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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 730717

Charles E. High,

Plaintiff in error,

v

Gordon Coleman,

Defendant in error,

Joint Appendix

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Chesapeake, Virginia 23325

Counsel for Plaintiff in error

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

GORDON COLEMAN,
Plaintiff,

vs-

CHARLES E. HIGH
2540 Marion Drive
Chesapeake, Virginia,
Defendant.

MOTION FOR JUDGMENT

The Plaintiff, Gordon Coleman, moves this honorable Court for judgment against the defendant, Charles E. High, in the sum of Twenty-five Thousand ($25,000.00) Dollars for this, to-wit:

1. That on or about the 18th day of April, 1966 you did undertake to remove a certain oak tree which was approximately 30 feet in height located on your property at 2540 Marion Drive, Chesapeake, Virginia and otherwise referred to as Lot #69 of S. N. Hale Property, Great Bridge, Chesapeake, Virginia.

2. That the said tree was in close proximity to the rear of the home located on said premises and was in fact extending over a portion of the roof of said home.

3. That at the time and place aforesaid the Plaintiff, at the invitation of the defendant, was on said premises and as a result of the negligent, reckless and careless conduct of said defendant and his failure to use reasonable and proper care and also his negligence in failing to warn the Plaintiff of the great and impending danger, he the said defendant did cause the tree to fall upon said Plaintiff causing him great, permanent and serious personal injury and damage.

4. That as a result of such negligence aforesaid the Plaintiff suffered a fracture of the left clavicle, a fracture of the left acromium, a fracture of the left scapula, contusions of the head, arms and body; that said Plaintiff was confined in the hospital for over a period of ten weeks and that he has been permanently damaged, disabled and injured, lost huge sums by way of income and employment and has incurred and is incurring large

sums for hospital and medical expenses in order to be cured of his injuries.

5. That as a result of the negligence aforesaid the Plaintiff has suffered damages in the sum of Twenty-five Thousand ($25,000.00) Dollars.

WHEREFORE, the Plaintiff prays judgment and costs against said defendant in the sum of Twenty-five Thousand ($25,000.00) Dollars.

GORDON COLEMAN

By _____
of Counsel

Robert E. Gibson
Attorney at Law
Box 5025
Chesapeake, Virginia

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

GORDON COLEMAN,	:	
Plaintiff,	:	
v.	:	AT LAW NO.
CHARLES E. HIGH,	:	
Defendant.	:	

ANSWER AND GROUNDS OF DEFENSE

Now comes the defendant, Charles E. High, and as and for his answer and grounds of defense to the motion for judgment exhibited against him in this cause, states as follows:

1. The defendant admits the allegations in paragraphs One and Two.

2. The defendant denies paragraphs Three, Four and Five.

3. The defendant was free of negligence which caused or contributed to the accident.

4. The plaintiff was guilty of negligence which caused or contributed to the accident.

5. The plaintiff assumed the risk.

6. The defendant denies that he is indebted to the plaintiff for any sum of money whatsoever.

7. The defendant will rely on such other and further defenses as may develop between now and the trial or during the hearing of this matter on its merits.

CHARLES E. HIGH

By_____
Of Counsel

Allen J. Gordon, p.d.
P. O. Box 13226
Chesapeake, Virginia 23325

I hereby certify that a true copy of the foregoing Answer and Grounds of Defense was mailed to Robert E. Gibson, attorney of record for the plaintiff, at his office address, Box 5025, Chesapeake, Virginia, on this the 23rd day of April, 1968.

_____
Allen J. Gordon

June 4, 1973

In the Circuit Court of the City of Chesapeake, on Monday
the 4th day of June, In the Year of Our Lord
Nineteen Hundred and Seventy-Three.

PRESENT: The Honorable William H. Hodges, Judge.

GORDON COLEMAN, Plaintiff

vs.

CHARLES E. HIGH, Defendant

This day came again the above-named parties, in person, and by counsel, and came also the Jury heretofore selected, this case having been continued from the 1st day of June, 1973, and after having fully heard the evidence and argument of counsel, retired to their room to consult of a verdict, and after some time returned into Court having found the following verdict: "We, the Jury, find for the Plaintiff and fix his damages at $5,000.00, Johnnie Grandison, Foreman".

Thereupon the defendant, by counsel, moved the Court to set aside the verdict of the Jury as being contrary to the law and the evidence, which motion the Court overruled, to which action of the Court the defendant duly excepted.

Thereupon it is considered by the Court that the Plaintiff recover against the defendant the sum of Five Thousand ($5,000.00) Dollars, the amount by the Jury in their verdict ascertained, with interest at the rate of six (6%) per annum from the 4th day of June, 1973, until paid, and his costs, by him, in his behalf expended.

IN THE MATTER OF ALLOWANCES TO JURORS FOR THEIR SERVICES AT THE MAY TERM OF COURT.

The Court doth allow unto: A. W. Matthews, $8.80; James Forbes, $10.00; Alvah L. Cuthriell, $10.00; Arthur E. Watts, $12.00; Joseph P. Dettmer, $12.00; Johnnie Grandison, $10.60; Mrs. Ada C. Burke, $9.50, for their services as Jurors at the May term of Court, payable out of the Public Treasury.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

GORDON COLEMAN,	:	
Plaintiff,	:	AT LAW
vs	:	NO. 12466-M
CHARLES E. HIGH,	:	
Defendant.	:	

NOTICE OF APPEAL

The Defendant in the above styled cause, CHARLES E. HIGH, is aggrieved by the Judgment Order entered in this cause by the Circuit Court of the City of Chesapeake, Virginia, on June 4, 1973, and hereby files his Notice of Appeal prior to thirty (30) days after filing of Judgment Order and states that he will apply to the Supreme Court of Appeals of the Commonwealth of Virginia for a Writ of Error.

ASSIGNMENTS OF ERROR

CHARLES E. HIGH, the Defendant in this cause, assigns the following errors:

1. The Court erred in failing to strike the plaintiff's evidence and enter a summary judgment at the conclusion of the plaintiff's evidence.

2. The Court erred in failing to strike the evidence and enter a summary judgment at the conclusion of all the evidence.

3. The Court erred in granting the plaintiff Instruction No. 3.

4. The Court erred in granting Instruction No. 5.

5. The Court erred in refusing Instruction No. B-1.

6. The Court erred in refusing Instruction No. D-1.

7. The Court erred in refusing to set the jury verdict aside as contrary to the law and evidence.

STATEMENT OF PROCEEDINGS IN LOWER COURT

A transcript of testimony and other incidents of the trial will hereafter be filed.

CHARLES E. HIGH

By _____
Of Counsel

Allen J. Gordon, p.d.
P. O. Box 13336
Chesapeake, Virginia 23325

I certify that a true copy of the foregoing pleading was mailed to Robert E. Gibson, Attorney, 1105 Poindexter Street, Chesapeake, Virginia, and to Jack K. Moulton, Attorney, Board of Trade Building, Norfolk, Virginia, this 29th day of June, 1973.

_____

1 (The witnesses left the courtroom.)
2 (Opening statement presented by Mr. Gibson.)
3 (Opening statement presented by Mr. Gordon.)
4 MR. GIBSON: We would like to call Gordon Coleman.
5 * * *
6 GORDON COLEMAN, Plaintiff, having been
7 first duly sworn, was examined and
8 testified as follows:
9 * * *
10 DIRECT EXAMINATION
11 BY MR. GIBSON:
12 Q Please state your full name and home
13 address.
14 A Gordon C. Coleman, 1100 N. Acacia Ave., Anahein,
15 California.
Q How old are you?
16 A Forty-seven.
17 Q What is your present occupation?
18 A I work for Arvin Industries, assembly.
19 Q What is the name?
20 A Arvin Industries.
21 Q Now, on the 18th day of April 1966, where
22 were you living?
23 A 2570 Marian Drive, Great Bridge.
24 Q And at that time, were you employed?
25 A Yes.

1 Q Who were you employed with?
2 A Virginia Carolina Electric.
3 Q What was your average wage at that particular
4 time?
5 A After deductions and everything, it was
6 probably around $135.00 a week.
7 Q Now, I'll ask you whether or not that was
8 the day in which you received this injury?
9 A It was April 18th, around 4:30 or 5:00 in
10 the afternoon.
11 Q 1966?
12 A 1966.
13 Q And was it at the home of the defendant,
14 Charles E. High?
15 A Yes, it was.
16 Q And where in relation to his house did this
17 accident occur?
18 A It was in the backyard of his home.
19 Q And I'll ask you where were you or how was
20 it that you first received a call? Who called you to come
21 there?
22 A My niece, Charles High's wife.
23 Q I see. And about what time in the afternoon
24 was it?
25 A I figure around 4:30 or 5:00.

1 Q What were you doing at the time she came
2 to the home?
3 A I just got home from work and I started to
4 sit down with my brother-in-law to watch television, when my
5 niece came down and asked us to come down and help Charles.
6 Q Did you go there to the home to see what
7 the difficulty was?
8 A Well, we ran down there. We understood he
9 was in trouble. The tree was fixing to fall on his home and
10 everything. We ran down there and the tree had already been
11 cut at the base of the tree, and Charles - he had rope tied there.
12 I don't remember exactly what he had them tied to. Probably
13 another tree. He asked us to swing on the rope so if the tree
14 fell, it wouldn't go into his home.
15 Q How tall was this tree?
16 A I would say thirty-five or forty foot. I
17 just assume.
18 Q It was a tall tree?
19 A It was a tall tree, yes.
20 Q What was the size of the base of the tree,
21 approximately?
22 A I would say probably maybe thirty inches
23 maybe.
24 Q Now, did you take pictures of the tree
25 after it had been -

1 A Yes.
2 Q Do you have the pictures with you?
3 A Yes, I have.
4 MR. GIBSON: Your Honor please, we would like to
5 introduce these and have them marked.
6 THE COURT: Have you seen the pictures?
7 MR. GORDON: Yes, sir, your Honor.
8 THE COURT: Any objections?
9 MR. GORDON: I have none.
10 THE COURT: All right, sir. The five pictures will
11 be received and marked as plaintiff's exhibits one
12 through five.
13 * * *
14 BY MR. GIBSON:
15 Q I hand you first plaintiff's exhibit number
16 three, and is that the picture that shows the front of the
17 home and the type of trees in the area?
18 A Yes, sir.
19 Q And when were these pictures taken,
20 approximately?
21 A They were taken just before I went back to
22 California.
23 MR. GORDON: I couldn't hear.
24 MR. GIBSON: Just before he went back to California.
25 * * *

1 BY MR. GIBSON:
2 Q This is the condition that you found it in
3 at that time?
4 A Yes.
5 Q And this is the front of the home?
6 A Yes.
7 THE COURT: Mr. Coleman, I ask you that you speak
8 up louder and more into the microphone, so the jury
9 and counsel hear everything.
10 THE WITNESS: Yes, sir.
11 * * *
12 BY MR. GIBSON:
13 Q I show you plaintiff's exhibit one, and is
14 that the stump and portion of the tree that is at the rear of
15 that building?
16 A This is after the tree was cut up.
17 Q Then I'll show you plaintiff's exhibit two
18 and it shows a tree there growing in the same area.
19 A Yes, sir.
20 Q Is this a similar type of tree?
21 A It's a similar type, yes, like this.
22 Q And plaintiff's exhibits four and five are
23 just two additional shots of the same area?
24 A Yes, sir.
25 Q Now, when you arrived there at the house,

1 was there any discussion or decision made by you and Mr. High
2 relative to what should be done or what should not be done?
3 A. It was no conversation other than swing on
4 the ropes while he cut the tree from the back. He had already
5 made one cut on the tree.
6 Q. Right.
7 A. Then he proceeded to make a cut from the
8 back, and he wanted us to swing on the ropes so the tree
9 wouldn't fall into the home.
10 Q. Was he off the ground or was he at ground
11 level?
12 A. He was at ground level.
13 Q. What was he using to make this cut with?
14 A. A chain saw.
15 Q. Do you know whether or not he is in the
16 business of removing trees?
17 A. Far as I know he isn't.
18 Q. Did he express any concern or say anything
19 to you relative to any danger or anything of that nature?
20 A. No, there was nothing mentioned.
21 Q. Any warning given to you?
22 A. No warning.
23 Q. Now, was the tree leaning toward you or
24 toward the home at the time that you went there?
25 A. It was leaning back toward the home.

1 Q And what instruction did he give you,
2 if any?
3 A He just told his father-in-law, which is
4 my brother-in-law, and myself to swing on the ropes, to make
5 sure the tree didn't fall back on his home.
6 Q Did he indicate where the tree would fall?
7 A He said the way he cut it, it would fall
8 straight out.
9 Q What happened then?
10 A He proceeded to make his second cut on the
11 back side of the tree, and when he did the tree turned on its
12 stump and fell toward me. When I saw the tree, what it did,
13 it twisted on the stump. When I saw what happened, I started to
14 run and caught my foot in the rope I was swinging on and the
15 tree fell on me instead of straight out.
16 Q You were carried to the hospital?
17 A Yes.
18 Q Which hospital?
19 A Norfolk General.
20 Q How many days were you in the Norfolk
21 General Hospital?
22 A It was either three or four days.
23 Q And were you treated by a doctor at the
24 Norfolk General Hospital?
25 A Yes, sir.

1 Q Who was that doctor?
2 A Dr. Spear.
3 MR. MOULTON: Mr. Gordon, do you want to look at
4 this?
5 MR. GORDON: No.
6 MR. MOULTON: No objection?
7 MR. GORDON: No objection. It's Norfolk General,
8 isn't it?
9 MR. GIBSON: This is Dr. Spear.
10 MR. GORDON: Isn't he going to be here to testify?
11 MR. GIBSON: Yes. Want to hold it until then?
12 MR. GORDON: Don't you think it would be preferable?
13 * * *
14 BY MR. GIBSON:
15 Q I'll ask you if that is the bill from
16 Norfolk General Hospital?
17 A Yes, it is.
18 MR. GIBSON: I would like to have that introduced.
19 THE COURT: It will be received and marked as
20 Plaintiff's exhibit number six.
21 * * *
22 BY MR. GIBSON:
23 Q What injuries did you receive as a result
24 of this accident?
25 A I had a concussion of the left side of my

1 head, and my shoulder and my left arm.
2 Q Did you have any fractures?
3 A Yes. Two fractures in each broken place.
4 Q Now, you were released from the hospital
5 then approximately four days, is that right?
6 A Yes.
7 Q And did you return home?
8 A Yes, I came back to the address where I was
9 living at the time.
10 Q Did you continue receiving treatment from
11 Dr. Spear?
12 A Yes.
13 Q And how long, approximately, did you receive
14 treatment from him?
15 A I would say anywhere from six to seven
16 weeks.
17 Q And do you know the number of visits
18 actually that you went - do you remember how many visits you
19 went?
20 A I don't exactly remember how many visits
21 it was. Perhaps once a week, whenever I was, you know, having-
22 Q Difficulty?
23 A Difficulty.
24 Q Later were you confined to the Veterans
25 Hospital, or did you go to the Veterans Hospital?

