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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 731015

GLENAVIE L. WASHINGTON
(nee Glenavie L. Fowler),

Plaintiff-in-Error,

vs.

GAYLORD S. WILLIAMS

and

JERRY W. BAINS,

Defendants-in-Error.

APPENDIX

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which would have been at the June price; similarly it is undisputed that there were 4,000 gallons, I think roughly, in the ground that he couldn't use because they cut the lines.

THE COURT: Right.

MR. BRYDGES: And also admittedly they didn't deliver the gas on June 30th.

THE COURT: Right.

MR. BRYDGES: Now he wants to know why he didn't order more gas at a more expensive price when they had failed to deliver the first one.

THE COURT: No. He asked would he have accepted it at a higher price.

MR. BRYDGES: What is the materiality when he had ordered it at the lower price?

THE COURT: As I understand it, then he wouldn't have had to close the station.

I overrule your objection.

MR. BRYDGES: Note my exception.

BY MR. OUTLAND:

Q Would you have refused?

A I never refused to accept a load of gas. I never refused to accept a load of gas.

Q Would you have accepted a load of gas delivered

1 to you in July at the July price?

2 A You are asking me if things were different what

3 would I have done.

4 Q I think it is a very simple question, Mr. Beasley.

5 You can answer it yes or no.

6

7 MR. BRYDGES: What is the question again

8 now? Would he have accepted a load?

9 THE COURT: If it had been delivered to

10 him in July.

11 MR. BRYDGES: At the higher price than

12 he had ordered in June?

13 MR. OUTLAND: Two cents more on the gallon.

14 THE COURT: Right.

15 THE WITNESS: What I would have done probably

16 would have been to accept the gas and negotiate

17 with them hoping that they would reimburse me

18 with the difference in the price, but I certainly

19 would not have refused to let them deliver gas

20 at the station.

21

22 BY MR. OUTLAND:

23 Q All right. When you called the terminal did

24 you specifically tell the terminal to send you a load of gas?

25 A No. I called Mr. Ward and told him that I had

1 ordered gas in June and would he reach someone that could
2 authorize the gas to be delivered to me.
3 Q Didn't he tell you that he couldn't deliver the
4 gas to you in July at the June price?
5 A He didn't tell me that he could or couldn't.
6 I asked him to talk to someone that could authorize the delivery.
7 Q He then asked you would you like to order some
8 gas?
9 A He may have asked me if I wanted to put in an
10 additional order.
11 Q You said no?
12 A I didn't want to put in an additional order,
13 no.
14
15 THE COURT: What did you want? You wanted
16 your June order?
17 THE WITNESS: Yes, sir, Your Honor.
18 The whole crutch of this thing is that they
19 used this price as an incentive to get me to sign
20 all the papers over here. I didn't have to sign
21 a note for $1100 and give it to them unless there
22 was a change in the method of purchase. I had
23 been buying gas from them for 16 years, and I
24 had always paid for it in no time. All I would
25 have had to have done was stayed in the same place

1 and had them put gas in the tanks and still pay
2 for it a week at a time. But they used coercion
3 to get me to sign these papers, including an
4 $1100 note so that I could get the tanks filled
5 up before June 30th.
6
7 BY MR. OUTLAND:
8 Q And that would make $120 in your pocket?
9 A I haven't figured it up, because it didn't mean
10 that much to me, the $120.
11 Q It was a matter of principle?
12 A Whether $120 or $150, they promised to do
13 something and they didn't do it.
14 Q July 15th you ran out of supreme?
15 A Right.
16 Q And you still kept possession of the station?
17 You locked the pumps, I believe?
18 A Yes, sir.
19 Q You still had some of your stuff in the trailer?
20 A Right.
21 Q Then you still had possession of the premises?
22 A Right.
23 Q When did you say the pumps had changed -- somebody
24 pumped the gas from the 4,000-gallon tank that had been ruptured
25 into the empty supreme tank?

1 A The transfer was completed at 10:00 on August 3rd.
2 Q And the station was not -- was closed then at
3 that time, was it not?
4 A It was closed at that time, yes, sir.
5 Q It was closed from July 15th until August 6th,
6 I believe, when you went in there?
7 A Right. It took them from July 15th to August 3rd
8 to pump that gas from one tank to another.
9 Q Now, on your profit statement there you included
10 the entire month of April?
11 A Yes, sir.
12 Q What was your net profit in April of 1971?
13 A Seven hundred ninety-five dollars and thirty cents.
14 Q Now, what was it in 1972?
15 A Four hundred ninety-seven dollars three cents.
16 Q Four hundred ninety-seven?
17 A Yes, sir.
18 Q What?
19 A Four hundred ninety-seven dollars three cents.
20 Q Well, you only -- you operated there with just
21 the pumps and the trailer for about six to seven days of that
22 month, didn't you?
23 A Somewhere about there, yes, sir.
24 Q And you figured that through September 30th?
Is that what your figures are based on, from April 1 through

1 I left or not, but prior to my leaving I didn't know anything
2 about him not being able to use the 4,000 gallons.
3 Q Now, as of midnight of June 30th, how much
4 increase was in the price of gas? How much was the increase?
5 A I think the tax was two cents.
6 Q Could Atlantic Richfield have sold any gas to
7 the dealer on July 1st or July 2nd at less than that price?
8 A No, they couldn't. The prices are fixed and
9 federally controlled, and we can't sell to individuals on different
10 prices. There was an across the table price increase, and it
11 affected every dealer we had in the United States -- I beg your
12 pardon - in Virginia. It was a state tax.
13 Q I hand you a paper entitled "Rent Abatement,
14 Reconstructed Station," and ask if you can identify that.
15 A Yes, I can.
16 Q What is that?
17 A Well, this is a program whereby when a dealer
18 is being reconstructed we will give him a rent break. In other
19 words, Mr. Beasley's rent was normally one seventy-five per gallon.
20 During the reconstruction we reduced his rent to a minimum of
21 one cent per gallon, but as his volume maintained its normal
22 level he could pay as low as half a cent per gallon.
23 I discussed this with Mr. Beasley because one
24 thing, he mentioned, you know, "You want to reconstruct the
25 station. What are you going to take care of?" At that time I

Now, I did give him an exact date of the 13th, to answer your question.

