215 Va. 16

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
DEC 31 1973
RICHMOND, VIRGINIA

4

Record No. 730802

IN THE
SUPREME COURT OF VIRGINIA

FREDERICK T. WYNNE
T / A, etc. — Plaintiff in Error

vs — **Record No. 730802**

FRANK WILLIAM SPAINHOUR, JR.
Defendant in Error

From the Circuit Court of Halifax County
Meredith C. Dortch, Judge

Frank D. Harris, of
Harris & Matthews, Attorneys
115 West Danville Street
South Hill, Virginia 23970
Counsel for Appellant

Record No. 730802

IN THE
SUPREME COURT OF VIRGINIA

FREDERICK T. WYNNE
T / A, etc. — Plaintiff in Error

vs — **Record No. 730802**

FRANK WILLIAM SPAINHOUR, JR.
Defendant in Error

From the Circuit Court of Halifax County
Meredith C. Dortch, Judge

Upon the petition of Frederick T. Wynne, trading as Thriftway of Centerville, a writ of error and supersedeas is awarded him to a judgment rendered by the Circuit Court of Halifax County on the 29th day of May, 1973, in a certain motion for judgment then therein depending, wherein Frank William Spainhour, Jr. was plaintiff and the petitioner was defendant.

And it appearing that a suspending and supersedeas bond in the penalty of $8,500, conditioned according to law, has heretofore been given in accordance with the provisions of Section 8-465 of the Code, no additional bond is required.

TABLE OF CONTENTS

	Page
Amended Motion for Judgment	5
Answer and Grounds of Defense to Amended Motion for Judgment	6
Testimony of Witnesses	8
Stipulation	28
Instruction	28
Instruction X	29
Judgment Order	29
Assignments of Error by Frederick T. Wynne, T / A, etc.	30
Assignments of Cross Error by Frank William Spainhour, Jr.	31

FREDERICK T. WYNNE, T / A, etc.

vs

FRANK WILLIAM SPAINHOUR, JR.

APPENDIX

AMENDED MOTION FOR JUDGMENT

---

1. The plaintiff, Frank William Spainhour, Jr., acting by and through Chandler A. Nelson, of the law firm of Tuck, Bagwell, Dillard & Mapp, his attorneys, hereby moves the Circuit Court of Halifax County, Virginia, to enter judgment against the defendant, Frederick T. Wynne, T / A Thriftway of Centerville, in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), plus the cost of this proceeding, which sum is due and owing by the defendant to the plaintiff for the following damages and wrongs hereinafter set forth, to-wit:

2. On or about December 27, 1969, the plaintiff stopped at the defendant's place of business in Centerville, Virginia, known as Thriftway, to make certain purchases as a customer, which purchases were to be made by him in the ordinary course of trade and as he proceeded to enter the store as a customer and invitee thereof, he was caused to slip and fall and seriously injure himself because of the icy and wet condition of the walkway of the said store.

3. Said accident and injuries resulting to the plaintiff were proximately caused by the negligence of the defendant, his agent, servant or employee, in permitting said walkway to be icy and slippery as aforesaid, thereby causing the plaintiff to slip and fall as aforesaid and the icy condition of said walkway was known to the defendant, his agent, servant or employee, or in the exercise of reasonable care should have been known before the time of said accident but notwithstanding said knowledge and said

constructive knowledge the said defendant, his agent, servant or employee negligently failed to remedy the same.

4. Said accident occurred in Halifax County, Virginia.

5. As a direct and proximate result of said accident and of said negligence, the plaintiff has received permanent and disabling injuries to his person. He has been caused to suffer great pain and mental anguish and will continue permanently to suffer so. He has been required to expend a large sum of money in being treated for his injuries and will be required to expend additional sums for such purposes in the future; and he has suffered loss of wages.

WHEREFORE, plaintiff is entitled to recover from the defendant a judgment in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), plus the costs of this proceeding, and he hereby moves the court to enter judgment for the same.

FRANK WILLIAM SPAINHOUR, JR., Plaintiff
By Counsel

Filed in the Clerk's Office the 11th day of September, 1972.

H. M. Sizemore, Clerk

ANSWER AND GROUNDS OF DEFENSE TO AMENDED MOTION FOR JUDGMENT

Comes now the defendant, Frederick T. Wynne, T/A Thriftway of Centerville, and for his Answer and Grounds of Defense to an Amended Motion for Judgment filed herein against him by Frank William Spainhour, Jr., plaintiff, states:

- 1 -

The defendant denies that he is indebted to the plaintiff in the sum alleged in said Amended Motion for Judgment or for any sum whatsoever for any reason.

- 2 -

The defendant admits that on or about December 27, 1969, the plaintiff stopped by his place of business and while he was there

he fell on the walkway area of said business.

- 3 -

The defendant denies each and every allegation of negligence charged against him in said Amended Motion for Judgment.

