it was enough moisture content, and so on?

A. That's right.

Q. Do you, from your investigation and knowledge of this thing, have any explanation as to why this cable broke?

page 23 } A. No, sir, I don't.

Q. In the event that one of these cables broke, is there anything that can be done to prevent the boom from falling or is it then loose?

A. It is just loose then.

Mr. Hazen: I assume, Mr. Marks, that we can stipulate that it was Franklin Woodruff Kelly who was killed in this accident?

Mr. Marks: Yes, sir.

Mr. Hazen: That was an employee of Thompson's Ready-Mix, Incorporated acting in the course of his employment at the time.

Mr. Marks: Right. Employed as a transit-mix operator.

William S. Davis

Mr. Hazen: Who?
Mr. Marks: Transit-mix operator.

Q. This crane you were operating, the pictures show that it appears to be a crawler type. Is that the way it is properly described?
A. That's right.
Q. With a track on it like a Caterpillar tractor?
A. Yes, sir.
Q. Are some of them mounted on automobile chassis rather than crawlers?
A. Some of them are mounted on a heavy chassis
page 24 } with rubber wheels. Mobile crane.

Mr. Hazen: All right. Answer Mr. Marks' questions.

CROSS EXAMINATION

By Mr. Marks:
Q. I would like to get the pictures straight before we go much deeper into this gentleman's testimony.

NOTE: Counsel and the witness approach the bench.

Q. Now, Mr. Davis, I am going to call to your particular attention the Plaintiff's Exhibit No. 2, which appears to be a view from the rear, slightly from the rear, of your cab equipment, isn't that right?
A. Yes, sir.
Q. Now, will you take this ink pen and put a circle around the movable cable that raises and lowers this boom?
A. You want the ones that go all the way down?
Q. No, just in the sheave, if you don't mind.
A. (Doing so).
Q. Now, there is a lead line on both sides, is there not?
A. Yes, sir. One of them is a dead-end line.
Q. Which one is the dead-end line?
A. That one on this side.
page 25 } Q. On the left?
A. That's right.
Q. May I put an X on the dead-end line. That is right now?
A. That's right.
Q. What does that fasten to?

William S. Davis

A. That is anchored to the bottom of the crane.
Q. Inside the cab?
A. Inside, yes, sir.
Q. Now, the movable end is the one on the right then?
A. That's right.
Q. May we put a Y on this one?
A. That's right.
Q. (Doing so). Now, the bucket cable is this long thing that comes from the end of the crane down to the bucket down here, is that right?
A. That's right.
Q. And that passes through some kind of a sheave arrangement up here in the head of the boom, doesn't it?
A. Yes, sir.
Q. And leads back down inside the cab also?
A. That's right.
Q. Now, is this the lead—
A. Yes, sir.
page 26 } Q. For that? So, if we put a B here and a B here, we are talking about the same cable, right?
A. That's right.
Q. Now, let's look at number 5 for the plaintiff, with respect to this same situation. If you will take this pen again and circle the area you circled over here.
A. (Doing so).
Q. Now, which of these various and sundry things that we see in the middle here is the lead from the dead-end?
A. This one.
Q. All right. Put the B on that one, then.
A. (Doing so).
Q. Now, can we see the bucket cable lead in that picture? Wouldn't this be it here?
A. I think that would be it.
Q. All right. Put a B on that one.
A. (Doing so).
Q. This one over here is the Y cable?
A. That's right.
Q. The movable boom cable?
A. Yes, sir.
Q. Put a Y on that one.
A. (Doing so).
Q. Now, let's pass that one by and look back at Number 2 again. This entire arrangement with Link-Belt
page 27 } written on the back of it, and this cab arrange-

ment, and the boom arrangement, and this business on top of the cab swiveled on these tracks, didn't it?

A. That's right.

Q. So, when you want to change the location of your boom from left to right, or from front to back, you do not crawl with it, you can just turn it right around on its base?

A. That's right.

Q. Now, then, we come, if you don't mind, to Picture No. 4. These cables lead, am I correct or not, to these drums that we see in Number 4, and wind on them?

A. All except the boom cable. The boom cable is located down inside the crane. Near the bottom.

Q. Near the bottom. Now, are these levers that I see here the control levers that you push and pull to do what is necessary to make this thing perform the way it is supposed to behave?

A. Yes, sir.

Q. So, then, your seat, as shown in Exhibit No. 3, through the left hand door of the cab is right behind this row of stuff?

A. That's right.

Q. And this is the opening through which you look when operating to see what is going on out in front?

A. That's right.

page 28 } Q. By moving one or more of these levers here, you can activate these winches?

A. That's right.

Q. And also the winch that is down inside that raises and lowers the boom, is that right?

A. Yes, sir.

Q. When you don't actually move one of the levers, the thing stays the way it is supposed to stay, doesn't it?

A. That's right.

Q. Does it have an automatic lock or brake on some part of it?

A. The boom has. The boom has an automatic brake, but on these drums you have brakes to lower them with your feet. Like a car pedal.

Q. Pedals?

A. That's right.

Q. All right. I think I understand that much of it. Now, let's get over here. Is your crane sitting, in Exhibit No. 6, in the identical location that it was sitting when this boom fell?

A. That's right.

William S. Davis

Q. Now, this structure in the back of Picture No. 6, on which I have my hand, and a structure in the back of Picture No. 7, to which I am pointing, is a timber trestle, isn't it?

page 29 } A. Yes, sir.

Q. That was constructed, was it not, by Warsing's forces as a part of this job?

A. That's right.

Q. To detour the railroad?

A. Yes, sir.

Q. This structure on which I put my finger in those two photographs, which are respectively Number 7 and Number 6, is the new concrete structure you were engaged in making at the time of the accident?

A. Yes, sir.

Q. For the train to later run over?

A. Yes, sir.

Q. So, will you then take the pen again and put a T for the temporary trestle, and mark them?

A. (Doing so).

Q. This one also.

A. (Doing so).

Q. Will you put an O.P. on the concrete portion to show overpass, or U.P., underpass. I think it is overpass.

A. (Doing so on both exhibits).

Q. Now, when you were up here before pointing out things on pictures, you mentioned something about a deck slab?

A. Yes, sir.

Q. Would you take a pen and put the initials DS

page 30 } on the deck slab.

A. Well, I will have to put it on the bottom, because it is not a top one.

Q. This was formed in which side?

A. That side.

Q. The side of the form. Which of the sides was being built?

A. This is the bottom of it. You can see all the way across the bottom.

Q. All right, mark that area so we will know what we are talking about.

A. (Doing so).

Q. Can you tell us, Mr. Davis, what these little blocks are that are sitting around in photograph No. 9. In the area in which your sheaves came to the ground, these little square—

A. They are pilings drove for the footing of the wing.

Q. Can you find a wing in any of these other pictures?

A. That is the form—
Q. For the wing.
A. —on that side.
Q. And there is another wing over on this side somewhere, isn't it?
page 31 } A. That's right. It will join here.
Q. Are these pilings we are seeing in Photograph 9 the pilings for the wing that is going to join here, or can you tell us?
A. That's right.
Q. So, this scene where this pulley-sheave arrangement came to rest is somewhere in the foreground and off the Picture No. 7, is that correct?
A. That's right.
Q. Would that put it somewhere to the left of, and in front of, the front end loader?
A. Approximately.
Q. That front end loader is in No. 6. Now, sir, when you say the front end loader was used to pick up and move the boom off Kelly's body and over the bucket, tell us how that was done, if you don't mind, or you can show us if you wish.
A. Well, in this photograph here—

The Court: Number 6.

A. (Continued) I don't remember whether he used the bucket under the boom and raised it or whether he used the chain. After he raised the boom off of the man, then he moved —moved the boom over just a few feet so they could get to the man.
Q. To the right in the picture?
A. That's right.
page 32 } Q. What is the chain, while we are at it, in Picture No. 6?
A. I think they used the chain at first, then they decided not to, I mean, but the chain on there for the purpose of picking it up. I don't think they—they didn't use it after they put it on there.
Q. In other words, that chain is not a part of your crane?
A. No, sir.
Q. What we are trying to establish, that is something added after the accident in an effort to work out this removal of the crane and the boom from the body?
A. Yes, sir.

William S. Davis

Q. Whether it was used or not is immaterial. Now, the boom in these pictures after repair, is that the same length as it was at the time the accident occurred?

A. Yes, sir.

Q. No additional sections have been put into it?

A. No, sir.

Q. Will you please, Mr. Davis, tell us what this roadway which I see on the right in No. 2 is?

A. That is Route 360 in Halifax County.

Q. Route 360 in Halifax County?

A. Near Clover, Virginia.

Q. This area in the foreground, is that the access
page 33 } road, or what was it?

A. This would be two more lanes added to make a four lane road there on 360.

Q. Later?

A. Right.

Q. You weren't engaged in that, however?

A. Yes, sir. We were building box coverings for the new two lanes.

Mr. Hazen: To avoid confusion, I believe we explained that it was a completely different occasion and that it had nothing to do with the accident.

Mr. Marks: I beg your pardon, Bill. I thought it was the location of the accident. That's why I was confused. I didn't know it was taken somewhere else.

Mr. Hazen: It was made clear that it was different. It has nothing to do with it.

Mr. Marks: I beg your pardon, sir. I didn't mean to confuse you. I have one correction, because I thought you were somewhere near 29 in this case, not 360.

Q. Let's get at it this way. The road, the access road, was coming under the concrete structure that we see in Plaintiff's Exhibit No. 7, is that correct?

A. Yes, sir.

page 34 } Q. The railroad was going to run on top of it?

A. Yes, sir.

Mr. Marks: That's all, I think, as far as the pictures go.

NOTE: The witness resumes the witness stand.

Q. I would like for you to tell us, if you please, something about the way these boom lift cables are put together. Are these the fine strand woven wear flexible cables that we all know, sort of wire rope, or are they the heavy ply steel cabling

we see for guys on telephone poles?

A. They are wire rope, we call it.

Q. They are made of multiple fine strands that are lined up almost like hemp rope, aren't they?

A. That's right.

Q. Isn't it true, sir, in your experience that a cable can have rust on the inside and weakness on the inside and not show on the outside?

A. Yes, sir, I guess it can happen.

Q. Have you ever known one to be that way?

A. Well, it's hard to tell, sir, until they break.

Q. Until after they break?

A. Well, you don't know—unless something cuts it.

Q. Now, Mr. Davis, how long had you been working for Mr. Warsing as a crane operator at the time the

page 35 } accident occurred?

A. I guess about six years, maybe. Four, something like that.

Q. Had you always been a crane operator?

A. For Mr. Warsing, I had.

Q. I am talking about while you were employed by Mr. Warsing.

A. Yes, sir.

Q. Mr. Warsing's work during the time you were with him, I believe you told us was general contracting and mostly with the state highway projects?

A. That's right.

Q. Will you give us some idea of the type of equipment that he kept and owned and maintained and used during the time you have been with him.

A. Well, he has cranes and bulldozers and rubber tire pans.

Q. Anything else?

A. And trucks, too.

Q. Does he have a concrete mixer?

A. Yes, sir.

Q. Does he have a batching plant?

A. Yes, sir.

Q. He owns one?

A. Yes, sir.

page 36 } Q. Does he have any truck-mounted mixers?

A. Yes, sir.

Q. And he has been using these in his work since you have been working for him, with him, on these projects?

A. Yes, sir. Not on his work.

Q. I realize he doesn't use every piece on every job, but he uses them as needed, isn't that right?

A. Yes, sir.

Q. Very frequently, he has more than one job going at one time, doesn't he?

A. Yes, sir.

Q. Do you know whether he had more than one job going at the time you were all working on this access road?

A. Yes, sir.

Q. What jobs did he have going at that time?

A. I don't know. I don't know where they were located.

Q. What were they, generally, do you know?

A. Well, he builds bridges and also roads, too.

Q. All right, sir. We will have to ask him about it, I guess. Do you know whether or not his own mixer truck and batching equipment was in use on another job at the time this underpass was being constructed?

A. Yes, sir, I am pretty sure they were.

Q. Would you have any idea as to where they
page 37 } were in use?

A. No, sir. I wouldn't know how often, either.

Q. Would it be in another location from where you were working, is that right?

A. Yes, sir.

Q. Now, turning our attention, Mr. Davis, to the particular day that this thing had occurred, this accident occurred, this was not the first day that concrete had been brought on the job in mixer trucks, was it?

A. No, sir.

Q. Do you have any idea as to how many days concrete had been delivered in mixer trucks on the job site?

A. No, sir.

Q. You had poured a substantial chunk of this overpass before the accident happened, hadn't you?

A. Yes.

Q. This accident happened about what time of day?

A. I would say about the middle of the morning, possibly. Nine o'clock or maybe a little bit earlier or a little later.

Q. What time did you all start working on this job?

A. At 7:00.

Q. I believe you told us that one truck of Thompson's, one mixer, transit-mix unit of Thompson's, had come to the job first, is that right?

page 38 } A. That's right.

Q. And it had gotten into position and you had received the concrete out of the mixer into your bucket and had placed it in the form up on the slab?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And you then brought your bucket on back down to start receiving the contents of Kelly's truck?

A. Yes, sir.

Q. All right, now, after you had received the contents of the first mixer truck, that truck, I take it, had to move out of the way, didn't it?

A. Yes, sir.

Q. Did you see it move out of the way?

A. No, sir. I was dumping the bucket.

Q. But, it was gone when you looked back?

A. Yes, sir.

Q. Now, when you first saw Kelly's truck, the first time that day, where was it?

A. I didn't pay any attention to it until he backed up to unload.

Q. Had it been there while you were unloading the other truck?

A. It may have. I don't know how long.

page 39 } Q. Do you know or did you notice whether or not the mixer drum was turning?

A. No, sir, I didn't.

Q. Didn't pay any attention to it. Where was Mr. Hayes at the time the first little sample of Kelly's concrete came out into your bucket?

A. I don't know. I think he was there at the truck. I am not positive, because he runs all over the place.

Q. Normally, he would be there at the truck?

A. That's right.

Q. Normally, he would be looking at what comes out, wouldn't he?

A. Yes, sir.

Q. If he didn't like it, what would he do, normally?

A. Well, he would tell the driver to add water.

Q. You don't know whether he did in this case or not?

A. I don't.

Q. Now, if he did tell the driver to add water, it is true, isn't it, that that driver had to start adding water and to get that water through the mixer?

William S. Davis

A. Yes, sir.

Q. That held you up in getting the bucket full and getting it off the ground while this was going on, didn't it?

A. Yes, sir.

page 40 } Q. The discharge is not made until after Hayes looks at the sample, says this is all right, go ahead and fill the bucket?

A. Well, not all times. Sometimes he doesn't inspect all the trucks. He just spot checks.

Q. In those that he does check, that is the procedure though?

A. Yes, sir.

Q. Do you know, Mr. Davis, or have you observed, whether or not any ticket came with these loads?

A. Yes.

Q. Isn't it true, or have you observed, that when they add water on the job the driver makes Mr. Hayes or somebody sign the ticket that more water was put in?

A. I don't know about that, sir.

Q. But you do know that some sort of ticket is signed normally by someone who tested this mix?

A. Yes, sir.

Q. Now, the truck of the other Thompson driver who was on the scene, which you say got out of the way of the boom, was that the truck that you had unloaded or was that another Thompson truck waiting to be unloaded?

A. I think it was one waiting to be unloaded.

Q. So, if that is so, there was one Thompson's Ready-Mix unit sitting there waiting to be unloaded, and one

page 41 } in the process of discharging the contents when the accident occurred?

A. Yes, sir.

Q. Is that your understanding of what was going on?

A. Yes, sir.

Q. And that one had been there and had gone off somewhere; where, you don't know where he went, the first one?

A. Yes, sir, he had gone.

Q. Now, have you ever worked directly with concrete in any way other than as a crane operator picking it up and setting it down?

A. Well, I have helped shovel it some. After we have poured it all, we might have some to finish, and I will help.

Q. But, you never had any part in the actual mixing of the material that goes in the concrete, have you?

A. No, sir.

Q. You have never run a mixer or anything of that kind?
A. What?
Q. You never have run a mixer?
A. No, sir.
Q. When you are putting the concrete in forms such as you were doing on this particular day on this slab, what instructions do you have from Mr. Warsing with respect

page 42 } to keeping the work moving along?

A. Well, Mr. Hayes is superintendent.
Q. From Mr. Hayes?
A. Usually keeps you working. He doesn't let you loaf around.
Q. He sees to it that there is no undue delay in getting this material in the forms, is that what you are saying?
A. That's right.
Q. Have you observed in the course of your operations any time when Mr. Hayes refused to let concrete go into the forms because it had set too long before it got there?
A. I don't remember. I think maybe he has.
Q. In addition to this bridge that you all were working on, there was some excavating for a road that either had been done or was being done, and the road was going to be paved, wasn't it?
A. Yes, sir.
Q. And there were some other incidental things that were being done with respect to getting this access road into the plant, wasn't it?
A. Yes, sir.
Q. Over what area, how long an area, how wide an area, and how big an area was the job as a whole that was being carried on?

page 43 } A. You mean the road?

Q. The project.
A. I don't know. I would say maybe a quarter mile to a half.
Q. Of length?
A. That's right.
Q. How wide an area from side to side?
A. I don't know.
Q. It was a right substantially sized construction area, wasn't it?
A. Yes, sir.
Q. Was there any highway into the location where this bridge was being built?

William S. Davis

A. You mean—
Q. State highway.
A. The road that was already there.
Q. Yes, sir.
A. Not to the bridge.
Q. Was there any road that was already there to the plant, the Corning Glass Plant?
A. Yes, sir.
Q. How did the mixer truck come into, or the mixer equipment come into, the job site, did you notice?
A. They usually came down through this field alongside the railroad track. Down to where we wanted it.

page 44 } Q. They were not on the highway then?
A. Not on the old. Sometime they would go where it had been graded for the new highway and come in that way.

Q. Do you know which way Kelly came in that morning, whether he came in over the new graded area or whether he came down through the field?
A. No, I don't.
Q. Do you know how many of them came in that morning?
A. Well, I seen some waiting after the accident sitting up there in the field. Now, I don't—
Q. So, they were completely off the highway when they were unloading?
A. Off the old road.
Q. Off the old road and off the new road, too, weren't they?
A. Well, no part of it was in the new road.
Q. In the new road?
A. Because it wasn't any traffic on it.
Q. There was no other way in which this concrete could be gotten up to this deck that you were pouring except by truck, was there?
A. No, sir.
Q. Now, Mr. Davis, to get to this road that you all were working on, this project, from Danville, how would you go?
A. Go out 29.

page 45 } Q. South toward North Carolina?
A. Yes, sir.

Q. How close to the North Carolina line would you say you were working on this access road?
A. I don't know. Right close to the line. Probably, maybe three or four hundred yards.
Q. And the end of the project on which you were working

at the time this thing occurred intersected with Route 29, didn't it?

A. That's right.

Q. And the roadway came in and came to a dead end up there in the area of the plant?

A. That's right, near the plant.

Q. To get to the dead end near the Corning Glass Plant, it had to either go under, over, or avoid the railroad in some way?

A. Yes, sir.

Q. Therefore, the bridge that was in process at the time was being built to carry the road under the railroad?

A. Yes, sir.

Q. Train traffic during the time this was being under construction, was that carried on these temporary trestles we are talking about shown on the exhibits with the wooden posts and tracks on top?

A. Yes, sir.

page 46 } Q. Had you driven the pilings for that?

A. Yes, sir.

Q. With your rig?

A. Yes, sir.

Q. Normally, you were expected to pull it over after it served its purpose?

A. Yes, sir, or cut it off below ground.

Q. Now, Mr. Davis, had you had any mechanical trouble of any kind with this crane within a month before this accident?

A. No, sir, I don't think so. I am not sure on that.

Q. You say that the crane was approximately four years old?

A. That's right.

Q. At the time of the accident?

A. Approximately. Maybe a few months older or newer.

NOTE: By request of counsel the last answer is read by the court reporter.

Q. In other words, maybe a little more than four years old and maybe a little less than four years old?

A. Yes, sir.

Q. Do you know whether the boom lift cables had been replaced at any time during this four-year period?

A. Yes, sir.

page 47 } I am sure it had, but I don't know the date.

Q. Had you been the operator of the crane during the entire time Warsing had had it?

A. Yes, sir.

Q. That was your baby, in other words?

A. Most of the time.

Q. Why had they been replaced?

A. For several purposes.

Q. How long before the accident, according to your best estimate, was it that they were replaced?

A. I don't know. It has four different cables on it, and—

Q. I am talking about the boom lift cable now, the one that broke in this instance.

A. Yes, sir. I don't know.

Q. Did you requisition the replacement cable and tell them they had to put it on, or how is it handled?

A. Well, I tell the superintendent.

Q. I am talking about the time it was done.

A. Well, sometimes he will say let's change these cables; then, I will say, well, don't you think we ought to change these cables?

Q. You can't give us any indication as to your recollection of how long from the accident it was before this cable had been changed?

page 48 } A. No, sir.

Q. Do you ever end-for-end your cable, your boom lift cable, I am talking about?

A. No, sir.

Q. In other words, take the fixed end and fasten it on to the drum, and take the drum end and fasten it on to the fixed portion?