1 A. I went to the Veterans Hospital for ten
2 weeks after I was released from Dr. Spear.
3 Q. What was the reason for going to the
4 Veterans Hospital?
5 A. I contacted hepatitis.
6 Q. Well, was that related to this accident, or
7 are you in position to say?
8 MR. GORDON: That's medical opinion, and I don't
9 think he is qualified to express that opinion.
10 THE COURT: All right, sir.
11 * * *
12 BY MR. GIBSON:
13 Q. What treatment did you receive at the
14 Veterans Hospital?
15 MR. GORDON: Your Honor, unless it's related to
16 this and it is some testimony to tie it together,
17 I submit it is not admissable to the jury.
18 THE COURT: You're going to have to lay the proper
19 foundation.
20 * * *
21 BY MR. GIBSON:
22 Q. At the time of going to the Veterans
23 Hospital, were you still having difficulty with your shoulder?
24 A. Yes, I was.
25 Q. And you were there for approximately ten

1 weeks?

2 A Ten weeks.

3 Q Then subsequently, I understand you left -

4 that is, left this area?

5 A Yes.

6 Q Where did you go?

7 A I went to California.

8 Q And did you go back to work?

9 A Not right away, no.

10 Q Why didn't you?

11 A Well, I wasn't strong enough to go to work

12 at the time. I was too weak and I had to get my health back

13 before I tried to take a job.

14 Q Did you receive treatment in California?

15 A Yes.

16 Q Who was your doctor there?

17 A Dr. Daniel Coleman.

18 Q What difficulty have you experienced over

19 this period of time that has elapsed since the injury?

20 A From the injuries?

21 Q From your injuries.

22 A I have had a constant pain in my shoulder

23 and in my arm and my head. I have headaches continuously.

24 Q Do you have any difficulty in using your

25 arm or shoulder?

1 A Yes, sir, I do.
2 Q Is there any visible sign of this injury
3 on your body at any point?
4 A Yes, I have a big hole here in my shoulder
5 which never corrected itself, and I lost use of this left arm
6 almost. As far as the strength goes, I have no strength at all.
7 Q Now, have you seen any other doctor since
8 your return from California?
9 A Yes, I went to see Dr. Jennings two days
10 ago.
11 Q Did he take X-rays as to your condition?
12 A Yes, he did.
13 Q Now, relative to your lost time, were you
14 out of employment from April 18th until November 22nd?
15 A Yes, I was.
16 Q Did you try to go back to work?
17 A I tried to go back to work, but I couldn't
18 maintain my job.
19 Q Your gross pay before the accident was
20 $130.00 you say, approximately?
21 A $130.00 to $135.00.
22 Q And did you make more or less at different
23 occasions?
24 A I made less. I couldn't go back in the job
25 I was working in, construction, so I had to take a different job

1 and also deduction of pay.

2 Q How long after you were summoned, that is

3 to Mr. High's house, was it before the tree actually fell?

4 A It was very shortly after we got there,

5 because he had already made one cut on the tree and it was

6 leaning. As soon as we got there, he told us to get hold to the

7 ropes, which we did, and he made the second cut in the back of

8 the tree. I would say perhaps five or ten minutes.

9 Q You say there was no discussion of procedural

10 outlines?

11 A No, he said he was worried that the tree

12 was going to fall on his home.

13 Q Now, at the time that you were in the

14 hospital, did they set these fractures, or what kind of pro-

15 cedure was followed?

16 A They put me in a sling which I wore for

17 six weeks. They didn't set the fracture or anything. They said

18 they would correct themselves, which they didn't.

19 Q You say they did not correct themselves?

20 A No, because he said the shoulder and every-

21 thing would correct themselves, but the disfigurement and

22 everything is still there.

23 Q What, if any, difficulty have you suffered

24 as a result of the use of that arm?

25 A Well, I can only get my arm so high as far

1 as reaching, and I have difficulty if I try to get behind my
2 back or anything like that.
3 Q You mean in raising your arm?
4 A Yes.
5 Q And I'll ask you whether or not you have
6 made any comparisons with the size of your arm?
7 A Yes, it's deteriorated. It never came back
8 to normal size, and I lost muscle strength in my left arm.
9 Q I would ask you whether or not you suffered
10 any long period of pain relative to this injury?
11 A I have a pain all the time in my left arm.
12 I take medicine for it. I take muscle relaxers for almost eight
13 years now, pain pills.
14 Q That is to relax the muscles and ease the
15 pain?
16 A Yes, it is.
17 Q What effect, if any, has this injury had
18 upon your nerves - that is, as to your ability to work?
19 A I have pinched nerves in the shoulder and
20 arm and have nervous reactions.
21 Q Now, please state to his Honor and to the
22 members of the jury what your physical condition was prior
23 to the accident.
24 A I had no - anything at all as far as I know
25 wrong with me. I worked everyday and I was in good health.

1 Q I'll ask you whether or not there will be
2 any necessity for you to have continued treatment?
3 A I'll probably have treatment on this
4 probably the rest of my life.
5 MR. GORDON: Your Honor, I object to that.
6 THE COURT: The Court is going to instruct the jury
7 that you will disregard that statement. It would
8 have to be a medical conclusion based on an opinion
9 of someone who is an expert. The Court regrets to
10 interrupt you. Ladies and Gentlemen, not to
11 divulge my business, I'm having a luncheon meeting
12 with the City Manager and Director of Public Safety
13 and Chief of Police about some matters. I didn't
14 want you to think I was frivolously invading your
15 time. I'm going to recess now until 1:00. During
16 the recess, don't discuss the case among yourselves
17 or with anyone else. Don't go view the scene of
18 where the accident happened. Don't read any reports
19 or material that might divulge any information, or
20 listen to any. If anyone tries to approach you to
21 discuss the matter with you, inform the court or the
22 sheriff. We will stand in recess until 1:00.
23 (The court recessed for luncheon and reconvened
24 at 1:20 P.M.)
25 (The jury entered the jury box.)

1 MR. GIBSON: If it please his Honor, the doctors are
2 here.
3 THE COURT: All right.
4 MR. MOULTON: Judge, do we have an X-ray view box in the
5 court here? I know the court usually has
6 one.
7 THE COURT: Yes. No objection to Mr. Gillette stepping
8 into the jury room to obtain it?
9 MR. MOULTON: No, sir.
10 THE COURT: Mr. Gordon, inasmuch as we have already
11 broken with this witness, any objection to
12 taking the doctors out of order?
13 MR. GORDON: None at all, your Honor.
14 THE COURT: Which doctor will you have first?
15 MR. GIBSON: Dr. Spear.
16 (Dr. Spear called as a witness for the
17 plaintiff, and sworn.)
18 * * *
19 DR. CURTIS V. SPEAR, Witness, having
20 been first duly sworn, was examined
21 and testified as follows:
22 * * *
23 DIRECT EXAMINATION
24 BY MR. MOULTON:
25 Q Will you state your name, please.

1 A. Curtis Spear.
2 Q. And Dr. Spear, I will ask you, sir, what
3 is your profession?
4 A. I practice medicine.
5 MR. GORDON: We will stipulate he's an orthopedic
6 surgeon, specializing in the bones and joints.
7 THE COURT: All right, sir. Any questions?
8 MR. MOULTON: No, sir. As long as Mr. Gordon
9 stipulates Dr. Spear is an orthopedic surgeon and
10 a specialist.
11 MR. GORDON: Yes, sir.
12 THE COURT: What counsel has just done, rather than
13 to go into the doctor's educational background and
14 training that he has had, counsel has stipulated
15 that he is a qualified practicing physician with a
16 specialty in orthopedics.
17 * * *
18 BY MR. MOULTON:
19 Q. Would you for the jury, please sir, and the
20 Court's edification, tell us what orthopedics involves, sir?
21 A. Orthopedics is that branch of medicine that
22 has to do with injuries and abnormalities of the muscular-
23 skeletal system, that is the arms, the legs, the back and neck.
24 Q. In addition to the regular four year medical
25 degree, Dr. Spear, to become a medical doctor, how many more

1 years of medical study is required to become a specialist such
2 as you are, sir?
3 A. It takes a year of internship and four years
4 of residency, that is specialization in orthopedics.
5 Q. A total of five years in addition to a four
6 year medical degree?
7 A. Including internship, yes.
8 Q. In your capacity as an orthopedic specialist,
9 did you have occasion to examine Gordon Coleman?
10 A. Yes, I did.
11 Q. When was the first time that you saw Gordon
12 Coleman?
13 A. April 18, 1966.
14 Q. Did you take any type of history from Mr.
15 Coleman when you saw him, sir?
16 A. Yes, I did.
17 Q. Would you give the jury and his Honor the
18 benefit of the history Mr. Coleman gave to you?
19 A. He said while at work, he had been struck
20 by a falling tree, that the tree had struck and injured his
21 left shoulder.
22 Q. Did you make an examination of his shoulder
23 and his whole body?
24 A. Yes, I did.
25 Q. Would you tell the jury and his Honor when

1 you made this examination, exactly what you found?
2 A The patient was found to have pain over the
3 left shoulder region, both in the area of the outer part of the
4 collar bone or clavicle, as well as pain over the back part of
5 the shoulder, over the scapula or shoulder blade area. There
6 was pain on movement of the arm either by the patient attempting
7 to move the arm, which he could not do, or with the doctor
8 passively raising the arm. There was crepitation on moving the
9 arm, when the examiner placed his hand over the uppermost part
10 of the arm, the fractured collar bone made a crepitation or
11 cracking type movement. There was also a contusion of the left
12 scalp region, but the scrape is on the left side of the head but
13 the area was in the shoulder that was injured.
14 Q Did you order any X-rays be taken of this
15 patient, Gordon Coleman?
16 A Yes, I did.
17 Q Did you examine those X-rays?
18 A Yes, I did.
19 Q Would you tell his Honor and the Ladies and
20 Gentlemen of the jury what the X-rays disclosed?
21 A The patient had a fracture of the left
22 clavicle or left collar bone area, less than an inch from the
23 outermost part, from the part here. There was some displacement
24 of the area. There was fracture of the left acromium, the
25 outermost part of the shoulder blade area. There was a fracture

1 of the coronoid area, which is an additional part of the
2 shoulder blade area. And these were the major areas of fracture.
3 Q Did you order this man to be hospitalized?
4 A Yes, I did.
5 Q And while he was in the hospital, did you
6 treat him, sir?
7 A Yes, he was treated with immobilization of
8 the arm, first with a sling and later with a strapping of the
9 arm to help to hold the fractured collar bone in place.
10 Q Now, did you visit with him daily in the
11 hospital?
12 A Yes, sir. I did.
13 Q When did you release him from the hospital,
14 sir?
15 A He was discharged on April 21st.
16 Q When he was discharged from the hospital
17 on April 21st, did you release him at that time or did you
18 order followup examinations and treatment?
19 A I asked him to come into the office on the
20 25th, which he did.
21 Q And after his release from the hospital and
22 your first visit with him after hospitalization on the 25th, when
23 you saw him in your office, did you subsequently see him and
24 treat him on other occasions?
25 A Yes, the strapping was readjusted on May 7th,

1 May 9th, May 16th, and then on May 24th. On May 24th, X-rays
2 were taken and he was taken out of the sling and started on mild
3 exercising.
4 Q Dr. Spear, you have described that when you
5 first examined this man, the pain that you found in the various
6 areas of his left shoulder and his back. After you hospitalized
7 him, would this pain disappear or would it be normal for him to
8 experience pain while he was in the hospital in the condition
9 you have described?
10 A He would be expected to have some pain contin-
11 uing, but decreasing in amount.
12 Q How about after he was released from the
13 hospital? Would it be normal for him to continue to have pain
14 or should he be pain free?
15 A No, I would expect him to continue to have
16 discomfort, even after removal of the sling after he began to
17 work on getting back motion. It would be expected he would have
18 discomfort with this.
19 Q Did you ever come to any conclusion as to
20 whether or not this man has a permanent disability or not, sir?
21 A He came back in following admission to another
22 hospital on April 23rd. At that time, he had good motion. He
23 had a residual step off or a slight deformity of the outermost
24 part of the clavicle at the site of the fracture, collar bone.
25 He was still having some symptoms at that time and I did not feel

1 he could be evaluated for permanent-partial disability. I have
2 not seen him since that time up until today.
3 Q. Have you had the benefit of examining medical
4 reports from any other physicians that have treated this man?
5 A. Yes, sir. I have.
6 Q. Have you had the benefit of examining X-rays
7 taken of this man's shoulder by doctors or hospitals other than
8 yourself?
9 A. Yes, sir.
10 Q. Are you in a position today, Dr. Spear, based
11 upon your treatment of this man and the other knowledge that
12 you have accumulated concerning his condition, are you in a
13 position to say whether or not he has a permanent disability?
14 A. From looking at the X-rays and from seeing
15 the reports of the doctor that examined him recently, I would
16 certainly agree he has a permanent defect as a result of the
17 injuries. And if he is having symptoms related to the permanent
18 defects, then it would be fair to say he has a permanent-partial
19 disablement as a result of the injury he sustained.
20 Q. Dr. Spear, you treated the man in the
21 hospital daily, you said, sir, and in addition you saw him on
22 various occasions in your office. I'm going to hand you a Xerox
23 copy of the bill from your office and ask you to examine that sir,
24 and tell me whether or not that is your bill for services for
25 treatment and/or any report that you may have rendered in

1 accordance with that treatment?

2 A Yes, sir.

3 MR. GORDON: One second. The portion of it dealing

4 with the report isn't coming in. He's going to have

5 to exclude that.

6 MR. MOULTON: Is there any charge for any report

7 or anything?

8 A On your copy, there is not. On a copy I

9 brought along with me, there is one additional report, but on

10 this it does not include any.

11 MR. MOULTON: Thank you, sir. Mr. Gordon had the

12 opinion some of this was for reports. I would like

13 to offer this in evidence.

14 THE COURT: It will be received as plaintiff's

15 exhibit number seven.

16 MR. MOULTON: Thank you, Dr. Spear. Mr. Gordon may

17 have a question.

18 MR. GORDON: I have no questions.

19 THE COURT: Any objection to the doctor being

20 excused?

21 MR. GIBSON: No objection, your Honor.

22 MR. GIBSON: I would like to call Dr. Jennings. I

23 think he is in the witness room.

24 (Dr. Jennings entered the courtroom and was sworn.)

25 * * *

1 WALTON STANLEY JENNINGS, Witness, having
2 been first duly sworn, was examined and
3 testified as follows:
4 * * *
5 DIRECT EXAMINATION
6 BY MR. MOULTON:
7 Q Would you please state your name and
8 address and occupation to his Honor and the lady and gentlemen
9 of the jury.
10 A Walton Stanley Jennings, General Practitioner
11 in Chesapeake, Virginia.
12 MR. GORDON: We will stipulate that Dr. Jennings
13 is a general practitioner in Chesapeake and licensed
14 by the Commonwealth.
15 THE COURT: Is the stipulation acceptable, gentlemen?
16 MR. MOULTON: Yes, sir. And he is fully qualified?
17 MR. GORDON: As a general practitioner, yes, sir.
18 THE COURT: The stipulation is, lady and gentlemen
19 of the jury, that Dr. Jennings is a licensed
20 practicing physician in the Commonwealth of Virginia
21 in general practice.
22 * * *
23 BY MR. MOULTON:
24 Q How many years have you been practicing,
25 Dr. Jennings?