- 4 -

The defendant denies that he or any agent, servant, or employee of his was guilty of any negligence in the maintenance and operation of his business facility on or about December 27, 1969, which in any way caused or efficiently contributed to cause the plaintiff to fall and to suffer any alleged injuries or damages while on his premises.

- 5 -

The defendant denies that he or any agent, servant or employee of his was guilty of any act or acts of omission or commission in the maintenance and operation of his store property on or about December 27, 1969, which amounted to negligence on his part or on the part of any agent, servant or employee of his, and which was a proximate cause of or efficiently contributed to cause any alleged injuries and damages to the plaintiff.

- 6 -

The defendant denies that the alleged injuries and damages suffered by the plaintiff were caused in the manner alleged in said Amended Motion for Judgment.

- 7 -

The defendant denies that the plaintiff was injured in the manner and to the extent alleged in said Amended Motion for Judgment.

- 8 -

Without waiving any of his defenses set forth herein, but expressly relying on the full benefit of all of said defenses, the defendant further states that if he be found guilty of any negligence in the maintenance and operation of his store property on or about December 27, 1969, which proximately caused any injuries and damages to the plaintiff, then he will rely upon the contributory negligence of the plaintiff in failing to exercise reasonable and ordinary care for his own safety and wellbeing, which contributory negligence on the part of the plaintiff

proximately caused or efficiently contributed to cause any alleged injuries and damages suffered by the plaintiff, and which contributory negligence would, in law, legally bar the plaintiff from any recovery herein against the defendant.

- 9 -

The defendant further alleges that the plaintiff was guilty of negligence in failing to exercise ordinary and reasonable care for his own safety and wellbeing, which negligence on the part of the plaintiff was the sole proximate cause of any alleged injuries and damages suffered by the plaintiff while on the property of the defendant on or about December 27, 1969.

- 10 -

Any and all allegations of fact and / or negligence set forth in said Amended Motion for Judgment not herein admitted by the defendant are specifically denied by him.

- 11 -

The defendant will further rely upon any and all other legal and provable defenses that might be available to him in any trial of this action.

- 12 -

The defendant reserves unto himself the right to amend and / or enlarge his Amended Answer and Grounds of Defense at any time in the future that he might deem necessary and proper.

FREDERICK T. WYNNE, Defendant
By Counsel

Filed in the Clerk's Office the 2nd day of October, 1972.

M. Layne, D. C.

TESTIMONY OF WITNESSES

. . .

(Page 4) Mervin Seamster:

Q. On December 27, 1969, where were you employed?

A. Thriftway Super Market.

(Page 4) . . .

Q. And, what is your capacity there?
A. Manager, Store Manager.
Q. And, were you acting as manager on this date, December 27, 1969?

(Page 5)

A. Yes, I was.

(Page 5) . . .

Q. What time did you get to work that morning?
A. 8:00 o'clock. We open every morning at 8:00.
Q. You were there, yourself, at 8:00?
A. I was there, myself, at 8:00.
Q. How late did you work that day?
A. That, I can't remember.
Q. About how late?
A. I would say somewhere between 6:00 and 7:00 o'clock.
Q. Then, you were there when Mr. Frank Spainhour fell?
A. Yes, I was.

(Page 8) . . .

Q. Now, what type of gas service is this?
A. Self service.
Q. Tell us how it works, Mr. Seamster?
A. Well, you drive up, and we have a intercom system there, a button you push and take the nozzle down and it's a

(Page 9) switch you turn on and put it in the tank.

(Page 9) . . .

Q. How does he go about getting the gasoline paid for?
A. Comes in the store.

. . .

(Page 13)

Q. You may have your seat. Now, Mr. Seamster, what was the condition of the weather on this day that this accident took place?
A. It was extremely cold.
Q. How cold?

A. That, I couldn't say.

Q. Was it below freezing?

A. Yes.

Q. Now, had there been any falling weather that day, anything falling, snow, rain or sleet, during that day of the accident?

A. That day?

Q. Yes, sir.

A. As far as I remember, no.

Q. As far as you remember, no? Now, you think you would remember had there been any, don't you?

A. Three years, I don't know. I'm not sure I would.

Q. Well, for the past several days, say, for the past three or four days, what had been the temperature of the weather?

. . .

(Page 14) Had it been moderate, cold or warm?

A. I would say it had been extremely cold.

Q. For several days prior to this?

A. Yes.

Q. Now, some several days before this accident, had you had some snow and ice to form, snow and sleet on the driveway?

A. As well as I can remember, we had.

. . .

(Page 14)

Q. Now, you had had some sleet on it, and some snow on it, both, had you not?

A. Now, I don't know. I don't know about the sleet. I think we had had some snow, but sleet, I don think so.

Q. Had the snow been removed? Had the snow been removed, that fell several days earlier?

A. Yes, it had been removed.

Q. How was it removed?

(Page 15) . . .

A. Tractor and blade.

Q. You all got someone to do that?

A. Yes, sir, we have a man that comes every morning after it snows: have since we've been there.

Q. Did you supervise that, yourself?

A. (Nods affirmatively)

. . .