A. No, sir.

Q. That is not done customarily?

A. Maybe some people do.

Q. You don't?

A. I haven't done it.

Q. Doesn't Mr. Hayes, the job foreman, normally give you a signal as to what he wants you to do in the operation of the crane?

A. Yes, sir, he or someone else.

Q. When he wants you to pick the load up with the load cable, what signal does he give you? Does he give you a finger up in the air like that (indicating)?

A. Yes, sir.

Q. And when he wants you to lower the load with the load cable, he gives you a finger down, doesn't he?

A. Yes, sir.

Q. When he wants the boom up, he gives you a thumb up?

page 49 } A. Yes, sir.

Q. When he wants the boom down, he gives you a thumb down?

A. Yes.

Q. When he gives you a sideways point, or points in one direction or points the other way, it means to move in that direction, is that right?

A. Yes, sir.

Q. So, you sit there, you take instructions from the foreman as to what he wants you to do with that piece of equipment that you are operating?

A. Yes, sir.

Q. Very frequently, Mr. Davis, while it may not be material in this case, it is probable, isn't it, that you don't even know what is going on up there out of your sight, while you may be putting something down if you are following these signals?

A. Yes, sir.

Q. We talked on your direct examination for a bit about a handle that activated some folding doors in the bottom of the bucket. Who normally has the responsibility of pulling that handle up there when you have got the bucket in the proper position? Does the cement mixer do it, does the foreman do it? Who does it?

A. Usually, the foreman tells a certain man to dump the concrete. It may not be the same person every day.

page 50 } Q. In other words, it is a man that is there for that purpose, and he is told by Mr. Hayes?

A. That's right.

Q. In this instance, you pulled the handle and dumped the concrete, or just dumped the concrete?

A. Yes, sir.

Q. In other words, he does that when he is satisfied that you have got it in the location where he wants it?

A. That's right.

Q. How is the door on the bottom of the bucket closed again?

A. By raising the handle to a catch near the top of the bucket to hold it.

Q. Is that done before you take the bucket from the place where you made your pour, or is it done after you bring it back to the ground again?

A. It is done where they pour the concrete.

Q. Up on the top then?

A. Yes, sir.

Q. So, when the bucket gets back down to the mixer truck location, it is all ready for some more to go in, is that right?

A. That's right.

Q. Now, Mr. Davis, have you ever seen a mixer truck sitting waiting to be discharged when the drum on it

page 51 } wasn't rotating?

A. Well, usually, when they have discharged, while they are waiting for the bucket to come back down, it is not turning.

Q. I am talking about before they get into position for the bucket or for it to be discharged.

A. I haven't—

Q. You haven't paid any attention to them at all?

A. Well, I mean that is not my business. I don't look after it.

Q. Have you ever seen one going down the road with a load in it when the drum wasn't moving?

A. I don't know.

Q. You haven't paid that much attention to it?

The Court: I don't know how he would know whether they had a load in it or not if one were standing still.

Q. (Continued) How do you release the brake on the boom cable, the boom lift cable?

A. You mean that raises the boom?

Q. Yes.

A. It releases automatically by this lever. When the power that lets the boom down, when the power starts to turning the drum, it is a valve that releases the brake.

Q. When the power stops turning the drum, what happens?

page 52 } A. The brake automatically holds it.

Q. The load lift cable, however, you brake that, I believe you told us with your foot pedal?

A. That's right.

Q. When you get it where you want it, you put your foot on the brake and that stops it?

A. Right.

Q. You hold your foot there until you are ready to change its location or position?

A. That's right.

Q. Now, this chute on the back of the mixer, the opening through which the concrete is discharged or the mix is discharged is about how high off the ground?

A. I guess maybe five or six feet.

Q. How high off the ground is the top of your bucket when it is being filled at this location that we have been talking about today?

A. I guess about three or four feet.

Q. And, the connection between the opening through which the contents of the mixer is discharged and the bucket is this chute that you say the operator puts in position and removes?

A. Yes.

Q. That is hinged in some way so it can be adjusted to take care of that distance, is that right?

A. That's right.

page 53 } Q. In between the two locations.

A. Yes, sir.

Q. Does the chute rest on the bucket or does it hang over it?

A. It just hangs over it. Sometimes maybe it will have to rest on it by this particular height.

Q. Do you know whether or not on this particular day Kelly's chute was resting on the bucket or whether it was hanging over the bucket?

A. I don't think it was resting on it. You have to pick it up if it is to get it away from the bucket.

Q. You don't recall having seen Kelly pick it up to get it away?

A. No, sir, I don't think he did.

Q. When you saw Kelly move the chute out of the way, where did he move himself to with respect to the rear of the mixer truck or mixer vehicle?

A. He moved to the side near the rear.

Q. Now, if you stood in front of the vehicle or in front of the mixer and looked at it, which side would that be, the right side or left side?

A. The right side.

Mr. Hazen: Excuse me. Would that be the driver's side or the other?

The Witness: That's right. The driver's side.

page 54 } Q. And the controls on the mixer are on the driver's side at the rear?

A. That's right.

Q. Do you know where on those trucks the water valve is?

A. Most of them, I think, are at the rear.

Q. Did the boom when it fell hit the truck?

A. It scraped the truck.

Q. Whereabouts on the truck did it scrape?

A. I think it hit either the end of the chute where he had it around, and I think it hit the running board over the wheels back there.

Q. It didn't do any real damage to the vehicle, did it?

A. No, sir.

Q. As far as you observed?

A. No, sir.

Q. When the bucket hit the ground and the boom dropped, did the bucket land in the same location that it would have been or some other location?

A. Just about the same spot.

Q. How close to the spot then would the rear of the Kelly truck have been at the time he discharged the mix into the bucket?

A. Probably about two foot, maybe three.

page 55 } Q. Now, I am not sure that I can phrase this so you will know what I am talking about. I am going to try. At what angles to your boom was the mixer sitting?

A. Do you mean was it—

Q. Let me see if I can explain it. Was the point of your boom or the length of your boom in line with the vehicle?

A. Pretty near. It was probably near the side, because when it fell I hadn't moved it.

Q. What I am trying to get *it,* Mr. Davis, is this: Your boom is sitting up on a forty-five degree angle, more or less, sitting here in this picture, is that right?

A. Pretty close.

Q. Did the truck back directly up like that or did it come in from the side?

A. Well, he wasn't straight out, you know, in line with him, but maybe just a little angle.

Q. About how much of an angle would you say?

A. I don't know whether—

William S. Davis

Q. Let's put it this way. Your seat, from where you sat in the cab of the crane, was the front of the truck further to the right of the boom than the rear or further to the left of the boom than the rear?

A. It was just a little bit further to the right.

Q. That would put, then, the left rear corner, or
page 56 } the rear corner on the driver's side, of the truck closest to the boom, is that right?

A. Now, how was that again?

Q. All right. Would that put the left rear of this mixer, the left rear corner of the mixer, the driver's side of the mixer in the rear, the closest point on the truck in line with the boom?

A. I suspect so. Yes, sir.

Q. That is where Kelly was standing?

A. Yes, sir.

Q. Did you do anything out of the ordinary, anything that you hadn't been doing right along in connection with your operation that morning with that crane?

A. No, sir.

Q. Did you notice any reluctance on the part of the crane to do what it was supposed to do under your control?

A. No, sir.

Q. As far as you could tell, it was in perfectly sound mechanical operating shape the entire time that morning up until the time this boom cable broke?

A. Yes, sir.

Q. You told the judge also, as I understand it, that you did nothing to make the cable break?

A. No, sir.

Q. And this is as much a shock and surprise to
page 57 } you as it was to everyone else, is that right?

A. Yes, sir.

Mr. Marks: I think that's all.

The Court: Any further examination?

Mr. Hazen: I have a few questions.

NOTE: An off-the-record discussion is had, following which recess is had for lunch from 12:50 p.m. until 2:05 p.m., whereupon court is reconvened, the witness resumes the witness stand, and the matter continues as follows:

William S. Davis

RE-DIRECT EXAMINATION

By Mr. Hazen:

Q. Mr. Davis, Mr. Marks has asked you something about Mr. Warsing's equipment, and I believe you said he did have some concrete mixer trucks, is that correct?

A. Yes, sir.

Q. Were any of those used on this job?

A. No, sir.

Q. I believe you said he had what was referred to as a batching plant. Is that where they picked this stuff up to go and put it in a truck, is that correct?

A. No, sir. He puts it in the truck and his truck mixes it.

Q. Where did he get it if he used his own trucks? Did he have a plant of his own similar to Thompson's

page 58 } Ready-Mix Plant?

A. How was that?

Q. I say where they get the dry material and mix it with water, mix it up, do they call it a batching plant?

A. I am not familiar with it.

Q. I believe that was the term used. Did he have one of those plants where you would dump the stuff into his own trucks if he were using his own stuff?

A. Yes, sir. He dumped the dry material.

Q. Where is that loaded?

A. At Crewe, Virginia.

Q. Approximately how far is that from this job site?

A. I would say over a hundred miles. Maybe one hundred ten.

Q. So, in other words, if he had been using his own plant, and his own concrete mixing trucks, they would have to have hauled each batch approximately one hundred miles or more, is that correct?

A. That's correct.

Mr. Marks: I am perfectly willing to let the Judge measure it from Crewe to Danville and south of Danville, if he wants, by the shortest route.

Mr. Hazen: It is around a hundred miles to Danville.

Q. Do you know how many of Thompson's trucks

page 59 } were actually brought, how many different ones brought cement to the job we are talking about?

A. No, sir.

Q. Were there as many as three or four or more than that, would you say?

A. At least that many, I would say.

Q. I believe you testified that when the first truck that you had unloaded drove away you were looking the other way because you were dumping the last bucket, is that what you said?

A. That's right.

Q. At this point, your crane had been rotating around from another direction from which the truck was unloaded?

A. Yes, sir.

Q. Do you recall whether at that time when you swung the crane back to the place where you were going to unload Kelly's truck, whether his truck was aready in position to be unloaded?

A. I think it was.

Q. You think then that the first time you saw his truck he was in a stationary position at that point?

A. I think so. I am not definite.

Q. You are not positive?

A. No.

page 60 } Q. In any event, if it had been stationary, then I assume that you would have simply lowered the bucket down to the position right behind the truck?

A. Right.

Q. Again, tell me, if you will, upon whose signal would you start raising the bucket, or would it be a signal given by anyone?

A. You mean from the truck?

Q. Yes. After the stuff is dumped into the bucket, then how do you know whether the bucket is full and whether it is time for you to pick it up off the ground?

A. Well, usually, when he pulls the chute out of the way, I know he has put all he is going to. Then, sometimes the driver will tell you, you know, to pick the bucket up. Sometimes they don't, and just different—

Q. Would you say at that time whether they were ready for another bucket up on top of this overpass?

A. That's right. We were ready.

Q. You would know that by what means?

A. I would know unless he told me not to.

Q. So, if they weren't ready for it, then who would it be, Mr. Hayes, that would signal you to stop?

A. Mr. Hayes, or he would tell somebody to tell me.

John T. Wassom

Q. I believe you said you were not certain whether these trucks, the mixer part rotated at all times or not?

A. No.

page 61 } Q. Well, now, the chute that you talk about, of course, is stationery, I mean, in the center? It doesn't spin around, is that correct?

A. No, sir. It swings sideways, or you can raise it up and down.

Q. Is it straight like a pipe would be or is it open at the top and dished out?

A. It is dished out. Open at the top.

Q. So, do you know whether one of the chutes could be operated while the mixer part of the truck is rotating?

A. You mean move the chute while the mixer was turning?

A. No. Unload it while the mixer is turning. Could it be unloaded while the mixer is still turning, if you know?

A. To unload the concrete, they turn this drum in reverse to pour the concrete out.

Q. They turn it in reverse, you say?

A. That's right.

Q. The truck driver does that by means of the controls on the truck, is that what you mean?

A. Yes, sir.

Mr. Hazen: I believe that's all.

RE-CROSS EXAMINATION

By Mr. Marks:

page 62 } Q. This chute business, Mr. Davis, just to clear this thing up, that is like the same kind of chute they use to put coal in a house?

A. I suspect so. I don't know anything about that.

Mr. Marks: All right.

* * * * *

JOHN T. WASSOM, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hazen:

Q. Please state your name, your age, your residence and address.

John T. Wassom

A. John T. Wassom. Forty-eight. 8606 Arran Road, Richmond, Virginia.

Q. What is your occupation?

A. I am superintendent of claims for the United States Fidelity and Guaranty Company.

Q. In what office?

A. In the Richmond branch office.

Q. What territory comes under your jurisdiction?

page 63 } A. The entire State of Virginia, with the exception of the Washington-Alexandria area and the area around Winchester, Virginia.

Q. You have some suboffices throughout the State?

A. Yes. We have a suboffice in Norfolk, Roanoke, and Abingdon, Virginia.

Q. How long have you held the position of superintendent of claims at the Richmond branch office?

A. Since January 1962, I believe.

Q. What is your educational background, Mr. Wassom?

A. I attended King College in Bristol, Tennessee; Bluefield College, Bluefield, Virginia, and University of Richmond Law School.

Q. When did you graduate from Law School?

A. 1941.

Q. How long have you been a member of the Virginia State Bar?

A. Since December 1940, to the best of my recollection.

Q. Have you been in private practice, or have you been in claims work since that time?

A. I have never been in private practice. All of my business life has been in claims work.

Q. I assume that is casualty and surety claims and related claims?

page 64 } A. Yes.

Q. Mr. Wassom, I assume you received a report of this accident in which Mr. Kelly was killed on October 14, 1963, shortly after the accident?

A. That's correct.

Q. Did your office conduct the usual investigation?

A. Yes, sir, we did.

Mr. Hazen: In order for Mr. Wassom to refresh his recollection, I am going to hand him copies of correspondence, and we will offer them probably as one exhibit.

Q. Mr. Wassom, what was the first correspondence you had from Hartford regarding this case, that you recall. I think they start from the bottom, to assist you.

John T. Wassom

A. Apparently, the first correspondence from the Hartford was a letter dated November 14, 1963.

Q. That was a month after the accident, is that right?

A. Yes.

Mr. Hazen: Now, Your Honor, I will handle this any way you see fit. I am going to ask him to identify these letters, and we can have him hand them up and let you read them or have them read, however would suit you best.

page 65 } Mr. Marks: They are the same letters that you and I saw yesterday. They may be introduced by agreement of counsel as the correspondence in question.

Mr. Hazen: All right. I would like either for them to be read by the witness or be read by the Court as we go along so that we will see the development letter by letter.

Mr. Marks: You do whichever way you want to.

Mr. Hazen: Do you have any preference, Your Honor?

The Court: I can read them to myself, perhaps, faster. Suppose you let me read them.

Q. Again, Mr. Wassom, this letter dated November 14, 1963, is addressed to you?

A. Addressed to the company to the attention of Mr. Farr.

Q. Who is he?

A. He, at the time the letter was written, was an adjuster in our office. He is now in charge of our office in Roanoke.

Q. Who was that letter signed by?

A. Signed by Robert L. Johnson.

Q. What was his capacity with Hartford, if you know, at that time?

A. At that time, he was an adjuster in the office of the Hartford in Roanoke.

page 66 } Q. Would you tear that letter off the bottom, please, so His Honor can read it.

Did you reply to that letter, Mr. Wassom?

A. Yes, I did. I replied on the date of November 18, 1963.

Q. In that reply, did you say anything to Hartford about the loading and unloading clause of this policy being applicable?

A. Yes, I did. I indicated I thought it would be.

Q. Would you please hand this letter to His Honor.

A. (Doing so).

Q. What was the next letter in this chain of correspondence between the companies?

A. Next letter was November 21, 1963. It was a letter I wrote to Harry Daniel of the Hartford.

Q. What was his job with Hartford at that time?

A. He was claims manager in the Hartford office in Roanoke.

Q. That was dated what day?

A. November 21, 1963.

Q. Would you hand that to the Court?

A. (Doing so).

Q. I would like to interject one other thing at this point. In some of this correspondence, Mr. Wassom takes sort of a jocular attitude. So the Court might understand

page 67 } the circumstances, I would appreciate it if you would tell the Court just what your relationship has been with these people at the Hartford prior to this time.

Mr. Marks: Mr. Hazen, they were buddies. They were close friends and boon companions.

Mr. Hazen: And relatives.

Mr. Marks: And relatives also.

The Court: I think you have expressed it well enough, Mr. Hazen. I know how adjusters and lawyers, especially people this close, often put in little personal remarks and comments.

Mr. Hazen: I would like for him just to explain it very briefly, if Your Honor please.

A. Johnson is my wife's first cousin, and when he came back to Roanoke after service in the Navy, I was instrumental in getting him employed with the Hartford, and that accounts for a certain amount of it.

As far as Daniel is concerned, I have known Daniel, I guess, ten or fifteen years, and have always considered him a friend and buddy and crony.

Q. Have you previously been in Roanoke with U.S.F.&G.?

A. Yes, I was in Roanoke, eight years, I believe.

Q. What is the next letter in this series of correspondence?

A. November 22, 1963, from Mr. Johnson of

page 68 } Hartford in Roanoke.

Q. To you?

A. To me.

Q. Will you hand that letter to the Court?

A. (Doing so).

Q. Please identify the next letter in this series of correspondence.

A. The next letter is a letter I wrote to Mr. Johnson on November 27, 1963.

John T. Wassom

Q. Please hand that up to the Court.
A. (Doing so).
Q. The next letter, please.
A. The next letter is a reply dated March 31, 1964 from Mr. Daniel of the Hartford in Roanoke.
Q. Please sir hand that to the Court.
A. (Doing so).
Q. All right, the next letter, please.
A. The next letter is my reply to Mr. Daniel dated April 2, 1964. (Handing to Court).
Q. All right, the next letter, please, sir.
A. The next letter is dated April 20, 1964, and is from Mr. Daniel in Roanoke.
Q. To you?
A. To me, yes, sir. (Handing letter to Court).

page 69 } Q. At about this time, Mr. Wassom, did you receive a Motion for Judgment which had been served on Mr. Warsing in the case of Doris McGuire Link versus Warsing?

A. Yes, I did.
Q. What was the next move, or what did you do when you received this Motion for Judgment?
A. Well, of course, I read it over. I assume in the course of events. I sent it to Mr. Daniel of the Hartford with a letter dated April 30, 1964, and asked that he take over and handle the matter.
Q. Would you hand it to the Court, please.
A. (Doing so).
Q. Did you have a reply to that request that Hartford take over the defense?
A. Yes, I did. I received a reply from a Mr. Mang in the Washington office addressed to me dated May 18, 1964, in which they refused to voluntarily take over the case.

Mr. Marks: What was that date again?
The Witness: May 8.
Mr. Marks: I thought you said 18. I wanted to be sure.
Mr. Hazen: We would like to offer those collectively. I believe it will be Plaintiff's Exhibit No. 10, is that correct?

page 70 } The Court: The group of letters referred to in the foregoing testimony will be filed and marked as Plaintiff's Exhibit No. 10, and they will be stapled and taken as one exhibit.

NOTE: The above-referred-to group of letters is marked and filed by the Court as Plaintiff's Exhibit No. 10.

Q. I hand you what purports to be a policy and ask you if that is the original policy that U.S.F.&G. had in force for Mr. Warsing at the time of the accident?
A. Yes.

Mr. Hazen: I would like to offer it as Plaintiff's Exhibit No. 11.
The Court: The policy is received and filed marked Plaintiff's Exhibit No. 11, and initialed.

NOTE: The above-referred-to policy is marked and filed by the Court as Plaintiff's Exhibit No. 11.

Q. When Hartford refused to take over this defense for Mr. Warsing, what did you then do, Mr. Wassom?
A. I sent the Motion for Judgment to Mr. Vaughan and asked him to defend it or to file an answer on the last day.
Q. What was the reason for those instructions?
A. Well, I hoped that the Hartford would reconsider its position.
Q. Is that Mr. Robert T. Vaughan from South Boston, who is here in the room?
A. Yes, sir.
page 71 } Q. Did he then undertake the defense of the case?
A. Yes, he did.
Q. For Mr. Warsing. Did you initiate through other counsel this proceeding with which we are now concerned?
A. Yes, I did.
Q. Did you request any extension of time for filing pleadings from Mr. Meade, who was counsel for the plaintiff?
A. Yes. I requested thirty days extension.
Q. Did you receive a reply from him?
A. Yes, I did.
Q. What was the date of it?
A. The reply was dated May 5, 1964, addressed to me by Mr. Meade.

Mr. Hazen: All right. I would like to offer that as Plaintiff's Exhibit No. 12, if Your Honor please.

John T. Wassom

Q. With that, there is another letter which Mr. Marks has that was addressed to Mr. Meade. Please identify that.

A. This letter is the letter dated May 6, 1964, that I wrote to Mr. Meade after he had indicated that he would not give us an extension of time for which to plead.

Mr. Hazen: All right. Those can be collectively put in as Plaintiff's Exhibit No. 12.

The Court: Two letters received, marked and page 72 } filed as Plaintiff's Exhibit No. 12, and initialed.

NOTE: The above-referred-to letters are marked and filed by the Court as Plaintiff's Exhibit No. 12.

Q. I assume that in the normal course of events you and Mr. Vaughan conferred about the case and had correspondence back and forth?