1 A Twenty. Twenty-one, to be exact.
2 Q All right, sir. Are you on the staff of any
3 hospitals in the Tidewater area, sir?
4 A Yes, sir.
5 Q How many hospitals are you on the staff?
6 Which ones?
7 A DePaul, Leigh Memorial, Norfolk General,
8 Kings Daughters.
9 Q DePaul, Leigh -
10 A Norfolk General. Kings Daughters.
11 Q You are on the staff of four hospitals?
12 A Yes, sir.
13 Q Now Dr. Jennings, at the request of counsel
14 for the plaintiff here, Mr. Gordon Coleman, did you have a
15 chance to make an examination of Mr. Coleman recently, sir?
16 A Yes, sir. On May 30th, this past Wednesday.
17 Q Prior to making your examination, were
18 you furnished background material by way of doctors reports,
19 hospital reports, from Dr. Curtis V. Spear, an orthopedist who
20 had previously seen Mr. Gordon Coleman?
21 A Yes, sir. They sent a photostated copy
22 of the hospital file and a photostated copy of his letters to
23 Mr. Gibson, and also there were some copies of little brief
24 notes of physicians in California.
25 Q Based on that medical history that you have

1 established, did you take a history from this patient, Gordon
2 Coleman, when you examined him?
3 A Yes, sir.
4 Q Would you briefly tell the jury and his
5 Honor what the history was?
6 A His history was he was injured when a tree
7 fell across his shoulder and head, that he was helping to hold a
8 rope pulling a tree over in some direction and the tree swung in
9 his direction and he went to run and tripped over the rope and
10 fell on the ground, and the tree hit him across the shoulder and
11 head. He was unconscious a brief period of time, was taken to
12 the hospital and the fracture of the shoulder was treated by Dr.
13 Spear. Following the hospital stay, he returned home and was
14 noted to be yellow jaundiced and sent to the Veterans Administra-
15 tion Hospital and treated for hepatitis. Following this, he had
16 been in California for further treatment. I inquired of Mr.
17 Coleman what would be his usual situation if he were in Cali-
18 fornia, and he had been sent to my office to be seen, by his
19 attorney. He informed me he fairly frequently needed physician
20 services and when he went to the doctor, his chief complaint was
21 pain in the shoulder and head at this particular time, persisting.
22 Q Dr. Jennings, after you had taken a history
23 from the patient here, Gordon Coleman, and after you had reviewed
24 all the background material that you have described that you have
25 in your possession, did you make a physical examination of this

1 man?

2 A. Yes, sir.

3 Q. Did you have made X-rays of the areas that

4 were involved in this previous hospitalization by Dr. Spear,

5 with the broken bones in his shoulder and chest and so forth?

6 A. Yes, sir.

7 Q. Do you have those X-rays with you?

8 A. Yes, sir.

9 Q. Did you use those X-rays in helping you

10 reach a conclusion when you examined this gentleman?

11 A. Yes, sir.

12 Q. Could we for the benefit of the jury -

13 take those X-rays if you would please, sir, that you made and

14 here's a box. And if you would tell his Honor and this lady and

15 these gentlemen of the jury what the X-rays disclose to you, sir,

16 that you took of Gordon Coleman. And if you would take them one

17 by one and put them on the view box. It would be all right for

18 him to step down there, wouldn't it, judge?

19 THE COURT: Yes, sir.

20 A. In addition to the shoulder X-rays, we did

21 skull films because Mr. Coleman was under the impression while

22 his stay in the Veterans Administration following his stay in the

23 hospital in Norfolk, that he had a skull fracture, according to

24 the Veterans Hospital in Kecoughtan, I assume. We did skull

25 films to show that. The skull fracture will not show healing in

1 an adult. I cannot demonstrate the healing lines.
2 Q Just the ones that helped you mach your
3 final conclusion.
4 A The significant X-ray involved the left
5 shoulder. According to the original injury, the report from the
6 hospital, Norfolk General, when Mr. Coleman was injured he had
7 a fracture. This is the left shoulder. Identified by the
8 number "L" on the film.
9 Q Identify it again for the record.
10 A There's an "L" on the numbers of the film.
11 L means left.
12 Q What is the number on the film?
13 A The numbers are all the same, as they apply
14 to the same patient. I make the differentiation with the right
15 shoulder, because they are normal.
16 MR. MOULTON: Could we get it marked for the record,
17 Judge, the one he is using, so the record will
18 reflect which film he is describing.
19 A Specifically the injury described by the
20 hospital X-ray in '66, when Mr. Coleman was injured, was when the
21 tree fell across and apparently broke the clavicle. This repre-
22 sents the healed fragments of the clavicle here. This bone
23 formation, some people call it arthritic type spurring. This
24 represents a fracture line in this particular part of this bone,
25 which is the clavicle. There is a fracture described of the

1 acromium of the clavicle, this portion of the clavicle. You can
2 identify this projection of the bone here. This is the shoulder
3 blade. You can see the fracture line here is healed. The
4 third fracture described on the report from Norfolk General is a
5 break through the scapula. This is best shown in the normal
6 state as one solid bone. There remains in Mr. Coleman a separate
7 fragment. This is outlined here. It's a separate fragment bone
8 which normally is attached to the bone which is here, which is
9 pulled down. This is the primary cause of Mr. Coleman's
10 continued disability. The findings relevant to the present sit-
11 uation is Mr. Coleman's limitation of motion. He can raise his
12 arm like this, not like this. If you put pressure on his arm
13 and ask him not to move it up and down, this one goes down.
14 With his arm posteriorly, he can't get past his belt line. He
15 can't scratch his shoulder. Those are the limitations, as far
16 as physical movement of his arm and hand. This is the same area
17 described on the X-rays of 1966. Frankly, in my experience it
18 is unusual for these fragments to be so widely apart and not to
19 have healed. In comment, he's been seen by many people,
20 apparently, on the West coast and Veterans Hospital. But
21 specifically, whether something could have been done earlier to
22 attach the two bones together, is a question. I think nowadays
23 something would be done to wire them together several months
24 ago. I don't think Dr. Spear had an opportunity to see him after
25 this. The reason Mr. Gibson sent him to my office is Dr. Spear

1 could not arrange to see him before time to appear in court.
2 Q This was done in your office because Dr.
3 Spear could not -
4 MR. GORDON: He couldn't know that. It would be
5 hearsay.
6 A I'm relating the history given to me by
7 Mr. Gibson and the patient.
8 * * *
9 BY MR. MOULTON:
10 Q You were speaking about plaintiff's exhibit
11 eight, doctor, when you were describing that?
12 A That's right. Now, this is the picture of
13 the right shoulder. If you can possibly see what we are talking
14 about. You see, this bone that you see here is a separate bone
15 you can't see here, because it's part of this big bone here.
16 This is normal. This is the right side.
17 Q That is the -
18 A This is the right shoulder.
19 Q Plaintiff's exhibit number ten you are
20 referring to is the normal shoulder?
21 A That's right.
22 Q Compared to plaintiff's exhibit number
23 eight?
24 A And this is marked by an "R" which is very
25 faint, but you can see it to identify it. The other complaints

1 that Mr. Coleman stated were present was in addition to the pain
2 in the shoulder, was that he had recurring pain in his temple
3 in the left side and the back part of his neck. This would be
4 consistent with - the trapezius muscle actually goes in the
5 shoulder and up the side of the neck. This could cause a pain
6 in the side of the neck. It's consistent with his complaint.
7 However, his statement was he took probably aspirin or bufferin
8 everyday and occasionally took Indozine for pain, which he did
9 not take constantly but as needed. He also took Valium, a muscle
10 relaxant, as needed.
11 Q Doctor, from your examination, study of this
12 man's history, X-rays here that you have shown to the jury and
13 to his Honor, can you give this jury and his Honor an opinion as
14 to whether this man has a permanent disability, sir?
15 A It is my opinion on the basis of the X-ray
16 findings and his examination and history, that what he experiences
17 today he will experience the rest of his life, unless some other
18 procedure is done to correct the shoulder disability.
19 Q Do you feel a procedure would be in order
20 at this time, to try to correct it after this passage of time?
21 A I'm not that much of an expert in this field,
22 but I would say there are a lot of -
23 MR. GORDON: He just said he isn't an expert in the
24 field, so I submit he can't answer it.
25 MR. MOULTON: I think he ought to finish his answer,

1 your Honor. He said, "I'm not an expert, but -"
2 THE-COURT: Lady and Gentlemen, suppose you step
3 in the jury room, please.
4 (The jury entered the jury room.)
5 MR. MOULTON: He never got a chance to finish the
6 answer to the question. I asked him after this
7 passage of time does he feel a procedure would be
8 necessary or proper or warranted. He said, "I'm not
9 an expert, but -". I don't know what he was going to
10 say. The fact he qualified his answer by saying,
11 "I'm not an expert" I don't think is grounds for an
12 objection. He should be allowed to answer the
13 question, then object. He's an expert. He's a
14 medical doctor.
15 MR. GORDON: Well, I think -
16 THE COURT: When a witness is called as an expert and
17 qualifies himself to the point and says he is not an
18 expert, that certainly is something that should be
19 precluded from the jury until the determination of
20 what answer is going to be made.
21 MR. MOULTON: I think what he meant is "I'm not an
22 orthopedic expert." Everybody knows a medical doctor
23 is an expert.
24 MR. GORDON: Wait a minute, your Honor. I don't
25 think Mr. Moulton should be suggesting to the witness

1 the answer. Dr. Jennings is intelligent and can
2 answer for himself. Obviously, there are fields of
3 medicine a G.P. can't talk about. When you get into
4 psychiatry, orthopedic surgery, I don't think a G.P.
5 can ramble all over the field of medicine and say
6 I'm an expert. He doesn't purport to be and I don't
7 think he should venture his opinion.
8 THE COURT: The court will take judicial notice of
9 the integrity of the doctor, and I don't think -
10 knowing the doctor as I do - personally and pro-
11 fessionally - that anyone is going to suggest an
12 answer.
13 MR. MOULTON: I didn't mean to.
14 THE COURT: I'm going to let him complete the answer
15 he started, for the record.
16 MR. MOULTON: Then you can rule on whether it's an
17 objectionable answer, sir. Go ahead and answer.
18 A. I'm not an expert in that particular field
19 to make that decision, but I would suggest if he were my patient
20 that I would suggest he be seen by an orthopedist and have the
21 special studies that would be necessary to decide whether an
22 operation could help the situation. There are certainly things
23 must be done to see if surgery would help him. Specifically,
24 such procedure would be a means of stablizing the two fragments.
25 What can be done to make it whole again. Sometimes there is

1 such a fibrous union that it wobbles a little, but the integrity
2 is there. This is a field I say I'm not an expert to make a
3 determination. As a doctor, I would suggest he see an orthopedic
4 surgeon in reference to it.
5 MR. MOULTON: Do you object to that, Mr. Gordon?
6 MR. GORDON: No.
7 MR. MOULTON: That's what I said.
8 MR. GORDON: Of course, you don't know what he is
9 going to say and the damage is done.
10 THE COURT: I think you are perfectly right in
11 doing what you did under the circumstances, Mr.
12 Gordon, and the Court finds no criticism. Bring in
13 the jury.
14 (The jury entered the jury box.)
15 MR. MOULTON: Your Honor please, may I have the
16 court reporter read that answer for the jury, rather
17 than the doctor give it again? It was quite lengthy.
18 THE COURT: I think it would be better coming from
19 the doctor's mouth, Mr. Moulton.
20 * * *
21 BY MR. MOULTON:
22 Q If you can repeat that, Doctor.
23 A As I recall, the question was whether or not
24 additional procedures could be helpful in relieving this problem.
25 My answer was to the effect that I'm not an expert in this field,

1 but if he were my patient, I would make a recommendation to him
2 in this regard that there are possibly procedures that could be
3 done, but whether or not they would help him would depend on
4 certain examinations that I'm not expert to do, that I would
5 refer him to certain people to do. You want to do something to
6 get these parts together. Maybe you couldn't or maybe you could.
7 But tests would determine whether a bone graft, for example,
8 would solve some of his problems.
9 Q What do you mean by procedures?
10 A Operation.
11 Q Dr. Jennings, for the X-rays, sir, and
12 examination and so forth, what do you charge for your services
13 and the X-rays, the physical examination you gave this man?
14 What is your total bill including X-rays?
15 A My total bill was $70.00.
16 Q Mr. Gordon may have questions.
17 * * *
18 CROSS EXAMINATION
19 BY MR. GORDON:
20 Q You saw Mr. Coleman at the request of Mr.
21 Gibson to come here today to testify, isn't that right?
22 A Yes, sir.
23 Q You didn't see him to treat him or anything
24 of that sort?
25 A No, sir.

1 Q The injury he has falls in the field of
2 orthopedic surgery, does it not?
3 A Not entirely.
4 Q Basically, though, the muscular - skeletal
5 system, the injury described.
6 A Generally, after the orthopedics have done
7 all they can do,the followup is usually in the field of general
8 medicine and the orthopedic doesn't usually follow him closely
9 after that.
10 Q If you were referring somebody for further
11 evaluation, if he had been your patient you would send him back
12 to an orthopedist now?
13 A In the sense of hoping a surgical procedure
14 could help him. But the orthopedist would probably refer him
15 back, if he wasn't going to do surgery.
16 Q Under normal procedure, he would stay with
17 this orthopedist, wouldn't he?
18 A Normal procedure, he would stay with the
19 family doctor if the orthopedic surgeon wasn't going to do surgery.
20 Q Didn't he have a fracture?
21 A He had fracture and other problems, but the
22 orthopedist would not keep following him on a regular basis.
23 That is not their field.
24 Q Fracture is not their field?
25 A If you're saying this man is not going to

1 have additional work by orthopedist, he is not going to keep
2 the man coming back to prescribe pain medicines and so on. This
3 is general medicine.
4 Q If the man is having problems with the
5 muscular-skeletal system - isn't that the problem he is having?
6 A Yes.
7 Q Isn't that the orthopedic field?
8 A If you can repair it.
9 Q If someone has a problem with ball and joint,
10 isn't that the expert you go to? What expert field is there
11 other than orthopedics to treat the field you describe?
12 MR. MOULTON: That had two or three questions in it
13 and didn't give the doctor time to answer the first
14 one.
15 A May I answer this way. Mr. Coleman has been
16 in several V.A. hospitals and I haven't checked with him as to
17 the accuracy of what I'm going to predict. I predict at the
18 V.A. hospital he was put under the care of a general medical
19 man. That man asked for suggestions from other fields. This is
20 the way medicine works. Whether it's good or bad is your
21 opinion, but this is the way you usually do things in medicine.
22 For expert opinion and surgical procedures and followup care
23 afterwards, usually the orthopedic man does his work. But for
24 general followup care with use of muscle relaxants and pain
25 relief and so on, the orthopedic doesn't concern himself with it.