Q Let me put it to you this way: If Mr. Beasley said to you on the 13th in the office of Atlantic Richfield Corporation that he didn't want you to tear it down, would you have torn it down anyway?

A No, we couldn't have.

Q Did you tell Mr. Beasley that?

A No, he didn't ask me.

Q So you didn't tell this operator of 16 years vintage that he had a right to not allow the tearing down of the station because he didn't ask you? Is that what you're telling me?

A I don't go around giving legal advice. I can't give legal advice and go around giving legal advice.

Q You're doing all right so far. You're doing fine.

A What I am saying: We discussed the tearing down of the building. He never offered any protest.

Q Mr. Newton, let me ask you this question: Did you tell him at any time, and it was obviously upsetting to him, that his building was going to be torn down?

A It certainly was.

Q Why didn't you tell Mr. Beasley that "you didn't have to do it; We can do it after the lease expires in three or

A I say he never told me at all.

Q Whether he called the terminal or not, you don't know?

A No.

Q You left July 24th and you don't know anything about what happened after that?

A That's correct.

MR. BRYDGES: All right. Thank you, Mr. Newton.

THE COURT: Any redirect?

MR. OUTLAND: No.

You may come down.

(Witness excused.)

** ** ** **

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

DIRECT EXAMINATION

BY MR. OUTLAND:

Q Would you state your name, please, sir?

A W. B. Ward.

Q What is your occupation?

1 A Terminal Superintendent.

2 Q What?

3 A Superintendent.

4 Q At the terminal?

5 A Yes.

6 Q Where?

7 A Atlantic Richfield down in Chesapeake.

8 Q As superintendent of the terminal, do you take

9 orders for gas from the various dealers?

10 A Yes, sir.

11 Q And do you keep logs of these orders?

12 A Yes, sir.

13 Q Did you receive any calls from Mr. Beasley in

14 regard to gas in July of 1972?

15 A He called July 13th and stated that he had

16 seven and a half inches of supreme.

17 Q That's high test?

18 A Right. But he did not place an order.

19 Q What was the gist of the conversation?

20 A Sir?

21 Q Do you have the conversation written down?

22 A He just stated that he was not making an order

23 and wanted me to tell the salesman --

24 Q Did you ask him if he wanted to make an order?

25 A Yes, sir.

1 Q What did he say?

2 A He said no.

3 Q Did he mention anything about a June price?

4 A He wanted me to notify the sales people that they

5 hadn't met the commitment, that they hadn't fulfilled this

6 commitment, that he wanted gasoline on the old price. I told

7 him I had no authority; this was state law; the gasoline was

8 up and I could deliver at the old price.

9 Q As of July 1st how much was the price increase?

10 A Two cents per gallon.

11 Q Was that tax?

12 A Yes, sir.

13 Q Would you have delivered him a load of gas then

14 at the June price?

15 A Yes, sir.

16 Q The June price? Could you have delivered him

17 a load of gas in July at the June price?

18 A No, sir. I have no authority for that.

19 Q Would that have been against the law?

20 A Yes, sir.

21 Q Did you receive any other calls from him?

22 A Not to my knowledge. Not to my knowledge.

23 Q You specifically asked him if he wanted to place

24 an order?

25 A Yes, sir.

1 Q His response was what?

2 A No, he just wanted me to inform the salesman.

3

4 MR. OUTLAND: Answer Mr. Brydges.

5

6 CROSS-EXAMINATION

7

8 BY MR. BRYDGES:

9 Q Mr. Ward, you are not the only one at the terminal,

10 are you?

11 A We have one terminal operating.

12 Q But other people may have received calls other

13 than you?

14 A Yes, sir.

15 Q Whether or not he called any other people you

16 don't know?

17 A Well, it's not logged in the book.

18

19 MR. OUTLAND: It's what?

20 THE WITNESS: It's not logged in the book.

21 I logged his call at 9:15.

22

23 BY MR. BRYDGES:

24 Q You may not have logged his call.

25 A No, we log all calls.

1 KENNETH A. WEBER, called as a witness on
2 behalf of the defendant, having been first duly
3 sworn, was examined and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. OUTLAND:
8 Q Would you state your name, please, sir?
9 A Kenneth A. Weber.
10 Q What is your occupation?
11 A Manager Representative for --
12 Q I didn't understand you.
13 A Manager Representative for Atlantic Richfield
14 Company.
15 Q And when did you take over the area?
16 A I first came to the area — I believe it was
17 the 11th of July, last year.
18 Q July 11th.
19 Did you have any conversation with Mr. Beasley
20 relative to his tank being low, his supreme tank, after you got
21 there? Do you remember?
22 A No, sir, I do not recall any such conversation.
23 Q Did he ever ask you for any gas to fill that up?
24 A No, sir, he didn't.
Q And did you make certain observations of the

station during the first part of August as to whether or not it was closed or what?

A Yes, sir, I did.

Q Do you have a written memorandum of that?

A There is a copy of it. I don't have it on my person.

Q Do you recall the days you observed the station?

A Yes. As I recall it was the 1st through the 4th of August.

Q And what did you observe?

A The station was closed. It was not operating. There was a sign hung on the face of one of the pumps - I believe it was a reversed paper plate - on which the word "closed" was written, and it was taped to the pump.