A. Yes, we did.

Q. Did that case ever go to trial?

A. The case never went to trial, no.

Q. It was settled, is that correct?

A. That's correct.

Q. Do you recall the amount of the settlement?

A. $18,000.00.

Q. As *in* shown in the Order, it was paid, I believe, $11,400.00 to Hartford and the balance to the beneficiaries?

A. I don't recall how the drafts were written, but I am sure that's correct.

Q. Did Mr. Vaughan send you a bill for his services?

A. Yes, he did.

Q. I assume it was not gratutious?

A. Yes, sir, he did.

Q. And expenses?

A. Yes, sir.

Q. Do you recall the amount, do your files reveal?

A. The file reflects the amount of it was—

page 73 } Mr. Marks: What amount? You mean of his fee?

Mr. Hazen: Yes.

Mr. Marks: $1,528.00 some cents.

Mr. Hazen: You are a little too generous with Mr. Vaughan. The amount is—

Mr. Marks: Whatever the amount is is all right with me.

Mr. Hazen: $1,258.64.

Q. That amount was paid to Mr. Vaughan?

A. Yes, it was paid to him.

Q. Did you request that I contact Mr. Marks, as attorney for Hartford, with reference to their attitude on a compromise settlement during the time this suit in Pittsylvania was pending?

A. Yes, I did.

Mr. Hazen: In order to avoid having to call Mr. Marks as an adverse witness, I will see if he will agree that he is familiar with these two letters dated July 20 and September 16.

If Your Honor please, at this time, I would like to introduce letters which I wrote to Mr. Marks, one dated July 20, 1964 and one dated September 16, 1964, as Plaintiff's Exhibit No. 13, and I believe Mr. Marks has already indicated that he would stipulate that these letters were not an-
page 74 } swered by him by telephone or by letter, is that right?

Mr. Marks: Correct.

The Court: The letters mentioned are received and filed as Plaintiff's Exhibit No. 13, and initialed.

NOTE: The above-referred-to letters are marked and filed by the Court as Plaintiff's Exhibit No. 13.

Q. In addition to the efforts which were made through me, did you have direct contact with Hartford as to what their position would be, or did you handle it through me?

A. I wrote Harry Daniel a letter before I asked you to take care of that part of it, and asked him if we—what his attitude would be toward our settling the case, and I received a reply from him somewhat like Mr. Marks' position. He made no commitment one way or the other.

Q. I will ask you to identify these two letters, if you will, Mr. Wassom, and state if they are ones you referred to in your previous testimony?

A. I wrote Mr. Daniel under date of July 6, 1964, as indicated in my previous correspondence, and his reply was dated July 14, 1964, addressed to me.

Q. Would you hand those to the Court.

A. (Doing so).

John T. Wassom

Mr. Hazen: We would like to offer those as Plaintiff's Exhibit No. 14.

Mr. Marks: No objection.

page 75 } The Court: Two letters mentioned and stapled are received and filed and marked as Plaintiff's Exhibit No. 14, and initialed.

NOTE: The above-referred-to letters are marked and filed by the Court as Plaintiff's Exhibit No. 14.

Mr. Hazen: Your Honor, at this point, as I indicated in the opening statement, I feel we have gone as far at this point as we are required to go in a burden of proof. I do not believe that there is any allegation in the defendant's pleadings that this settlement was made in bad faith, that it is unreasonable or excessive. I think Mr. Marks takes the position because we waived certain—

Mr. Marks: Mr. Marks hasn't taken any position. I have taken no position.

Mr. Hazen: That is our position. If the Court rules otherwise, we are prepared to go ahead with additional evidence.

Mr. Marks: If Your Honor please, at this point, I am going to move the Court to strike the letters because it is perfectly manifest on the face of it that it is an effort between two gentlemen in a lay capacity to resolve their respective difficulties, and neither of them were taking a position that they intended to be binding upon them in any way.

page 76 } It is perfectly apparent from the whole series of letters.

Mr. Hazen: We have alleged, as is necessary for us to do and prove, that first of all, Hartford was notified properly that we considered this was a case covered under the loading and unloading provision of their policy. They were given notice of that. We forwarded the suit papers to them and gave them further opportunity. If we hadn't done so, they would be here screaming today that they had late—

The Court: That's enough. Mr. Marks, your motion is overruled. I see what you say about it. I can see where it would have been done for other purposes also.

Mr. Marks: Save the exception.

CROSS EXAMINATION

By Mr. Marks:

Q. At the inception of this situation, is it not true that the

correspondence between you and Mr. Daniel and between you and Mr. Johnson was in an effort to resolve on an amicable basis the difference of opinion that you had with respect to who ought to pick up the ball and run with it.

A. Well, the purpose in the correspondence, as far as I was concerned, was to get the Hartford to handle the case.

page 77 } Q. By the same token, their correspondence was an effort to get you to handle the case?

A. That's true.

Q. At one point of the proceeding, there was an effort made to arrive at some mutually acceptable procedure, was there not, wherein the case would be handled, and the result—liability of the companies would be submitted to arbitration and postponed for some future determination, some such business as that?

A. That was Mr. Daniel's idea.

Q. You didn't buy that, and you submitted a counter-proposal which he refused to buy?

A. That's right.

Q. It went back and forth like that all the way up to the time when we got to the very end of the line, didn't it?

A. Well, it went up to a point, then it ceased, because I was put in a position that I had to take some action. My insurance company was sued. Suit had to be answered. Of course, that was the position I was in, that Daniel was not. Of course, I had—I had arrived at that point where I had to take a stand.

Q. All right, sir. You took it?

A. I took it.

Q. Now, let's get to settlement, if you please, Mr. Wassom. You are familiar, I take it, with the terms and conditions of the settlement, are you not?

A. Generally.

page 78 } Q. Do you have, or does your counsel have, a copy of the record in the case in the civil court of Pittsylvania County?

A. I think we have a copy of the record when the demurrer was argued. Of course, the case was never tried.

Q. I understand that. I am talking about the pleadings that were filed, order that was entered, all the way through to the end of it.

Mr. Hazen: I have a complete list of the pleadings that were filed in Pittsylvania, which have been attested to by the

clerk, which I plan to introduce through Mr. Vaughan, but I will be glad for you to use them.

Mr. Marks: May I use them?

Mr. Hazen: There is one exception. They include in here a copy of our petition for declaratory judgment. I don't know why that is in this file. I have taken it out of there because it is already in the Court's papers.

Mr. Marks: I have no desire to have it in this record.

Mr. Hazen: With that exception, those are the records.

Mr. Marks: Can we go ahead and put them in by agreement?

page 79 } Mr. Hazen: Sure. It will be the records of the case of Link versus Warsing in the Circuit Court of Pittsylvania County.

The Court: So received and marked as Plaintiff's Exhibit No. 15, and initialed.

NOTE: The above-referred-to record is marked and filed by the Court as Plaintiff's Exhibit No. 15.

Mr. Marks: We would like to offer for the record the award of Chairman Evans of the Industrial Commission in connection with a claim made by the dependents of Kelly against Thompson's Ready-Mix and Hartford, and an Order entered by the Commission on September 17, 1964, approving this settlement that was made in the common law case.

The Court: Gentlemen, do you want to offer those as one exhibit?

Mr. Marks: Yes, sir.

The Court: So received as Defendant's Exhibit No. 1 and initialed.

NOTE: The above-referred-to record is marked and filed by the Court as Defendant's Exhibit No. 1.

Q. Mr. Wassom, was it your job to pass upon the propriety of a compromise settlement of the case of Link against Warsing?

A. You say was it mine?

page 80 } Q. Yes.

A. Yes.

Q. And you did pass upon the propriety of such a settlement?

A. Yes, I did.

Q. Will you say what motivated you in abandoning the position that this was barred by the Compensation Act?

Mr. Hazen: If Your Honor please, at this point, I would like to interpose an objection based on my previous statement to the Court that, as I understand it, the good faith and reasonableness, so on, of this settlement had not been attacked in the defendant's pleadings. I do not think the defendant is entitled to go behind the settlement except to show bad faith. I will be glad to cite authorities to that effect.

Mr. Marks: Has Your Honor ruled?

The Court: You want to be heard further, Mr. Marks?

Mr. Marks: Yes, sir. If Your Honor please, by his own testimony, by the exhibits he has introduced, continuously from the beginning of this case, he has taken the view that no court action would lie with respect to the claim of Kelly's estate for wrongful death against Warsing, because he maintained consistently the position that Kelly was
page 81 } working at the time he was killed in the trade, business and occupation of his insured, Mr. Warsing. If that position is sound, or was sound, of course, there was no liability, one hundred per cent out. I merely want to know, and I have asked the question, what considerations motivated him in abandoning that position he had previously taken, which is demonstrated by the pleadings that I filed in the law suit, presumably, at his direction and under his control, and went to another position.

NOTE: At this point colloquy is had between Court and counsel, which is reported but in the interest of brevity is not here included in this transcript, whereupon the matter continues as follows:

The Court: I am going to overrule your objection at this point. I think we are treading on thin ground, but I am going to overrule it for the time being.

Mr. Hazen: Note the exception.

A. My action was based on the home office's recommendations and also after discussing the case with counsel. As I recall, counsel's position was that it was a novel question in Virginia. This particular point. There was no case in point on it in the State, and counsel gave me both sides of the question. He told me what we could expect as future litigation; what the cost would be, generally, of course; and the time consumed on trying the issue.

page 82 } Of course, as a lawyer, I was interested in the

John T. Wassom

issues, and I would have liked to have seen it tried and determined, but, of course, my position is not to make laws or to decide novel questions. It is up to me to dispose of it on what I thought was the best basis for the company, considering all the parties concerned, on a fair and reasonable basis, in other words, and looking at the thing pro and con; and, particularly, based upon the recommendations of the home office, I decided the best thing to do was to compromise it, and that was what was done.

Q. Now, at that time, sir, will you tell us whether or not any effort was made by United States Fidelity and Guaranty Company to hold out that portion of it that it claimed Hartford should not get back from the Hartford?

A. Will you restate the question.

Q. I will restate it this way. The compromise settlement contemplated a total payment of $18,000.00, I believe you said?

A. Yes, sir.

Q. For which a consent judgment order was entered as it appears from the file?

A. (Indicating in the affirmative).

Q. Pursuant to that consent judgment order, it was provided that $11,400.00, I believe, of the $18,000.00 should be paid to the Hartford Accident and Indemnity

page 83 } Company, and I ask you whether or not any effort was made by the United States Fidelity and Guaranty Company to pay the Hartford Accident and Indemnity Company $11,400.00, or to pay it in any way other than as payment under Mr. Warsing's liability policy, or to receive any rights with respect to it, or to have any provisions entered in the court order that undertook to preserve any rights U.S.F.&G. might have to get it back from Hartford at a later date?

A. Well, I think you have put more than one question to me.

Q. All right.

A. Now, in the first place, at the time this settlement was made, to the best of my recollection, I don't—I don't think I knew what the status of Hartford's payments to this woman were. I am not sure that I knew that they had even commenced payment. As I recall, the correspondence we have entered, one letter showed that they had or they were going to commence payments, and put us on notice of the fact that their compensation rights would be injected in the picture. As far as I recall at this time, the compensation feature of

it didn't enter into it any further. I didn't know how much they would pay or what the status of the payments were. I don't know of any way we could have settled the thing and held out any portion of a settlement.

And, of course, the answer to the third part of
page 84 } your question, that was the purpose of all the
previous correspondence, and the letter that I wrote to Daniel was to try to get him to at least cooperate to the extent that we could settle the case without either one of us prejudicing our rights.

Q. You say you had your file, Mr. Wassom. Isn't it true you made a draft for $11,400.00 payable to the Hartford Accident and Indemnity Company?

A. As I told you, I don't recall how the drafts were written.

Q. Doesn't the file show?

A. What was that?

Q. Wouldn't your file show?

A. No. If you say that—

Q. I am not telling you.

A. I will explain that. I wrote the draft as directed by Mr. Vaughan, and that was determined, and he told me how to write the draft, to settle it; of course, just because he knew it at the time doesn't necessarily mean that I knew it. I knew it, of course, when the drafts were drawn to settle the case.

Mr. Hazen: Could he refer to his copy of the drafts to refresh his recollection?

A. Well, the draft copy shows that we paid a total sum of $18,000.00 in one lump sum on September 8, 1964, and the
attorneys, as well as the Hartford, were included as
page 85 } payees in the draft.

Mr. Hazen: Would you read the exact way it was paid.

A. (Continued) The exact way it was paid was to the order of Doris McGuire Link, Administratrix of the Estate of Frank Woodruff Kelly, deceased, and Eugene A. Link, and Horace G. Bass, her attorney, and Meade, Tate & Meade, attorneys for Hartford Accident and Indemnity Company.

By The Court:

Q. Let me ask you this: What is the date of that draft?

A. The date of the draft is September 18, 1964.

John T. Wassom

Q. And this suit in this court was pending at that time?
A. Yes, sir.

Mr. Marks: I have nothing further.

RE-DIRECT EXAMINATION

By Mr. Hazen:

Q. Mr. Wassom, under your insurance contract or policy with Mr. Warsing, was U.S.F.&G. required to defend him?

A. Yes, sir.

Q Was it your understanding that the settlement that was being negotiated through Mr. Vaughan representing you was a lump sum package deal to take care of everything concerned?

page 86 } A. That's correct.

Q. Is it fair to state that you have been in this business long enough to know that legal questions can go either way?

A. Yes, sir.

Q. Including this one?

A. I have learned that the hard way, and also have been pleasantly surprised.

Q. Did it occur to you, and did Mr. Meade, Hartford's attorney, represent to you that he thought that he would get a large verdict because of the circumstances?

A. It is my recollection that I never had any conversation or correspondence with Mr. Meade. Mr. Vaughan did. But I was present when the demurrer was argued, and he gave the impression at that time that he was very confident about the case, and his correspondence, which Mr. Vaughan sent to me, indicated he was very confident about it.

Q. Did he mention on more than one occasion the question that he felt this was a *res ispa loquitur* case as far as Warsing was concerned?

A. Yes, he did. He made that clear in his correspondence. I got the impression he was taking me to task for not recognizing it in his Motion for Judgment.

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

page 87 } RE-CROSS EXAMINATION

By Mr. Marks:

Q. In the course of correspondence, Mr. Daniel had told you, had he not, in no uncertain terms that the Hartford, if a suit were brought by the estate of Kelly against Warsing,

would get in there so as to avoid a waiver of rights and for no other purpose?

A. I am not sure that I understand your question.

Q. All right. May I have the correspondence, if Your Honor please.

A. May I just answer the question by saying the correspondence speaks for itself on that question.

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

* * * * *

Mr. Marks: Before we start on this thing, there is attached, if Your Honor please, on my Grounds of Defense and Special Plea a copy of policy of Hartford. I am very much afraid Your Honor will have trouble reading it. It doesn't look too clear, and I would like to put this better copy in, if I may.

page 88

NOTE: An off-the-record discussion is had.

The Court: All right. The policy of Hartford Accident and Indemnity Company is received and filed, marked Defendant's Exhibit No. 2, and initialed.

NOTE: The above-referred-to paperwritings are marked and filed by the Court as Defendant's Exhibit No. 2.

ROBERT T. VAUGHAN, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hazen:

Q. Mr. Vaughan, please state your name, age, residence and address.

A. Robert T. Vaughan, 1005 Washington Avenue, South Boston, Virginia. Did you ask for my occupation?

Q. I am going to.

A. What else did you ask me?

Q. Age.

A. My age is forty-five.

Q. What is your occupation?

page 89

A. Attorney-at-law.

Robert T. Vaughan

Q. Where are you practicing?

A. South Boston.

Q. What is your educational background?

A. Well, I graduated from high school at C. H. Friend High School, South Boston. I went to Washington & Lee University. A.B. degree in 1942. Law degree in 1944.

Q. Have you been in private practice since that time, since 1944?

A. Except for a very brief excursion with the government. I have been practicing since 1949.

Q. You are a member of the Virginia State Bar?

A. Yes, sir.

Q. Licensed to practice?

A. Yes, sir.

Q. What is the nature of your practice, if you can tell us, Mr. Vaughan?

A. Well, I am a country lawyer. I do general practice.

Q. You do much insurance work?

A. Yes, sir. I represent quite a few insurance companies.

Q. What was your first connection with this case, if you recall?

A. As I recall it, I got a letter from Mr. Wassom

page 90 } probably enclosing part of his file and requested me to file appropriate pleadings on the last day that I had, legally, to file the appropriate pleadings.

Q. Would you explain why that sort of unusual request was made?

A. I think he indicated he hoped Hartford would come, or words to that effect. I can't recall exactly.

Q. I ask you, Mr. Vaughan, to refer to the exhibits with all those pleadings. What responsive pleadings did you first file to the Motion for Judgment?

A. I believe I filed a demurrer.

Q. What was the basis of that?

A. Well, the basis of that was that legally the tort action would not allow it because Workmen's Compensation would cover the situation.

Q. Did you file any other pleadings as you recall at that time?

A. Yes, sir. Later, I filed a plea to the jurisdiction. Let me just look at these a minute. Apparently, I filed a demurrer on May 15, 1964, and I filed a Motion for Bill of Particulars on May 15, 1964, at the same time. Then, Mr. Meade, I believe, filed a Motion to Strike or reject the Motion for Bill

of Particulars, then, later, I believe on the day we argued the demurrer, I filed on June 23, 1964, a plea to the jurisdiction.

page 91 } Q. Now, what was the nature of this hearing before Judge Jones on June 22, 1964?

A. It was actually June 23, I think.

Q. Excuse me. June 23.

A. We had an argument on the demurrer, and rather fully argued the legal principles which I have already referred to.

Q. Is there an order entered, a copy thereof, entered by the Judge with reference to that conference?

A. Yes, sir, there is. There is an order that was entered on June 29, 1964.

Q. Would you just state briefly, without reading, what that order, in effect, provided?

A. It overruled my demurrer. It required Mr. Meade to file a Bill of Particulars. And, I am not sure how fully the order went into that, but it provided that the legal question I had raised would be considered by the Court at the same time the jury considered whether or not there was any liability and the amount thereof.

Q. Now, do you recall when it was that you had any conversation with Mr. Meade or any other attorney representing the plaintiff as to any possible settlement of the negotiation?

A. I believe the first time that I can recall was at a docket committee meeting. I don't recall the date. Mr. Meade approached me and suggested possibly we should

page 92 } settle it, and I believe I told him I had no authority but that I would be pleased to pass on any offer he might care to make.

Q. Did you request him to write you a letter thereafter putting this in the form of writing or submitting an offer to you?

A. I don't recall whether I requested him to do so or whether he and I just agreed we woud do it.

Q. Did you receive a letter from Mr. Meade dated June 30, 1964, with reference to the possibility of settlement?

A. Yes, sir, I received this letter.

Q. That was an offer, I believe, of $27,500.00?

A. That's correct.

Q. I believe, also, isn't it true, that this case was originally set as the second or third case on July 30?

A. Yes, sir.

Q. Then, later, the trial date was postponed?

Robert T. Vaughan

A. That is true.

Q. Do you remember what the next trial date was, when it was actually to be tried?

A. I believe September. Sometime in September of '64. I don't remember the exact date.

Mr. Hazen: I want to put it in as the next exhibit.

The Court: The letter of Meade, Tate & Meade, dated June 30, 1964, received and filed as Plaintiff's page 93 } Exhibit No. 16, and initialed.

NOTE: The above-referred-to letter is marked and filed by the Court as Plaintiff's Exhibit No. 16.

Mr. Hazen: If the Court would like to read the letter, I would appreciate it.

The Court: I will read it. (Doing so).

Q. Mr. Vaughan, Mr. Marks has called my attention to the fact that the Judgment Order said that the case was set for trial October 2.

A. That could be correct. Sometime our September terms goes over into October.

Q. Subsequent to the hearing and the Order, were additional pleadings then filed in that case?

A. Yes, sir. I filed Grounds of Defense on—

Q. The 1st of August?

A. On the 30th of June, I believe I mailed the copy. I don't see where it was marked filed.

Q. Did Mr. Meade file the Bill of Particulars then?

A. Yes.

Q. Then you filed yours?

A. I believe that's correct, yes, sir. Or he filed his on the 26th day of June.

Q. Did you thereafter have additional conversations and settlement negotiations with Mr. Meade?

A. Yes, sir. I think I discussed it with him per-
page 94 } sonally and over the telephone, and there may have been correspondence, I am not sure.

Q. And you did finally arrive at an agreement with him to settle the whole case for $18,000.00, is that correct?

A. Yes, sir.

Q. Including the Hartford portion and the beneficiaries' portion?

A. Yes, sir.

Robert T. Vaughan

Q. Now, in the conduct of the litigation and the hearing, so on, who was the one who took the lead as far as the plaintiff's attorneys were concerned?

A. I don't believe I ever had any discussion with any attorney other than Mr. Meade.

Q. How about the discussion of settlement negotiations, who was the—

A. Do you mean the attorney on the other side?

Q. Of the plaintiff's attorneys?

A. I don't believe I ever discussed the case except maybe just in passing with any attorney other than Mr. Meade.

Q. I believe the record shows that all pleadings that were filed on behalf of the plaintiff have Mr. Meade's firm name on them?