(Page 15)

Q. Now, what was the condition of this driveway when you came to work on the morning of December 27th, morning of the accident?

A. It was ice scattered around.

Q. It was scattered ice? Ice was not over the whole driveway?

A. Well, as I can remember, no, it didn't cover the whole...

Q. Now, the snow was all gone?

A. It could have still been some packed down where cars ran over and packed it, still at this time. It might not all have been off.

(Page 16)

. . .

Q. Now, it was some ice on the driveway when you came there that morning?

A. Yes.

Q. Now, can you tell us where this ice was?

A. No, I couldn't tell you exact spots.

. . .

(Page 16)

Q. You just know it was some there in some places and not in some places?

A. Right.

. . .

(Page 17)

Q. Now, you made an effort this morning to do something when you came to work about the ice, did you not?

A. I did.

Q. You spread salt on it?

A. Yes, sir.

Q. Now, where did you spread the salt; where you found ice, or did you spread it over the whole lot?

A. That, I don't remember either, because I don't remember how much ice was there. If it was very much, I did it over the whole lot.

Q. All you can remember is that you spread some salt?

A. Right, yes.

Q. How much salt did you spread?

A. That particular day, I can't remember. I don't remember how much I put that particular day.

Q. You can't remember how much you spread that

. . .

(Page 18) particular day, and you can't remember, specifically, where you spread it, whether it was spread over the whole lot or just over certain icy parts?

A. No.

Q. Now, you do remember where Mr. Spainhour fell, because you pointed out there in the pictures. Do you, specifically, remember spreading salt there?

A. Yes, if it was ice there I put salt on it, yes.

Q. And, there was ice there when Mr. Spainhour fell, wasn't it?

A. It was.

Q. And, when he got up he was getting up off of a sheet of ice?

A. Yes.

. . .

(Page 18)

Q. You went there, and you put additional salt over it after he fell, didn't you?

(Page 19)

. . .

A. After he fell?

Q. Yes, sir.

A. I salted it again that night. Now, how soon after, what time that afternoon, I don't recall.

. . .

(Page 20)

Q. Anyhow, whatever time it was, at that time you realized that there was ice out there where he fell before he fell, didn't you?

A. I realized it was ice out there before, yes.

Q. Yes, sir. Well, why didn't you warn him of it?

A. Well, we took all the necessary precautions; had the scraper get off the ice we could get off, and put salt on what was left that hadn't melted.

Q. But, you knew that there was ice left out there in this area where he fell before he fell?

A. I knew there was ice on the lot.

Q. And, you didn't do anything to warn Mr. Spainhour, did you?

A. No, I didn't go out and tell him it was ice out there.

(Page 21) . . .

Q. And, you didn't have any kind of notice of any nature out there?

A. Signs, you mean?

Q. Yes, sir.

A. No.

Q. Well, did you or anybody there in this store, connected with the store, to your knowledge do anything on earth to warn Mr. Spainhour or any other customer of the store of the ice out there?

A. Nothing but what we thought was necessary procedures to make it safe for customers.

Q. What was that?

A. Scraping it, putting salt, and keeping salt on it.

Q. That's all you did?

A. That's what we did.

Q. What was the hour, again, that you sprinkled the salt that morning?

A. Well, we open up at 8:00, and I usually, as soon as some of the other employees get there, I go, then, and put salt. So, it was somewhere between 8:00 and 9:00 o'clock.

Q. And, nothing further was done until after the accident?

A. Far as I can remember, no.

. . .

(Page 24) Frank William Spainhour, Jr.:

Q. Did you shop at Thriftway Grocery?

A. Some, yes, sir.

(Page 24) . . .

Q. Now, go ahead and tell the jury what you did and what took place?

A. I filled up with gas and hung the nozzel back up and took the money out of my billfold and started to the store. The driveway was clear, and when I got up to enter...the cars parked on each side of the door...I went between the cars, and it looked like a moisture spot, and I was looking down at
(Page 25) the ground. It looked kind of damp, and I made the first step, and my foot went out from under me, and I laid there a few minutes before I could get up, and my wife saw me. And she come to me, to help me get up, and I told her to watch her step, she might fall, too.

(Page 25) . . .

Q. And, were you going between the two automobiles?

A. Yes, sir.

(Page 25) . . .

Q. Mr. Spainhour, what was the weather on the date this happened?

A. It was real cold.

Q. Had it been cold several days prior to this?

A. Yes, sir.

(Page 26) . . .

Q. Do you recall whether there had been any falling weather on the day the accident happened?

A. No, sir, it hadn't.

Q. Do you recall whether there had been any the day before?

A. It hadn't in about three days.

Q. Now, when had you last been at Thriftway Grocery prior to the day the accident happened?

A. I went there on Christmas Eve.

Q. All right, what was the condition of the parking lot at that time?

A. Well, it had some snow and ice then. I was right careful of the snow.

Q. All right, how did the parking lot compare on December

27th when you fell, to the parking lot on December 24th?