Q Was this a period in the excess of 72 hours?

A Yes, sir.

Q Did you ever have any conversation with Mr. Beasley relative to this station, tearing down the station, or anything?

A Tearing down the station, no, sir.

MR. OUTLAND: Answer Mr. Brydges.

1 your station running, if you had said yes when you called Mr. Ward
2 would have sent you a load.
3 A I don't know that. I had 4,000 gallons of
4 gasoline that I couldn't pump that was at the old price, and
5 nobody did anything to allow me to pump that gas.
6 Q But you never told Mr. Ward to send you a load;
7 right?
8 A I called Mr. Ward and told him I was waiting for
9 a load of gasoline. I don't know how to make it clearer.
10 Q You don't deny what he testified to, that he
11 asked you specifically: "Would you like to place an order"?
12 A I don't remember him asking me that.
13 Q You don't remember him asking you that?
14 A No, I don't.
15
16 REDIRECT EXAMINATION
17
18 BY MR. BRYDGES:
19 Q Mr. Beasley, this $400 Mr. Newton offered you,
20 what was that about?
21 A All right. When they started building the new
22 building they put a new tank in to supply the new station when
23 it was going to be complete. Now, there was approximately 20 -
24 21,000 gallons of gasoline in this new tank.
25 Q Which was put in the ground?

1
2 E X C E P T I O N S
3
4 MR. OUTLAND: The defendant objects to the
5 granting of any instruction on behalf of the
6 plaintiff as the Court should rule, as a matter
7 of law, that the plaintiff is not entitled to
8 recover.
9 The defendant further excepts and objects
10 to the refusal of the Court in granting Instruction
11 2A on the grounds that this instruction adequately
12 states the case for the defendant, in that if the
13 plaintiff acquiesced in the remodeling of the
14 station and remained in possession, the verdict
15 should be in favor of the defendant.
16
17 (Jury returned at 5:02 p.m. with a verdict for
18 Plaintiff in the amount of $4,509.93.)
19 ** ** ** **
20
21
22
23
24

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

GLENAVIE L. FOWLER, Plaintiff, vs. GAYLORD S. WILLIAMS University of Virginia Hospital Albemarle County, Virginia and JERRY W. BAINS #3411 North Fifth Street Phoenix, Arizona Defendants.	: : : : : : : : : : : : : : : : : :

MOTION FOR JUDGMENT

[Filed November 11, 1970 and amended by orders of January 19, 1971 and January 9, 1973]

The plaintiff, Glenavie L. Fowler, moves the Court for a judgment against the defendants, Gaylord S. Williams and Jerry W. Bains, jointly and severally, in the sum of Five Hundred Thousand Dollars ($500,000) for the wrongs and injuries hereinafter set forth.

1. On or about April 5, 1969 the plaintiff was injured in an automobile collision at the junction of Highway Route 22 with Highway Route 250, in the County of Albemarle at or near Shadwell. Her injuries consisted

chiefly of a fractured jaw, facial lacerations, and a fractured patella. Thus, the plaintiff was required to seek and to submit to medical, surgical and hospital care and treatment.

2. The plaintiff submitted to medical, surgical and hospital care and treatment at the University of Virginia Hospital, an institution owned and controlled by the Commonwealth of Virginia, which is located partly within the City of Charlottesville and partly within the County of Albemarle and wholly within this Court's jurisdiction by virtue of Section 17118 of the Code of Virginia, 1950, as amended. Plaintiff or her parents for her agreed to pay, and subsequently the plaintiff did pay or cause to be paid, all reasonable and proper charges and costs incident to her hospitalization, care and treatment.

3. At said hospital, the plaintiff became the patient of the defendant Jerry W. Bains, a medical doctor licensed in Virginia; and for compensation to him to be paid by or on behalf of the plaintiff, the defendant Bains undertook to treat the plaintiff and to relieve and cure her of her said injuries.

4. The defendant Gaylord S. Williams on and after April 5, 1969 was a medical doctor employed by said hospital as a resident physician.

5. The defendant Jerry W. Bains engaged the defendant Gaylord S. Williams as an assistant, apprentice and agent of the defendant Bains to associate in the care and treatment of the plaintiff.

6. Repair of the plaintiff's fractured jaw was accomplished by the alignment of the fractures through the use of intra-dental wiring and arch bar application.

7. At said hospital, on or about May 28, 1969, and while preparing the plaintiff for the removal of said intra-dental wiring and arch bar, the defendant Gaylord S. Williams did inject a certain preoperative medication into the left arm of the plaintiff. The plaintiff's left arm had not been injured at and prior to the time the injection was made. As a direct result of the said injection and the manner in which it was accomplished, the plaintiff's left hand become pained, swollen and, ultimately, gangrenous; and notwithstanding corrective treatment undertaken on May 29, 1969 and continued thereafter, the plaintiff's left forearm was of necessity amputated on July 10, 1969 between the wrist and elbow.

8. At the time he injected said medication into the arm of the plaintiff the defendant Gaylord S. Williams was and was acting within the scope of his duties as the assistant, apprentice and agent of the defendant Jerry W. Bains, associated in the care and treatment of the plaintiff.

9. At the time said medication was injected into the arm of the plaintiff, the defendants were and each of them was and had been under a duty to insure that the treatment and procedures to which the plaintiff would be subjected would accord with sound medical practice and would be administered with the care, knowledge and skill commonly used by physicians and surgeons in the community.

10. The said medication was injected into the plaintiff's arm in a negligent manner and in a manner which did not accord with sound medical practice or with the care, knowledge and skill commonly used by physicians and surgeons in the community.