1 He has too much to do in terms of other procedures.
2 Q You're saying orthopedics don't prescribe
3 muscle relaxants?
4 A I'm saying this is my viewpoint of what
5 medicine is today. The accuracy of my answer can be checked by
6 checking Mr. Coleman's records at the V.A. hospital.
7 Q The accuracy would be what orthopedic
8 surgeon does?
9 MR. GIBSON: I think Dr. Jennings has answered the
10 question. Whether counsel agrees with him or not
11 is of no significance. We are going over the same
12 thing now about three times. If you check the
13 records, I think Dr. Jennings has answered his
14 question twice and now he is still coming back to
15 the question of whether or not muscle relaxants or
16 this, that and the other are prescribed by ortho-
17 pedics. Of course they are. I think he has
18 answered the question enough. I suggest if he has
19 any other questions, then ask them.
20 THE COURT: It appears to the Court what Dr.
21 Jennings is testifying is what the custom is in the
22 profession in this area, confronted with situations
23 of this type.
24 * * *
25 BY MR. GORDON:

1 Q To determine an injury of this sort or to
2 read the X-rays, orthopedics are certainly more qualified at
3 reading fracture X-rays and this type thing than a G.P.?
4 A If you want to argue the ability of G.P.'s
5 as opposed to orthopedic men, we're going to spend a long time.
6 I think you're talking about individual abilities and personali-
7 ties. In that field, each person has their own expertise. If
8 you tell me another guy can see the X-ray better than I can -
9 it takes two eyes. He can see. That's all it takes. Anyone
10 of a lay personality - you can show them normal and abnormal and
11 they can see what it is.
12 Q When looking at X-rays of fractures of a bone,
13 that falls more in the line of what an orthopedic does than G.P.
14 does.
15 A No. To answer your question, a radiologist
16 is the man that handles that particular situation.
17 Q Thank you, doctor. That's all.
18 THE COURT: Anything further of the doctor?
19 MR. GIBSON: That's all.
20 THE COURT: Any objection to him being excused?
21 MR.GIBSON: No, sir. Now we will let Mr. Coleman
22 finish.
23 THE COURT: You may resume the stand, Mr. Coleman.
24 * * *
25 GORDON COLEMAN, Plaintiff, having

1 been recalled to the witness stand, was
2 examined and testified as follows:
3 * * *
4 DIRECT EXAMINATION
5 BY MR. GIBSON:
6 Q Now, Mr. Coleman, just a couple of questions.
7 One, and I'm not positive as to whether or not I asked you this
8 question. Have you on any prior occasion ever assisted or
9 carried on any work relative to removing a tree adjacent to a
10 home?
11 A No, I never had.
12 Q You had no experience in that at all?
13 A No.
14 Q And as to any rigging or the type of rigging
15 that would be used by a tree expert, did you take part in pre-
16 paring or tieing in any of the lines or anything on this
17 occasion?
18 A No, I did not.
19 Q All right, sir. Answer Mr. Allen Gordon.
20 * * *
21 CROSS EXAMINATION
22 BY MR. GORDON:
23 Q Mr. Coleman, on this occasion you were up
24 at Mr. Barton's home watching T.V. when Mrs. Mary High came by
25 and asked if you could render some assistance, asked Mr. Barton

1 if he could render some assistance in removing a tree in the
2 High's backyard. Is that true?
3 A Yes.
4 Q She came about five doors down to his house
5 and asked if the two of you would come down?
6 A Yes.
7 Q You returned together, the three of you?
8 A I don't know if she was with us. We started
9 running.
10 Q Isn't it a fact -
11 MR. MOULTON: Let him answer the question.
12 A We started running - my brother-in-law and
13 myself - because she said Charles needed help in a hurry.
14 Q When you got there the tree wasn't going
15 anywhere - it hadn't been cut through. It was still standing,
16 was it not?
17 A The tree had been cut and Charles had two
18 ropes. The tree was tied off when we got there, leaning toward
19 his home.
20 Q Wasn't the tree a "V" type tree?
21 A It was not, no. It was a tree like the
22 rest of the trees in his yard.
23 Q It didn't have a "V" out of it and you could
24 see one stump had been cut off and the other one was there?
25 A He had a V cut.

1 Q Wasn't it one stump, and out of it came two
2 branches where one had been cut before?
3 A Those branches were laying in the yard. They
4 had been cut off the main tree.
5 Q The rope was tied to the tree?
6 A It was tied from the tree out to another
7 tree.
8 Q The rope was about waist high, I believe,
9 was it not? Approximately waist high? Along here?
10 A The end of the rope wasn't. It was tied
11 down.
12 Q At the point where you were standing, it was
13 about waist high?
14 A I was at the end of the rope where it was
15 tied off.
16 Q There was an explanation made of what he
17 desired to do, correct?
18 A All he told us was to hold the rope and take
19 the strain off the tree where it was leaning toward the home,
20 so it wouldn't fall back when he made the additional cut.
21 Q He had just notched one side of the tree?
22 A Yes.
23 Q Just a mere notch?
24 A Yes.
25 Q When you got hold of the ropes, you and Mr.

1 Barton grabbed the ropes and were pulling on them?
2 A We were taking the strain off the tree.
3 Q You were pulling in the direction you were
4 standing from the tree, away from the home?
5 A Yes. Away from the home.
6 Q You were standing about the middle of his
7 yard, were you not?
8 A I would say about the middle of the yard,
9 yes.
10 Q About halfway from each side of the yard?
11 A I would say twelve, maybe fourteen feet from
12 the tree.
13 Q I understand that, but about an equal dis-
14 tance, so to speak, from his left side yard?
15 A The ropes was tied at an angle from the way
16 the tree was supposed to fall straight out.
17 Q The tree did fall straight out, didn't it?
18 A The tree did not fall straight out. That's
19 why I got hit.
20 Q I put you on guard, I expect to contradict
21 you.
22 A I was told the tree was supposed to fall
23 straight out. I had no knowledge of tree work. When the tree
24 fell toward me, that's when I ran.
25 Q You were supposed to step back from the tree,

1 weren't you?
2 A Step away from it.
3 Q As it started to fall -
4 A I saw the tree fall.
5 Q And you fell down?
6 A I tripped on the rope I was holding.
7 Q And you fell down?
8 A Right.
9 Q And that's when actually a branch of the
10 tree hit you?
11 A I don't know what hit me. I was unconscious
12 at first. I know I was under the tree.
13 Q You were unconscious?
14 A (Witness nodded affirmatively.)
15 Q You were pulling on the rope immediately
16 prior to the tree coming down?
17 A My brother-in-law was at the same angle
18 I was, with the other rope. It was supposed to fall straight
19 out.
20 Q Wasn't it only one rope?
21 A It was two ropes.
22 Q Where was the other rope tied to?
23 A Tied to a tree, as far as I know. We had
24 hold of the rope when we got there.
25 Q Wasn't the rope tied from one tree to

1 another tree?
2 A. I don't recall what they were tied to.
3 Q. You don't recall? You don't deny the rope
4 was tied from the tree that was being cut to one other tree,
5 do you?
6 A. I don't deny the rope I was holding was
7 tied to the tree that fell on me.
8 Q. You were pulling on this particular rope
9 just prior to the tree falling?
10 A. Right.
11 Q. The tree fell in the direction you were
12 pulling?
13 A. The tree twisted on the stump and fell
14 toward me.
15 Q. It fell in the direction you were pulling,
16 was it not?
17 A. Yes, sir.
18 Q. In fact, you fell down - you weren't able
19 to move, isn't that true?
20 A. I saw the tree coming at me and I started
21 to run and I tripped.
22 Q. You had your back to the tree?
23 A. Sideways. I didn't have my back to the
24 tree. I was facing the tree when it started to fall.
25 Q. You turned to run?

1 A. Right.
2 Q. You ran in the direction the tree fell?
3 A. I was running away from the tree.
4 Q. There were three of you present at that
5 time, and Mrs. High, isn't that true?
6 A. Charles, his wife - my niece. She was
7 there for awhile. Far as I can recall, she was there, my niece.
8 My brother-in-law and myself.
9 Q. There were three men, correct?
10 A. Three men, yes.
11 Q. And Mrs. Mary High?
12 A. Yes.
13 Q. Mr. Barton was right beside you there pulling,
14 was he not?
15 A. No.
16 Q. He wasn't?
17 A. Mrs. Barton?
18 Q. Mr. Barton.
19 A. He was there, yes.
20 Q. He was pulling right beside you?
21 A. He was to the right of me.
22 Q. You don't recall what happened after that?
23 I take it you were knocked unconscious?
24 A. Yes.
25 Q. And you were taken to the hospital?

1 A Yes.
2 Q Thank you. That's all.
3 THE COURT: Anything further?
4 MR. GIBSON: No, sir.
5 THE COURT: You may step down. Who will you have?
6 MR. GIBSON: We would like to call Ben Smith.
7 * * *
8 BENJAMIN SAMUEL SMITH, Witness,
9 having been first duly sworn,
10 was examined and testified as
11 follows:
12 * * *
13 DIRECT EXAMINATION
14 BY MR. GIBSON:
15 Q Please state your name and home address.
16 A Benjamin Samuel Smith. 4143 First Street,
17 Chesapeake, Virginia.
18 Q And Mr. Smith, who do you work for?
19 A Ashburn Tree Expert Company.
20 Q How long have you been in the business of
21 tree expert work?
22 A It's going on ten years.
23 Q I'll ask you whether or not you served your
24 apprenticeship and training in the tree business?
25 A Yes, sir.

1 Q And during the apprenticeship, how long
2 were you in the lower grades, and if so, what was that grade?
3 A I started out as a ground man and I went
4 from A, B, C,tree ranks, to the top position, where I'm at now.
5 Q The firm that you work for now, who do they
6 do work for? In what areas?
7 A They contract for VEP Company.
8 Q Do they work in this area?
9 A Yes, sir.
10 Q And is this a large organization or not?
11 A Yes, sir. It's the largest in the United
12 States.
13 Q And I'll ask you as to whether or not you
14 are familiar with the removal of trees, say adjacent to or close
15 to a building?
16 A Yes, sir. I am.
17 Q Do you frequently have that responsibility
18 with your organization?
19 A Yes, sir.
20 Q Do you supervise and are you a supervisor
21 of a crew of men for this purpose?
22 A Sometimes yes, sometimes no.
23 Q I'll ask you, showing you plaintiff's exhibit
24 number one, do you see the tree and the stump there?
25 A Yes, sir.

1 Q How would a tree that was that close to a
2 home, how would you remove it?
3 A Well, this close to a house, you would more
4 than likely take it down in sections.
5 Q When you say take it down by sections,
6 what do you mean?
7 A Limbing the tree out and taking the butt
8 portion of the tree and lowering it in small sections either
9 with a rope or your hands.
10 Q Would you bisect the tree and lower it down
11 in small sections? Is that what you're telling his Honor and
12 the lady and gentlemen of the jury?
13 A Yes, sir. That would be the safest way.
14 Q In your work, are you taught and have you
15 been taught the use of a rope and how it is to be used in
16 removing limbs and trees and things of that nature?
17 A Yes, sir.
18 Q And as to tieing a tree off, are there
19 certain procedures that are used relative to that operation?
20 A Yes, sir. It is.
21 Q Now, the testimony has been here that this
22 tree was approximately twenty-five to thirty foot high. Would
23 this have any effect on the removal as to how this tree would
24 be removed?
25 A Well, yes, sir. Twenty-five or thirty feet

1 high, like I say it should come down in sections.

2 Q If you removed it in sections, would there

3 be any danger of any sections falling on anyone or anything of

4 that nature?

5 A No, sir. Because there wouldn't be nobody

6 under you to start with.

7 Q From the testimony here, there has been

8 testimony that two ropes were tied off to this tree, and as a

9 result of the tree falling, it injured the plaintiff. Was this

10 the proper procedure to follow in the removal of this tree?

11 MR. GORDON: That isn't a full description.

12 Unless he is there, he can't venture an opinion.

13 MR. GIBSON: I think, your Honor please, of course,

14 I have put part -

15 MR. GORDON: That is his version of it, your Honor.

16 MR. GIBSON: I understand, but I think he can pass

17 on the facts that have been presented here.

18 THE COURT: You can ask him - the evidence has been

19 put in and he can ask the witness.

20 * * *

21 BY MR. GIBSON:

22 Q There has been testimony here that the tree

23 was approximately twenty-five to thirty foot high and that it was

24 tied off with ropes within the area around the tree, that is two

25 ropes in the area.

1 A (Witness nodded affirmatively.)
2 Q And there is further testimony that the
3 tree had been notched and then was subsequently cut.
4 A (Witness nodded affirmatively.)
5 Q There has also been testimony to the effect
6 that the tree, in fact, twisted and fell on the plaintiff after
7 the cut. Now, my question to you is what steps should have been
8 taken to prevent the tree from falling on the plaintiff? That is
9 from the standpoint of your opinion and your professional work
10 as a tree expert.
11 A Well, it should have been a proper notch,
12 to start with, in the front of the tree.
13 Q Proper notch?
14 A Yes, sir.
15 Q What do you mean by -
16 MR. GORDON: Your Honor, the testimony was there
17 was a notch. There is nothing in the testimony it
18 was not properly notched. He can say there should
19 have been a notch in front of the tree, and that is
20 what the testimony was. That's in the testimony.
21 THE COURT: The part with which we are to be
22 concerned, he has said a proper notch. The only
23 evidence,Mr. Gibson, was there was a notch. He can
24 describe the type of notch he thinks ought to be
25 there and then maybe a question as to whether the

1 notch in question was a proper notch. Lady and
2 Gentlemen, you are to disregard the statement of
3 the proper notch. Whether it was proper will be
4 something for you to determine at the proper time
5 in consideration of all evidence and not by the
6 witness at this time.
7 * * *
8 BY MR. GIBSON:
9 Q Step over here, Mr. Smith. Now, I hand you
10 the exhibit number four and when you say that the tree is to be
11 notched, what do you mean? How would it be notched as far as
12 your procedure is concerned?
13 A It should be notched in the shape of a "V"
14 like the shape of a watermelon.
15 THE COURT: I'm having difficulty hearing.
16 Q Speak up a little louder.
17 A You should make a notch in a "V" shape like
18 a slice of watermelon. Come behind the notch, about two inches
19 above the notch and cut above it to keep the tree from leaning.
20 Q What determines where the notch is and where
21 the subsequent cut is made? As I understand it, would the
22 notch be level with the subsequent back cutting?
23 A No, sir.
24 Q It would not be?
25 A No, sir.

1 Q Would it be based on the height of the tree
2 or where do you determine as to the distances?
3 A Like I said, it needs to be about two inches
4 above the notch in the front. That keeps the tree from leaning
5 back to the house. The notch in the front, when you start
6 pulling, it will give and come right over.
7 Q According to this photo of the stump, was
8 it notched in that manner?
9 MR. GORDON: Just a minute. That photo does not
10 show the notch one way or the other. The testimony
11 is - we admitted it as a photograph of what existed
12 several weeks after. He can't testify to what the
13 photo shows. This is not the evidence. This is two
14 weeks afterwards and not what was there at the time
15 the tree was cut.
16 MR. GIBSON: He can answer whether the notch was
17 there.
18 THE COURT: The way to ask it is based on your
19 experience and knowledge in the movement and cutting
20 of trees, can you look at the photograph and tell
21 if in this instance it was properly notched. I'll
22 permit you to ask that.
23 * * *
24 BY MR. GIBSON:
25 Q Looking at that photograph, and with the

1 experience that you have in this field for the last ten years
2 in removal of trees, can you determine from that photograph
3 as to whether or not that was a proper notch?
4 A. No, sir. I see where it's been cut here
5 once before. Right here on the stump. But I can't determine
6 whether it's a proper notch.
7 MR. GORDON: He said he couldn't determine it.
8 That is what I was getting at, your Honor.
9 * * *
10 BY MR. GIBSON:
11 Q. Relative to the removal of a tree this
12 height and in this position, you say would have to be removed
13 or it would be proper to remove -
14 MR. GORDON: Your Honor, haven't we been over that
15 four times? I object.
16 THE COURT: I'm going to sustain your objection.
17 * * *
18 BY MR. GIBSON:
19 Q. Relative to roping off of a tree, of course
20 that is a part of your business and operation, isn't it?
21 A. Yes, sir.
22 Q. Now, are there rules and regulations rela-
23 tive to rigging a tree?
24 A. Yes, sir.
25 MR. GORDON: What rules and regulations?