A. It looked pretty clean. It had some snow piled up around out in piles, but for the driveway and all it was pretty clear.

Q. As you walked from your vehicle to the place where you fell, did you see any ice on the parking lot?

A. No sir.

Q. Did you have anything in your hand at the time?

A. A five dollar bill.

. . .

(Page 33)

Q. All right, Mr. Spainhour, on December 27, 1969, when you fell there at Thriftway, did you notice any ice....I mean,

(Page 34) any salt spread on the driveway?

A. No, sir, it was not any there.

Q. Did you see any particular area where you slipped?

A. No, sir.

Q. Did you see any ice in that particular area before you fell?

A. No, sir.

Q. Were you watching where you were going?

A. Yes, sir.

Q. Mr. Spainhour, what caused you to fall there at Thriftway?

A. My feet slipped.

Q. And, what did they slip on?

A. It was ice.

Q. Mr. Spainhour, I hand you some bills, here, and ask you to verify that they are related to the accident that happened on December 27th. I hand you a bill from the Danville Orthopedic Clinic for $603.00. Is this treatment received by you, as a result of the accident, from Dr. Boyer?

A. Yes, sir.

Q. Bill from Danville Memorial Hospital, 14 days hospitalization; February 13, 1971, February 27, 1971; was this when the surgery was performed on you by Dr. Boyer?

A. Yes, sir.

Q. And, how much is this bill for?

(Page 35)

A. A thousand eighty-nine-twenty.

Q. I hand you a bill from South Boston Hospital; two days

hospital confinement that Dr. Watkins placed you there for?

A. Yes, sir.

Q. I believe that's...

A. ....$86.85.

Q. And, this is the bill from South Boston Clinic for treatment received by you as a result of the accident, from Dr. Sheriff and Dr. Watkins?

A. Yes, sir, $41.00.

Q. Now, Mr. Spainhour, was it necessary for you to employ someone to carry you to Danville to see Dr. Boyer?

A. Yes, sir, I couldn't drive.

Q. Who did you employ to do this?

A. James Pruitt.

Q. How many times did he take you?

A. Six.

Q. Is this a receipt from him for money you paid him?

A. Yes, sir.

Q. $42.00?

A. $42.00, yes, sir.

Q. I have two statements, here, from your employer as to your loss of time. Let me ask you this: In January, 1970, immediately right after the accident, what was your hourly wage (Page 36) at that time?

A. $2.45, I think.

Q. Now, does this statement indicate the hours and days that you lost, to the best of your knowledge?

A. Yes, sir.

Q. I believe that indicates you lost $1,222.80 in loss of wages?

A. (Nods affirmatively)

Q. I hand you a second loss of wage sheet, which is the time the surgery and period thereafter; what was your salary at that time, hourly wage?

A. $2.55.

Q. All right, this indicates you lost $1,346.40?

A. Yes, sir.

Q. And, I hand you a drug bill from Faulkner and Lawsons...Was this for medication because of the accident?

A. Yes, sir.

. . .

(Page 37)

Q. Back over the last, well, say year or two before this happened, how often would you say you had been into Mr. Wynne's store?

A. Oh, I went in there every week.

Q. You think you went in as much as one time a week?

A. At least one time a week. Most times twice a week.

Q. So, you were thoroughly familiar with the lot and with the store and all the surroundings?

A. Yes, sir.

. . .

(Page 38)

Q. Describe for us, if you will, what the condition of the lot was on the 24th when you were there?

A. Well, it had right much snow piled up, you know, in piles, where the blade had pushed it up.

Q. Was it ice on the lot?

A. Not much, no, sir, some spots.

Q. Some spots?

A. Yes, sir.

. . .

(Page 39)

Q. Was it any sign or anything out there at that time to tell you it was ice on the lot?

A. No, sir.

Q. Now, from the 24th up until the 27th when this happened, do you recall whether any additional weather had fallen; any additional snow or rain or sleet of any kind?

A. No, sir.

Q. You and Mr. Seamster, both, said it was; you said it was real cold, and he said extremely cold. By that, I assume you mean it was freezing weather all along through that period of time, is that right?

A. This...On some days, you know, it might warm up a little, you know, for it to get a little soft, and then refreeze right back.

Q. But, it would freeze right back at nights?

A. Yes, sir.

Q. And, you were aware of what the weather had been along from the 24th, 25th, 26th, and 27th, weren't you?

(Page 40)

A. Yes, sir.

. . .

(Page 40)

Q. It was ice the day you fell?

A. Well, it looked like a dark moisture spot.

Q. All right, now, about what time did you get to the lot on the 27th?

A. About 20 minutes after 12:00.

(Page 41) . . .