11. The plaintiff was maimed, disfigured and seriously handicapped and she has sustained loss of earnings and has suffered and will permanently continue to suffer pain, inconvenience, impairment of normal life, humiliation, embarrassment, mental anguish, and diminution of earning capacity, all as a direct result of the aforesaid negligence of the defendants and the violation of their aforesaid duty to the plaintiff and the consequent amputation of the plaintiff's left forearm.

WHEREFORE, the plaintiff prays that she recover judgment against the defendants jointly and severally in the sum of Five Hundred Thousand Dollars.

COUNT II

12. The allegations of paragraphs numbered 1 through 11 are made a part of this count as if fully stated herein.

13. The injection of the preoperative medication into the left arm of the plaintiff was made on May 28, 1969 at or about 10:00 A.M., and on that day the plaintiff was permitted to leave the hospital and return to her home.

14. On May 29, 1969 at or about 4:55 A.M., the plaintiff was again admitted to said hospital to be treated for a painful and swollen condition of her left arm and other symptoms of serious injury to her arm, including some cyanosis of fingers of her left hand; and then and until her subsequent discharge from the hospital on June 18, 1969, the defendant Jerry W. Bains was and continued to be the plaintiff's attending physician.

15. At the time of the plaintiff's May 29, 1969 admission, said Jerry W. Bains knew or should have known that a solution containing Demerol and Vistaril had been injected into the plaintiff's left arm at the anticubital fossa on May 29, 1969 and that there was a probability that said solution had been injected intra-arterially.

16. Said Jerry W. Bains knew or should have known that intra-arterial injection of Vistaril would be likely to cause thrombosis and such cyanosis of fingers as was then apparent.

17. On June 2, 1969 an operation was performed on the plaintiff's left brachial artery in an attempt to remove the obstruction or obstructions therein, to restore proper circulation of blood and to save the plaintifff's hand.

18. In delaying or permitting the delay of such operation from the time of the plaintiff's May 29, 1969 admission to the hospital until June 2, 1969, the defendant Jerry W. Bains failed to use due care or skill and failed to follow sound medical practice and to treat the plaintiff with the care, knowledge and skill commonly used by physicians and surgeons in the community.

19. The aforesaid negligence of the defendant Jerry W. Bains was an efficiently concurring and contributing cause of the plaintiff's loss of her left forearm.

WHEREFORE the plaintiff prays that she recover judgment against the defendant Jerry W. Bains in the sum of Five Hundred Thousand Dollars.

* * *

GROUNDS OF DEFENSE OF JERRY W. BAINS

[Filed February 11, 1971]

Comes now the defendant, Jerry W. Bains, by counsel, and for his grounds of defense to the Motion for Judgment, as amended, filed against him in the above action, says:

(1) He does not know whether the facts alleged in Item 1 exist or not.

(2) He admits that plaintiff was treated for injuries at the University of Virginia Hospital, an institution owned and controlled by the Commonwealth of Virginia. He does not know whether the other facts alleged in Item 2 exist or not.

(3) It is admitted that the plaintiff became a patient of the Department of Plastic Surgery of the University of Virginia Hospital of which department this defendant was a member of the staff. He does not know whether the other facts alleged in Item 3 exist or not.

(4) The allegations of Item 4 are admitted. Gaylord S. Williams was on and after April 5, 1969 a medical doctor employed by the University of Virginia Hospital which was owned and operated by the Commonwealth of Virginia.

(5) The allegations of Item 5 are denied. Gaylord S. Williams was not the agent or employee of this

defendant but was employed by the University of Virginia Hospital and the Commonwealth of Virginia.

(6) This defendant does not know whether the facts alleged in Item 6 exist or not.

(7) This defendant does not know whether the facts alleged in Item 7 exist or not.

(8) The allegations of Item 8 are denied. It is denied that Gaylord S. Williams was an agent or employee of this defendant.

(9) The allegations of Item 9 are denied as to this defendant.

(10) The allegations of Item 10 are denied.

(11) The allegations of Item 11 are denied.

(12) All acts of negligence on the part of this defendant are denied.

(13) All allegations of agency and employment of Gaylord S. Williams on the part of this defendant are denied. The injections alleged in the Motion for Judgment were made by Dr. Gaylord S. Williams without the knowledge and supervision of this defendant. This defendant owed no duty to participate or supervise the injections.

(14) The medical treatment received by the plaintiff on May 28, 1969 was given by Gaylord S. Williams and other members of the staff of the University of Virginia Hospital and not by this defendant.

(15) The damages claimed are excessive.

* * *

REQUEST FOR ADMISSION OF FACTS

[Filed December 7, 1971]

To: Edward R. Slaughter, Jr., Esquire
McGuire, Woods & Battle
Attorneys for Gaylord S. Williams, defendant
Charlottesville, Virginia 22902

To: Robert E. Taylor, Esquire
Taylor, Michie & Callaghan
Attorneys for Jerry W. Bains, defendant
Charlottesville, Virginia 22902

Plaintiff, Glenavie L. Fowler, requests the defendant Gaylord S. Williams and the defendant Jerry W. Bains within ten (10) days after service of this request to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial, the truth of the following facts:

1. On April 5, 1969 the plaintiff entered the University of Virginia Hospital as a patient.

2. At the time the plaintiff entered the University of Virginia Hospital on April 5, 1969, her injuries consisted of (1) a fractured mandible, (2) a fractured right patella and (3) facial lacerations.

3. Upon the plaintiff's admission to the University of Virginia Hospital on April 5, 1969, she had not at that time sustained an injury to her left arm.

4. On the Index Sheet which shows the admission of the plaintiff to the hospital on April 5, 1969, Jerry W. Bains affixed his signature as the signature of the plaintiff's attending physician.

5. Jerry W. Bains was the plaintiff's attending physician during the period of her hospitalization at University of Virginia Hospital which commenced April 5, 1969.