1 THE COURT: I don't think you have rules and regula-
2 tions. I think you have a procedure.
3 * * *
4 BY MR. GIBSON:
5 Q You have certain procedures that you do
6 follow?
7 A Yes, sir.
8 Q Relative to the rope, for example, that is
9 used and the length of the rope, what determines the length of a
10 rope on the felling of a tree?
11 A It's according to how high the tree is.
12 The rope should be extended beyond the fall of the tree.
13 Q What is the purpose of that?
14 A That's to keep from hitting anybody, anybody
15 in the way or pulling the rope.
16 Q Now, there has been testimony that this
17 tree twisted on its stump. Is that possible with what is
18 indicated in that photograph?
19 A Well, it can twist on a stump if it's not
20 properly notched. Like I said while ago, it can twist or fall
21 any way.
22 Q The notching you referred to is what you
23 just explained to his Honor and this lady and members of the
24 jury?
25 A Yes.

1 Q Do you have any difficulty of a stump kicking
2 back or anything of that nature?
3 A Have I had any?
4 Q Can you have that difficulty?
5 A Yes, sir. If you don't notch it right.
6 Yes, sir.
7 Q Answer counsel.
8 * * *
9 CROSS EXAMINATION
10 BY MR. GORDON:
11 Q If Mr. High notched the tree in a watermelon
12 wedge, and then he cut above the notch in the back and the tree
13 fell straight out, would that indicate a proper notch and proper
14 cutting?
15 A It's according to the width of the tree,
16 according to how big it was.
17 Q If the tree fell straight out from the
18 house, and assuming this is the house, and if the tree fell -
19 and I'm referring to exhibit five - if the tree fell straight
20 out from the house perpendicular to the house, and went straight
21 out into the yard, and went over without twisting on the stump,
22 and went straight down, would that indicate it had been properly
23 notched and properly cut?
24 A I would have to see the tree when it fell
25 to know.

1 Q Really all your testimony is you would have
2 to be there when it was notched or be there in connection with
3 anything done to cutting or anything?
4 A I'm telling you how to properly do it.
5 Q Isn't it necessary for you to be there
6 before anything was changed?
7 MR. MOULTON: He answered it. I object.
8 THE COURT: He is on cross examination.
9 MR. MOULTON: Let his Honor rule.
10 THE COURT: The witness is on cross examination.
11 MR. MOULTON: He didn't get the answer he wanted.
12 Then he asked the same thing.
13 MR. GORDON: He said he couldn't say without being
14 there.
15 MR. MOULTON: No, he said, "I'm telling you the
16 proper procedure."
17 * * *
18 BY MR. GORDON:
19 Q In order to determine whether it was properly
20 notched and properly cut, wouldn't you have to see the notch and
21 the cut before anything had been done to it? Isn't that true?
22 A I guess you would say that.
23 Q If you didn't see the notch and you didn't
24 see the cut, you then couldn't express an opinion whether it was
25 properly notched or properly cut, isn't that true?

1 A Yes, sir.
2 Q These pictures here don't disclose the
3 notch or the cut, do they?
4 A In that one picture, it looks like it's cut
5 at a straight angle.
6 Q If it had been cut subsequent, if the tree
7 had been cut up and the pieces had been cut off the tree after
8 it had fallen, that would make a big difference in your determi-
9 nation, would it not?
10 A Yes, sir. If you take it down in pieces
11 and get it to a safe level and notch your tree -
12 Q I'm speaking about the point it is notched.
13 MR. MOULTON: Object to Mr. Gordon interrupting
14 the witness.
15 THE COURT: The witness has not finished his answer.
16 Permit him an opportunity to answer it.
17 * * *
18 BY MR. GORDON:
19 Q Go ahead.
20 A Repeat it, please.
21 Q In order to determine whether a tree is
22 properly cut and notched, you have to see the notch and cut
23 itself, either in person or an actual accurate photograph of it,
24 isn't that true?
25 A Yes, sir.

1 Q If you don't see an accurate photograph or
2 the actual things, you can't determine whether it's been
3 properly cut or notched, isn't that true?
4 A That's true.
5 Q If the testimony was to come out that after
6 this tree had been notched and cut, the stump was cut again more
7 level with the ground, that would make it impossible for you
8 not to tell how the cut was at all - if you cut a piece off the
9 stump after it had first been notched and cut.
10 THE COURT: You asked two questions.
11 MR. MOULTON: He's asking a hypothetical - if, if.
12 MR. GORDON: I think this is going to be the testi-
13 mony.
14 MR. MOULTON: If you assure his Honor - that's what
15 you have to do. You're putting if something
16 happened.
17 * * *
18 BY MR. GORDON:
19 Q Isn't that true?
20 A Yes, sir.
21 Q Really, you can't tell anything from the
22 photograph if the evidence develops that pieces have been cut
23 off where the notch was after the tree had fallen and before
24 the photograph had been taken, isn't that true?
25 A Yes, sir.

1 Q Thank you. That's all.
2 * * *
3 REDIRECT EXAMINATION
4 BY MR. GIBSON:
5 Q But as I understand your testimony, under
6 no circumstances would you fell this tree in one section,
7 adjacent to the home?
8 A That's right.
9 Q All right, sir. That's all. Come down.
10 THE COURT: Any objection to the witness being
11 excused?
12 MR. GORDON: No objection.
13 THE COURT: Who do we have next?
14 MR. GIBSON: This concludes the testimony for the
15 plaintiff at this time.
16 THE COURT: You rest?
17 MR. GIBSON: Yes, sir.
18 THE COURT: Lady and Gentlemen, if you will please
19 step in the jury room.
20 (The jury entered the jury room.)
21 MR. GORDON: I move to strike the evidence and
22 enter summary judgment on two grounds. One, there
23 hasn't been any evidence of any negligence on the
24 part of the defendant in this case. It is pure
25 speculation. They brought in, and I assume they

1 were attempting to establish by the expert that
2 the tree had not been properly notched or properly
3 cut. But this expert said quite frankly he couldn't
4 determine where the notch or cut was. There wasn't
5 anything there. This gentleman said the tree was
6 notched. He never said how it was notched, where
7 the cut was and so forth. I submit there isn't any
8 evidence to any negligence on this party's part.
9 The degree of care this party uses is certainly
10 different than the degree of care an expert would
11 use in removing trees. I think the Court knows
12 that. If you assume there was a dangerous situation,
13 as they want to have the jury believe, present there
14 and the party comes out and participates in pulling
15 the tree. And in pulling it down, it falls on him
16 because he got entangled with the rope he is pulling.
17 I can't conceive of a case a man can't be guilty of
18 contributory negligence or having assumed the risk.
19 I can't think of a case where you would be more
20 guilty of contributory negligence, and I move to
21 strike the evidence and enter summary judgment.
22 THE COURT: Have you searched the law on assumption
23 of risk where someone renders assistance voluntarily,
24 under an emergency or semi-emergency condition?
25 MR. GORDON: Your Honor, there wasn't an emergency

1 condition here. The man came down. He was trying
2 to cut it. He ran down, but he didn't say it was
3 an emergency.
4 THE COURT: I said emergency or semi-emergency.
5 The evidence is the young lady came down running
6 and solicited the assistance of the plaintiff and
7 his brother-in-law, because of the fear that the
8 tree was going to fall on the house. In the Court's
9 mind, that creates a degree of emergency.
10 MR. GORDON: Let me answer this. I believe the
11 evidence was they ran down. There wasn't evidence
12 she ran down. I specifically asked him and he said
13 he couldn't recall. He said that he ran back.
14 THE COURT: That they ran. That would indicate that
15 the circumstances were such - this is what the Court
16 feels - not to be specific. It did appear to the
17 Court in consideration of all the evidence that the
18 plaintiff and the gentleman with him had a state of
19 mind that an emergency existed. I'm not familiar -
20 that familiar with the law in the particular situa-
21 tion as covers the assumption of risk.
22 MR. GORDON: Your Honor, let me answer that. There
23 isn't any change in the duty. When you come in and
24 it's a danger situation existing, and you assume
25 that risk, whatever the condition is there, you

1 assume it. He came in as a volunteer. He didn't
2 have to. It wasn't a compunction or duty on
3 him to assume the risk. But he came in and assumed
4 it, and I submit he is guilty in that situation.
5 The evidence is such from their testimony and their
6 expert, their expert when you weigh it, he said
7 he can't say anything. He says in his opinion he
8 would take it down in sections. That doesn't make
9 him guilty of negligence. It hasn't shown negli-
10 gence on this party's part. An expert may have a
11 better way of doing it than someone else. The
12 accident came about not because of the tree falling.
13 This is uncontradicted testimony. The accident
14 came about because he fell and tripped on the rope
15 he was pulling.
16 THE COURT: Gentlemen, I'll hear from you on the
17 liability.
18 MR. GIBSON: Your Honor please, I say that there are
19 two questions here that I think are throughout
20 Virginia law, that it's a question first of the
21 negligence of the defendant. I say that the
22 defendant from the plaintiff's testimony here shows
23 that he attempted to remove this tree and that it
24 got apparently in a situation in which he was trying
25 to remove it himself. And he really created a

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* * * * * * * * *

1 MR. GORDON: Yes, sir.
2 THE COURT: I have reviewed the authorities,
3 gentlemen, during the recess. It is a very close
4 decision and the Court has some difficulty in seeing
5 how reasonable minds can differ. It appears that
6 under the circumstances the question of assumption
7 of risk should be left to the jury, so I'm going to
8 overrule your motion at this time, Mr. Gordon.
9 MR. GORDON: Note my exception.
10 THE COURT: Yes, sir. And note your exception. Ask
11 the jury to come in.
12 (Jury entered the jury box.)
13 (All counsel approached the bench an a side bar
14 conference was held.)
15 THE COURT: Who will you have as your first witness,
16 Mr. Gordon?
17 MR. GORDON: Mary High.
18 * * *
19 MARY JULIE HIGH, Witness, having
20 been first duly sworn, was examined
21 and testified as follows:
22 * * *
23 DIRECT EXAMINATION
24 BY MR. GORDON:
25 Q Would you please state your name.

1 A Mary Julie High.
2 Q You are the wife of Charles High, who sits
3 to my left?
4 A Yes, I am.
5 Q And do you live at 140 Marian Drive?
6 A Yes, I do.
7 Q How long have you lived there?
8 A About eleven years.
9 Q I believe you are a housewife?
10 A No, I'm working.
11 Q You work also?
12 A Yes, sir.
13 Q You are a housewife and work?
14 A Yes, sir.
15 Q I think you have a job at Addington Beaman,
16 as a bookkeeper?
17 A Yes.
18 Q Do you recall the occasion of this tree
19 incident back April 18th, 1966?
20 A Yes.
21 Q Do you remember the date,as such?
22 A No.
23 Q Do you remember the incident?
24 A Yes.
25 Q On that occasion, do you recall about what

1 time of the day it was?
2 A. Well, I suppose it was 4:00, maybe 4:30,
3 5:00, something like that.
4 Q. What were the weather conditions on that
5 date, do you remember?
6 A. It was a nice day.
7 Q. Now, did you have occasion to go anywhere
8 on that day?
9 A. You mean other than -
10 Q. From your house. Did you leave your house
11 that afternoon after you came home?
12 A. Well, when my husband was starting to cut
13 the tree down, I went down to my father's house and asked if
14 he would come help my husband.
15 Q. Where was your husband?
16 A. He was at home.
17 Q. Where at home?
18 A. In the backyard, getting ready to cut the
19 tree down.
20 Q. Had he actually started cutting the tree
21 down?
22 A. I think he had notched the front of the tree.
23 Q. He had notched the front of the tree?
24 A. Yes, sir.
25 Q. Was there any danger at this point, having

1 notched the front of the tree?

2 MR. MOULTON: I object to that.

3 MR. GORDON: I think she can answer.

4 MR. GIBSON: Certainly she is not in a position to

5 pass on the question of any dangerous activity.

6 MR. GORDON: I asked was there danger at this point.

7 MR. MOULTON: Danger to whom or what?

8 THE COURT: You can ask her if she felt.

9 * * *

10 BY MR. GORDON:

11 Q Did you feel that there was any danger at

12 this point, he having notched the tree, or anything?

13 A Not at this point, no. He had just notched

14 the front of it. He was going to cut it from the back.

15 Q What did you do then, after he had notched

16 the front?

17 A I went up and asked my father.

18 Q How did you go up there, did you drive, run

19 or what?

20 A I drove.

21 Q You drove up there?

22 A Yes, sir.

23 Q How far away was your house from that house?

24 A About a block.

25 Q About a block?

1 A. A block, yes.
2 Q. Now, what happened after you drove up
3 there? You asked your father to assist -
4 MR. MOULTON: I'm going to have to object, your
5 Honor please. Counsel is leading.
6 THE COURT: The Court is going to sustain your
7 objection.
8 MR. GORDON: She already stated that.
9 THE COURT: I don't think she did.
10 * * *
11 BY MR. GORDON:
12 Q. What did you do?
13 A. I asked him would he come help my husband
14 take down the tree, that it was close to the house and I didn't
15 want him to take it down by himself,because he would have to cut
16 and then pull on the rope and then cut, and I thought it would
17 be better if he had some help.
18 Q. What transpired then?
19 A. He said he would come down, and I went home
20 and they came.
21 Q. How did they come? Walk, who got home
22 first, do you remember?
23 A. I did.
24 Q. They didn't come with you in the car, if you
25 remember?

1 A. I really don't remember. I don't think they
2 did.
3 Q. Was there any emergency in your mind at this
4 point in time?
5 A. No, sir.
6 Q. Were you out back when they arrived?
7 A. Yes, sir.
8 Q. Where was your husband at that time?
9 A. He had the saw and he was getting ready to
10 cut the back of the tree.
11 Q. Describe if you could the situation there
12 at that time with reference to the tree and so forth and so on,
13 that you recall.
14 A. Well, we had the tree tied off with a rope,
15 and my husband had already notched it, like I said, in the front
16 and he was behind it with the saw ready to cut the back of it.
17 And my father and my uncle came and they were on opposite sides
18 of the rope.
19 Q. How many ropes was it?
20 A. Just one that I remember. There was just
21 one rope, I think.
22 Q. Fine. Go ahead. Were they on the same rope?
23 A. One was on one side and one was on the other.
24 Q. Of the same rope?
25 A. Of the same rope.

1 Q You said the rope was tied off. What was
2 it tied off to?
3 A To another tree.
4 Q In your own words, tell what happened.
5 A Well, I was standing back at our garage
6 door and my uncle was on the same side I was on.
7 Q Did they have a discussion before your
8 husband started doing anything, after they arrived?
9 A Not to my knowledge. I don't remember that
10 they did.
11 Q Had your husband made any anticipation of
12 where he wanted the tree to fall or so forth?
13 MR. GIBSON: Wait.
14 MR. GORDON: I said had he.
15 THE COURT: I sustain your objection.
16 MR. GORDON: I think that is -
17 THE COURT: She can't state what is in the mind of
18 somebody else.
19 MR. GORDON: I said had he made any -
20 THE COURT: Any anticipation. Had he made any
21 anticipation.
22 * * *
23 BY MR. GORDON:
24 Q Had he indicated to anyone -
25 MR. MOULTON: I object to the leading.