Q. All right, can you tell us, as you drove into the lot, whether you saw any ice on the lot at any place?

A. Some spots, but it wasn't any in the driveway.

Q. All right, can you tell us, as you went from your truck to the store, where you were looking?

A. I was looking down where I was going and watching for cars backing out or anything, so they wouldn't back into me.

Q. Do you remember, also, testifying here on the 24th of October, 1972, when we took your deposition and Mr. Seamster's deposition about this matter?

A. Yes, sir.

Q. Do you recall that I asked you this question, and this was your answer: "Where were you looking, Mr. Spainhour?" Page 28, "if you can tell us, when you walked from your truck towards the store?" "Well, I was watching on both sides for cars, you know, coming in and out, and watching where I was going and looking towards the store." Is that correct?

(Page 42) . . .

A. (Nods affirmatively)

Q. So, I assume you were looking around for cars, and you were looking towards the store and glancing down at the ground. Is that what you are telling us?

A. I was watching for the cars that were pulling in and out, yes, sir.

Q. Now, you said you saw what you thought was a dark or a moist, wet spot?

A. Yes, sir.

Q. Up around the cars?

A. That's right.

Q. From what you and Mr. Seamster tell us, it was certainly cold enough for anything moist on the ground to be frozen, wasn't it?

A. Yes, sir, I reckon so.

Q. And, you realized that, isn't that true?

A. Well, I don't know that I realized that or not. I realized it was like a damp place. It didn't look like any ice.

Q. I'm not trying to cross you up, just getting to the true facts. You certainly said on the 24th it was ice and snow on the lot?

A. Yes, sir.

Q. Now, the period of time was extremely cold,

. . .

(Page 43) and now you tell us you saw a moist spot, or some kind of spot, up ahead of you. You knew it was extremely cold. Did you make any particular effort to see whether it was ice or not?

A. Well, I was walking just caution as anybody could walk. I had to go through there some way to pay the man.

Q. When you got there you didn't stop to check it carefully and see if it was ice, knowing it was extremely cold weather, and you were going...coming to a dark spot?

A. I didn't stop, no, but I took it easy.

Q. And, you say when you stepped on it your feet shot out from under you?

A. Yes, sir.

Q. And, there was ice there, wasn't it, Mr. Spainhour?

A. Yes, sir.

Q. Can you tell why you didn't see it if it was ice there?

A. Because it looked like a damp spot. It didn't look like ice.

Q. It didn't alert you that that was a different color from the other part of the lot you were walking on?

A. Yes, it was a different color.

Q. It was a different color?

A. Yes, sir.

(Page 44) . . .

Q. And, you could recognize it as you walked on up to it, is that right?

A. Yes, sir.

Q. But, you did not see the ice?
A. No, sir, I didn't see no ice. I looked down.

(Page 44) . . .

Q. Let me back up and ask you: Did you see any salt from where you parked your truck all the way into the store?
A. No, sir.
Q. Did you see any salt on the area where you fell?
A. Where I slipped?
Q. Yes, sir.
A. No, sir.

(Page 44) . . .

Q. All right, after you hit the ground and you looked
(Page 45) around, did you see how much ice was on the ground? I want you to tell me, was it a place as big as this table or...
A. It was a space between the cars about the width of that table, where you walk in between them.
Q. All right, was that whole space covered entirely with ice?
A. It was moist looking, yes. It didn't have no thick sheet of ice.
Q. After you got up, after you fell and when you got up, did you realize it was covered completely with ice?
A. I told my wife to watch and not step on it when she was helping me get up.
Q. I know that, but did you recognize the whole area between the two cars was covered with ice after you fell and when you got up?
A. Yes, sir.
Q. You did?
A. I recognized it.
Q. And, this was the dark area, or the different colored area that you had seen as you walked up to it?
A. Yes, sir.
Q. Mr. Spainhour, can you tell us why you didn't see the ice? It's obvious that it was there from what you say. Can you give us an explanation as to why you didn't see it?

(Page 46) . . .

A. Well, I just thought it was just a damp place in the

blacktop, and I didn't think it was any ice.

Q. In other words, you misjudged it to be something else, and it was ice?

A. That's right.

. . .

(Page 49) Mrs. Frank William Spainhour, Jr.:

Q. Did you notice any snow or ice on the lot?

A. It was some, I think, that they had pushed up in big piles.

Q. Where was this located on the lot?

A. Kind of...Well, it was several piles all through the lot.

(Page 49)

. . .

Q. All right, did you notice any ice between where you got out of the truck and the area Mr. Spainhour fell in?

A. No, sir.

Q. Did you notice any rock salt on the parking lot?

A. No, I didn't.

. . .

(Page 50)

Q. All right, as best you can, describe the ice that you saw at that time?

A. Well, it was just dark looking.

Q. Just what?

A. Dark looking.

Q. All right, was it thick ice, thick piece of ice, sheet of ice?

A. I don't think it was so thick.

Q. Speak up, now?

A. It wasn't too thick, but I don't know exactly how thick it was.

Q. Did it have any color to it?

A. No sir, I mean, it didn't look any different from the other to me.

(Page 52)

. . .