A. Yes. Mr. Meade, as I recall it, prepared every legal paper which we filed in this suit. I think all my correspondence insofar as other attorneys were concerned, page 95 } was with Mr. Meade.

Q. Did you consider it was a fair and reasonable settlement under the circumstances?

A. Yes, sir, I thought it was a matter of judgment which we, quite frankly, run into. One person's judgment might be different from the other, but I certainly thought it was a reasonable settlement.

Q. Since it was a death case, it was necessary to secure Court approval of it?

A. Yes, sir.

Q. Was that the explanation for the Judgment Order rather than dismissed agreed order?

A. I think that's true, and the Court had to determine to whom the money should go.

Q. And of the $1,256.64, which was paid to you, do you recall offhand what was your fee and what was the expenses of the case?

A. I think $1140.00 was fee and the balance was expenses.

Mr. Hazen: If Mr. Marks wants the details, we can get them from the file.

Mr. Marks: I don't think so.

Q. Did you have any conversation with Mr. Meade about this declaratory judgment action if whether any party was waiving any right or anything of that kind; was

page 96 } any position taken by any of you, or was that left up to Mr. Meade?

A. As I recall, the only way the declaratory judgment entered into our conversations was when it was first filed. Judge Jones was inclined to put the case off in Pittsylvania until this action was determined, and later we discovered that it was not the practice of this court to enjoin proceedings such as we had there, so we went ahead with the case, but that's the only way that I can recall that it entered into our situation at all.

Q. I ask you the same question Mr. Marks asked Mr. Wassom. What were the motivating factors that you were concerned with in arriving at the compromise settlement?

A. As I recall the whole situation, Mr. Wassom was very fully informed by me as to the law and facts as near as I knew them, and I think I wrote what is known possibly as clairvoyant letters to them maybe about the matter, and we discussed the settlement.

I don't recall whether he ever asked me for an opinion about the matter one way or the other, but he told me what the arrangement of the settlement he hoped to make was, and I made the best settlement I could under the circumstances.

Q. That was within the arrangement, is that correct?

A. Yes, sir.

Mr. Hazen: All right. Answer Mr. Marks.

page 97 } CROSS EXAMINATION

By Mr. Marks:

Q. Mr. Vaughan, let me ask you this. Before you filed your pleadings, before you evaluated the case, before you arrived at the settlement of the case, did you have occasion to consider the contract of Mr. Warsing with the State Highway Department under which this job had been done?

A. I don't recall that, Mr. Marks. I don't recall seeing this contract, if that's what you are asking me.

Q. Do you recall whether or not you ever read the Virginia Road and Bridge Specifications dealing with and incorporated in Mr. Warsing's contract with the State of Virginia under which the work was being done?

A. I am sure I did not.

Q. Do you recall whether or not you ever looked at the plans for the work under which this work was being done?

A. I did not.

Q. Do you recall whether or not you made any intensive factual investigation to determine the full facts with respect to what Kelly had been doing on the jobsite immediately prior to the time he was killed?

A. Yes, sir, and I learned pretty much what has been shown today. If you want to know what I did, I visited where this accident happened. I talked to these various people. I went to the scene where the crane was working at

page 98 } another location, I believe where these last pictures were taken and so forth.

Q. Mr. Vaughan, please don't misunderstand me. I am not trying to be critical at all. I merely want to know what facts and considerations you took in evaluating the legal aspects of this factual picture.

A. I understand, sir.

Q. And I take it you also made some slight investigation into the background, didn't you?

A. Considerably, yes.

Q. Mr. Vaughan, I will ask you this: How did it happen that instead of using the procedure set out in the Code for settlement of a claim for wrongful death where suit is pending, you agreed to a trial by the Court without a jury and a finding of liability on Mr. Warsing to the plaintiff to the tune of $18,000.00 and went on that basis?

A. Mr. Meade suggested it. I didn't see any objection.

Q. You did agree to and participate in the entry of Judgment Order by Judge Langhorne Jones on September 19, 1964, didn't you?

A. Yes.

Q. And pursuant to that Order, you did deliver the settlement draft and see to it that appropriate certificate of satisfaction of judgment therein contained was procured and sent on?

page 99 } A. Yes.

Q. What did you discover in the course of your investigation, Mr. Vaughan, concerning the requirements imposed upon a general contractor under the Virginia Road and Bridge Specifications and his contract with the Commonwealth as to the definition of materials, the work, scope of the work, and the equipment and things of that sort he agreed to provide?

A. I have already told you I haven't seen that contract.

Q. I see. You didn't go into that phase of it at all in any way?

A. No, sir. I don't think, frankly, now that it is material.

Q. What's that?

A. I don't think it is material now. I mean—

Q. All right. You may be right His Honor may so rule. Have you ever had any experience, yourself, personally, in concrete construction?

A. No, sir, I have not.

Mr. Marks: I have nothing further.

RE-DIRECT EXAMINATION

By Mr. Hazen:

Mr. Hazen: Could he look at Plaintiff's Exhibit No. 1, please. The contract with Thompson's Ready-Mix.

page 100 } Q. Mr. Vaughan, in considering all these factors, did you have in your file the contract which you now have, Plaintiff's Exhibit No. 1, between Warsing and Thompson?

A. Yes, sir, I did.

Q. What was your interpretation of that contract as to its meaning?

A. May I refresh my memory.

Q. Yes, sir. I direct your attention to the front page—at least, to the top paragraph of the reverse side.

A. Well, generally, I understand that he was going to deliver concrete for a certain price. I mean—

The Court: I didn't hear.

The Witness: Generally, I understand that he was to deliver concrete at the site of this job for a certain price. I don't know exactly what else you had in mind.

Q. Well, did you take it then that they were in the status of a materials man, Thompson's that is?

A. Yes, sir. Of course, the whole question here, one of the whole questions, I think it could have, that position could have been reasonably taken.

Q. Now, I am asking whether you considered this in connection with the defense?

A. Yes, sir, I certainly did.

page 101 } Q. Would this be favorable or unfavorable to the position you had taken with reference to that defense?

A. I considered it unfavorable to my defense, sir.

Mr. Hazen: All right, sir. I have no further questions.

* * * * *

Mr. Marks: Let the record show that by agreement Mr. Hazen does not rest his case at this point, but he states he is temporarily out. I have to put on some evidence, and I will go out of order by agreement with him.

Mr. Hazen: We have these depositions also.

CARL TORRENCE, first being duly sworn, testified as follows:

DIRECT EXAMINATION

page 102 } By Mr. Marks:

Q. Mr. Torrence, will you tell the Judge who you are, where you live, what you do for a living, how old you are.

A. I am Carl Torrence. I live at 1011 Nottingham Road, Richmond. I am a consulting engineer, partner of Torrence Dreelin & Associates, 114 East Cary. Fifty-four years old.

Q. Are you a *registed* professional engineer in the State of Virginia?

A. Virginia and many other states, let's put it that way.

Q. Are you practicing your profession in Richmond?

A. Yes, sir.

Q. Give us something of your background experience, Mr. Torrence, with respect, particularly, to bridges and concrete, things like that.

A. From 1942 to 1946, I was structural engineer for the R.F. & P. Railroad. I had the responsibility of designing and seeing that the bridges were built that were needed, and also repairing existing bridges. From 1949 to 1954 I was senior structural engineer for the City of Richmond, the building inspector's office. On that job, I instructed inspectors on how to inspect and also check the specifications and plans for all buildings built in Richmond.

Q. Now, since that—

Carl Torrence

A. Since then, I have been in the consulting
page 103 } engineering private practice. Our firm are the
structural engineers for the new City Hall, City Safety and Welfare Building; the Catholic Hospital, Petersburg Hospital, and many other large projects.

Q. Did you at any time in recent years have a connection with a firm that does bridge work?

A. Yes, sir. I headed the organization American Engineers. I withdrew from that firm. The firm designed highways and bridges for the State Highway Department for part of Route 64 down at Covington.

Q. In your capacity as an engineer, have you had occasion to consider, study, and so on, the Virginia Road and Bridge Specifications?

A. Yes. I have a copy of it.

Q. Are you familiar with the contract forms used by the Virginia Department of Highways?

A. Yes, sir.

Q. Are you familiar with the plan sheets under which roads, bridges and things are constructed?

A. Yes, sir.

Q. I hand you two batches of paper, one in a green cover, one a roll of print, and ask you to look at them and tell us what they are.

A. This is a contract document that is part of this specifica-
tion. It also refers to highway specifications. This
page 104 } is the 1959 copy. I believe that's the current one.

Q. What job is covered by that contract? It tells you on the face of it, I believe.

A. This is Industrial Access Road to Corning Glass Works, Intersection 29 at .422 miles east of Int. 29.

Q. Will you look at the bill of quantities that is shown in that contract?

Mr. Hazen: If Your Honor please, at this point I would like to interpose the same objection that I have before—that we do not think this evidence is relevant or material to any of the issues before Your Honor in this case.

The Court: At this point, I don't see that they are either, but I am going to admit them reserving the right to rule on your motion later.

Mr. Hazen: All right. We reserve the exception, please.

Q. Will you look at that—

Mr. Hazen: Excuse me a minute. May it be understood that my objection is a continuing one to all the questions?

The Court: We understand that, yes, sir.

Q. (Continued) In that contract, the contract that deals with the job shown on this roll of plans, that is what I am primarily concerned with.

page 105 } A. Yes. This is a contract that goes with the set of plans.

Q. Who signs the contract as far as the contractor is concerned?

A. W. W. Warsing.

Q Will you please look at the plans then and tell us substantially whether or not the plans contemplate the construction of a railroad overpass for the Southern Railway to travel over the access road?

A. Yes. That's part of the job. A bridge.

Mr. Marks: We'll offer the plans and contract and the red book of specifications which goes with them.

Mr. Hazen: We have the same objection, based on the grounds stated originally.

The Court: The Court understands your position, Mr. Hazen. A green book entitled *Proposal, Contract and Bond For State Highways,* W. W. Warsing, Crewe, Virginia, received and marked as Defendant's Exhibit 3 and initialed. A red bound book styled *Virginia Department of Highways, Road and Bridge Specifications,* April 1, 1958, received and filed marked inside of the front cover Defendant's Exhibit No. 4 and initialed.

Mr. Marks: At this point, may I say to the Court that there may well be some penciled bracketing in the

page 106 } bound volume that Your Honor has that does not come with the original, and I would like to make the point that if it is there, it is inadvertently.

NOTE: The above green and red books are marked and filed by the Court as Defendant's Exhibits 3 and 4 respectively.

The Court: I understand. A set of plans denominated Plans and Profiles, Proposed State Highway, Pittsylvania County, from INT Rt. 29 to 0.422 miles east Int. Rt. 29 consisting 18 sheets received and filed marked Defendant's Exhibit No. 5 and initialed, all of which are received and filed subject to the objection made by Mr. Hazen.

NOTE: The above-referred-to items are marked and filed by the Court as Defendant's Exhibit No. 5.

Q. Mr. Torrence, will you look at your copy of the 1958 specifications, and I will ask the Court if the Court would mind looking at the copy that has been introduced—that is the red bound volume—page 13, definition of work.

A. (Reading) Work shall be understood to mean the furnishing of all labor, materials, equipment and other incidentals necessary or convenient to the successful completion of the project and the carrying out of all the duties and obligations imposed by the contract.

Q. Now, will you turn, please, to page 26 of the red specifications, Section 104.01 under the heading Scope of Work and Intent of Contract.

page 107

A. Page 26, Section 104.01, Intent of Contract. (Reading) The intent of the contract is to prescribe a complete work or improvement which the contractor undertakes to do in full compliance with the plans, specifications, special provisions, proposal and contract. The contractor shall perform all work in accordance with the lines, grades, typical sections, dimensions, and other data shown on the plans or modified by written orders, including the furnishing of all materials, implements, machinery, equipment, tools, supplies, transportation, labor and all other things necessary to the satisfactory prosecution and completion of the project.

Q. All right, sir. Now, will you turn, please, to page 56 of the red book and look at Section 109.1 dealing with measurement of concrete and masonry. That is in the third paragraph of that section, if I recall correctly.

A. (Reading) All concrete and masonry shall be measured by dividing the work into simple geometrical figures and adding their volumes. Where applicable, the prismoidal formula shall be used to calculate such volumes.

Q. Can you tell us what is meant by prismodial formula?

A. Prismoidal formula is the formula you use to sum up a volume of irregular shape. It is the area of the base of each end plus four times the area at the middle divided by six. It eliminates—

page 108

Q. Is that a recognized engineering practice?

A. Yes, it is a recognized practice.

Q. Now, Mr. Torrence, continuing in the red book, Division Two, which commences on page 70, deals, I believe, with materials, does it not?

A. Yes, sir. Division Two is materials. We don't have a definition of material. Do you want a definition of it?

Q. Yes. It would be a good idea. Let's get the definition.

A. Here is the definition in the specifications of materials on page 10.

Q. All right, sir.

A. Page 10 (reading) Materials—any substances specified for use in the construction of the project and its appurtenances.

Q. Now, then, go over there to Division Two. Will you look at Section 200.01, the fourth paragraph of that section, I think, dealing with what is sometimes advertised as combination of ingredients products.

A. It is a product. It is either a product or incomplete product. (reading) Where a material is fabricated or treated with another material, or where any combination of materials is assembled to form a product, any or all of page 109 } which are covered by specifications, the failure of any of the components of the product to comply with the designated specification shall be deemed sufficient cause for the rejection of the whole.

Q. Now, there follows in numerical order the batch of descriptive specifications covering mineral filler, fine aggregate, coarse aggregate, other types of stone, all kinds of things, does it not?

A. Asphalt, bituminous, concrete, all of that.

Q. Now, stop for a minute at Section 212 on page 93.

A. Yes.

Q. And look at Section 212.01, and tell us what the specification's description of bituminous concrete is.

A. (Reading) Bituminous concrete shall consist of a combination of mineral aggregates and bituminous material mixed mechanically in a plant. Bituminous concrete shall conform to the requirements for the type designated for the work.

Q. Now, 212.02 deals with what?

A. Materials.

Q. What does this say?

A. (Reading) The materials for this work shall conform to the requirements of these specifications.

Do you want me to read them all?

A. No, I don't. Will you continue on to page 107, and I believe you will find there something to do with page 110 } Section 216.

A. Yes. Portland cement.

Carl Torrence

The Court: 216.01?
The Witness: Yes.
Mr. Hazen: Section 216.

A. Section 216, Portland cement. 216.01 Quality. (Reading) All portland cement used in work done under these specifications shall conform to the chemical and physical requirements and the regulations relative to packages, marking, storage, inspection, and rejection of the A.A.S.H.O. Specification M85 in force on the date of the contract, except as noted below.

Q. What does 217 deal with?

A. 217.

Q. That is on page 109.

A. 217 is Air-Entraining Admixtures.

Q. What is that?

A. Admixture is something you put into concrete either to accelerate the setting or to delay the setting. In hot weather, you want to slow it down; in winter, you want to accelerate it.

Q. What is air entraining?

A. Air entraining, there are several names. Possolith is one, but what it does, it puts little air bubbles in the concrete, and you put in three to six per cent air. It does page 111 } several things. It cuts the weight of the concrete, but the main purpose of it is to make it more impervious to water.

These little bubbles stay near the surface. They use it on highways, bridges, and exposed concrete to make it watertight, and you have much less spoiling in winter time from salt, from road salt.

Q. Will you look at Section 218, and see what else, on page 110.

A. Section 218 is water for use with cement.

Q. That has certain qualities?

A It describes the cleanliness of the water and alkalinity.

Q. 219 deals with Portland concrete, does it not?

A. Yes.

Q. Read from 219.01 on page 110.

A. (Reading) Section 219.01 description: Portland cement concrete shall consist of an approved portland cement, a fine aggregate, a coarse aggregate, water, and such admixtures as may be specified, mixed in the proportions shown for the various classes of concrete, and by one of the methods hereinafter designated.

Q. There is a bill of materials in 219.02 as to the materials for the work.

A. (Reading) The materials for this work shall conform to the requirements of these specifications.

page 112 } That specifies the cement; fine aggregate, which is sand; coarse aggregate, which is stone; admixtures.

Q. Will you look at Section 219.10 on page 120, and tell us what that says.

A. Well, that is Section 219.10, mixing. (Reading) Concrete shall be mixed at the job site in a batch mixer of approved type and capacity. Transit mixed concrete, ready-mixed concrete, and hand mixed concrete will be permitted only with written authority from the engineer. Concrete may be used by the contractor only from plants which have been inspected and approved by the engineer. Misuse of tested cement will result in the withdrawal of permission to use ready-mixed or transit-mixed concrete from the producing plant and the requirement that all concrete must be mixed on the job.

Q. Will you look at page 121. I believe you will find something there with respect to the truck mix, transit mix, ready mix, things of that kind.

A. Yes. Paragraph B, transit mix and ready mix (reading) Ready mixed concrete shall be mixed and delivered to the designated point by means of one of the following methods. Do you want me to read them all?

Q. Yes.

A. (Reading) Central mixed concrete shall be mixed completely in a stationary mixer—

The Court: Just a moment. Let me ask you

page 113 } about this. Mr. Marks, I believe you said you wanted him to read them all?

Mr. Marks: No, sir, I don't.

The Court: Because we are going to be all day here.

Mr. Marks: I realize we will be all day, sir. I only meant that he read about transit mix and ready mix.

A. (Reading) Transit mix and ready mix. Well, actually, it describes the difference in the two things.

Q. Go ahead.

A. (Continued reading) Transit mixed concrete shall be mixed completely in a truck mixer at the batching plant or while in transit.

Carl Torrence

Q. All right. Now, we need not go any further about that. Now, will you look over to the following page.

A. That is page 122.

Q. That's right. Section 4.

A. Section 4, paragraph 4 (reading) When a truck mixer is used for complete mixing, each batch of concrete shall be mixed for not less than seventy nor more than one hundred revolutions of the drum or blades, at a rate of rotation designated by the manufacturer of the equipment as mixing speed. Additional mixing, if any, shall be at the speed designated by the equipment manufacturer as agitating speed.

page 114 } Q. Now, will you look at Section 6, the last sentence, which deals with truck mixer?

A. (Reading) When a truck mixer is used for complete mixing of the concrete, the mixing operation shall begin within thirty minutes after the cement has been added to the aggregates.

Q. Now, what does the next paragraph provide for? You needn't read it.

A. The next paragraph provides for some control over the concrete by requiring that the plant set up a ticket system, and the truck driver has a ticket saying how many yards of concrete is carried, what the ingredients are, and how much water either has been added or is to be added.

Q. All right, sir. Now, go up, if you will, and leaf through the materials section until you get to bridges and structures. We will find things like steel forging, eyebars, sundry things of that kind, won't we?

A. Yes, sir.

Q. Now, then, do you know what category is bridges and structures, what division?

A. Four.

Q. Section 4?

A. 401.

Q. 404 deals with concrete masonry, doesn't it?

page 115 } A. Yes, concrete masonry.

Q. Start at the beginning of Section 404, with 404.03, if you will.

A. Yes. Construction methods. 404.02 materials (reading) Concrete of the class specified on the plans for each particular application shall be in accordance with Section 219. Reinforcing steel shall be in accordance with Section 231.

Q. What is 219?

A. That's what we were reading earlier about material.

Q. Material and—

A. Material and mixing.

Q. Now, go on, please, to paragraph 3 of Section 404.03, if you will.

A. Third paragraph (reading) Concrete shall be placed in the forms immediately after mixing, and in no case shall concrete be used which does not reach its final position in the forms within thirty minutes after the time that water is first added to the mix. The method and manner of placing shall be such as to avoid the possibility of segregation or separation of the aggregates or the displacement of the reinforcement.

Q. Now, we are almost through. If you will go over to 404.22 on page 332.

A. 332?

Q. 404.22.

page 116 } A. (Reading) Basis of Payment—Concrete masonry shall be paid for at the contract price per cubic yard for the particular class of concrete specified, complete in place.

Q. Then, if you will look at page 333 and the last two paragraphs of that same section.

A. (Reading) The cost of materials and preparation of bearing pads to receive bearing assemblies shall be included in the unit price bid for superstructure concrete.

The payments for these items shall be full compensation for all materials, scuppers, drains, joint fillers, all equipment, tools, falsework, forms, bracing, surface finish, labor, and all other items required to complete the work shown on the plans in accordance with these specifications.

Q. All right, sir. Will you put the book down. I ask you to look at the plans.

NOTE: The witness and counsel approach the bench.

Q. (Continued) On the first page of the plans, which have been identified as Exhibit No. 5, there is a note, Mr. Torrence, and I call that to your attention, and will you read that into the record, please.

A. (Reading) This project is to be constructed in accordance with the Virginia Department of Highways, Road and Bridge Specifications, dated April 1, 1958, and Road Design and Standards dated November 1, 1953, revised

page 117 } November 1, 1958, and including all subsequent

revisions.

Q. All right, sir. Will you look over at the sheet marked Sheet 9015 in the right lower corner, which is a part of this exhibit, and tell us what is shown on that sheet.

A. Well, there are several things shown. Those are the expansion plates and tie rods and signs, Southern Railway signs, detailed out here.