6. On the Index Sheet which shows the admission of the plaintiff to the hospital on May 29, 1969, Jerry W. Bains affixed his signature as the signature of the plaintiff's attending physician.

7. Jerry W. Bains was the plaintiff's attending physician during the period of her hospitalization at the University of Virginia Hospital which commenced May 29, 1969.

8. On April 5, 1969 Jerry W. Bains was and had been a medical doctor licensed in Virginia and he continued to be such until after June 18, 1969.

9. Jerry W. Bains submitted or caused to be submitted his bill for $125 for surgery performed on the

plaintiff at University of Virginia Hospital during her confinement at said hospital on and after April 5, 1969.

10. The bill of $125 due Jerry W. Bains for surgery performed on the plaintiff at Unversity of Virginia Hospital during her confinement at said hospital on and after April 5, 1969 was paid.

11. Jerry W. Bains submitted or cause to be submitted his bill for $150 for surgery performed on the plaintiff at Unversity of Virginia Hospital during her confinement at said hospital on and after May 29, 1969.

12. The bill for $150 submitted as being due Jerry W. Bains for surgery performed on the plaintiff at University of Virginia Hospital during her confinement at said hospital on and after May 29, 1969 was paid.

13. Jerry W. Bains was the only physician or surgeon connected with the University of Virginia Hospital who submitted a bill for treating, caring for or attending the plaintiff at the hospital between April 5, 1969 and June 18, 1969.

14. The authority of Gaylord S. Williams to administer medical treatment unto the plaintiff was derived from Jerry W. Bains.

15. In administering medical treatment to the plaintiff, Gaylord S. Williams acted under the direction of Jerry W. Bains.

16. In administering medical treatment to the plaintiff, Gaylord S. Williams acted under the supervision of Jerry W. Bains.

17. In adminstering medical treatment to the plaintiff, Gaylord S. Williams acted under the control of Jerry W. Bains.

18. When Gaylord S. Williams adminstered medical treatment to the plaintiff on May 28, 1969, he was acting under the authority of Jerry W. Bains.

19. When Gaylord S. Williams administered medical treatment to the plaintiff on May 28, 1969, he was acting at the direction of Jerry W. Bains.

20. On May 28, 1969 Gaylord S. Williams injected 50 mgs. of Vistaril into the left arm of the plaintiff.

21. The Vistaril injected into the plaintiff's arm by Gaylord S. Williams on May 28, 1969 was injected into the brachial artery.

22. Vistaril is a trade name for hydroxyzine hydrochloride.

23. The 1968 Edition of the Physicians' Desk Reference to Pharmaceutical Specialties and Biologicals gives the following warning with respect to the intravenous use of hydroxyzine hydrochloride:

"Intravenous Use: Against the background of wide-spread usage of hydroxyzine parenteral solution over a number of years, a small incidence of digital gangrene has occurred distal to the site of reported intravenous administration, apparently the result of endarteritis and thrombosis. These have been considered due to inadvertent intraarterial injection, although the possibility of periarterial extravasation with arterial spasm, cannot be ruled out. WHEN HYDROXYZINE HYDROCHLORIDE PARENTERAL SOLUTION IS ADMINISTERED INTRAVENOUSLY PARTICULAR ATTENTION SHOULD BE DIRECTED TO INSURE THAT THE DRUG IS INJECTED ONLY INTO THE VEIN (INCLUDING ASPIRATION AND PROPER ANATOMICAL SITE SELECTION) TO AVOID EITHER INTRA-ARTERIAL INJECTION OR EXTRAVASATION. The intravenous administration should be accomplished slowly, no faster than 25 mg. per minute, and not to exceed 100 mg. in any single dose. In order to avoid possible adverse effects it is recommended that hydroxyzine hydrochloride parenteral solution be diluted to at least 50 cc. with sterile normal saline and administered over a period of four minutes or more, preferably into the tubing of a running intravenous infusion.
Intramuscular Use: As with all intramuscular preparations, Vistaril (hydroxyzine hydrochloride) Parenteral Solution shoud be injected well within the body of a relatively large muscle."

24. On and before May 28, 1969, Jerry W. Bains knew that in making intravenous administration of Vistaril, he should direct his particular attention to insure that the drug would be injected only into the vein to avoid either intra-arterial injection or extravasation.

25. On and before May 28, 1969, Gaylord S. Williams knew that in making intravenous administration of Vistaril, he should direct his particular attention to insure that the drug would be injected only into the vein to avoid either intra-arterial injection or extravasation.

26. After the injection was made on May 28, 1969 there occurred a thrombosis of the plaintiff's left brachial artery.

27. After the injection was made on May 28, 1969 gangrene developed in the plaintiff's left hand.

28. The injection of Vistaril into the plaintiff's left brachial artery on May 28, 1969 caused the thrombosis of that artery to occur.

29. The injection of Vistaril into the plaintiff's left arm on May 28, 1969 caused the development of gangrene in the plaintiff's left hand.

30. The development of gangrene in the plaintiff's left hand necessitated the amputation of plaintiff's forearm which was accomplished July 10, 1969.

* * *

OBJECTIONS TO REQUEST FOR ADMISSION OF FACTS

[Filed December 15, 1971]

Comes now the defendant in the foregoing action, Gaylord S. Williams, and objects on the following grounds to the request for admission of facts which plaintiff has heretofore served upon him:

1. As to all paragraphs of such request, this defendant objects to them on the ground that they are prematurely served because this defendant has heretofore filed a plea of sovereign immunity. Such plea has been argued, briefs have been submitted, but the issue has not been decided by the Court. Pending the determination of such plea, this defendant has filed no answer, and at this time no issue exists between plaintiff and this defendant to which the information sought in plaintiff's Request for Admission of Facts would be relevant.