Q. Now, was that area...I assume it was different colored from the rest of the parking lot that you had walked down from the truck?

A. Well, I didn't notice if it was different.

Q. But, you could tell this was a dark looking area, is what you say?

A. I didn't even see it until I got on it.
Q. After you looked at it, it was a dark looking area?
A. Yes, sir.

. . . .

(Page 56) Mervin Seamster:

Q. On the day in question, December 27, 1969, what, if anything, did you do in an effort to make this lot more safe because of any snow or ice that might have been on it?

A. Put salt on it.

Q. What time during that day did you put salt on it, the first time?

A. The first time?

Q. Yes, sir.

A. Somewhere between 8:00 and 9:00 o'clock.

Q. Was there any salt on it at that time when you put it on it between 8:00 and 9:00 that morning?

A. Was it already salt?

Q. Yes, When did you salt it prior to that?

A. The night before.

Q. On December 26th?

A. Right.

Q. At about what time?

A. Now, I don't remember; sometime before I left that afternoon; somewhere around sundown, dark, little before dark.

Q. Did you, personally, yourself, put down salt on the lot on the morning of December 27th?

A. Yes, I did.

Q. What type of salt did you use?

A. Rock salt.

. . .

(Page 57)

Q. Now, explain to us, Mr. Seamster, if you will, what manner you put this salt down. How did you do it?

A. I usually cut the top of this bag and take it under my arm and take it out and sow it the same way you sow wheat or oats.

(Page 57) . . .

Q. All right, on the morning of December 27, 1969, tell us

exactly how you salted this lot?

A. Well, I went over it twice with this same salt.

(Page 58) . . .

Q. How did you go over it? You said you went over it twice; in what manner?

A. I go over it one direction, and then turn across and come back the other way.

Q. Why do you do it that way?

A. To make sure you covered all the spots.

(Page 58) . . .

Q. On the morning of December 27, 1969, when you put salt on this lot, was any ice on the lot?

A. Yes.

Q. Did you or did you not see this ice when you drove into your lot that morning?

A. Oh, yes.

Q. Can you, Mr. Seamster, tell us, or give us, to the best of your judgment, how much of the area of your lot was covered with ice at the time this thing happened, at approximately noon on December 27th?

A. Just getting my best I can remember, I'd say it was somewhere like 5 and 10 percent, somewhere in that area.

(Page 59) . . .

Q. When you went out after this man fell, did you still see, yourself, icy spots on your lot?

A. Oh, yes.

Q. Sir?

A. Yes, sir.

Q. When you went out after Mr. Spainhour fell, could you, or could you not, see any of this rock salt on the area?

A. Yes, it was on there.

Q. Sir?

A. It was on there.

(Page 61) . . .

Q. You heard them describe the dark, moist, wet area. Did you see that area of ice there as he described it?

A. Yes.

Q. Did you have any difficulty seeing it when you

(Page 62) walked out there?

A. As far as I remember I didn't, no.

(Page 63) . . .

Q. So, you just put it on the spots where you saw the ice?

A. Yes, I put it on the spots all around the edges and up the front of the store...

Q. But that.

MR. HARRIS: Let him finish.

BY MR. BAGWELL:

Q. Go ahead, if you are not through.

A. ....and any area that had ice on it.

Q. Any area that had ice, but the part of your driveway that didn't have ice, you didn't spread the salt?

A. No, not out in the center. It wasn't ice out in the center; might have been some.

. . .

(Page 67) Frederick T. Wynne:

Q. How many people would you say go in and out on a given day or given week?

A. It would be hard to say, daily; probably five or six thousand a week.

. . .

(Page 69) Dr. Delos W. Boyer:

Q. Were you called upon in the practice of your specialty to treat Mr. Frank W. Spainhour, the plaintiff in this case, sitting over there, with reference to the injuries he suffered in this accident of December 27, 1969?

A. Yes, sir.

Q. Doctor, will you, referring as you please to your own records and your own files, tell this jury in layman's language what you can about these injuries that he suffered?

A. May I refer to my notes, sir?

THE COURT: Yes, sir.

A. I initially saw Mr. Spainhour at the request of Dr. William Watkins on January 15, 1970. I will just go down this

chronologically.

BY MR. BAGWELL:

Q. That's fine, Doctor.

A. He gave a history of having fallen and injured his left leg on 12-27-69, and he was initially treated by Dr. Watkins and referred to me; so that was approximately 18 days after his injury that I saw him in my office. At that time he had a rather marked valgus deformity of the left knee.

Q. You had better tell us what that is, Doctor; whether that came from the accident.

A. He also had a similar thing in his right knee. When we say valgus, these are terms we use. It means it had a knock-kneed form, tended to come in, in a knock-kneed position rather than being straight.