Q. Looking at the next sheet, what do we find?

A. This is a bridge deck here. This is a bridge deck. It reinforces the concrete for the deck.

Q. What is the title of that sheet?

A. The title of it?

Q. Sheet 10015.

A. Concrete Deck Slab Plan and Details.

Q. Now, we go to the next one which bears the title of sheet 11015.

A. That shows the concrete deck slab section. That shows the steel beam and the concrete deck.

Q. And above the concrete deck?

A. Waterproofing, then the balance of the railroad and the tracks.

Q. That is the extent of what you need to look at on those. Now, I am going to ask you to look at the green book on page 2 of the quantity schedule, and the last two categories cover what?

page 118 } A. Well, underpass at Southern Railway Station 9 plus 402.76.

Q. Those are the materials that were the estimated quantities to go into that, are they not?

A. Yes, and set up the unit price, so if it is any additional quantities needed, the highway knows what to pay the contractor.

Q. At the bottom of the page, is that the total price of the contract?

A. Yes, sir.

Q. Now, Mr. Torrence, is the mixing of concrete from the engineer's standpoint looked upon in public structures as work?

A. Yes, it is work.

Q. Is the contractor for public structures who undertakes to perform all of the work indicated on plans and in a contract covered by specifications such as we have been considering called upon to perform that work either directly or through the services of someone else?

A. Yes. You can use subcontractors.

Carl Torrence

Q. Is there a recognized trade difference in the engineering and consruction field between concrete mixed in a truck and brought to the job site in a transit mix outfit and a rig, or a load of pipe, or a load of steel beams, or whatever it might be?

page 119 } Mr. Hazen: I have an objection to that question. It is so long, I would like for the reporter to read it back so I can state my objection properly.

NOTE: The above-referred-to question is read by the reporter.

Mr. Hazen: That is certainly an engineering problem. The concrete mix is different. I don't know what the purpose of the question is.

The Court: I don't either, but let him answer.

A. Yes, there is a difference. The concrete mix truck is performing a process. It is taking materials and making it into a product. The materials of the concrete are cement, sand, stone and water, and, of course, admixtures are sometimes added, but are not necessary in making concrete. But, these materials go in and out. It becomes a partially completed product, which is completed when it hardens within twenty-eight days, when it is finished properly and hardens. A chemical action takes place during the mixing. Curing starts immediately, and we extend it to twenty-eight days.

By The Court:

Q. What would be the difference in that and if it were mixed at a plant and brought on a truck, just an open-bodied truck, or whatever kind of truck?

A. If it's brought on a truck, the truck driver has no control over it. He can't change the quality. He

page 120 } delivers what he is given.

A truck driver of a transit mix truck can change the quality by 100 per cent if he adds too much water, if he does not mix it properly, or if he overmixes it. He can cut it to such an extent that the highway inspector would not accept it, so he does have control over his product.

* * * * *

Q. What authority does a job foreman in a concrete situation where mixer trucks deliver transit mix to a

page 121 } job have with respect to the consistency of con-

crete as it comes out of the drum, in the normal course of events in the trade?

A. It is either the driver that delivers it or the superintendent of the job.

Q. Both?

A. Well, if the superintendent of the job does not think it is wet enough for him to place—I say place rather than pour because concrete is an item that should be placed—and he thinks it is not wet enough and he insists on having water added, then he has to assume the responsibility for the quality of the material, because he is cutting the quality when he adds the water. The strength of the concrete is the ratio between cement and water. The aggregates have really nothing to do with it. The strength varies with the water-cement ratio, so when he adds water he changes the quality that much.

The job superintendent has to assume the responsibility for the quality should it not test up, and the truck driver insists on him signing the ticket saying how many gallons of water he authorizes to be added.

Q. Where does the water that is added come from?

A. In a tank on the truck.

Q. So, the truck comes equipped with a water tank?

A. With a water tank, yes.

Q. After you add the water at the direction of the construction superintendent, do you have to do any more mixing?

page 122 } A. Yes. You aggregate it some, or turn it over some.

Mr. Marks: That's all.

The Court: Mr. Hazen?

Mr. Hazen: No questions.

* * * * *

GORDON S. MAYNARD, JR., a witness of lawful age, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Marks:

Q. Mr. Maynard, will you tell the Court who you are, where you live and how old you are.

Gordon S. Maynard, Jr.

A. I am Gordon S. Maynard, Jr. I live at 403 Clarkson Drive in Danville, Virginia. Thirty-seven years old.

Q. In what business are you engaged, sir?

A. I am general manager of Thompson's Ready-Mix, Incorporated, in Danville.

Q. Mr. Maynard, are you familiar with the piece of equipment that Kelly was operating on the day he was killed?

A. Yes, sir.

page 123 } Q. Will you tell the Court what that equipment was?

A. It was a six-yard Challenge mixer mounted on a '59 GMC tandem truck.

Q. What is a tandem truck?

A. Two axles in the rear.

Q. Will you describe briefly the appearance of this outfit.

A. I have got a tie clip on. I can show you that if you would like to look at it. That's what it is (Indicating tie clip).

Mr. Marks: Let the record show that you indicated the tie clip attached to your coat.

Q. Describe the best you can for the record the size of a tandem truck in most cases with a drum on the rear.

A. Some of them have separate engines, some have drives that work off of the main truck.

Q. What about this Challenge?

A. That one was a separate engine drive.

Q. So that the motor power for the drum is given from the automotive power for the vehicle, is that correct?

A. That's correct. It has a water tank for carrying water, extra water, for adding to the concrete, and also for wash down after you make your pour?

A. What is in the drum, let's say, before we put anything in there, just like it came from the factory? What

page 124 } is in it?

A. It is a series of spirals inside that sit out from the base about eight or ten inches. Those spirals are welded to the drum inside. When the drum is going in a clockwise direction, from the rear the material is pulled into the truck. When it is reversed, by process of gears, these blades push the concrete out of the back of the rear.

Q. Now, the Challenge mixer that we are talking about in this particular case that Kelly was driving or operating, is he in any way in control of the mixer portion of his vehicle,

and what is it doing while he is driving the truck down the road?

A. When the driver leaves the plant, if he is hauling transit mix concrete, which is mixed en route to the job, he puts the thing in gear, in mixing speed, which is a higher number of revolutions than an agitating speed. Some trucks have three speeds, some have two. He will put it in the highest gear that he can to mix the concrete on the way to the job.

Q. What I am asking you about is while he is rolling down the road, sitting up there steering his truck, the truck is mixing the concrete, does he have any control over what is going on out back other than on a determined preset basis that he fixed before he left?

A. No, he doesn't, no.

Q. So, what he is actually doing—

page 125 } A. He can stop alongside of the road and change it.

Q. I mean while he is in transit.

A. No.

Q. How does he know, or how does the inspector on the job know, or the person to whom the truck ultimately comes know how well mixed the contents of the drum is when it gets there?

Mr. Hazen: If Your Honor please, I don't mean to interrupt. I want it understood by everybody that my objection to the relevancy and materiality continues.

Mr. Marks: Yes, sir. We have made that agreement.

Mr. Hazen: All right, but this is a different witness. I thought I had better be sure.

The Court: It will be understood.

Q. (Continued) Go ahead.

A. I think I understood your question correctly. There are a certain number of revolutions that is specified by the truck manufacturer as to how many revolutions these drums should have on them, depending upon the mix. How many revolutions should have on the drum when it gets to the job. Is what you are referring to?

Q. Well, Mr. Torrence read us a specification of the State Highway Department that says it shall be at least seventy rotations and not more than one hundred.

page 126 } A. That's right.

Q. What I want to know is when the thing gets

to the destination, how does anybody know how many revolutions it has had?

A. It has a revolution counter made on it. In order to work for the Highway Department, you have to have a revolution counter on each truck.

Q. So, it's a very simple matter looking at a little gauge on it?

A. You start out turning it back to zero. When you get there, you see how many revolutions you have.

Q. Is mixing speed a higher speed than agitating speed, or what is the difference between that?

A. It is the highest speed.

Q. What is agitating speed?

A. That is the slowest speed. Three to four revolutions per minute.

Q. Now, with respect to the particular concrete that Kelly was hauling on the date of the accident, do you have a record as to what type it was?

A. Practically all highway concrete is the same. It is Class A, which is 3000 pounds of concrete, which is air entrained.

Q. I will ask you to look at a ledger account, sir, which purports to come from your company. See if you

page 127 } can tell us what it is.

A. That is one of our ledges cards on this job from Mr. Warsing.

Q. With reference to the contract, Exhibit No. 3, can you tell us what the project number is?

The Court: Defendant's Exhibit No. 3.

A. Project number is 1092. Always the first three or four digits are the project number for the highway. The balance is for the culvert and bridge. B608 is bridge.

Q. Will you look at your entry for the 14th of October and tell us what, if anything, was involved with Project 1092 on that day.

Mr. Hazen: What year?

Mr. Marks: '64.

A. That is '64, October?

Mr. Hazen: I object. This accident happened October 14, 1963.

Mr. Marks: '63 is what I meant to say.

A. It is '63.

Mr. Hazen: All right.

A. (Continued) We delivered eleven yards of AEA which is what I referred to before.
Q. "A" is 3000, "AE" is air-entrained?
A. Air-entrained.

By The Court:
page 128 } Q. How many yards?
A. Eleven cubic yards.

Mr. Marks: We offer that ledger card.
The Court: Received and filed marked Defendant's Exhibit No. 6, and initialed.

NOTE: The above-referred-to ledger card is marked and filed by the Court as Defendant's Exhibit No. 6.

By Mr. Marks: (Continued)
Q. Now, Mr. Maynard, will you tell where this job was located with respect to the Virginia-North Carolina line?
A. It was very close. I would say within a quarter to half a mile of the North Carolina line.
Q. From what point did your transmit mix trucks take the concrete mix to the job on the day Mr. Kelly was killed?
A. We had a plant that was just about a quarter of a mile over the North Carolina line at Shelton, North Carolina, and we were operating out of there this particular day.
Q. I am going to ask you to look at and identify this paper and tell us what it is.
A. It is a North Carolina-South Carolina Esso map.
Q. Road map?
A. Road map, yes, sir.
Q. Can you find Danville on there?
A. Yes, sir.
page 129 } Q. Would you put a pencil mark approximately where the job was and a pencil mark approximately where your plant was.
A. Well, you can't put the marks that close, so I will put two marks here. I have one in Virginia, one in North Caroina, right at the border off of 29.

Mr. Marks: We will offer this.

The Court: Wait just a minute, if you don't mind. I am going to put them on here a little better than that.

The map is marked Defendant's Exhibit No. 7, and initialed.

Go ahead, Mr. Marks.

NOTE: The above-referred-to map is marked and filed by the Court as Defendant's Exhibit No. 7.

Q. How long a time run is it for a '59 GMC tandem with a Challenge six-yards or whatever it is?

A. Mixer?

Q. Mixer on the back of it, from your plant below the North Carolina line to this job above the North Carolina line?

A. Five or ten minutes.

Q. During that time, is a complete mix obtained?

A. No, sir. Not on a short run like that.

Q. How long does it take to run at mixing speed
page 130 } one of these mixers at seventy revolutions?

A. Takes about twenty minutes, fifteen to twenty minutes.

Q. How long had Kelly been operating this type of equipment, as far as you know?

A. Well, he was actually—Thompson's Ready-Mix bought out the company from Laramore Construction Company, old concrete business. They bought them out. Mr. Kelly was working for them prior to the time that Thompson purchased the business, and he was still employed doing the same job.

Q. Then, he was with Thompson's Ready-Mix from the time Thompson's Ready-Mix started until his death?

A. That's correct.

Q. What, if anything, can you tell the Court with respect to his ability concerning the concrete-mixing portion of the operation as distinguished between their driving the truck up the highway?

A. He was a good operator. Very good.

Q. Does an operator of this type equipment receive a different pay scale from an operator of an ordinary truck that hauls cargo up the highway?

A. I would say so, yes.

Q. In addition to carrying a self-powered mixer on a truck

up the road, what are the duties of an operator at this time?

page 131 } A. Well, he does in our company—I don't know what others do—in our company, he looks after the truck. It is more his own piece of equipment. He greases it, changes the oil, keeps it clean, maintains it, so forth, so the vehicle will operate in a proper way.

Q. When he reaches his destination, what are his functions?

A. He is to, if called for by the customer, add additional water to the concrete and get it to the consistency that the customer wants, and then discharge it into the forms.

Q. Do you all have any ticket system with respect to how these things are handled?

A. Yes, sir.

Q. Tell the Court how the ticket system operates.

A. We make out a ticket on every load, whether it be four, five, or six yards. We make out a ticket for each load. The customer signs the ticket, and prior to the signing of the ticket, the driver, if he has done so, has added any water to the job, he will put it on the ticket, and the customer signs for that, also.

Q. Now, what information is contained on the ticket, if any, in addition to the quantity involved?

A. I don't believe I am able to say. They are not responsible for water being added on the job unless signed for. There is a waiting time charge on there of $10.00

page 132 } after a half hour. There is something on there, I believe, about our responsibility ends at the curbline. We are not responsible for bushes and trees and shrubs and things.

Q. I am not talking about that kind of thing. I am talking about information with respect to what is in the mix. Does it specify the class of concrete?

A. Yes, sir.

Mr. Hazen: Does he have one of those tickets?

Mr. Marks: I don't have it. I am sorry.

Q. Do you have one?

A. I don't have one. I could have easily brought one.

NOTE: Colloquy is had relative to the above, which is reported but in the interest of brevity is not here included in this transcript, whereupon the matter continues as follows:

Gordon S. Maynard, Jr.

Q. Were you personally familiar with this 1092 project, Mr. Maynard?

A. Yes, sir.

Q. Were you personally familiar with the location of the underpass or overpass structure that was being worked on at the time Kelly was killed?

A. Yes, sir.

Q. To get to that structure with a mixer truck of the type you have described and that Kelly drove, how did

page 133 } you get there from your plant in Carolina?

A. Well, you came out of the plant and headed north like you were going back to 29 at the Carolina line. Instead of turning left, you turned right, went under an old underpass there and around on the Corning Glass old road, and came in, most of the time, up the grade, the new grade.

Q. Up the new grade?

A. Yes. Occasionally, we came down through the woods right beside of the railroad tracks.

Q. When you say you come in on the grade, what do you mean?

A. I mean the new road that cuts in there. 1092.

Q. The road which was being constructed?

A. Yes, sir.

Q. You came over that after it was in condition?

A. That's correct.

Q. After the mixer got to the overpass location, where was it with respect to the project? In other words, was it on the project or over the project?

A. It was on the project. It was, I would say, right in the middle of the project. Pretty close to the middle.

Q. We have got our piece of equipment there, and let's assume that they are ready for him to pour out the contents. What does the mixer operator then have to do?

A. He backs his truck up to the place where the

page 134 } concrete is to be deposited, as per the instructions of the foreman or superintendent on the job. Then, he discharges a small amount in the form or in the bucket, and the contractor will look at it to see if he thinks he can handle it in that form. If he cannot, if it is too wet, they send it back to the plant. If it is too dry, we add a little water, as per his instructions.

Q. How does he discharge? What does he do to make it discharge?

A. He puts the drum in reverse, opposite from mixing.

Q. In other words, he has to shift a gear on his engine to reverse the rotation of the drum?

A. Correct.

By The Court:

Q. May I ask one question, sir. Does this inspector or foreman on the job inspect each and every load?

A. I understand they do now. The Highway Department—

Q. I am talking about then?

A. I don't think they inspected every load on this particular job.

By Mr. Hazen: (Continued)

Q. Excuse me. Were you referring to the Highway Department inspector or the general contractor's people?

A. Well, both. Both inspect it.

page 135 } Q. Together?

A. Well, it can be done together or separately.

Mr. Hazen: I see. Thank you.

The Court: I understood Mr. Davis to say that only spot checks were made.

Mr. Hazen: That's what I understood.

Mr. Marks: It may well be true. I will clear it up.

By Mr. Marks: (Continued)

Q. You were not continuously on the job, were you?

A. No, sir. I would go to the job once or twice, maybe three times a week. If they were making a big pour, I would go out to see if everything was going all right.

Q. If one of your trucks arrived at a location of that kind and the contractor is not ready for him, but he has completed his mixing operation, what does he do?

A. He puts the drum in a lower gear and lets it turn very slowly at agitating speed, and waits until—

Q. What I am trying to get at is how long does he keep up the agitating speed?

A. Until he can unload the load.

Q. Then, at unloading time he puts it in reverse and it starts coming out the back?

A. That's correct.

Q. Is there some kind of gate or valve or something of that sort that holds it in there?

page 136 } A. No. It is just the blade holds it. The mixer is tilted this way. It is a high discharged truck.

Q. When it comes out of the end by rotation in reverse, where does it go from there?

A. It goes down the chute into the—we have an extension chute on the side of the truck that you can put on if you have to run it out a long ways. Ten or fifteen feet, you can pull from the chute. To pour in the bucket, it folds back and just turns over and lays down in the bucket.

Q. I see. When he has completed filling a bucket to its capacity, or is told to stop putting more in there, whichever course, how does he stop the concrete from coming out of the thing?

A. He has a lever that throws it out of gear.

Q. That stops the rotation of the drum?

A. Stops it dead, yes, sir.

Q. How long have you been engaged in the concrete business, Mr. Maynard?

A. Two and a half years.

Q. What did you do before that?

A. I sold Portland cement for a cement company out of Pennsylvania.

Q. What is the difference between Portland cement and concrete.

page 137 } A. Cement is just the binder that holds the other materials together. The concrete is what they term a homogeneous mass of aggregates—fine and coarse cement, Portland cement, and water.

Q. What is the function of a mixer in the ultimate overall picture?

A. It is to combine all of these products into one, into a different product.

Q. Now, sir, when you learned—when I say you, I am talking about Thompson's Ready-Mix—of Kelly's death, was a report made to your compensation carrier with respect to it?

A. Yes, sir, right away.

Q. Who was that compensation carrier, if you can tell us?

A. It was the Catlin Agency in Danville, who represented the Hartford Accident and Indemnity Company.

Q. Subsequently, did you receive any information which you have in your file, or otherwise, with respect to certain protection taken under the Workman's Compensation law before the Industrial Commission?

Gordon S. Maynard, Jr.

Mr. Hazen: We will stipulate it is in the record.

A. Yes, sir.

Mr. Marks: All right.

Q. Until this petition for declaratory judgment was served on Thompson's Ready-Mix, Mr. Maynard, were you, or any person connected with your company, aware of
page 138 } the fact that you were involved in any way in litigation?

A. No, sir.

Q. What is a batch plant?

A. It is a plant where the materials are stored and weighed in certain proportions and then put into the truck to be mixed.

Q. Can one use a batch plant with respect to a mixer of a fixed type other than a truck type?

A. Yes, sir. We have one in Danville. Central Mix Plant.

* * * * *

Q. Is there any essential difference between a fixed mixer and a truck-mounted mixer of the type we have involved in Kelly's death other than the fact the mixer is on the truck?

A. Ask that question again, Mr. Marks.

page 139 } Q. I said is there any essential mechanical difference between a truck-mounted mixer of the Challenge type, that is, on this truck that Kelly was driving, and a stationary mixer that sits on the ground other than the fact that one of them is mobile and one isn't?

A. Yes, sir. That's the only difference I know of: There are different type mixers. There is the turbine-type mixer, there is the drum-type mixer. There are two types.

Q. But, they both perform identical functions?

A. That's right.

Q. Could you take the self-powered mixer off of Kelly's truck, set it on the ground and operate it?

A. Yes, sir.

Q. All right. Now, we go to the last question. I know His Honor will be glad of that.

Is there any part of the physical truck, itself—now, in this particular situation when I say the physical truck, itself, I am talking about the chassis, the wheels, the engine, the cab, the lights, the whatever—involved in the discharge of concrete from this mixer?

A. Not from this mixer, no.

Mr. Marks: That's all.

CROSS EXAMINATION

By Mr. Hazen:

page 140 } Q. May I look at Plaintiff's Exhibit No. 1, and the ledger sheet, too.

I notice, Mr. Maynard, that you and Mr. Marks are not using the word "unload". Is the word "unload" ever used in connection with getting the concrete out?

A. We use discharge. That is a common word in the business.

Q. Are you familiar with the fact that Thompson's had a contract with Mr. Warsing? I hand you Plaintiff's Exhibit No. 1.

A. Yes, sir.

Q. In connection with this job?

A. Yes, sir.

Q. Did you operate under that contract? Was that the true relationship between Mr. Thompson and Warsing?

A. I would say so.

Q. Isn't it a fact, by interpretation of this contract, you agreed with him that you would deliver—I assume one thousand is estimated?

A. Estimated.

Q. Cubic yards as he wanted it and where he wanted it for a certain price per cubic yard, is that correct?

A. That's correct.

Q. Did that include the delivery charge?

A. That's correct.

page 141 } Q. In other words, it is f.o.b. job site, is that correct, sir?

A. Yes, sir.

Q. Now, I notice here on October 8, 1963, there is only 75 hundredths of a yard.

A. Three-quarters of a yard.

Q. Well, that wouldn't even be a truckload, would it?

A. No, sir.

Q. Would eleven yards that was delivered on the day of the accident be approximately two truckloads?

A. Approximately, yes. It would be more on one than

it was on the other. We have two seven-yard trucks, six and five.