2. As to all paragraphs of such Request, this defendant objects thereto on the grounds that they seek admission of facts not contemplated by Rule 4:11 of the Rules of the Supreme Court of Virginia because (a) such paragraphs seek admissions concerning contested issues;
(b) such paragraphs are too general and too broad;
(c) such paragraphs are phrased in non-objective language;
(d) such paragraphs are phrased in argumentative language;

(c) such paragraphs seek admissions which are plain opinion, conjecture and suspicion, and (d) in many paragraphs the information sought is readily available to plaintiff.

3. As to the information sought in paragraphs 1, 2, 3, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of such Request, the establishment thereof should be made by competent testimony of witnesses as plaintiff proves her case, and such information may not be elicited through the device of a request for admission of facts.

4. As to the information sought in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of such Request, this defendant says that he has no standing to admit any information sought therein even if it were true because such information relates to defendant, Jerry W. Bains, and in general to matters about which this defendant could not testify either because he does not know the information requested or knows it only secondarily.

5. As to paragraphs 14, 15, 16, 17, 18 and 19 of such Request, this defendant says that the information sought therein amounts to legal conclusions in support of which facts must be introduced in evidence but which are not susceptible of admission through the means of a request for admission of facts.

wherefore, defendant, Baylord S. Williams, moves that the Court deny the plaintiff's Request for Admission of Facts in its entirety.

* * *

OBJECTIONS TO PLAINTIFF'S
REQUEST FOR ADMISSION OF FACTS

[Filed December 15, 1971]

Comes now the defendant, Jerry W. Bains, by counsel, and sets forth the following objections to the plaintiff's Request for Admission of Facts:

(1) Defendant objects to this entire Request as prematurely served. The defendant has before this Court a plea in bar raising the issue of sovereign immunity upon which the Court has not yet ruled. If the defendant prevails in his plea, it would not be necessary for him to answer the plaintiff's Request. Therefore, until the Court has ruled, the information requested is not yet relevant.

(2) Defendant objects to this entire Request on the grounds that it is not in keeping with the theory or purpose of Rule 4:11 of the Rules of the Supreme Court of Appeals of Virginia. The theory and purpose of this rule is to allow parties to avoid the necessity of trying relevant facts needlessly where such facts are uncontested. It is

not designed to permit a party to circumvent the normal methods of discovery nor to try his case by compelling the other side to admit or deny facts which are in dispute. It is further asserted that this rule is not intended to allow onerous or unfair requests, but as a convenient tool for narrowing contested factual issues by eliminating uncontested ones.

(3) Defendant specifically objects to plaintiff's paragraph 1 because the information sought is more readily within the knowledge of the plaintiff than the defendant.

(4) Defendant specifically objects to plaintiff's paragraph 2 based on the fact that it is a matter of record and that the records involved are not available to the defendant at this time, but are easily available to the plaintiff.

(5) Defendant specifically objects to plaintiff's paragraph 3 on the grounds that it is argumentative and that it calls for speculation and an opinion on the part of the defendant whereas it is within the certain knowledge of the plaintiff.

(6) Defendant specifically objects to plaintiff's paragraph 4 on the grounds that it is an argumentative, factually non-objective statement concerning a contested issue of fact.

(7) Defendant specifically objects to plaintiff's paragraph 5 on the grounds that it calls for a legal conclusion and is posed in an argumentative fashion. Further, defendant objects on the grounds that the information requested goes to a contested issue of fact, the basis of which must be established by formal proof.

(8) Defendant specifically objects to plaintiff's paragraph 6 on the grounds that it is posed in an argumentative manner and calls for a statement about a contested issue, the basis for which must be established by formal proof.

(9) Defendant specifically objects to plaintiff's paragraph 7 on the grounds that it is argumentative and calls for a legal conclusion. In addition, defendant objects on the grounds that this paragraph calls for a statement concerning a contested issue of fact, the basis for which must be established by formal proof.

(10) Defendant specifically objects to plaintiff's paragraphs 9 and 11 on the grounds that these statements relate directly to the issues of fact in contest in this case for which strict formal proof is necessary.

(11) Defendant specifically objects to plaintiff's paragraphs 10 and 12 on the grounds that this information is more readily available to and within the knowledge of the plaintiff.

(12) Defendant specifically objects to plaintiff's paragraph 13 on the grounds that the information called for is not within the knowledge of this defendant; that is requires speculation and an opinion on his part. Furthermore, defendant objects on the grounds that this is a factually non-objective question stated in an argumentative fashion and that it is fundamental to a contested issue of fact, the basis for which must be established by formal proof.

(13) Defendant specifically objects to plaintiff's paragraphs 14, 15, 16, 17, 18, and 19 on the grounds that in each of these paragraphs, what is sought is a statement about issues of fact which are contested and the basis for which must be established by formal proof. Further, the defendant objects because these questions are framed in an argumentative manner and call for a legal conclusion on his part.

(14) Defendant specifically objects to plaintiff's paragraph 20 on the grounds that it calls for speculation on his part about information more likely with the knowledge of defendant, Gaylord S. Williams, and not this defendant. Further, defendant objects on the basis that this settlement is directed toward a contested issue of fact, the basis of which must be established by formal proof.

(15) Defendant specifically objects to plaintiff's paragraph 21 on the grounds that it clearly calls for a statement concerning a contested issue of fact; it is argumentative; and further calls for a medical opinion and a conclusion on his part about something which is not within the first hand knowledge of this defendant, but more likely within the knowledge of Gaylord S. Williams, defendant.

(16) Defendant specifically objects to plaintiff's paragraph 24 on the grounds that it is argumentative; it goes to a contested issue of fact, the basis for which must be established by formal proof.