I examined the x-rays that were brought with him, of the knees, and they showed no evidence of fracture or dislocation, but he was having severe pain in his left knee. And because of this I placed him in a cylinder cast, which is a cast that comes from the thigh to above the ankle. And I advised him to use crutches, and I asked him to return to me again in 10 days. At that time, on the 26th of January, he returned.

I took the cylinder cast off. The muscles about the knee and the entire leg were rather weak. We started him on exercises for this. Should I give each date that I saw him?

Q. Yes, Doctor, I would appreciate that you did.

A. All right; then, again, I saw him on February 3rd and he was improving as far as the ability to...strength of his muscles, but he was still having considerable pain. On March 9th I saw him again, and he was wearing heavy elastic stockings above the knee to protect it, because he was having some swelling. Then, he was seen in the office by my associate, Dr. Musgrave, on the 19th, and at that time he said that he could return to work.

I think Mr. Spainhour did return to work, but he was having considerable pain all this time, but he returned to his activities, and I saw him again in March, the 31st, and the knee still showed some instability. In other words, it wasn't completely free of motion, and I requested that he return. And he came back on 4-21-70, at which time he was continuing to do his quadriceps exercise.

Then, I last saw him on 5-21-70 at which time he had a

good range of motion of his knee; still complaining of some generalized leg pain, but he felt that he was doing all right. He was discharged at that time without disability.

I did not see Mr. Spainhour again until February 1st of 1971....that's a period of nine months....but he was having extreme pain in his left hip. It was very painful. He couldn't walk, and I asked him about how long this had been going on, and he said it had been getting progressively worse ever since the last time I saw him. He never had any relief from this. At this time I took an x-ray of his pelvis and found that he had a fracture of the neck of the femur. I can show these on the x-ray in a minute. I'll run through this, and then we'll show the x-ray, and I'll explain this better. And, this apparently was an old fracture by the sight of it. I recommended we go ahead and do surgery on him. So, he was brought into the hospital on February 13th, and I did
(Page 72) surgery on him on the 16th.

Prior to doing the surgery I had him admitted to the hospital for three days to evaluate him as far as other problems that might be present; possibility of cancer, something like this. But, all these were ruled out. They were all found to be negative. And, so we went ahead and did a prosthesis, which means we take the head of the femur...These, I can show you on the x-ray...and put a metal prosthesis, or prosthetic hip in its place. And, he did satisfactorily, postoperatively; followed him at intervals in the office until 8-13-71, at which time I discharged him from there.

(Page 74) . . .

Q. Dr. Boyer, in your opinion, was this fracture that you have shown there on this x-ray caused by his accident of December 27, 1969?

A. I can account for no other way.

Q. Then, I take it, it's your opinion that it did?

A. Yes, sir.

Q. Now, is he left with any kind of permanent disability as a result of this injury to his hip?

A. Yes, as a necessity, or as a need to replace a normal part of the body with a prosthesis as we call his, metal implant, this leaves the patient with a permanent disability; yes, sir.

Q. Now, how does this affect him now, and how will
(Page 75) it continue to affect him during the rest of his life, in his daily activities?

A. Well, our experience...this is general experience, patients that have this type of prosthesis will always have some pain. I mean, generally, the more active they are, the less pain they have. This is the general rule. This doesn't always hold true. About 20 percent of the patients may have more difficulty with the prosthesis; may be a later date he may have to have it removed and the total hip prosthesis put in. This would be later on, so we have to rate the patient with a permanent disability rate because of the necessity of the prosthesis.

Q. And, would you state how you estimate this, percentagewise?

A. Yes, we have a book put out by the American Academy of Orthopedic Surgeons, and list this in general form as to the percentage.

Q. What is that percentage?

A. This is not out of the hat.

Q. What is that?

A. My percentage rating is 15 percent total disability.

Q. Is that total body?

A. Yes, sir, total body disability.

. . .

(Page 77)

Q. Is it any shortening of that leg?

A. Yes, he has approximately three-quarters of an inch shortening on that side. This is anticipated.

(Page 77) . . .

Q. Does he have any limp as a result of this?

A. Yes, sir.

Q. Will that limp be permanent?

(Page 78)

A. Yes, sir.

. . .

(Page 81) Frank William Spainhour:

Q. Mr. Spainhour, what was the general condition of your health prior to this accident on December 27, 1969?

A. What do you mean?

Q. What type of health were you in?

A. Good as far as I know

Q. Were you experiencing any difficulty with your left hip or left leg at that time?

A. No, sir.

Q. All right, now subsequent to the accident, or after December 27, 1969, until you saw Dr. Boyer in Danville, February of 1971, did you suffer any other injury or have any
(Page 82) other accident?

A. No, sir.

STIPULATION

(Page 82)

May we stipulate, I think it's agreeable with Mr. Harris, that the life expectancy of the average male 49, which is Mr. Spainhour's age, is 23.6 years as by the mortality tables that is in existence in this state; 23.6 years average life expectancy.