* * * * * * * * *

* * * * * * * * *

1 tion on that basis. I'll state the reason later.
2 I don't want to suggest anything.
3 MR. GORDON: Answer the question.
4 THE COURT: Only if the question is at the time was
5 Mr. Coleman present.
6 A. Was he present?
7 THE COURT: Yes. At the time that he came to the
8 house and while he was present, did your husband
9 indicate to anyone where he wanted the tree to fall.
10 A. I can't say for sure.
11 THE COURT: All right.
12 MR. GORDON: Fine.
13 * * *
14 BY MR. GORDON:
15 Q. How is your lot shaped?
16 A. It's wide in the front and very narrow in the
17 back. It's a pie shape.
18 Q. If the tree went to the left, what would
19 happen? If that tree when it fell went to the left, what would
20 happen?
21 A. It would have hit a power line that goes to
22 the house on the side of me.
23 Q. If it went to the right, what would have
24 happened?
25 A. It would have hit the fence or the house on

1 the other side of me.

2 Q Which way did the tree fall?

3 A Straight back.

4 Q Which way were the men pulling?

5 A For it to go straight back. It had to go

6 between two trees.

7 Q Did it fall in the direction you anticipated

8 it going?

9 MR. MOULTON: I object, your Honor.

10 MR. GORDON: I asked what she anticipated.

11 MR. GIBSON: Was she taking the tree down?

12 MR. GORDON: She was there and seeing it.

13 MR. GIBSON: I object to that question unless he

14 qualifies this witness to show she contemplated the

15 tree going this way or that way or pursuant to some-

16 thing she was doing or directing her husband to do.

17 Otherwise, it's immaterial and we object.

18 THE COURT: I'll permit her to - over your objection,

19 over the plaintiff's objection - to testify if the

20 tree fell where she thought it would fall.

21 A Yes.

22 MR. MOULTON: Note our exception.

23 * * *

24 BY MR. GORDON:

25 Q Did it, Mrs. High?

1 A Yes, it did.
2 Q Would you go ahead and describe after the
3 men arrived there and in your own words tell what happened after
4 they arrived. I appreciate it was seven years ago.
5 A One got on one side of the rope and one got
6 on the other. When my husband started sawing, both of them
7 pulled on the rope. The tree started to lean, so they both ran
8 back one to the right and one to the left. Then as -
9 Q What happened then?
10 A Then the tree went back and sort of leaned
11 the other way. My father went into the rope and pulled and
12 went back. About the time my father started back, my uncle ran
13 into the rope to pull. I don't know he did, but I think when he
14 realized the tree was starting to fall, that he ran into the
15 rope instead of backwards. When he got into the rope, he ran
16 straight back into the way the tree was falling.
17 Q And what happened?
18 A And it hit him.
19 Q Did anything happen to him before the tree
20 hit him? Was he standing, or was he up or what?
21 A He fell. In the backyard as he was running
22 backwards, he fell.
23 Q Which direction was he facing when the tree
24 came down?
25 A The back of the lot.

1 Q. He was facing the back?
2 A. Yes, sir.
3 Q. With reference to the tree, what part of
4 his body was to the tree?
5 A. His back.
6 Q. Which way had your father gone?
7 A. Which way had he gone?
8 Q. Yes.
9 A. Face down.
10 Q. I said which way had your father gone?
11 A. My father?
12 Q. Yes.
13 A. To the right.
14 Q. And the first time the parties left the
15 rope, you indicated it was twice - which way had the plaintiff
16 gone?
17 A. To the left.
18 Q. The second time, which way did he go?
19 A. He went right. Into the rope and then under
20 it and back.
21 Q. When you went down there, did you tell your
22 father or tell Mr. Coleman there was an emergency or something
23 of that sort?
24 A. I asked them if they would come and help
25 my husband take down the tree.

1 Q Did you indicate there was any emergency
2 at that time?
3 A No.
4 Q How big was this tree in question?
5 A It wasn't - I mean it was a right big tree.
6 I don't know how to tell you how big it was.
7 Q Was there a single trunk to the tree,
8 originally?
9 A It had two. It was one trunk, but it went
10 up into two trees, you know, about halfway up.
11 Q Were both the trees on there at that time?
12 You indicated there were two trees when this was cut.
13 A No, we had already taken down the front
14 part of it.
15 Q Was the rope tied to the tree when Mr.
16 Coleman arrived there?
17 A Yes.
18 Q Was the rope tied to the other tree, that
19 was tied off, when he was there?
20 A Yes.
21 Q Had the back of the tree been cut when Mr.
22 Coleman arrived there?
23 A No. The front half just had been cut when
24 my husband had notched it.
25 Q Thank you. You may inquire.

1 CROSS EXAMINATION

2 BY MR. GIBSON:

3 Q Mrs. High, this exhibit, plaintiff's exhibit

4 three, that's a picture of your home at that time?

5 A. Yes.

6 Q. Is that right?

7 A. Yes.

8 Q. And I show you exhibit four and is that a

9 picture of the stump after it had been cut off?

10 A. Yes.

11 Q. This is the portion of the tree that's been

12 sawed up?

13 A. Yes.

14 Q. I'll ask you are these trees that's around

15 your home, are they the proportionate size of the tree that was

16 sawed? Are they more or less the same general size?

17 A. Not all of them, because some of them are

18 sort of big trees.

19 Q. According to your testimony, you said that

20 he wanted - your husband wanted the tree to fall in one direc-

21 tion, because if it fell one way it would hit the high tension

22 wires.

23 A. Yes.

24 Q. And if it fell the other way, it would fall

25 across the fence?

1 A. Right.

2 Q. So from the position of that house to the

3 high tension wwires would be about thirty or forty feet, wouldn't

4 it?

5 A. It might have been.

6 Q. By the same token, to hit the fence - from

7 the rear of your home where the picture showed, to the fence was

8 approximately thirty feet. So it was generally the same distance

9 going in either direction, is that what you're saying?

10 A. I guess it's about the same distance.

11 Q. Was the cross section of this stump here,

12 would you estimate that to be five or six inches across - right

13 across here?

14 A. But that wasn't the size of the tree there.

15 Q. I know.

16 MR. GORDON: Let her finish answering the question.

17 A. There were two trees that come up off that

18 stump.

19 Q. That's right, but this is the main stump and

20 then as it grows up, it forked out.

21 A. Uh huh.

22 Q. What I'm asking you is, is this area here

23 the diameter of that, wasn't that approximately twenty-six inches?

24 A. I don't know.

25 Q. You would not be able to lift that portion

1 of the tree shown there, would you?
2 A. No.
3 Q. Now, the reason that you went to get your
4 father and Mr. Coleman was because of the fact that the tree
5 began to lean toward the -
6 A. No. He hadn't started cutting the back of
7 it yet.
8 Q. It was not leaning when you went up there?
9 MR. GORDON: You said started to lean.
10 * * *
11 BY MR. GIBSON:
12 Q. Let me correct it. Was the tree leaning
13 toward your home?
14 A. The tree was right on the back of our house.
15 You can like stand on the roof and touch the tree.
16 Q. Had your husband made a cut into the tree
17 before you went up to get help?
18 A. Yes, sir. He had notched the front of the
19 tree.
20 Q. This caused some concern to you, didn't it?
21 A. What caused my concern was I didn't want my
22 husband to take it down by hisself, because someone had to pull
23 on the rope and someone had to cut the tree.
24 Q. He didn't ask you to pull on the rope, did
25 he?

1 A. No. He didn't ask me to go get them either.
2 It was my idea.
3 Q. It was some concern of yours that he
4 probably needed help, isn't that true?
5 A. Yes.
6 Q. You went, and did you tell your husband you
7 were going after help?
8 A. Yes.
9 Q. And what did he say? Did he agree or nod
10 or anything?
11 A. He said he could do it by hisself. I said
12 I would feel better if I got somebody.
13 Q. So you went and took the car and went about
14 a block to their home?
15 A. Yes.
16 Q. And asked them to come down and help?
17 A. Yes.
18 Q. And then you went on and got back in the
19 car and went back and they came on in?
20 A. Yes.
21 Q. Was that immediately after you had left,
22 that they returned?
23 A. Yes.
24 Q. And now, tell me this, and his Honor and
25 this Lady and members of the jury. Do I understand your testi-

1 mony to say that there was only one rope tieing off that tree?
2 A. Yes.
3 Q. Well, how was he to keep the tree from
4 going eitherto the right or to the left, if it was only one
5 rope?
6 A. The notch in the front of the tree was
7 supposed to make it come forward.
8 Q. So he was depending on how the cut was made
9 to take the tree down?
10 A. Yes.
11 Q. Had your husband removed any other trees
12 there on the property before?
13 A. Yes.
14 Q. And this one, the concern that you had for
15 this tree was because of the fact it was in such close proximity
16 to the house?
17 A. Yes.
18 Q. Now, how long was the rope that extended
19 from the tree down to the ground?
20 A. I don't know how long it was.
21 Q. It was tied to another tree in the yard?
22 A. Yes.
23 Q. And how far was that tree from this tree?
24 Do you have any idea of that?
25 A. No.

1 Q How far was the rope onto the tree, thinking
2 in terms of height? How high was it up on the tree?
3 A It was pretty high up.
4 Q Was it even with the roof of your home or
5 higher?
6 A I think it was close to the roof level.
7 Q Closeto the roof level of your home?
8 A Uh huh.
9 Q Was that at the point where it was a crotch,
10 where the "V" was?
11 A No.
12 Q Was the "V" lower than that?
13 A Yes.
14 Q At what point would you say that the crotch
15 or the"V" extended off?
16 A On the picture of that stump, you can about
17 figure out about how high it was, because that's where it
18 started, that part that is laying on the ground.
19 Q Then you would say it's approximately four
20 or five feet off the ground that it"V'd" on out?
21 A Maybe four.
22 Q Now, your testimony has been that there
23 was no discussion between your father and your husband and the
24 plaintiff.
25 A My testimony was that I did not remember any.

1 I don't remember there being any.

2 Q How long after they arrived there was it

3 before the tree fell?

4 A When they came, my husband started cutting

5 the tree.

6 Q I see. All right. Now, do you recall how

7 far the notch was from the base of the tree?

8 A No, sir. I don't.

9 Q Do you know whether it was a foot or two

10 feet? Are you in position to say?

11 A No, sir.

12 Q Did you see your husband put the chain saw

13 to the tree?

14 A Yes.

15 Q Was he between the tree and the house?

16 A Yes.

17 Q And was the notch on the other side?

18 A Yes.

19 Q Did he cut all the way through, or how far

20 did he cut through the tree? Do you know?

21 MR. GORDON: At what point, Mr. Gibson?

22 MR. GIBSON: With the chain saw.

23 MR. GORDON: At what point? Are you talking about

24 the notch or the chain saw or when?

25 MR. GIBSON: I'm talking about the point when he was

1 using the chain saw after all of them were there.
2 THE COURT: The testimony was at that point that the
3 notch had already been cut.
4 MR. GIBSON: I understand.
5 * * *
6 BY MR. GIBSON:
7 Q Do you know how far he cut into the tree?
8 Did he come all the way across?
9 A Not all the way through. You know. Before
10 the tree fell, did he come all the way across?
11 Q Yes. Before the tree fell.
12 A Yes.
13 Q He did?
14 A (Witness nodded affirmatively.)
15 Q You see the stump here?
16 A Yes.
17 Q That's exhibit four. He was between the
18 stump and the house?
19 A Yes.
20 Q And this was a power saw?
21 A Yes.
22 Q Gasoline?
23 A Yes.
24 Q And he cut from this side coming toward this
25 side?

1 A Yes.
2 Q And the notch was on this side?
3 A Yes.
4 Q And he came completely through?
5 A I think so. To the best of my knowledge.
6 Q That's all.
7 THE COURT: Anything further, Mr. Gibson?
8 MR. GIBSON: That's all.
9 * * *
10 REDIRECT EXAMINATION
11 BY MR. GORDON:
12 Q Did the tree twist before it fell?
13 A No, sir. I don't think so.
14 Q I couldn't hear your answer.
15 A No, sir.
16 Q Thank you. That's all.
17 THE COURT: You may step down. Are you going to
18 need Mrs. High any further?
19 MR. GORDON: I don't think so.
20 THE COURT: You are at liberty to leave, or you can
21 remain in the courtroom if you like.
22 (The defendant was called to the stand.)
23 * * *
24 CHARLES HIGH, Defendant, having
25 been first duly sworn, was examined

1 and testified as follows:

2 * * *

3 DIRECT EXAMINATION

4 BY MR. GORDON:

5 Q Would you please state your name?

6 A My name is Charles High.

7 Q Where do you live?

8 A 140 Marian Drive, Chesapeake.

9 Q What do you do for a living?

10 A Jet engine mechanic at the Naval Air

11 Station.

12 Q How long have you been a jet engine

13 mechanic?

14 A Ten years.

15 Q Marian Drive, I believe is located right

16 here in Great Bridge?

17 A Right.

18 Q I think opposite the high school, just

19 below it?

20 A Right.

21 Q How long have you lived at the address of

22 140 Marian Drive, the premises there?

23 A Twelve years.

24 Q Do you recall the occasion of April 18th

25 when you were cutting this tree in which Mr. Gordon Coleman was

1 injured?

2 A Yes, I do.

3 Q About what time of day was it this took

4 place?

5 A It must have been close to 5:30, because I

6 had worked that day.

7 Q Now, would you describe your premises for

8 us? The lot and house and so forth? What type lot do you have?

9 A Well, the lots in that area are 100 x 200,

10 but my lot is pie shaped because I live in the curve. There's a

11 slight curve in the street.

12 Q Could you come down and on this piece of

13 paper draw your house and the lines? Come down here for the

14 jury.

15 (The defendant stood before the jury box.)

16 MR. GORDON: Your Honor, could you mark this as

17 defendant's exhibit?

18 THE COURT: Have you gentlemen had an opportunity to

19 see it?

20 MR. MOULTON: No, sir.

21 MR. GORDON: I was going to get him to put some

22 things on it.

23 THE COURT: The jury will recognize that is drawn

24 freehand and is not to scale accurately. It will be

25 received as defendant's exhibit number one.

1 BY MR. GORDON:

2 Q. There was a reference to an electric line.
3 Could you show us where that electric line would be?

4 A. Yes. The pole is in the backyard on the
5 left corner. Right here, right at the line. The wires come
6 into the house this way.

7 Q. In fact, is this the wires to your line
8 that is shown here in exhibit number one, plaintiff's exhibit
9 number one showing the wires to the top of your house?

10 A. Yes, sir. It goes straight over here.

11 Q. Now, where is the fence located that we
12 have spoken about?

13 A. The fence is right here. This is the fence.

14 Q. That line -

15 A. This is the fence right here. Between the
16 two houses, this is the fence. There is also a fence over here.

17 Q. With reference to your lot, where is this
18 tree located? With reference to your house, what part is it
19 located near?