Q. Of course, when the accident happened, Mr. Kelly's truck was still practically fully loaded. I assume that went to waste or hardened or something?

A. That's right, that's right.

Q. Well, it is fair then to say that the ony contract you had as far as this job was concerned was to take to the job site and deliver to Mr. Warsing's company whatever concrete he required at a certain price per cubic yard f.o.b. job site?

A. Right.

page 142 } Q. Now, do you actually know what the pay scale of the various types of truck drivers is in all lines of industry, or were you just guessing at that when you answered Mr. Marks' question?

A. Well, I am familiar with some that they have down there in Danville to drive dump trucks. I know the national scale according to the National Ready-Mix Association is high. Our scale is higher than some of the dump truck drivers, which we term dump truck drivers' scale.

Q. What was Kelly making? Is that in the record?

Mr. Marks: No, it is not in the record, but I can give you the information. Maybe we can stipulate it in the record, if it suits you.

NOTE: An off-the-record discussion is had.

Mr. Hazen: It is stipulated that the employer's report of accident to the Industrial Commission shows that Frank Woodruff Kelly was earning an average weekly wage of $97.88 per week.

Mr. Marks: Let's put the other part in there, too, that he worked ten hours a day, five and a half days a week.

* * * * *

page 143 }

* * * * *

By Mr. Hazen:

Q. Now, Mr. Maynard, would you please explain to us once more, I think we have covered it piecemeal, just exactly

what Thompson's driver does when he arrives at the job site from the time he gets there until the time he leaves? What would his normal activities be, just exactly how you would go about it?

A. He would pull up on the job. He would first look at the revolutions counter on the truck to see how many revolutions he had on the drum. If it is not the proper amount, which would be between seventy and a hundred, he would let the truck continue to rotate at the mixing speed until he arrived at that number of revolutions. Then, he would slow it down to a lower gear, let it agitate until another truck pulled out from the place where they were placing the concrete, then he would back in, then pull his chute over.

Q. Suppose the other truck ahead of him has already pulled away. Does he pull up in the dumping position?

A. That's right, and he will sit there before he discharges the concrete or until he has the proper number of revolutions.

Q. Then what does he do when he has the proper number of revolutions?

A. Then he will pull the drum in reverse and

page 144 } deposit the concrete in the form, or in the bucket, or whatever it is.

Q. Specifically, how does he do this? What does he do about the chute?

A. It depends upon how far he is away from the form. He may have to chute the concrete over to that door (indicating).

Q. Assuming the facts you testified to here today, to get it to the bucket, he would just turn it?

A. There is a piece of fold-over chute attached to the truck that folds back over about three feet long. He would turn that over into the bucket, and then he would put the drum in reverse and the concrete would come out the chute.

Q. How does he stop it from overflowing?

A. By pulling the lever to take it out of gear. Then, the bucket is lifted by the crane and dumped some place else. The bucket comes back, and after he again fills the bucket, he will pull the chute back out of the way so the bucket can be raised.

Q. Then I assume he repeats this procedure until his mixer is empty, is that right?

A. That's correct. Occasionally, in some instances, the contractor will have an employee of his at the bucket to steady it into position, and sometime our drivers do that, in order to get the bucket—if it is swinging a little bit, if it is not right

in the position it ought to be, the proper position, they put plywood down for the bucket to rest on. Now, page 145 } on this day whether it was done in this case or not, I don't know.

Q. As soon as the last bit of concrete has come out of his mixer into the bucket, then what does he do?

A. He folds the chute back, pull down on the job somewhere out of the way, and rinses the back of the truck off.

Q. Rinse it?

A. Yes, sir. With a hose.

Q. The inside of it or outside?

A. Some will go down, if he is going down to get another load. If he has finished the job for the day, he will run water in the drum, turn it some to wash out the inside of the drum so the concrete won't stick inside, but if he is going back for another load, he will wash the back hopper off and the chute and go back and get another load.

Q. That is all this driver does on the job site, the things you have described? Have you described completely what the driver does?

A. Well, he will add water to the mix, if necessary. I think I left that out. If the contractor requests more water, in the concrete, if it needs more water for workability, he will request the water, and the driver will add it.

Q. I believe you also mentioned he will get a ticket?

A. When he completes unloading the truck. He page 146 } has a gauge on the water tank which he fills up before he leaves the plant. He will see how many gallons he has taken out and put into the truck. He will put that on the ticket, and the contractor, foreman, or superintendent is supposed to sign for him.

Q. If they don't add any water, do they get a ticket signed?

A. Yes, sir. Everybody gets a ticket signed.

Q. You described that he moves on away, washes off the hopper and the chute and goes on back to the plant, is that correct?

A. That's right.

Q. Let me ask you again is that all that he does? Have you described completely what he does while he is there, to the best of your knowledge?

A. I don't think I have left out anything.

Q. Now, is it possible that the ticket for the truck ahead of Kelly would be available in your records, or any of these tickets that are shown on that ledger?

A. Yes, sir. I have a ticket. I am sure we have it.

Q. So we will be accurate, Mr. Marks has agreed to introduce one. Could we have one that was in use at that time?
A. That was '63. I believe we have them. I believe, I am sure we do.

By Mr. Marks:
page 147 } Q. Why don't I ask you, Mr. Maynard, to make a search for any tickets he has dated October 14, 1963, for delivery at 1092.
A. It could be that these tickets were turned over to Hartford or somebody may have them already. I mean, I don't know that, but I will do like you say. I will make an effort to find them.

By The Court:
Q. You will do it if it is possible?
A. Yes, sir.

Mr. Hazen: That's all.

By Mr. Marks: (Continued)
Q. Let me go back and refresh you on one thing, sir, in connection with this all-he-does business. If he does add water, there is another step in there, isn't it?
A. Well, he has to mix the water through the drum, through the load.

Mr. Marks: That's all I want to know.

* * * * *

page 151 } Mr. Marks: If Your Honor please, at the last session in this case, Mr. Gordon Maynard was requested to provide certain delivery tickets.
The Court: Yes.
Mr. Marks: He did. He has sent the originals of those tickets to me with a letter dated October 1, 1965, and he has called me on the telephone and has requested, if I can arrange it, that I substitute photocopies and send his originals back to him.
I have sent copies to Mr. Hazen. We would like to offer Mr. Maynard's letter to me of October 1, with the two tickets attached and have it marked as an exhibit, and retain the original for retransmission to him.
The Court: Is that all right with you, Mr. Hazen?

Mr. Hazen: No objection.

Mr. Marks: It is somewhere in the record, a note of the request made and the fact that they were to be supplied. I don't remember the page.

The Court: Do you have any idea what number that would be?

Mr. Marks: It would be Defendant's Exhibit No. 8.

page 152 } NOTE: An off-the-record discussion is had.

The Court: The letter and the tickets just referred to will be received and filed marked Defendant's Exhibit No. 8, and initialed.

Mr. Hazen: Before Mr. Marks calls his first witness, I wonder if I may make a brief statement of our position. You may recall we made a continuing objection to certain portions of the testimony, and I think it ought to be in the record.

Mr. Marks: Go ahead, Mr. Hazen. I have no objection to his reiterating it.

* * * * *

page 153 }

* * * * *

Mr. Hazen: Briefly, Your Honor, I would like to renew an objection which we made at the former hearing, and I think you will recall it has been our position in this case that if we are successful in showing to Your Honor that Hartford did have coverage by reason of this being under the loading and unloading provision of the policy, then their policy would be primary, and the U.S.F.&G. policy would be excess by the specific terms of the policy; and we are prepared and will in our brief give you a number of authorities for the proposition that where you have two insurance companies involved and one of them fails and refuses to acknowledge the coverage under the policy, thereafter it cannot complain if the other company goes ahead and makes a settlement of the case so long as it is done in good faith and so on. That seems to be the rule—that they would have to show bad faith.

Now, in the special plea, the defendants set up that we had waived certain defenses in this case by making settlement, that if we had gone ahead and tried it, in other words, we would successfully have been able to defeat the claim of the plaintiff on the ground that the decendent Kelly

page 154 } at the time of the accident was actually engaged

in a part of the trade, business or occupation of Mr. Warsing, therefore, Mr. Warsing was not a third party who could be sued by way of subrogation, and we have, for that reason, objected to any testimony which pertains to that point, and it would seem that that is probably the main purpose of the witnesses here today, so if we can understand that our objection runs through their testimony in that connection, then I think the record will be clear.

The Court: All right.

Mr. Marks: I think that has already been made pretty plain all the way through so far as Mr. Hazen, and I have proceeded on the theory that the objection did reason that way. Not that I concede the validity of it in any way, of course.

The Court: I was hoping you would save me some trouble and do that, too.

NOTE: An off-the-record discussion is had.

Mr. Hazen: If Your Honor please, did you overrule my objection so that we will have the record straight?

The Court: I haven't ruled on it at all. I thought we were accepting the evidence subject to your ob-
page 155 } jection.

Mr. Hazen: All right. Well, I just wanted the record to be straight. Save my point.

The Court: Yes.

* * * * *

VASTER HATCHETT, a witness of lawful age, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Marks:

Q. Mr. Hatchett, will you just spell your name.

A. H-a-t-c-h-e-t-t. V-a-s-t-e-r.

Q. Mr. Hatchett, where do you presently reside?

A. Sir?

Q. Where do you presently live?

A. In Providence, North Carolina.

Q. And where are you presently employed?

A. Laramore Construction Company.

page 156 } Mr. Hazen: I didn't understand.

Vaster Hatchett

The Witness: Laramore Construction Company.

Q. You are in Virginia on a job for them part of the time, are you not?
A. We work in Virginia most all of the time.
Q. Where did the sheriff catch up with you?
A. At the plant.
Q. In Virginia?
A. Yes, sir.
Q. Back in 1963, Mr. Hatchett, were you at any time employed by Thompson's Ready-Mix, Incorporated of Virginia?
A. Yes.
Q. In what capacity, sir?
A. Truck driver.
Q. Did you have any particular truck or did you drive most any truck that happened to be there for you to drive, or just how did you do?
A. We was assigned a truck.
Q. Directing your attention to the day on which Mr. Frank Kelly was killed on the job, were you there at that time?
A. Yes, sir.
Q. The record indicates that that was October 14, 1963. Would that be correct?
A. Yes, sir.
Q. Why were you on the job at that time, sir?
page 157 } A. We was hauling material to W. W. Warsing.
Q. What kind of material were you hauling?
A. Concrete.
Q. It was this ready-mix concrete—
A. Yes.
Q. Were you driving a mixer truck or what kind of truck were you driving?
A. Yes, sir, a mixer truck.
Q. Had you made any deliveries yourself at the time Mr. Kelly was killed?
A. That was the first load.
Q. This was the first?
A. First. My load.
Q. First load for you?

By The Court:
Q. Let me get that. Was your load the first load or was Kelly's the first load?
A. No, sir. Kelly's was the second load. It had been one load before then.

By Mr. Marks: (Continued)

Q. Were you the driver of the truck that came in before Kelly?

A. No, sir.

Q. So you were behind Kelly?

A. Yes, sir.

page 158 } Q. You were driving No. 3 truck?

A. Yes, sir.

Q. Do you recall who was driving No. 1 truck?

A. Yes, sir.

Q. Who was?

A. Ira Strader.

Q. Was he still on the job with his truck at the time Kelly was killed, or had he left?

A. No, sir. He had gone to return with another load.

Q. Now, when you reached the scene with your truck, Mr. Hatchett, describe just what you found.

A. Well, when I got there, Frank Kelly, he had already backed up to be unloaded, and, well, I parked my truck over to one side out of the way, and I walked up, talking to him.

Q. To Kelly?

A. Yes.

Q. Can you tell us whether Kelly added any water while he was getting ready to unload?

A. Yes, he had added water a time or two.

Q. At whose direction had he added water? Who told him?

A. Well, it was inspectors on the job, so they bound to have told him.

page 159 } Q. Now, was the mixer on Kelly's truck turning when you reached the scene?

A. Yes.

Q. Had he turned it in reverse to discharge his load, or was it turning on its cycle on the mixer when you got there?

A. He had put some in the bucket.

Q. When you got there?

A. Yes, sir. Well, not when I got there, no, sir.

Q. I am asking you what the situation was when you got there.

A. No, sir. He hadn't put any in there when I got there.

Q. After parking the truck, you got out, went on over there, did you talk with Kelly, or what did you do?

A. After I parked my truck, I went over and asked him how much water he had added to his, and I figured I could

add the same to mine, and it would be right to be unloaded when he got out of the way.

Q. Tell us how you add water.

A. Well, it works by pressure. You got valves and all on the back. The gauge, you can tell how much you put in.

Q. You have your own water on your truck?

A. Yes.

Q. Is that in a tank?

page 160 } A. Yes, sir.

Q. That's part of the equipment?

A. Yes.

Q. How much does that tank of water that is on your truck hold, as a normal thing, or does it vary?

A. Well, the truck I drove carried 245.

Q. What?

A. The truck that I drove carries 245. Kelly's truck had 150 gallon tank.

Q. All right, sir. How far was the run from the batching plant to the scene of this construction job?

A. About a quarter of a mile.

Q. What?

A. About a quarter of a mile from the plant.

Q. One quarter of a mile?

A. We was hauling from the Shelton plant then.

Q. All right, sir. Now, just where were you standing at the time Kelly was killed?

A. Right close by.

Q. Tell us what he was doing at the time this accident happened?

A. Well, after he got it like it was supposed to be, you know, the right amount of water and all in it, he dumped the first bucket full, and he pulled the chute back out of the back and he started up with it.

page 161 } Q. When you say he started up with it, who do you mean?

A. The crane operator started up with the bucket, and it never got but about five or six feet off of the ground. I heard the cables rattle.

Q. What?

A. The cables.

Q. You heard the cables do what?

A. It made a rattling noise.

Q. All right.

A. I just happened to look up, seen it, and got out of the way.

Q. And Kelly didn't?
A. Yes, sir.
Q. Now, do you know who was directing Kelly with respect to the operation of adding water at the time there on the scene?
A. No, sir, I don't. I done forgot even who was there.
Q. You know of anybody having been on the job by the name of Bill Davis?
A. No, I don't know anybody.
Q. Did he ever add water to yours?
A. Not on that job, no, sir.
Q. Not at that time. Did you make your de-
page 162 } livery after the accident occurred, or did things come to a halt?
A. No, sir. Another driver came and drove my truck.
Q. Came and drove your truck?
A. Yes, sir.
Q. You were pretty well shook, I imagine?
A. Yes, sir.
Q. Now, describe, if you will, the way in which you positioned the truck at that particular job to do the unloading. In other words, you came in off the highway. Let's start with that.
A. Well, when we left the Shelton plant, we came down and crossed another little highway. We didn't go more than 25 yards on that. We took a left—well, it wasn't a dirt street or anything. It was just a little road they had cut in there, and we went in that way and down to the job.
Q. Is this sort of a lane driveway, the thing that you went in on, or was it an old time road, or what?
A. No, sir. Just a road that had been cut in there, I mean, to haul.
Q. To get you to the job?
A. (Indicating in the affirmative).
Q. After you drove down that road to get to the job, what did you do? What was the next thing that you did?
A. Well, to back up to the crane box and unload.
page 163 } Q. Was there a special place to back up to the crane box or what?
A. No. I wouldn't call it a special place to back up to it.
Q. You just backed in the general vicinity, and that was it?
A. Yes.
Q. How long had you been on the job with your truck when Kelly was killed?

A. I hadn't been there over five or ten minutes at the most.
Q. Was your truck mixing at that time?
A. Yes, sir.
Q. And it was mixing when you arrived?
A. Yes, sir.
Q. How long after the accident was it that you stayed there on the scene?
A. Well, we wasn't there over a half hour at the most.
Q. When you say we, who are you talking about?
A. Well, I mean it was Mr. Maynard. He came up and all, and the fellow came and drove my truck. I rode back with him.
Q. Had you been unloaded before you left?
A. No, sir.
page 164 } Q. You carried the same load back that you carried up there, right?
A. Yes.
Q. All right. Had you ever driven any truck other than the one that you were driving that day?
A. Yes, I had drove others.
Q. Had you driven the one Kelly was driving?
A. Yes, sir.
Q. Will you tell us something about the truck Kelly was driving that day? I believe it was No. 24.
A. Yes.
Q. Did the mixer on that have an independent motor or was it part of the—did it run off the truck motor?
A. No, sir. It had a motor pulling the mixer.
Q. So that the truck engine did not have to run at all while the mixer was turning?
A. No, sir.
Q. You remember, Mr. Hatchett, what type concrete you all were hauling at this particular time, what class concrete it was?
A. It was State cement, and it was Type 2 cement.
Q. Do you happen to know the name of the foreman that Mr. Warsing had on the job?
A. It was Mr. Hayes.
Q. Mr. Hayes. He is the gentleman back over
page 165 } here in the courtroom?
A. Yes, sir.

Mr. Marks: You may take him, Mr. Hazen.

Vaster Hatchett

CROSS EXAMINATION

By Mr. Hazen:

Q. Mr. Hatchett, is it always necessary to add water after you arrive at the job site, or are there times when the consistency is all right without adding water?

A. Well, it just all depends. Sometimes it's right and sometimes it's not. Some people want it a little wetter than others.

Q. How often do you have to add water?

A. Well, if you get it right the first—on the first load, you will know on the next load about how much to put in there before you leave the plant. It's about nine out of ten times you do have to add water.

Q. So, this is done either at the plant or at the job site, is that correct?

A. Yes, sir. They put a certain amount in at the plant, and most of the time you are going to have to add.

Q. Now, isn't it true that one bucket had already been unloaded and moved by the crane and dumped, and that this was the second bucketful out of Kelly's truck?

A. No. This was the first bucket.

page 166 } Q. That was the first one?

A. (Indicating in the affirmative).

Q. Did you arrive before he started unloading any of the concrete in the bucket?

A. No, sir. I arrived just about the time he started.

Q. Don't you think it's possible that another bucket could have been unloaded and this was the second one?

A. No.

Q. How many buckets, normally, would it have taken to unload one truckload?

A. I don't know how much a bucket held. I don't know whether it was a yard or yard and a quarter, or what size bucket it was.

Q. How much did the truck hold?

A. We carried six yards.

Q. It would be more than one bucketful, would it not?

A. Yes, sir.

Q. Probably four or five?

A. Well, if it was a yard bucket it would be six buckets. I never have figured out to see what it was.

Q. Now, do all these mixer trucks operate about the same

way with reference to unloading? That is, the chute and so on?

page 167 } A. Yes.

Q. Do you know where the concrete was being used that you were hauling for at that time?

A. Yes. It was being used on that underpass they were building.

Q. That is some distance above the ground, wasn't it?

A. Yes.

Q. How far above the ground, if you know?

A. Oh, I reckon probably 50 or 60 feet, something like that.

Q. And by what means do you unload a concrete mixer truck under those circumstances?

A. Well, you get—I mean, you get a fair place to unload, and if it is the best, convenient place for him, and you take and you back up to the bucket and put it in there.

Q. And with the crane, he lifts the bucket?

A. Yes.

Q. And takes and swings the boom over to where they are going to use the concrete, is that correct?

A. Yes, sir.

Q. And it is dumped there, and it swings back and picks up another load?

A. Yes, sir.

Q. Isn't that the usual way that this concrete

page 168 } is unloaded from your truck?

A. Yes, sir.

Q. In fact, it's about the only practical way, isn't it?

A. Yes, sir.

Q. Assuming, Mr. Hatchett, that the batch of concrete which you had in your truck had been mixed exactly right at the plant as to water content and so on, then would there be any change in it in that quarter mile that you drove to the job site?

A. No, sir, I wouldn't think so.

Q. In other words, it would not be necessary to add water at the job site if it had been done properly at the plant, is that correct?

A. If they had added—I mean, if they had got it right before they left, they wouldn't have had to add any.

Mr. Hazen: I believe that's all.

Graham Evans Hayes

RE-DIRECT EXAMINATION

By Mr. Marks:

Q. Have you ever worked in the batching plant, itself, Mr. Hatchett?

A. Yes.

page 169 Q. You batch according to specifications, don't you?

A. Yes, you do. By weight.

Q. And don't the specifications tell you how much water to put in?

A. You put so much per yard.

Q. And, normally, that is what is put in there at the batching plant?

A. Yes, but when you load for the State, you got an inspector, and he tells you how much to put in.

Q. When you get to the job, if the man on the job who is going to use the concrete thinks it is not wet enough, he tells you to put some more in?

A. It's up to the inspector when you are pouring for the State.

Mr. Marks: Yes. That's all.

Mr. Hazen: No further questions.

* * * * *

GRAHAM EVANS HAYES, a witness of lawful age, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Marks:

page 170 Q. Will you spell your name for the court reporter.