INSTRUCTION

(Page 96)

The Court instructs the jury if you believe from the evidence that the plaintiff, Frank W. Spainhour, Jr., saw, or in the exercise of reasonable care should have seen the icy condition existing upon the parking lot owned by the defendant, Frederick T. Wynne, it then and there became the duty of the plaintiff, Frank W. Spainhour, Jr., to exercise ordinary or reasonable care for his own safety and protection in using or walking upon said parking lot.

And if you further believe from the evidence that the plaintiff, Frank W. Spainhour, Jr., violated the foregoing duty, then he was negligent; and if you further believe from the evidence that any such negligence was a proximate cause or efficiently contributed (Page 97) to cause the accident in question and any resulting injuries to the plaintiff, Frank W. Spainhour, Jr., then you should return your verdict herein in favor of the defendant, Frederick T. Wynne.

INSTRUCTION X

The duty to exercise ordinary care to keep a proper lookout involves not only the duty to look when such looking to be effective, but also the duty to see what an ordinarily prudent person exercising ordinary care would have seen under the cirsumstances then and there existing; and a person who keeps a lookout but fails to take advantage of what it reasonable discloses is as negligent as one who fails to keep a proper lookout.

Refused January 30, 1973
M. C. Dortch, Judge

JUDGMENT ORDER

This cause having been duly docketed and set for trial, came on January 30, 1973, to be tried, and it having appeared to the court that all of the necessary pleadings were duly filed, and that all of the parties hereto were ready for trial, a jury, to-wit: O. L. Anderson, Mrs. Carol Crews, Stanford Loftis, George Mayo, J. H. Chandler, Edgar Glass and J. S. Ferrell, who having been selected as required by law, were sworn to try the issues joined between the plaintiff and the defendant.

And the jury having heard the evidence of witnesses and the argument of counsel, and having observed the exhibits introduced, retired to their room to consult of a verdict, and after some time returned to the courtroom and returned the following verdict, to-wit:

"We, the jury, on the issue joined, find in favor of the plaintiff, Frank William Spainhour, Jr., against the defendant, Frederick T. Wynne, and fix his damages in the sum of $7,500.00. O. L. Anderson, Foreman."

Whereupon the court inquired of counsel as to whether they had any motions to make before the jury was discharged, and counsel indicated that they had none at that time, and the jury was discharged.

After the jury was discharged, the defendant, by counsel, moved the court to set aside the verdict of the jury and enter judgment in favor of the defendant upon the grounds that it was

contrary to the law and evidence and without evidence to support it, and for error by the court in granting certain instructions on behalf of the plaintiff, and refusing certain instructions on behalf of the defendant, to which action by the court timely objections and exceptions were made, and the plaintiff, by counsel, moved the court to set the verdict of the jury aside on the grounds that it was inadequate as to amount, as a matter of law, and to grant a new trial on damages only. The court took both motions under advisement.

After mature consideration, the court doth hereby overrule both the aforesaid motion of the defendant and the aforesaid motion of the plaintiff to set aside the said jury's verdict and doth sustain the jury's verdict. Defendant, by counsel, excepted to the action of the court in overruling his said motion, and plaintiff, by counsel, excepted to the action of the court in overruling his said motion.

And the court proceeding to enter judgment doth adjudge and order that the plaintiff herein recover of the defendant the sum of $7,500.00, plus interest from January 30, 1973, and that he further recover of the defendant the costs of this proceeding.

And the defendant having indicated to the court his desire to apply to the Supreme Court of Appeals of Virginia for a writ of error to the aforesaid judgment, it is ordered that execution on the same be suspended for sixty days upon the said defendant, or someone for him, executing before the Clerk of this Court within fifteen days from the date of this order, bond with surety approved by the clerk in the penal amount of $8,500.00, and conditioned according to law.

May 29, 1971
M. C. Dortch, Judge

ASSIGNMENTS OF ERROR BY FREDERICK T. WYNNE, T/A, ETC.

1. The Trial Court was in error in refusing to set aside the verdict of the jury and enter up judgment in favor of the defendant upon the ground that the verdict of the jury was

contrary to the law and the evidence in the case and without credible evidence to support it.

2. The Trial Court was in error in refusing to grant Instruction No. X as offered by the defendant since this instruction correctly defined the law requiring the plaintiff to keep a proper lookout and to place the plaintiff under the duty to see what an ordinarily prudent person exercising ordinary care would have seen under the circumstances then and there existing.

FREDERICK T. WYNNE
T/A Thriftway of Centerville, Defendant
By Counsel

Filed June 8, 1973
M. Layne, D. C.

ASSIGNMENT OF CROSS ERROR
BY FRANK WILLIAM SPAINHOUR, JR.

1. The trial court was in error in refusing to set aside the verdict of the jury upon the grounds that it was inadequate as to amount as a matter of law and to grant a new trial on damages only.

FRANK WILLIAM SPAINHOUR, JR., Plaintiff
By Counsel

Filed June 8, 1973
M. Layne, D. C.