20 A. Looking from the rear of the house to the
21 front, it's closest to this fence than it is to the center of the
22 house. It's a little to the right of the center of the house.

23 Q. This shows the line here we are speaking
24 about?

25 A. Right.

1 Q Did you have any plans of where you wanted
2 this tree to fall?
3 A It had to fall here, was the only place
4 it could fall. It was a big tree here. If it fell here, it
5 would fall on this tree. If it fell here, it would fall on the
6 fence.
7 Q You mean that is where you wanted it to
8 fall?
9 A Yes.
10 MR. GIBSON: I object. I object to the leading
11 question.
12 THE COURT: I sustain the objection.
13 * * *
14 BY MR. GORDON:
15 Q Where did you want it to fall?
16 MR. MOULTON: Couldn't he resume up there, Judge?
17 THE COURT: I think it would be better.
18 MR. GORDON: Just a minute.
19 * * *
20 BY MR. GORDON:
21 Q Where did you want the tree to fall?
22 A I wanted it to fall straight back to the
23 rear of the lot.
24 Q Where did the tree, in fact, fall?
25 A Right where I wanted it to fall.

1 Q If it had gone to the left, what would have
2 happened?
3 A It would have hit either another tree or
4 this fence.
5 Q If it had gone to the right, what would
6 happen?
7 A It would have hit a big tree here.
8 Q What else could happen?
9 A If it had gone to the extreme right, it
10 would have hit the power line.
11 (The defendant returned to the witness stand.)
12 Q Do you recall your wife going to your father-
13 in-law's house?
14 A Yes.
15 Q Before she went to your father-in-law's
16 house, had you made preparations with regard to removing the
17 tree?
18 A I tied it off and notched it.
19 Q When you had tied it off and notched it,
20 was there danger of the tree falling at that point?
21 A To my knowledge, it couldn't fall.
22 Q How big a notch had you cut in the tree?
23 A It's been seven years. I can't answer
24 that. I notched the tree, but it's been so long, I just don't
25 know how deep a notch I put in the tree.

1 Q Did it appear to you at that time to be any
2 danger of falling after you notched it?
3 A No, because it was a lot of tree left.
4 Q What type tree was this? Was it one tree
5 going straight up and down?
6 THE COURT: Just a minute before they jump up and
7 object. He can describe it.
8 A It was a large tree at the base, like they
9 said twenty some inches. About waist high or maybe chest height
10 it came out into two, like this. One over the house and one to
11 the extreme rear. I had already removed the rear part days
12 before and it was gone and cut up.
13 Q At this point, it was only the other one
14 left?
15 A Right.
16 Q And where had you put the notch in the tree?
17 The side of the house?
18 A The notch was at the extreme rear, facing
19 the rear of the lot.
20 Q In other words, the opposite direction of
21 the house?
22 A Right.
23 Q Now, do you recall where you had tied the
24 tree - the one?
25 A I tied it to the tree that was the straightest

1 to the rear of the lot.

2 Q At what height did you tie the tree, if

3 you remember?

4 A I couldn't really say, it's been so long.

5 I don't really remember. I guess it was roof high or around the

6 gutter.

7 Q At what height had you tied the other end

8 of the line to the tree in the yard?

9 A About chest high.

10 Q How many lines was to the tree?

11 A One.

12 Q There's been some testimony here that there

13 were two. Were there two lines?

14 A It's been so long, that's probably the

15 reason why. But it was only one rope, because I only had one

16 rope.

17 Q You're sure of that?

18 A I'm positive.

19 Q Now, when they came up, was there any

20 discussion?

21 A I told them to pull the rope to get the tree

22 started in the other direction. We didn't discuss it. That was

23 all there was to it. They knew what to do as soon as they saw

24 what I was doing.

25 Q Where did they get hold of the rope? First

1 of all, did they get hold of the rope?

2 A. Yes.

3 Q. Where did they get hold of it?

4 A. Out close to where I had it tied off.

5 Q. At the end furtherest from the tree you

6 were falling?

7 A. Uh huh.

8 Q. Describe how they were standing, the two

9 of them, with reference to the rope.

10 A. My father-in-law was in front. The rope was

11 to his left. He was in the rear and the rope was to his right.

12 Q. Who was in the rear?

13 A. Mr. Coleman.

14 Q. You mean they were on opposite sides of the

15 rope?

16 A. Yes.

17 Q. Now, in your own words, tell just what

18 transpired.

19 A. Well, I was cutting the tree, so I didn't

20 really see as much as my wife saw, because I was holding the

21 chain saw, cranking the chain saw and sawing the tree. Then as

22 the tree fell over, that's when I looked. When he stumbled.

23 Q. How did he stumble?

24 A. I think he got his foot caught in the rope.

25 I was sawing the tree, and as I looked, I saw it hit him.

1 Q Did he stumble near the point where he was
2 pulling the tree?
3 A Right.
4 Q What, if anything, had your father-in-law
5 done?
6 A When the tree started in the direction, he
7 took about three steps to the right toward the fence, three or
8 four steps.
9 Q Was he clear of the tree at this point?
10 A (Witness nodded affirmatively.)
11 Q I can't hear your answer.
12 A Yes, he was clear.
13 Q What did Mr. High do?
14 A What did I do?
15 Q I'm sorry. What did Mr. Coleman do?
16 A He was assisting pulling the rope with my
17 father-in-law.
18 Q What did he do when it started to fall?
19 A He let go and started away.
20 Q Which direction did he go?
21 A The first time, I don't know because I was
22 sawing. After the tree was on its way, I looked up.
23 Q What do you mean the first time?
24 A It started one time and they let go and
25 took hold of it again. Next time they pulled it, it went over

1 passed the point and started over in the yard. That's when he
2 fell and that's when he went in that direction.
3 Q Which way were they facing?
4 A They were facing me when they were pulling
5 the tree.
6 Q Which way was he facing when the tree hit
7 him?
8 A He was facing straight out the back, because
9 the tree hit him on the shoulder and back of the head.
10 Q Which way was your father-in-law facing?
11 A He just stepped over to his right and was
12 facing the operation that was going on.
13 Q Let's go back to the pictures. Do these
14 pictures show the notch on the stump of the tree?
15 A It can't, because I cut those pieces down.
16 Q Is this at the point where you actually
17 notched the stump, or did you cut a piece off the stump?
18 A No, I cut the thing down to almost ground
19 level.
20 Q Does this show where you cut it almost to
21 ground level?
22 A Yes.
23 Q How far up was it you notched it?
24 A I notched it about chest high, because
25 that's where the tree started out in two branches.

1 Q At what point was it you cut behind the
2 tree, or I should say - you said you put another cut. At what
3 point was that?
4 A I cut into the notch. After I notched it,
5 I cut into the notch so the tree would go that way.
6 Q You cut from the same direction of the
7 notch or the opposite direction of the notch?
8 A The opposite direction of the notch. The
9 notch is what determines where it falls.
10 Q How high was the tree?
11 A I can't really say exactly how high the
12 tree was, but it was high enough that the end of the tree after
13 it fell was to the center of the yard, almost halfway back to the
14 back of the lot. So it had to be a good, I guess thirty-five or
15 forty feet tall, had to be.
16 Q How large in diameter was the tree?
17 A This is something else. Are you talking
18 about the trunk or the part I cut?
19 Q The part you cut.
20 A The part I cut was about ten to twelve inches
21 in diameter.
22 Q The picture shown in the photograph of the
23 piece of timber on the ground, is that the piece you cut or is
24 that the trunk?
25 A No, the piece I cut is laying on the ground.

1 Q Is this the piece here you cut?
2 A Right.
3 Q What part of that did you cut?
4 A It would be the largest part.
5 MR. GIBSON: Let the record show that is plaintiff's
6 exhibit one.
7 Q Was the condition obvious to everyone that
8 was there that the tree was notched and cut and so forth when the
9 parties came up?
10 A I don't know that they examined the tree or
11 not, but they saw it was tied off when they got there.
12 Q Now, did the tree twist, as Mr. Coleman has
13 testified to?
14 A Did it twist?
15 Q Yes. When it came down, did it twist?
16 A If it had of, it wouldn't have fell where
17 it did.
18 Q That isn't what I asked you. I asked you
19 did it twist?
20 A No.
21 Q If it had twisted,would you have known it?
22 A Yes. If it had twisted, it would have hit
23 a fence or another tree. It couldn't have fallen where it did.
24 Q Did you see the tree as it was falling?
25 A After the tree got about this angle, I put

1 the saw down and watched it the rest of the way down.
2 Q Had it twisted up to that point?
3 A No.
4 Q Did it twist from that point on?
5 A No
6 Q With reference to the direction they were
7 pulling it, where did it fall?
8 A It fell in that direction they were pulling
9 it.
10 Q How far from the point that they were
11 pulling it did Mr. Coleman move before he was struck?
12 A The tree - you mean the distance from where
13 I was?
14 Q No. From the point where he was pulling it
15 to where he was struck,
16 A Oh, I would say probably from you to me.
17 Q In which direction did he go?
18 A Toward the rear of the lot, straight back.
19 Q Was he standing when he was struck or -
20 A He was running when it hit him.
21 Q Was he on his feet, I take it?
22 A When he was struck, he was on his feet.
23 Q Do you know what type of tree it was that
24 you were cutting?
25 A I think it was an oak tree. I'm not sure

1 about that.

2 Q Did you ask you wife to go up and get Mr.

3 Coleman?

4 A No.

5 Q Or your father-in-law?

6 A No.

7 Q Why did she go up there and get them, do

8 you know?

9 A She was concerned that I would have trouble

10 getting the tree down.

11 Q Do you remember how they came?

12 A They walked.

13 Q Were they walking?

14 A Yes.

15 Q Or running or what?

16 A They were walking. Now, I couldn't see

17 them all the way down the street.

18 Q When you saw them, what were they doing?

19 A I saw them when they came in the yard and

20 they were walking. I don't think my father-in-law could run

21 that far, really.

22 Q Did you express to anyone any emergency?

23 A No.

24 Q Did you feel there was any emergency?

25 A No.

1 MR. GORDON: You may inquire.

2 * * *

3 CROSS EXAMINATION

4 BY MR. MOULTON:

5 Q Did I understand you, sir, to say that when
6 the tree started falling that Mr. Coleman ran as far as from you
7 to Mr. Gordon before he was struck?

8 A Right. That's approximately how far.

9 Q I understand that, approximately. Could
10 we approximate this distance for the record now, or have the
11 sheriff measure it?

12 THE COURT: The Court can give it to you. It's
13 sixteen feet from the witness chair to where you
14 are sitting.

15 MR. MOULTON: Sixteen feet. Thank you, your Honor.

16 Q Approximately sixteen feet he had run when
17 he was struck by the tree.

18 A (Witness nodded affirmatively.)

19 Q And how much of the tree extended over his
20 body after the tree was down on him? How much of the top of the
21 tree? Would it be as much as ten,fifteen feet?

22 A No, it was a short distance, because one
23 of the small limbs to my left is what hit him. It was almost to
24 the top of the tree, because it had short branches on it.

25 Q It was not out of the top yet? This was a

1 limb off to the side? There was still some distance up to the
2 top?
3 A Yes.
4 Q How far would you say it was up to the top
5 of the tree?
6 A See, there was different length branches.
7 Are you speaking of the branch that hit him?
8 Q No. The uppermost top of the tree, not the
9 branch that came up and hit him. When he was pinned under the
10 branch, what I'm asking is the uppermost top you indicated fell
11 almost halfway your lot. How much further would it be from here
12 to the top of the tree?
13 A That's something I couldn't answer.
14 Q You estimated sixteen feet when it fell.
15 A Well say from here to that desk. That's the
16 best I can do. I had no way to measure it. When it happened, I
17 wasn't concerned with how long the limb was. I wanted to get him
18 to the hospital.
19 Q I understand your concern. But it was a
20 distance of from you to the desk, which would be six feet, maybe
21 eight?
22 A Maybe six feet.
23 Q Now, you have indicated to the Court and so
24 did your wife that if the tree fell to the left, it would
25 damage a power line.

1 A. No. Which left? You mean my left?
2 Q. Maybe we should get orientation.
3 A. Right.
4 Q. Let's take plaintiff's exhibit one and this
5 is the back of your house and this is the tree and this is the
6 part you have indicated you cut down.
7 A. Right.
8 Q. Going from the back of the house to the
9 back of your lot -
10 A. Facing the rear?
11 Q. Facing the rear. Going from here to the
12 back of the lot.
13 A. This would be the left over here.
14 Q. That would be the left?
15 A. The fence was the closest to the house
16 over here and the closest to the tree.
17 Q. You have indicated now as I understand it,
18 going from the back of the house to the back of the lot is what
19 we are talking about.
20 A. Right.
21 Q. To your left was a fence, you have indicated.
22 A. Right.
23 Q. In that position and shown here on
24 plaintiff's exhibit one -
25 A. (Witness nodded affirmatively.)

1 Q To your right was a power line.
2 A All the way over to the extreme right was
3 the power line, coming in on an angle to the house.
4 Q You have drawn it here. How close was it
5 to the tree? This part, roughly.
6 A The power line comes in some distance from
7 the corner.
8 Q I've got you.
9 A So it would probably be from here to the
10 reporter, maybe a little more.
11 Q Say eight or ten feet?
12 A Something like that.
13 Q Can we mark eight or ten feet on here?
14 Power line. To the fence to your left as we look from the back
15 of your house, you said was how far?
16 A What fence?
17 Q The fence to the left. We are talking
18 about the left here. You said it was very close.
19 A It was very close. It's pie shaped and it
20 comes in this way.
21 Q I'm asking what was the distance between the
22 tree and the fence.
23 A Maybe from here to Mr. Coleman.
24 Q The Judge said that was sixteen feet. Do
25 you mind if I mark sixteen feet from the tree, eight to ten from

1 the power line? From your house, it was a matter of what? A
2 foot or two feet?
3 A. Between the house and the tree?
4 Q. Between the house and the tree.
5 A. Oh, three foot.
6 Q. Look at that and see if I have got that
7 right, the way we have described it.
8 A. It's approximately. That's all I can say.
9 I would have to measure it.
10 Q. Well approximately. So what I'm getting at,
11 sir, this tree had to fall in one direction and one direction
12 only. That's correct, isn't it?
13 A. No,it could have fell in any direction.
14 I merely said if it hadn't, it would have hit another tree or
15 the fence.
16 Q. Or your house?
17 A. No, it wouldn't hit the house. That's what
18 they were doing. Keeping it from hitting the house.
19 Q. I'm speaking of when you started this
20 operation. You were going to take this tree down yourself is
21 what you're telling this jury and his Honor.
22 A. I sure was.
23 Q. You were going to take this forty foot
24 tree. Do you know how tall the courtroom is, your Honor?
25 THE COURT: No. I'll say for the jury's information

1 the courtroom is sixty feet long and about thirty
2 feet wide.
3 * * *
4 BY MR. MOULTON:
5 Q So you were going to take this forty foot
6 tall tree down all by yourself?
7 A Can I answer your question? I didn't know
8 anybody knew how tall the tree was.
9 Q You testified it was approximately forty
10 feet long. I took it from your direct testimony.
11 A I'm giving my best estimate. I could
12 estimate your height, but I may not be right. I don't understand.
13 THE COURT: You have been asked what you think the
14 height of the tree was. Is it true you said
15 approximately forty feet?
16 A Right. I said thirty-five to forty, but
17 that's the best I can do.
18 Q You were going to take down this tree you
19 have described as being thirty-five to forty feet all by yourself?
20 A Right. That's right.
21 Q If this tree had fallen to the left or
22 right of your lot or it had fallen frontwards, it would have
23 torn down an electric line, torn down a fence or torn down your
24 house. That is correct, isn't it?
25 A You said if it had done that. Right?