A. G-r-a-h-a-m E-v-a-n-s H-a-y-e-s.

Q. How old are you, sir?

A. Forty-three.

Q. Where do you live?

A. Clarksville, Virginia.

Q. What business are you in?

A. Construction work.

Q. Are you presently employed in that type of activity?

A. Yes, sir.
Q. For whom?
A. W. W. Warsing.
Q. You still work for Mr. Warsing?
A. Yes.
Q. Were you working for Mr. Warsing on October 5, 1963, on the Corning Glass access road job?
A. Yes.
Q. How long had you been on that job on the date of October 14, '63?
A. On that particular job?
Q. Uh huh.
A. (No answer).
Q. Just a rough estimate.
A. Well, roughly around April, I guess. May
page 171 } or April, March or April.
Q. March or April. And you were there in October finishing up?
A. Yes. We finished up sometime before Christmas.
Q. What was your particular function on the Corning Glass access road contract?
A. I was superintendent of construction.
Q. What does the superintendent of construction have to do?
A. Whole lot.
Q. Well, I understand. We don't want to get into details, but, generally, what is—
A. I supervise the work on the bridge building, the forms for the concrete, driving piles and all work connected with the bridge structure.
Q. Now, when we speak of the bridge structure, are we talking about the railroad bridge that was going to be built over the road at that job?
A. Well, at the time of this accident, we were working on the bridge that would carry the railroad over the highway, yes, sir.
Q. That part of the bridge you are talking about?
A. Yes, sir.
Q. Directing your attention to the particular day of the accident, do you recall approximately what time
page 172 } of day it happened, Mr. Hayes?
A. No, sir, I wouldn't know the exact hour, but it was rather early in the morning. I would say possibly eight to eighty-thirty. May have been as late as nine o'clock, but not any later than that.

Q. Just what was going on in the way of work that morning up to the time of the accident?

A. Well, we had the first section of the floor section ready to pour, and the day previous we made all preparations. We started as early as we could after 7:00, and we had placed one load of concrete into the forms, and Kelly's load was the second load, and this boy that left was the third load, which brought it down that morning.

Q. The first one had already been unloaded, is that right?

A. That's right.

Q. Did you have a work crew of Mr. Warsing under your supervision?

A. Sir?

Q. Did you have a work crew of Mr. Warsing under your supervision at that time?

A. Yes, sir.

Q. Did you have a Mr. Bill Davis?

A. Yes, sir.

Q. What was his function?

page 173 } A. He was a crane operator.

Q. I am going to ask you to look at—

Mr. Marks: May I have that last exhibit, if Your Honor please.

The Court: Defendant's Exhibit No. 8.

Mr. Marks: That's right, No. 8.

Q. (Continued) And I am going to ask you to look at the original from which the photocopy was made, and will ask you whether or not you recognize tickets number 1, 3, 4, 5, 8 attached to Exhibit No. 8, and having been signed in two places by Bill Davis?

A. Yes, sir.

Q. You recognize that to be his signature?

A. That's his signature.

Q. That's his signature?

A. Yes, sir.

Q. The top signature indicates that the first load that went in there had twenty gallons of water added, is that right?

A. He put down 20 gallons of water. Actually, we don't usually sign but one place. He might have signed this for more than one reason. I mean, he might have signed it, and then the boy told him to sign it, but we usually sign one time.

Graham Evans Hayes

Q. He signed for 20 gallons of water on the job site, didn't he?

page 174 } A. Yes, sir.

Q. On the first one.

A. Is that—I don't know. I can't tell. It must have been the first load, yes, sir.

Q. All right. Now, after the first load had been disposed of, and Kelly's truck had been brought into position, did he add any water, Mr. Hayes?

A. Yes, sir.

Q. When did he add it?

A. He added before we poured any—I mean, he emptied some from his truck before we added any water, but we didn't pour any before he added some more water.

Q. Why was Kelly required to add more water?

A. Well, the first that came out the mixer was too dry. Wasn't the correct slump. In other words, in everyday language, it wasn't wet enough.

Q. Do you know approximately how long it took him to add the water to bring it to the proper consistency and get it mixed?

A. Well, it shouldn't take over five or six minutes.

Q. Then what happens the next thing? Do they pour out another sample?

A. On this—well, it didn't take that long. We put in a couple of gallons, turned it about three minutes, looked at it again. It might need a little more. Add another

page 175 } gallon or two, like that.

Q. What you do is sample until you get it to the mixture that it ought to be?

A. Try to get it wet as you want to before you get too much out of the truck so the whole load will be consistent.

Q. The purpose of this is to distribute water through the cargo that is on the truck after you decide you need to add some, is that right?

A. Yes, sir.

Q. Were you the one who determined whether it had enough slump or whether it didn't?

A. Well, actually, I did. You work with the inspector. In other words, I can do what I want to as long as it meets his specifications. I can't go out of his—I can do it, but I have to remain in what he wants done. I mean, the limits the State sets.

Q. Let me see if I can understand you. If you think more water needs to be added—

A. Yes, sir.

Q. —you tell the mixer driver to add it?

A. That's right.

Q. And so long as the ultimate result passes the inspector's approval, you are okay, is that right?

A. Not necessarily the inspector's approval, but what the State has set up for him to go by.

page 176 } Q. He's the one who decides whether it meets specifications?

A. Yes, sir. He uses the same thing I do to keep them in line, yes, sir.

Q. Now, you had then instructed Kelly to add water, and he had added it to your satisfaction and started to unload, is this right?

A. Yes, sir.

Q. And, at that time, he was on the job site of Warsing Construction project dealing with this access road and this railroad bridge?

A. Yes, sir.

Q. Now, after you had concluded that the concrete Kelly had aboard his truck was proper, then what is the next thing that happened?

A. I climbed my ladder up on the bridge. Told him to fill up the bucket. He filled up the bucket. I climbed up the ladder. The boy said a while ago it was about 60 foot, but it was about 24 foot from ground level to concrete level there.

Q. So, there was hoist of approximately 24 or 25 feet from level to level?

A. To get up there, yes, sir.

Q. They had to hoist a little higher than the actual level, so that possibly it was a hoist of 30 feet?

A. At the most, it would be about 30, I would say.

page 177 } Q. All right, now. Let me see if I understand you correctly, sir. You are down there looking at the concrete.

A. That's right.

Q. You expressed satisfaction with it.

A. (Indicating in the affirmative).

Q. You turn your back on it?

A. Yes.

Q. Climb the ladder back up to the top.

A. Yes.

Graham Evans Hayes

Q. He fills the bucket.
A. No. He has it filled when I left the ground.
Q. He has filled the bucket?
A. The first one.
Q. You turn your back and have gone up the ladder?
A. Yes, sir.
Q. Is that the sequence of it?
A. Yes.
Q. Where on top of the bridge do you go when you get up there?
A. To use this deck as the section we were pouring, the truck was backed right up to this corner right here, and the crane picks it up from here, and he was sitting over in this position. He swung it around, and we started on the farther side so we might be behind where we are *poring,* you see, and the bucket wouldn't be passing over our heads.

page 178 } I went up here to this corner. I started diagnally across to where he had to pour over in that corner. I was going away from the truck and over to where we were going to pour.

Q. You had your back to everything then?
A. That's right.
Q. Did you hear anything?
A. Yes, sir.
Q. What did you hear?
A. I heard this same noise the other boy heard.
Q. A rattling of the cables, you mean?
A. That's right.
Q. When you heard the rattling of the cables—
A. I turned around.
Q. What did you do when you heard the rattling of the cables?
A. I can't tell you. I turned around. I said Lord have mercy.
Q. And you got down there to see what happened?
A. Yes, sir.
Q. You took off as rapidly as you could?
A. That's right.
Q. Of course, wasn't anything anybody could do for Kelly at that time?

A. Well, this other fellow that was here, he

page 179 } ran and first thing I did was holler and ask if it hit the other guy. He said, no. Well, he was thinking of hisself. I said, well, it's bound to have hit him. Then I went down there.

Graham Evans Hayes

Q. Now, Mr. Hayes, how long have you worked for Mr. Warsing?

A. Twelve years.

Q. Tell us something of the type of work Mr. Warsing's organization does.

A. Most of the time it has been construction work. Project construction. Culverts, concrete. But, at that time, just beginning to do grading work to some extent. Now, we do grading and building.

Q. Back in '63—

A. We were doing the grading on this particular job, yes, sir.

Q. Then, the work that Warsing's organization did consisted of highway construction and concrete bridges and things of that kind, is that right?

A. Yes, sir.

Q. Culverts and curbing and gutters, things of that sort?

A. That's right.

Q. In that connection, did Mr. Warsing have his own batching plant?

A. You mean for this type of work?

page 180 } Q. Yes. For this type of work.

A. Yes, sir.

Q. Did he have his mixer?

A. We have mixers, yes.

Q. Were there any in his organization then? I don't mean necessarily on this particular job?

A. Did he own any?

Q. Yes. Did he own any?

A. Yes, sir.

Q. He had been operating them for some time, hadn't he?

A. Yes, sir.

Q. Do you know whether he had a batch plant of his own?

A. Yes, sir.

Q. Where was the batching plant located?

A. In Crewe, Virginia.

Q. Did Mr. Warsing have any ready-mix trucks of his own?

A. Yes, sir.

Q. How many would you say that he had of his own?

A. Four.

Q. Where were those trucks working, if you know?

A. They were working from this mixing plant, to and from delivering concrete.

page 181 } Q. From the Crewe mixing plant?
A. That's right.

Q. But, not down at the job where you were at Corning Glass access road?

A. No, sir.

Q. And Mr. Warsing had drivers for those mixers, didn't he?

A. Yes, sir.

Q. And they handled them just like Thompson's people handled the mixing trucks down there at—

A. Yes, sir.

Q. —the Corning Glass access road?

Mr. Hazen: If Your Honor please, I haven't objected to his leading questions. I am trying to save time, but this is Mr. Marks' witness, and if he would not characterize things.

Mr. Marks: I am perfectly agreeable.

Q. (Continued) Mr. Hayes, let's start out. I will be technical from now on.

Mr. Hazen: I am referring to your characterization on these things, using your own words. Let him use his words.

Mr. Marks: All right.

Q. (Continued) Mr. Hayes, were the Warsing mixer trucks the same type that Kelly was operating, which we
page 182 } have been told had an independent motor to turn the mixer drum, or were they the type that operates off the truck motors?

A. Oh, Mr. Warsing's present trucks operate from a mixer motor separate from the truck motor except one.

Q. Except one?

A. Yes.

Q. How about back in '63?

A. I don't think he had that one in '63, the one that runs off the truck motor.

Q. All right. That was quite a—was that a common way to handle these mixer trucks that had an independent motor for the drums?

A. Yes, sir.

Q. And do Mr. Warsing's mixer trucks have capacity to carry water?

A. Yes, sir.

Q. And the equipment to add it at the job site?

Graham Evans Hayes

A. Yes, sir.

Q. Have you ever been engaged in the actual manufacture of concrete as opposed to the pouring of it and finishing of it in form?

A. Just fifteen years.

Q. Just fifteen years?

A. Yes.

Q. Tell us how you go about batching a batch
page 183 } of concrete.

A. Well, there are different types—

Q. Let's take AEA concrete.

A. Let's say like we were using on this project. That would be better.

Q. In other words, just like you were using on this project?

A. Yes, sir.

Q. Tell us how you would go about making up a batch of that stuff to pour?

A. Yes, sir. Well, in this particular instance, Thompson's Ready-Mix supplied this concrete to us at the job site ready to dump into the bucket.

Q. Yes, sir, we understand that.

A. You want me to tell you what they did?

Q. No. I was going to ask you what—I don't know whether you know what they did or not.

A. Yes.

Q. I want to know how you make AEA concrete.

A. Well, to do this, you put so much cement, a certain amount of one—No. 7 stone and No. 4 stone, and you put sand—I mean, you add your water, and all of it is added in by weight. You weigh your sand, rocks, cement, and your water. You use the water by gallons, but actually it is figured by weight per gallon. You put these into
page 184 } the truck, then they bring them to the job site. Sometimes they mix them at the plant, right amount of revolutions before they get there. On a short haul like that, we were rushed to get it there, they let them make it on the job because it is such a short way. They make it from the plant to the site, and they backed up to the bucket, and we look at it, just as I said a while ago, to see how much water is needed. The water is put in at the plant. They have designed the amount of water to put into this concrete, but at the plant they usually hold back a portion from each batch so that it might not be too wet, or if you don't want it that wet, you can add a little at the job, but

that, more or less, is worked out between the inspector and the contractor on the job.

Q. So, in order to get concrete, then you start with sand and rock of various sizes?

A. That's right.

Q. And cement?

A. And water.

Q. And water. Then mix that all up together?

A. This AEA that you are talking about—air-entraining agent—you add to that, which is a very small quantity that is added, by weight also.

Q. You put all these things together in the mixer and mix it all up?

A. Yes, sir.

page 185 } Q. When you dump it out, that is concrete, is that right?

A. Yes, sir.

Q. And when you are using it in the type of construction that you were doing down here on this job, how do you make it stay where you put it?

A. First you build your forms and you brace them securely so that they won't move, then you get the bulkheads to the right grade at the end, and you scriet it over to the right elevation as required by the State.

Q. But, this stuff is wet when it is put in place?

A. Yes, sir, it is.

Q. And it is smoothed off and packed, isn't it?

A. Packed down.

Q. Tamped down and vibrated, and what have you?

A. Yes, sir.

Q. While it is contained in these forms, is that right?

A. That's right.

Q. How long then does it set there before you let it loose, take the forms off?

A. Well, this particular concrete would have to wait twenty-one days, this particular pour this day, due to the nature of the type of work it was.

Q. What happens during this twenty-one days?

page 186 } A. Concrete just gets hard.

NOTE: An off-the-record discussion is had.

Q. Now, tell us whether this bucket that fell on Kelly was the first or was it some other bucket out of Kelly's load?

A. Was it first out of Kelly's load?

Q. Yes.

A. Yes, sir. That other boy said—somebody said something about the second, but it was the first bucket, according to my knowledge. It was the first bucket from his truck, I feel pretty sure that it was. I couldn't actually swear to it being the first, but it's my opinion it was the first bucket.

Q. Now, is Bill Davis the same as William S. Davis?

A. Yes, sir. We call him Bill, yes, sir.

Q. He's the gentleman who testified at the last hearing up here?

A. Yes.

Q. Who operated the crane?

A. Yes, sir.

Q. Now, how long after the accident was it that the mess got cleaned up and things got back into operation again?

A. Well, actually, we worked a little bit that day, but, actually, we didn't go to work until the next day.

page 187 } We had to clean. Take concrete out of that form, or wash it out, and get a fire truck to wash it out, and we did some work around it that day, but not actually pouring concrete.

Q. In other words, this was the last load?

A. Yes, sir.

Q. That was used in any way in whole or in part on that particular day?

A. Yes, sir.

Mr. Marks: I think I have nothing further.

CROSS EXAMINATION

By Mr. Hazen:

Q. Mr. Hayes, does Mr. Warsing use his batching plant at Crewe all of the time or only on certain jobs?

A. This batching plant at Crewe is a permanent operation on this particular site, yes, sir.

Q. Is that a separate operation in the picture?

A. So far as these jobs are concerned, it's a separate operation, yes, sir.

Q. Does he ever use the batching plant and these trucks to sell Ready-Mix concrete to other contractors?

A. Yes, sir.

Q. It's not necessarily always his own jobs?

Graham Evans Hayes

A. Well, that's what I was trying to make clear, that the plant operates for him, but it's a public—I mean, page 188 } it's a concrete plant to sell concrete to anybody. It's not just used for his own personal jobs. Sometimes he does have a job close enough by that he can use it, but it's up there to sell concrete to the public in general, as a business of its own.

Q. Now, for practical purposes, how close would the job have to be to Crewe in order to make it practical for him to use that batching plant and his trucks?

A. Well, if it were his own personal job, he might could haul it twenty miles with special permission from the Highway Department. He couldn't exceed that very much, I don't think.

Q. How far is it from that plant to the job you all were working on approximately?

Mr. Marks: I will concede it's more than twenty miles.

A. It must be right close to a hundred miles. Somewhere between eighty-five and a hundred miles, I would say.

Q. Now, did I understand you correctly that this dry material is actually poured into the container on the back of a mixing truck?

A. Yes, sir. Excuse me. You place the materials in bins or hoppers, which are elevated. They are fed by gravity into scales which are above the mixer trucks, and these scales that you weigh it in has a bucket which has an page 189 } opening you can control by hand levers which dump it into the mixer truck, and you mix the dry materials from the scales and the water from the tanks simultaneously into the mixer.

Q. Is this the same tank that they would use to add water at the job site?

A. No, sir. The tank on the truck is what you call a storage tank. You put the right amount you want to put into the cement from a tank at the plant. This storage tank on the truck is for what additional water you need to add and to wash out your mixer and clean the equipment up after you have dumped your load of concrete.

Q. Now, is it correct to say that regardless of where this mixing takes place, that is while the truck is on the way to the job, or after it gets to the job site, nevertheless, by the time it is dumped into the crane bucket, it is ready for your use, isn't that correct?

A. Yes, sir.
Q. It's fully mixed, or else you—
A. Don't use it.
Q. —don't dump it?
A. That's right.
Q. And I believe that the reason why it was mixed, perhaps, more at this job site is because it was such a short distance from the batching plant?

page 190 } A. I said that was the reason it was allowed to be mixed while coming from the batching plant to the point of departure. If you have to haul it too far, you just put it in the truck and agitate it until you get to the job, then you mix it at the job site, because you can't mix it but so long before it's taken out of the mixer. See, they won't let you overmix. There is limitation on the time.

Q. What happens if the batch has too much water in it, or does that happen?
A. If you get too much water in it, the inspector sends it back, and we have to pay for it anyway, if I personally tell him to put the water in there. But, if they do it, it's their responsibility.
Q. And they would have to haul it back to the plant?
A. That's right. That's one reason they don't put it all in there before they send it out there a lot of times.
Q. Because you can add it but you can't subtract it after you get there?
A. That's right.

By The Court:
Q. You always intend to be a little bit dry when you get there?
A. That's right.

By Mr. Hazen: (Continued)

page 191 } Q. What about other materials used in a job like this as far as your duties and responsibilities of inspection are concerned—railroad ties or pilings or steel beams?

A. My duties?
Q. Yes, sir. In connection with your duties as superintendent.
A. Well, I supervise the driving of piling and placing the

steel, or any material that comes on the job, I have it all unloaded, and direct all of the work.

Q. How about the inspection to see if it meets specifications?

A. Well, most of the time they bring a test report or a bill, and I receive these, but it's up to the—actually, the inspector to see if it is the right material and if it meets the specification. We work together.

Q. That's the same as you do with respect to concrete, isn't it, that you work together with the inspector?

A. That's right. Although they changed that slightly, but it's practically the same way now.

Q. Now, in a situation of this kind, as existed at the time of the accident, was there any other practical way to unload one of these mixer trucks except the method that you all were using?

A. To my way of thinking, it's the only practical way you can do it. There are other ways you could do it that wouldn't be practical.

page 192 } Q. The crane and bucket is the only practical way to unload it?

A. Yes, sir.

Q. Is the crane also used in unloading other materials, such as piling?

A. It is used in handling all materials that are too heavy to handle by hand, yes, sir.

Q. Let me ask you one more question with reference to your inspection of any materials that come on the job to see that they are proper before they are put on the job. Is there any substantial difference between your inspection duties with respect to concrete or wood or steel or any other materials?

A. Well, what, my inspection?

Q. Yes, all your responsibilities.

A. I actually don't inspect them. I mean from that point. In other words, any material that is ordered for our job, it is tested by some test department, usually Froehling & Robertson, and this test comes to us stamped or is either sent to the Highway Department.

Q. So, by some means you know it is tested and inspected?

A. Yes. On piling, they have an F&R stamp they stamp on the end of them, and they have a tag they put on there that it has been tested, and different methods for different types of materials.

page 193 } Q. How about in grading. What about inspection of any material such as CBR material? What about your duties in that capacity, or is that up to the Highway Department?

A. The Highway Department has to test it. You can go out and select this material and find it on your job or in the pit they say it is in. You find it, and you tell the inspector you would like to have this inspected for CBR rating, and the Highway Department does that.

In some cases, if you want to have a little difficulty, you can take you a sample and get it tested, also, and compare the results with theirs and yours.

Q. Does the Highway Department also inspect the batching plants such as Thompson's?

A. Yes, sir.

Q. And, they would have done that the same as they would with reference to other materials to see that they are fabricated properly, isn't that correct?

A. Well, yes. The material has to meet certain standards, and the material, or the concrete, that is shipped to that plant is previously tested before it is sent to the plant, and those test reports follow that shipment, and inspectors take care of all that part.

Mr. Hazen: I believe that's all.

RE-DIRECT EXAMINATION

page 194 } By Mr. Marks:

Q. Mr. Hayes—

A. Yes, sir.

Q. —about how long, in your experience, has ready-mix been customarily used on concrete construction?

A. I think we were using ready-mix before I started in construction, I think. Not in the way they are today, but there were some ready-mix companies at that time. Not as numerous as they are today.

Q. Before there were any mixers, during the changeover period, or whatever it might be, how did you do the concrete work and get your concrete?

A. Well, you used stationary mixers, and I worked on two or three jobs that you had this, where you have a mixer that you put the material into what they call a skip with wheel-

barrows. I rolled it across the scales and weighed each wheelbarrow loaded. And to do this, your batch is set up by so many bags of cement or so many pounds of rock. You dump the cement into the same skip, one bag or two bags, whichever the mixer will take, and you add the water through a pressure tank which is on the mixer, and you have a little gasoline pump connected to your water supply that puts the pressure to the water tank, and you mix it in this drum similar to a mixer truck, and you mix it in the drum. You dump it out into the wheelbarrow, or crane, either one, and place it that way.

page 195 } Q. In other words, if I understand you correctly, there is no requirement that ready-mix be used? It can be job-mixed, could it not?