(17) Defendant specifically objects to plaintiff's paragraph 25 on the grounds that it calls for conjecture on the part of this defendant about something within the knowledge of Gaylord S. Williams, defendant. Moreoever, this paragraph is argumentative and directed to an issue of fact which is clearly contested in this case and the basis for which must be established by formal proof.

(18) Defendant specifically objects to plaintiff's paragraphs 26 and 27 on the grounds that this is directed to an issue of fact which is clearly contested in this case and the basis for which must be established by formal proof; and these paragraphs call for medical opinions and conclusions.

(19) Defendant specifically objects to plaintiff's paragraphs 28 and 29 on the grounds that they call for a medical opinion; they are clearly argumentative and call for a legal conclusion on the part of this defendant. In addition, defendant objects on the grounds that these paragraphs involve a clearly contested issue of fact, the basis for which must be established by formal proof.

(20) Defendant specifically objects to plaintiff's paragraph 30 on the grounds that it is argumentative and calls for a conclusion; calls for a medical opinion, and involves a contested issue of fact.

WHEREFORE, defendant, Jerry W. Bains, moves that the Court deny the plaintiff's request for admission of facts in its entirety.

* * *

GROUNDS OF DEFENSE

[Filed July 12, 1972]

Comes now the defendant, Gaylord S. Williams, and without waiving the defense of sovereign immunity heretofore asserted by special plea and overruled by the Court, for his grounds of defense to the motion for judgment heretofore served upon him says as follows:

1. This defendant admits the allegations contained in paragraphs 1, 3, 4, and 6 of the motion for judgment.

2. This defendant denies the allegations contained in paragraphs 9, 10, and 11 of the motion for judgment.

3. In response to the allegations contained in paragraph 2 of the motion for judgment, this defendant admits the allegation contained in the first sentence thereof but is without knowledge or information sufficient to form a belief as to the allegations contained in the second sentence thereof and thus calls for strict proof of such allegations.

4. In response to the allegations contained in paragraph 5 of the motion for judgment, this defendant avers that he was a resident physician employed by the University of Virginia Hospital on the House Staff of the Division of Plastic Surgery of the Department of Surgery. He was in that capacity under the direction of the head of the Division of Plastic Surgery, the defendant, Jerry W. Bains. This defendant further admits that he was associated in the care and treatment of the plaintiff. Insofar as the allegations contained in such paragraph 5 are not in accord with the foregoing, they are hereby denied.

5. In response to the allegations contained in paragraph 7 of the motion for judgment, this defendant admits all the allegations contained in such paragraph, except that he denies that plaintiff's difficulties and the amputation of her arm were a direct result of the manner in which such injection was accomplished.

6. In response to the allegations contained in paragraph 8 of the motion for judgment, this defendant admits that he was treating plaintiff under the supervision of Dr. Jerry W. Bains as more particularly set out in paragraph 4 above. Insofar as the allegations contained in such paragraph are not in accord with the foregoing they are hereby denied.

7. This defendant was guilty of no act or acts of negligence which were a, or the sole, proximate cause of any injuries or damages alleged in the motion for judgment.

8. The damages claimed are excessive.

WHEREFORE, this defendant moves the Court for judgment on his behalf and further moves the Court that he be awarded his reasonable costs in this behalf expended.

* * *

ANSWER TO REQUEST FOR ADMISSION OF FACTS OF JERRY W. BAINS

[Filed September 6, 1972]

1. Admit.

2. Admit.

3. I have no independent recollection as to whether the plaintiff had sustained an injury to her left arm as of April 5, 1969, and therefore I am unable to admit or deny the request upon my personal knowledge, but the hospital records do not indicate such injury.

4. Admit.

5. Deny.

6. Admit.

7. Admit.

8. Admit.

9. Deny.

10. Deny.

11. Deny.

12. Deny.

22. Admit.

26. I have no independent knowledge as to whether a thombosis of the plaintiff's left brachial artery occurred, and therefore I am unable to admit or deny the request on personal knowledge; however, the hospital records do indicate that such a thombosis occurred.

27. Admit.

30. Admit that a portion of plaintiff's forearm was amputated.

* * *

ANSWER TO REQUEST FOR ADMISSION OF FACTS OF GAYLORD S. WILLIAMS

[Filed September 29, 1972]

Comes now the defendant in the foregoing action, Gaylord S. Williams, and in response to those requests for admission of facts to which the Court has required this defendant to respond says as follows. The numbers below correspond to the numbers in the plaintiff's request.

1. Admit.

2. Admit.

3. This statement is true to the best of my knowledge.

20. I injected a solution into the plaintiff's left arm consisting of 100 milligrams of demerol and 50 milligrams of vistaril.

21. I can neither admit or deny this statement. At the time of the injection, I believed I was injecting the solution into an antecubital vein.

22. Admit.

26. Admit.

27. Admit.

30. Admit.

* * *

PLEA OF RELEASE
OF JERRY W. BAINS

[Filed January 10, 1973]

Comes now the Defendant, Jerry W. Bains, by counsel and for his plea of release to the above action, as amended, says:

(1) That on January 19, 1971, Glenavie L. Fowler, the same person as the Plaintiff in this action, filed a suit in this court against Charlie Smith, Keswick, Virginia, for the sum of $550,000.00 for injuries arising from a collision between two motor vehicles on April 5, 1969 on Route 250 at its intersection with Route 22 in Albemarle County, Virginia. The Plaintiff alleged that the Defendant did negligently drive his truck into the vehicle in which the Plaintiff was riding as a passenger and thereby caused injuries to the Plaintiff.

(2) Count II of the Motion of Judgment incorporated the allegations of Count I and in addition alleged that the Plaintiff was required to submit to medical care and treatment at the University of Virginia Hospital at Charlottesville, Virginia. It alleges that she became the

patient of Dr. Jerry W. Bains and his associate, Dr. Gaylord S. Williams.