1 Q Yes, sir. If it didn't fall the way you
2 anticipated or the way you were going to take it down,
3 A It would have hit a tree if it had gone
4 to the right some. But if it went to the right, it would fall
5 over the fence. It was over to one side. It wasn't in the
6 center of the lot.
7 Q I understand, but you say it was eight to
8 ten feet to the power line.
9 A Yes, sir.
10 Q No question it would have taken the power
11 line down.
12 A If it had gone to the extreme right, but
13 if it had just gone on an angle, it would have hit a tree.
14 Q What you're saying is if it had gone to
15 the angle -
16 A It would hit a tree.
17 Q You were going to take it down by yourself
18 and you didn't want any help from these people who came?
19 A No.
20 Q It was your wife's idea?
21 A Right.
22 Q She was concerned?
23 A Right.
24 Q You notched the tree before the people
25 had gotten there?

1 A. Right.
2 Q. Hadn't this tree leaned toward your house?
3 A. The tree had grown that way. This tree
4 was leaning over the house, it had grown there. It was planted
5 over there before anything happened, it was like that.
6 Q. If it was slanted over your house, would
7 this be a correct analogy - this would be your house and this
8 pen would be the tree?
9 A. Turn it for me.
10 Q. Let me turn it this way.
11 A. That was the way, but not that much of an
12 angle.
13 Q. Would you show the jury how much of an
14 angle?
15 A. I would say it was about like this, because
16 it was right over the - the tree was right over the gutter and
17 part of the roof. It was about like that. You could stand on
18 the roof and touch the tree.
19 Q. Well, if the tree was slanted over as you
20 have described here and not quite the angle of this pen, but
21 it was slanted this way, how in the world did you expect to notch
22 the tree here and make it fall back this way, sir?
23 A. That was what the rope was for.
24 Q. Who was going to pull on the rope?
25 A. I was.

1 Q You were going to saw the tree, waist high,
2 chest high, you said you notched it.
3 A Right.
4 Q And then you were going to run and pull on
5 the rope?
6 A Right.
7 Q And hope that it fell away from your
8 house?
9 A Hope? I was going to make it fall by
10 pulling the rope. It wasn't hope.
11 Q All right, sir. When these two men came
12 on - what did you say to them?
13 A I have no idea what I said. Again, it's
14 been seven years. In fact, I don't think anybody there knows
15 what was said.
16 Q I know that, sir, but didn't you say on
17 direct examination - I made notes. "When they came up, I told
18 them to pull the rope."
19 A Yes, sir. I told them to pull the rope.
20 Q You remember that now?
21 A You said what all was said. I don't know
22 what all was said.
23 Q I apologize to you then. But you did tell
24 them to get on that rope and pull it?
25 A Right.

1 Q This rope was a rope that you had attached,
2 you said, about roof high to a tree in the rear or off to the
3 right. Was it directly in the rear or off to the right?
4 A It was just off to the center of the tree.
5 Q And they were to get at the end of this
6 rope, the two men, you told them to get to the end of it?
7 A They were to get it started in that direc-
8 tion and move.
9 Q Did they get to the end of the rope?
10 A Almost. It was tied to another tree.
11 Q They got close to the tree as they could?
12 A Right.
13 Q Up to the tree?
14 A Right.
15 Q So you have estimated - let me do this.
16 Would you mark the little tree on there that it's tied to and
17 the position it's tied? Approximately how far was that from
18 this tree?
19 A About from here to that rail there.
20 Q This one?
21 A The rail.
22 Q The rail out here?
23 MR. MOULTON: Judge, do you know what it is to the
24 rail?
25 THE COURT: Yes, sir. It's twenty-two feet.

1 MR. MOULTON: Thank you, sir.
2 THE COURT: I stand corrected. It's a total of
3 twenty-eight feet to the rail. Sixteen feet, I
4 think is to the center of counsel's table.
5 * * *
6 BY MR. MOULTON:
7 Q What you are telling his Honor and this
8 Lady and Gentlemen of the jury is that you had a thirty-five to
9 forty foot tall tree and only had a twenty-eight foot rope?
10 A That's where I had it tied at.
11 Q That's what I mean. Twenty-eight feet
12 away.
13 A Approximately.
14 Q You said this gentleman was at the end of
15 the rope leaning up against the tree.
16 A I didn't say that.
17 Q I understood you to say he was at the end
18 leaning against the tree.
19 A They were at the end.
20 Q Then he turned and ran sixteen more feet
21 before he was struck down by the tree, according to your testi-
22 mony.
23 A Sixteen more feet?
24 Q Yes, sir. I just asked you how far did
25 he run. You said sixteen feet. You told Mr. Gordon that. Then

1 I asked you how far was it to the top of the tree, on cross
2 examination, to where he was struck. You said approximately six
3 more feet. So the twenty-eight feet here and the sixteen feet
4 that he ran which you told Mr. Gordon on direct examination -
5 you said as far as from me to you, Mr. Gordon, is how far he
6 ran before he was struck and he had already been to the end of
7 the rope. And it was still six foot over that, which makes a
8 total of twenty-two feet. If the rope was twenty-eight foot
9 away and he ran sixteen feet before he was hit by this tree,
10 and another six foot extending over, my calculation would be
11 this tree would be fifty foot high.
12 A. I knew that is what you were doing. That's
13 why I kept telling you they were approximate.
14 Q. Am I right or not?
15 A. I knew you were going to make the tree
16 longer than it was.
17 THE COURT: Let me say this to you at this point,
18 Mr. High. You are not to be argumentative with
19 counsel. Just respond to the question.
20 A. I'm not trying to be. But that is the
21 reason I kept saying approximately.
22 Q. That would make it approximately fifty
23 feet high, wouldn't it?
24 A. I don't think it was that high. Approxi-
25 mately could mean forty-two, couldn't it, or fifty-five. You

1 know.

2 Q But you knew the rope was not long enough
3 so that a person out here pulling, if the tree fell that they
4 would have to run to get out of the way, or else they would
5 have to jump to the side.

6 A They would have to move.

7 Q You had a rope short enough - it was not
8 long enough for safety purposes that they could be out of range.

9 A I had to tie it to the existing tree.

10 Q You knew the rope was not long enough,
11 didn't you?

12 A Right. You mean to clear the tree when it
13 fell?

14 Q That's right.

15 A It wasn't that long, no.

16 Q When that rope was hanging off the tree
17 and the men were pulling on it, you knew the rope wasn't long
18 enough that when the tree fell the men would be out of range?

19 A Right. They had to go to the side.

20 Q They had to run to the side?

21 A Right.

22 Q You knew that?

23 A I knew that.

24 Q But still you told them to get hold of the
25 rope and pull? Is that what you told us?

1 A Right. They had to move to keep from
2 getting hit.
3 Q You didn't tell them that?
4 A I didn't have to tell them that.
5 Q They had just walked up. This man had been
6 watching T.V. He knew he had to jump out of the way to keep
7 from getting killed or injured?
8 A My father-in-law didn't get hurt.
9 Q He managed to escape.
10 A He walked over to the fence and watched it
11 fall.
12 Q Just a slow walk, and this man was running
13 sixteen feet and he couldn't get out of the way of it?
14 A He was running in the direction the tree
15 fell.
16 Q You didn't bother to tell your father-in-law
17 or him that they had to move or else get hurt or killed?
18 A I didn't think I would have to say that.
19 Q I understood you on direct examination to
20 say that your father stepped to the right three steps.
21 A Right.
22 Q Toward the fence?
23 A Right.
24 Q Is what you told your counsel here on
25 direct examination, that your father-in-law took three steps to

1 the right toward the fence -

2 MR. GORDON: I think the record will show he said

3 three or four.

4 MR. MOULTON: I will stand corrected. Maybe I

5 didn't put the four. I put three.

6 * * *

7 BY MR. MOULTON:

8 Q You said three or four?

9 A Yes.

10 Q Now you are telling us he walked over to

11 the fence and leaned against the fence and watched it fall?

12 A I didn't say that. I said he went over

13 toward the fence. I didn't say he leaned on the fence.

14 Q You knew, didn't you sir, that if they

15 didn't get out of the way by running or moving to the side, they

16 would be hurt or killed, didn't you?

17 A That's right. Theywould have got hit by

18 the tree if they hadn't moved.

19 Q You didn't give them any warning at all

20 to get out of the way?

21 A You mean did I holler to them?

22 Q Holler or anything else. You gave them no

23 warning?

24 A Before I cut the tree?

25 Q Yes.

1 A When I started cutting the tree, they
2 pulled and that's when they ran or moved.
3 Q Mr. High, you heard the tree expert testify,
4 did you not, sir?
5 A Yes.
6 Q You heard him say that the proper way to
7 take down a tree of this magnitude and height would be take it
8 in short sections. That way you could handle it and nobody would
9 get hurt. You heard that didn't you?
10 A (The witness nodded affirmatively.)
11 Q Didn't you know that was the proper way to
12 take down this thirty-five to forty foot tree you estimate that
13 was slanting over your roof to such an extent it was touching it?
14 A No.
15 Q Don't you know that was the correct way of
16 doing it?
17 A No. I believe if he looked at the tree
18 before it was down that he would have taken it down the same
19 way I did.
20 Q You described this as being the log you
21 cut. How big is that?
22 A That's about twenty inches across where
23 it was cut. That's at the bottom. Right at the bottom where I
24 cut it.
25 Q Right here?

1 A. Right.

2 Q. You're telling us that after you cut this

3 down, you went here and cut this some more? This picture

4 doesn't accurately reflect the bottom where you cut?

5 A. This was a double tree.

6 Q. I understand you had already taken one

7 down.

8 THE COURT: Let him finish.

9 A. Then I went back and cut it down far as

10 I could cut it to the ground.

11 Q. This part is where you felled the tree or

12 up here is where you cut when you felled the tree?

13 A. Up here.

14 Q. On the top?

15 A. Right. This is on the bottom.

16 MR. MOULTON: Is there any other photograph to show

17 the top of it?

18 MR. GORDON: Here's some, Mr. Moulton.

19 * * *

20 BY MR. MOULTON:

21 Q. This shows the top of the stump. That's

22 where you made the cut?

23 A. I'm not sure. It looks like it. If you

24 look real close, you can see the "Y".

25 MR. GORDON: Would you show the jury that, please?

1 MR. MOULTON: Yes.
2 MR. GORDON: Let him show it.
3 * * *
4 BY MR. MOULTON:
5 Q Come down and show it to them.
6 (The defendant left the witness stand and stood
7 before the jury box.)
8 A The stump see, this was solid down here,
9 and right here I don't know if you can see it - it's a shadow -
10 but it comes out like this. It's two separate trees off one
11 tree. If you pick this up and sit it on top, that's the way it
12 was before I made the second cut. See the two butts of the two
13 trees. One was toward the house and one was back. I had
14 already taken this out.
15 MR. GORDON: How about taking a pencil and putting
16 a point on the stump.
17 MR. MOULTON: You can come back on redirect if you
18 like, Mr. Gordon. Please let me finish my cross
19 examination.
20 * * *
21 BY MR. MOULTON:
22 Q How long is it from here to here? You are
23 indicating this is the piece or the other side.
24 A See this, I don't know if you can see it,
25 but right there where that point is, the dark spot, that's the

1 other one. There is two of them there. Here's one and here's
2 one. This part here goes here. The tree Y'd off before chest
3 height.
4 Q. I'm asking you how far was it from here
5 to here? How long is that?
6 A. Subtract that from waist high, what is left
7 on the ground and you have it.
8 Q. This looks to me to be several feet high
9 when I compare it with the window. When I look at it and look
10 at here on the ground, it looks to me to be several feet high.
11 If I took this and stood it up like this, it looks like it would
12 come up here somewhere. You're telling me it's chest high.
13 A. In fact, the log here is still in the
14 yard. It Y'd off about at chest high.
15 Q. This one should set up on top of that one?
16 A. Right.
17 Q. This piece should fit on top of that one?
18 A. Right.
19 Q. And that's where you made the cut?
20 A. Uh huh.
21 Q. How high did it go up here when you set
22 that there. Show the jury.
23 A. About this high.
24 Q. Mark it on the building approximately how
25 high if you set that piece you have got cut on the stump. I

1 would say right along in here. Maybe not that high.

2 MR. MOULTON: Can I mark that with an "A" for

3 identification? Is that all right with you, Mr.

4 Gordon?

5 MR. GORDON: It's fine with me.

6 * * *

7 BY MR. MOULTON:

8 Q Then you indicated to the jury you tied

9 a rope where your gutter was.

10 A Approximately.

11 Q All right, sir. This is chest high, you

12 indicated, where you made the cut?

13 A (Witness nodded affirmatively.)

14 Q Which is how many feet?

15 A I'm 5' 11".

16 THE COURT: He has estimated four feet previously.

17 Q Then where you tied it from here to this

18 position is how many more feet? From where you claim you made

19 the cut to the top of the roof?

20 A Don't all houses have a standard height

21 there? I don't know what it is.

22 Q Could you tell us approximately, if you

23 could?

24 A It was gutter high or more, because I

25 tied it from the roof.

1 Q Thank you, sir. Sit back down up there.
2 (The witness returned to the witness stand.)
3 THE COURT: Do you have anything?
4 MR. MOULTON: No, sir. I think that's all the
5 questions I have of Mr. High.
6 * * *
7 REDIRECT EXAMINATION
8 BY MR. GORDON:
9 Q Referring to the picture again - come down
10 and show us on what point on the stump it was you actually cut
11 off, where you made the wedge cut and actually cut the piece
12 off that was to fall.
13 (The witness left the witness stand and stood
14 before the jury box.)
15 A Just above the "Y".
16 Q Could you show us on this stump, on this
17 picture here? Does it show on the picture?
18 A See the two dark spots, one here and one
19 here?
20 Q Let me show what you are talking about to the
21 jury. You are talking about a dark spot here and a dark spot
22 there?
23 A That's right.
24 Q Which one was it you were cutting?
25 A I don't know, but one was here and one over

1 the house. The bottom was probably the one I cut first, I
2 would think. It's just a matter of inches between the two.
3 Q This shows the "Y" with the two pieces
4 out?
5 A (Witness nodded affirmatively.)
6 Q Anyone coming up could see what you were
7 doing there? Was there anything to keep anybody from seeing
8 what was going on?
9 A It was broad daylight.
10 Q You indicated before that they had grabbed
11 hold of the rope and let go on a previous occasion, correct?
12 A Yes.
13 MR. MOULTON: I'm going to object to the question.
14 He says he indicated it before, so he is repeating
15 the same question.
16 THE COURT: I think it came in on direct.
17 MR. MOULTON: It's not rebuttal.
18 * * *
19 BY MR. GORDON:
20 Q Did you actually see them let go the first
21 time?
22 A I didn't see the first, because that's when
23 I was cutting. I was holding the saw and cutting.
24 Q Thank you. That's all.
25 THE COURT: All right, sir. Ladies and Gentlemen,