A. It could be job-mixed, but it wouldn't be practical, and the larger quantity you pour in bridges today, you could hardly build a bridge and keep the cost anywhere in line with other methods. You couldn't be competitive if you used stationary mixers. You wouldn't get a job.

Mr. Marks: That is all.

* * * * *

W. W. WARSING, a witness of lawful age, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Marks:

Q. Mr. Warsing, will you tell the court reporter how to spell your name?

A. W-a-r-s-i-n-g.

Q. What is your given name, sir?

A. Woodrow Wilson.

Q. Where do you live, Mr. Warsing?

page 196 } A. Live in Crewe, Virginia.

Q. And what is your business, sir?

A. Contractor.

Q. Are you the same W. W. Warsing who entered into a contract with the Virginia Department of Highways, which has been identified as Defendant's Exhibit No. 3, for the construction of industrial access road and some bridge work down in Pittsylvania County, I believe, to Corning Glass Works?

A. Yes, sir.

NOTE: At this point a recess is had, whereupon court reconvenes, the witness resumes the witness stand, and the matter continues:

By Mr. Marks: (Continuing)

Q. Mr. Warsing, I am going to hand you a green document identified as Defendant's Exhibit No. 3, and a red book identified as Defendant's Exhibit No. 4, and a roll of prints which have been identified as an exhibit in this case, and carry the number 5, and I will ask you whether or not you can tell us whether they are the things that pertain to the job that was being done by you down there on that Corning Glass plant access road at the time Kelly was killed?

A. This is the contract.

Q. By this, you are referring to the green instrument?

A. Yes, sir.

page 197 } Q. Identified as No. 3.

A. The contract between the Highway Department and myself. And this is the specifications (referring to Exhibit No. 4).

Q. This is the red book which has been identified as No. 4, specifications, referred to in the contract?

A. Yes, sir. And this is the plans on this particular job (referring to Exhibit No. 5).

Q. By this, we mean No. 5?

A. And these specifications cover all highway jobs. Not just for that one job.

Q. Yes, sir, I understand that.

A. In other words, you have your general provisions in the back of your contract which apply to that one particular job, applies to this one particular job, over and above your specifications.

Q. Yes, sir, I understand that. Now, that is why I have asked you if you will look at that contract, please, and see whether there are any special provisions in that contract that require you to use any special type of concrete, to wit, either ready-mix or job-mixed?

A. No, sir, it is not.

Q. So, you have the election?

A. That's right.

Q. Now, you are familiar with the red book, No.

page 198 } 5, specifications, aren't you?

A. Yes, sir.

Q. You use it pretty constantly?

A. I don't like to look at it any more than I have to.

Q. I sympathize. I am going to refer you, if you please, to the red book, however, Section 219, and will you tell us what type stuff 219 deals with.

A. That is to your concrete.

Q. Are those the specifications under which you were working with respect to the concrete on this particular job down there at Corning?

A. Yes, sir.

Q. All right, sir. Now, with specific reference to item under your left thumb, Section 219.02, that talks about what? What is the title catch line?

A. Type II Concrete.

Q. No, I am talking about Section 219.02. What is the catch line for that? Materials, isn't it?

A. Materials, yes, sir.

Q. What materials are listed?

A. You mean on this particular page?

Q. Yes, sir. Right there. As materials.

A. Well, the cement aggregate, also the water.

Q. There are four items, aren't there?

page 199 } A. Yes, sir.

Q. No, there are five—six.

A. Six items.

Q. Six items. Now, the first item is what?

A. Is your cement.

Q. And the second item is what?

A. Your aggregate.

Q. Has that got a specification as to whether it is fine or coarse?

A. It's fine aggregate. Table 1.

Q. What is the third item?

A. Coarse aggregate.

Q. Coarse aggregate?

A. Coarse aggregate. No. 3 is.

Q. Then, the fourth item is what?

A. Water, yes, sir.

Q. The fifth item?

A. Your air-entrained admixtures.

Q. That's what makes it AEA?

A. Yes, sir.

Q. What is the last one?

A. (No answer).

Q. Doesn't it say other admixtures?

A. Other admixtures.

Q. Which the engineer requires?

page 200 } A. Well, I don't think in this particular case we had any other admixtures.

Q. I don't know either, but that's what the specification says?

A. Yes, sir.

Q. Now, the next section deals with what? What is the catch line for the next section? Just the first four words up here.

A. In other words, in storing your material, storing or stockpiling, whichever they want to put it.

Q. And your contract calls for you to supply the material and the labor to construct this job under the plans and specifications we have been talking about here today?

A. That's right, yes, sir.

Q. So, in accordance with your requirements of your contract to supply the materials and labor to do this job, you put Mr. Hayes on as superintendent of construction?

A. Yes, sir.

Q. And you had a work crew there of laborers and other people, is this right, under him?

A. Mr. Hayes hires most of the men himself.

Q. They are on your payroll?

A. Yes, sir.

Q. And to get the cement and coarse aggregate and fine aggregate and water and put them all together

page 201 } and make concrete out of it, you got Thompson's Ready-Mix to do it, is that right, in this case?

A. Well, Thompson's Ready-Mix quoted us on the job before the job had let on furnishing the ready-mix concrete. Thompson's quoted and also Marshall's Ready-Mix from Danville.

Q. Now, Mr. Warsing, however it is, I believe you have told us and I don't want to put words in your mouth, and you are perfectly at liberty to disagree with me if I say something out of order, but didn't you tell us a minute ago that your contract called for you to supply all the materials and to perform all labor necessary to create the job in its finished and final condition as shown on the plans and called for by the specifications?

W. W. Warsing

A. Well, we supply the materials from other material people.

Q. Yes, I understand.

A. That is, in that business. What I mean, they quote us before we even bid on the job for us to be able to come up with a figure of what our material is going to cost. It's also decided whether you want to mix the materials yourself, furnish them and mix them yourself on the job, or use some ready-mix concrete outfit.

Q. How long have you been in the contracting business?

A. I went in the contracting business in 1951.

page 202 } Q. What is the major type of work that you did when you first went into the business?

A. Well, when we first went into the business, we were doing mostly concrete work. Bridge work, highway work. Any different types of concrete work.

Q. And, at that time, you did this particular job that is involved in this case down there at the Corning Glass, you were still engaged in doing concrete work, weren't you?

A. Well, concrete, and also excavating work. Grading work.

Q. Now, I believe you had in your equipment list, did you not, concrete mixers?

A. Yes, sir.

Q. Did you have so-called stationary mixers?

A. Yes, I had a stationary mixer at that time.

Q. How big a one would that have been?

A. Oh, half-a-yard mixer.

Q. And did you have mixer trucks?

A. Yes, sir, I had mixer trucks.

Q. How many did you have in '63, or when you bid this job and started in?

A. I believe it was four at that time.

Q. Did you have your own batching plant at Crewe at that time?

A. Yes, I had my own batching plant at Crewe,

page 203 } and also had a substitute set of bins and batching plant that I moved around on the job that we mixed on our own. Furnished on our own.

Q. That's what I was going to come to. You had a portable plant that you carried from job to job if the circumstances warranted?

A. Yes, sir.

Q. When you carried your own batching plant down there, you mixed your own concrete in it and transported it in your own mixers to your own work, didn't you?

A. Yes, sir. Most of the time we would set our bins up as close to the project as we could, if not on the project, so we wouldn't have too many, one, or maybe two, mixers to pull out from the plant at Crewe.

Q. Your plant at Crewe also sells ready-mix cement to other contractors and people who need it, isn't that right?

A. Yes, sir.

Q. Going back in history, Mr. Warsing, Mr. Hayes has described some kind of mixing equipment here on the stand which sounds to me sort of like the old-fashion paver. Are you familiar with the old-fashion paver, concrete paver?

A. Well, I've seen a lot of them work. I've never used one of them myself.

Q. Never had one of them yourself?

A. No.

page 204 } Q. But, the batching plant, portable plant, or parent plant, either one, performs the same function, essentially, as the old-fashion paver performed, is that right?

A. Yes, sir.

Q. Now, you were not on this particular job the day Kelly was killed before he was killed, were you?

A. No, sir, I wasn't.

Q. So, you don't know what may have gone on on the job before he was killed?

A. No, sir, I couldn't say what went on.

Q. But only on what someone might have told you?

A. Yes.

Q. But, based upon your experience in the contracting business, sir, and in the particular type of construction that you were engaged in down there, would it be fair to say that usually there is some water added to a batch of concrete in a mixer truck on the job site and some mixing done on the job site where the haul is a quarter of a mile or so?

A. Well, most of the time that is specified by the Highway Department, how they want you to do it.

Q. What I am talking about, specifically, is the addition of water to the contents of the mixer and the completion of the mixing operation after it reaches the job site.

A. Well, the biggest majority of the time, the man at the ready-mix concrete plant, if it is any way possible,

page 205 } he will run his water on the light side so it will be so that he can add more water when he gets to the job if the inspector says add it, but if he comes up on

the job with a load of concrete that will run over the slump that the specifications call for, in other words, we don't take the concrete. In other words, *it's* go back to him. In other words, he has to take the loss on it.

Q. Do I understand correctly, sir, then, that most of the time that concrete when it reaches the job, is on the dry side?

A. Yes, sir, most of the time it will be.

Q. And most of the time there is water added to it on the job site?

A. Yes, sir.

Q. And most of the time some additional mixing has to take place after you put the water in, isn't that right?

A. Yes, sir. Well, they have to run it a certain length of time before the inspector will let them dump it out after they add water.

Q. All this takes place while the truck is sitting there getting ready to dump?

A. Yes, sir.

Q. It's done under the direction of whom?

A. Well, it's done under the—supposed to be definitely, strictly, under the direction of the inspector on page 206 } the job. The contractor's superintendent can tell them to add water, as long as they don't get over —get more slump, too much water in it. In other words, if the contractor's man tells them to add water and they get too much slump, we have to pay for the concrete. In other words, it don't fall back on the ready-mix outfit.

Q. You are in a rather unique position, then. You are engaged in both sides of this business, the ready-mix business in Crewe, and, also, in the truck operation which uses concrete. You have been in it for some while. Will you tell the Court, please, what you are talking about when we talk about slump.

A. Well, in other words, they have a metal container, something in the diameter of approximately six inches at the bottom, and it comes up to approximately three, three and a half inches, at the top, and it's approximately, I'd say, approximately ten inches tall, and they will put them down on the board level on the ground or something, fill that full of concrete, and pull that container up out of it, and they will set the container back, and lay a stick or something straight across your container, and measure from that down to see how much the concrete slumped.

In other words, they call it slumping down when you pull the container off of it. In other words, we want it to stand as

page 207 } near within—I think they got the slump down there on the bridge slabs to three inches. Not more than three inches. When you take the container off of it, what I mean, if it slumps more than three inches, the inspector has a right to reject the load of concrete. That's the reason for not putting too much water in before it goes to the job. In other words, they are trying to put the responsibility on somebody else.

Q. That's what I am trying to clear up. I think you have made it plain, but, perhaps, I should make sure I understand.

If, after you take the container off the top level of the pile that is left on the board or on the level ground or whatever it may be, it is more than five inches below where it was before you took the can off—

A. They have a right to reject the load of concrete.

Q. Then, the differential between the two levels is that term they call slump?

A. What they call slump, yes.

Q. That is, of course, accompanied by a widening out of the base of the pile or some other portion of the pile, isn't it?

A. Yes, sir.

Q. Now, Mr. Warsing, do I understand correctly that if your superintendent, let's say, Mr. Hayes, wishes to do so, he may direct a ready-mix truck driver to add water to the

page 208 } contents of his truck, and if he does do so, the truck driver then adds it and Mr. Hayes is responsible to see that he doesn't get too much to meet the requirements of the inspector?

A. Yes, sir.

Q. And if he does get too much, then Mr. Hayes has bought himself a load of unusable concrete, is that right?

A. That's the way it happens sometimes.

Q. And when Mr. Hayes buys himself such a load, then Mr. Warsing pays for it?

A. That's the way it generally works out, yes, sir.

Q. Now, on the other hand, if when the stuff reaches the scene of the job and the initial slump test is made it does not come up or stand up the way it should, then the inspector says you can't use this on my job, and back she goes to the plant and gets dumped along the road somewhere, and the ready-mix man looses the load, is this the way it is?

A. Yes, sir.

Mr. Marks: That's what I want to be sure of. Thank you very much, Mr. Warsing. That's everything I have.

CROSS EXAMINATION

By Mr. Hazen:

Q. I would like to see Plaintiff's Exhibit No. 1. Mr. Warsing, in connection with this job, you had certain

page 209 } labor to perform and certain materials to provide. Was all of the labor done by your employees, or was some of this subcontracted to other—

A. Some of it was subcontracted. We subcontracted the asphalt, stone to the Thompson-Arthur Construction Company.

Q. With respect to the materials, I believe you said that you normally get a bid from the material men before you file your bid, is that correct?

A. Yes, sir. We generally get all that we can possibly get a quote on. What I mean, from some material outfit before we bid on it. Sometimes we have to bid on something which we don't get those prices ahead of time.

Q. In the specifications there, they refer to this ready-mix concrete as material, isn't that correct?

A. Yes, sir.

Q. You consider it to be material the same as bricks, stone, or steel, do you not?

A. Well, we use concrete as a material. We use it as a material the same as steel beams, or structural steel.

Q. Throughout the contract, it's referred to as other materials. I mean, as a material rather than a labor item.

A. Yes.

Q. Now, I believe this has been introduced as the contract which you had with Thompson's Ready-Mix?

A. That is Thompson's Ready-Mix, yes, sir.

page 210 } Q. That is Plaintiff's Exhibit No. 1. And, is this the entire contract that you had with Thompson's Ready-Mix, Incorporated?

A. Yes, sir, I think so.

Q. Were any of Thompson's employees put on your payroll any time during this job, their own employees?

A. No, sir.

Q. How about the truck drivers? They were paid by Thompson's rather than you, is that correct?

A. Yes, sir.

Q. And the only thing you paid Thompson for was so much per yard of ready-mix concrete delivered to the job site, is that correct?

A. Yes, sir.

Q. Now, is your batching plant at Crewe operated as a separate operation from your contracting business?

A. No, sir. We run it under the—run it in the name of Crewe Ready-Mix, but we have got it all in the one business.

Q. The business itself is run under a separate name?

A. Yes, sir. It is run under a separate name.

Q. What is that name?

A. Crewe Ready-Mix.

Q. Now, is it correct to say that as far as inspection of materials is concerned when they arrive on the

page 211 } job, or maybe before they arrive on the job, this is primarily the function of the Highway Department, is that correct?

A. You mean the testing?

Q. The testing and inspection.

A. Yes, sir.

Q. In other words, you are told when it gets there that it does meet their specifications and their approval, is that correct?

A. Well, it generally comes with—the materials we get come by Norfolk and Western Railroad, and each contract would have a seal on it, F&R seal.

Q. Seal from the manufacturing plant, is that right?

A. That's right.

Q. But, if your superintendent does find something that is not properly sealed, then I assume he would reject it, is that correct?

A. Well, most of the time, if we found it that way, we would call it to the attention of the inspector that's on the project. In other words, any material that comes on the project that hasn't been tested, or we haven't had any proof it has been tested, we are not supposed to use it.

Q. Now, as far as you are concerned with this question again of adding water, is it any concern of yours whether it gets there properly watered, or whether the water is added afterwards? Does it make any difference to you

page 212 } so long as when it's dumped in the bucket it has the proper slump?

A. Well, that's our responsibility after we put it into the

forms. What I mean, it becomes our responsibility when it is dumped off the truck and put in the forms.

Q. But, you don't care whether it's done at the job site or at the plant, do you?

A. Well, that doesn't bother us anywhere. What I mean, other than many times it might hold you up a few minutes if it's done on the job site.

Q. What your interest is is in the product as delivered, not the crane bucket?

A. That's right.

Q. You pay them on that basis, is that correct?

A. Yes, sir.

Mr. Hazen: I believe that's all.

RE-DIRECT EXAMINATION

By Mr. Marks:

Q. Now, Mr. Warsing, let me clear up one thing. You say you sublet some part of this job to Thompson-Arthur Construction Company?

A. Thompson-Arthur Paving Company.

Q. Paving company. What part of the job did they do?

page 213 } A. I think on this particular job, they laid the aggregate base and put down the plant mix, the asphalt plant mix.

Q. In other words, they brought it in and put it down on the job, asphalt paving for the road?

A. Yes.

Q. And this was on a subcontract basis?

A. Yes, sir, on a subcontract basis.

Q. And isn't it possible to buy asphalt or bituminous mix by the truckload from a supplier and bring that in and lay it with your own forces?

A. They don't ever quote us that way anyway. For a small job, I would say you can buy a few truckloads or something like that. On these particular jobs, they don't quote that way, in other words.

Q. But there is no *fundemental* difference in the essentials of subcontracting the delivery of some premixed bituminous material and subcontracting the delivery or the manufacture or the preparation and delivery of concrete, is it?

A. (Pause) I don't know what difference it would be. Thompson-Arthur Paving Company, they specialize in their end of it. Paving. What I mean, mixing and laying pavement.

W. W. Warsing

Q. All right, sir. What I am trying to get at is this: You can subcontract your concrete work if you want to, can't you?

A. Well, the Highway Department have a—
page 214 } have a ruling in there. What I mean, they specify the contractor do at least better than 50 per cent of the project. We bid on the job, we work with several other different contractors where specify doing one particular item. What I mean, just such as pavement, such as that. In other words, it would cost us too much to get into the business as far as equipment which is for laying the pavement.

Q. To get away from that. What I am trying to say, is, there is no restriction, however, on your subcontracting concrete work, is there? This just happens to be your particular expert field?

A. Yes, sir. That's my particular line. What I mean is the concrete work and the grading.

Q. But, there's no reason why you couldn't subcontract the concrete work, is it?

A. (Pause) No, it's no reason. What I mean, as long as I do 50 per cent or better of the job, that's the only restriction we have in it.

Q. And so long as you take the ultimate responsibility for the finished product as being in accordance with the plans and specifications?

A. Well, you have to take that responsibility for the whole job. It don't make no difference who you subcontract it to.

Mr. Marks: I think that's the evidence.
page 215 } The Court: Anything further?
Mr. Hazen: I believe that's all, Your Honor.

* * * * *

Mr. Hazen: I only have one other bit of evidence that I would like to offer.

Mr. Marks: What is it?

Mr. Hazen: Again, I have objected to the introduction of the evidence of this defense being waived and so on. Mr. Vaughan testified as to what went on at Pittsylvania—that his demurrer was overruled, and the Court said as to the special plea, we'll reserve it until the trial of the case on its merits, and, at that time, I will rule again.

I have the transcript, which is not signed by the court

reporter, but I am sure we could get it signed—that original, and for the purpose of showing that we were on the opposite side of the fence in that case. Hartford took the position that there was no such defense, and strongly urged it upon the Court. Of course, at that time, we hopefully claimed there was such a defense, and I think it shows the position of the parties. We have introduced correspon-
page 216 } dence, there has been testimony, and I think this should be clear in the record.

Mr. Marks: May I make this comment. I don't doubt for one single solitary minute that this is a true correct and accurate transcript of what transpired, but I wasn't there. I haven't read it, and I would like to have the privilege of doing so, and conferring with Mr. Edwin Meade, who was there, before I agree to admit it without signature, but I believe that I can safely say that it will ultimately come in without any authentication.

Mr. Hazen: Can we tender and ask it be identified, and I will be glad to have Mr. Marks take it if he wants to make a copy. I am sure Mr. Meade has one. This is the only one we have.

NOTE: An off-the-record discussion is had.

Mr. Hazen: I tender what I state is a transcript of the argument of the motion for demurrer on special pleading before the Judge of the Circuit Court of Pittsylvania County, Virginia, on June 23, 1964, taken and transcribed by Brenda Elder Tharpe, court reporter, and ask that it be identified as an exhibit to be offered by the plaintiff.

Be No. 17.

Mr. Marks: As No. 17. Let me say for the
page 217 } record that I am willing to have it identified as Plaintiff's Exhibit No. 17, and I agree of record that upon saying myself that it is what it purports to be, it may be admitted without the signature of the court reporter or the testimony of the court reporter to support it.

Mr. Marks: And I will further add that should counsel disagree as to the authenticity of the document, we will appear before the Court and resolve our difficulties.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Petition for Declaratory Judgment	2
Answer of Defendant, Doris McGuire Link, Admx, etc.	4
Answer of Defendants, Hartford Accident and Indemnity Company and Thompson's Ready-Mix, Incorporated	5
Order—September 7, 1965	8
Special Plea	8
Answer to Special Plea	10
Decree—April 6, 1967	11
Notice of Appeal and Assignments of Error	14
Witnesses:	
William S. Davis	15
John T. Wassom	48
Robert T. Vaughan	63
Carl Torrence	71
Gordon S. Maynard, Jr.	82
Vaster Hatchett	99
Graham Evans Hayes	107
W. W. Warsing	122
Proceedings	58, 97, 133