(3) It is further alleged that while preparing the Plaintiff for the removal of an intra-dental wiring and arch bar, Dr. Gaylord Williams did inject a preoperative medicine into the left arm of the Plaintiff. It is alleged that the injection to the Plaintiff's arm was performed in a negligent manner and as a result thereof it was required to amputate her left arm.

(4) It is alleged that Dr. Jerry W. Bains was well qualified in the profession of medical doctor and was highly competent to treat the Plaintiff for the injuries she sustained (Count II 10).

(5) Count II, 8 alleges that inherent in submitting to medical surgical or hospital care and treatment is the risk of further injury resulting from negligence in the administering of such treatment and it is sought to hold the Defendant Charlie Smith liable for the negligence of Dr. Gaylord S. Williams.

(6) By order entered by this court in the action of Glenavie L. Fowler against Charlie Smith on December 20, 1972 (L.O.B. 62, p. 16) the motion for judgment was amended by striking and deleting all of Count II and decreasing the amount in suit from $550,000.00 to $50,000.00.

(7) On January 17, 1973 an order was entered in the action of Glenavie L. Fowler v. Charlie Smith in which it was represented to the Court that all matters in controversy in the action had been compromised and settled and it was ordered that the case be and the same is thereby dismissed agreed with prejudice (L.O.B. 62, p. 84). On or about the same date the Plaintiff, Glenavie L. Fowler, entered into a formal release whereby she released Charlie Smith of all claims arising from the collision which occurred on April 5, 1969.

(8) The Plaintiff Glenavie L. Fowler having declared that Charlie Smith was a joint tort feasor with Jerry W. Bains and having formally released Charlie Smith by operation of law the plaintiff Glenavie L. Fowler has released the Defendant Jerry W. Bains.

* * *

SPECIAL PLEA OF RELEASE

[Filed February 9, 1973]

Comes now the defendant in the foregoing matter, Gaylord S. Williams, by counsel, and for special plea of release to the motion for judgment heretofore filed against him says as follows:

1. Plaintiff sustained injuries to her jaw and other injuries in an accident with one Charlie Smith on the 5th day of April, 1969.

2. Plaintiff was treated for such injuries at the University of Virginia Hospital by various physicians including the defendants. During the course of her treatment, an injection was given her in the left arm in connection with the removal of certain wires about her jaw which had been placed there to assist in effecting a cure for the injuries sustained in the automobile accident with Charlie Smith. Subsequently a portion of plaintiff's left arm was required to be amputated.

3. On November 11, 1970, plaintiff brought the present action in this Court alleging negligence on the part of the defendants in connection with the injection aforesaid.

4. On January 19, 1971, plaintiff brought an action in this Court against Charlie Smith, and in such action Count II of the motion for judgment alleged that the loss of plaintiff's arm was a proximate result of the negligence of Charlie Smith, all as more particularly set out in such motion for judgment, copy of which is attached to this plea as Exhibit A.

5. On December 20, 1972, counsel for plaintiff dismissed Count II of the action against Charlie Smith an reduced the ad damnum in that action from $550,000.00 to $50,000.00.

6. On January 17, 1973, plaintiff compromised and settled her claim against Charlie Smith for the sum of $9,250.00 for which a release was given, attached hereto as Exhibit B, and which resulted in an order dismissing such action agreed with prejudice, copy of which is attached hereto as Exhibit C.

7. Despite the attempt of plaintiff to avoid the well-settled law in Virginia that the "release of one tort feasor releases all," plaintiff has heretofore taken the position that this defendant was a joint tort feasor with Charlie Smith. Although this defendant has denied, and continues to deny, that he was a tort feasor in this action, he avers that the accord and satisfaction between plaintiff and Charlie Smith and the subsequent release of Charlie Smith by plaintiff have released him from any liability resulting from tortious conduct on his part, which would have been joint tortious conduct with that of charlie Smith.

WHEREFORE, this defendant prays judgment that the plaintiff ought to have or maintain her aforesaid action thereof against him.

* * *

EXHIBIT ____, RENUMBERED #1

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

GLENAVIE L. FOWLER,	:
Plaintiff	:
vs.	:
CHARLIE SMITH Keswick Albemarle County, Virginia	:
Defendant	:

MOTION FOR JUDGMENT

[Filed January 19, 1971]

The plaintiff, Glenavie L. Fowler, moves the Court for a judgment against the defendant, Charlie Smith, in the sum of Five Hundred Fifty Thousand Dollars ($550,000.00) for the wrongs and injuries hereinafter set forth.

COUNT I

1. On or about April 5, 1969 the plaintiff was lawfully riding in an automobile owned and operated by James O'Neal Fowler, proceeding westwardly on Highway Route 250 en route to Charlottesville, Virginia; and said automobile was

proceeding toward and through the intersection or junction of Highway Route 22 with Highway Route 250, in the County of Albemarle at or near Shadwell.

2. The defendant, Charlie Smith, was driving his 1956 Chevrolet pickup truck eastwardly on Route 250 toward and into the said intersection or junction; and said defendant stopped his truck in the center lane which, at that point, was allocated exclusively to east bound traffic about to turn to the left and across the line of travel of west bound vehicles and to proceed northeastwardly on Highway Route 22.

3. The defendant did negligently and unlawfully drive his truck from the center lane into and across the immediate and lawful path and line of travel of the automobile in which the plaintiff was riding, thereby requiring James O'Neal Fowler to attempt a sudden stop and also causing the two vehicles to collide with considerable force and violence.

4. As a direct and proximate result of the aforesaid negligence of the defendant, the plaintiff was thrown about in said automobile and sustained severe injuries, including a fractured jaw, facial lacerations, and a fractured patella.

5. The plaintiff's said injuries required her to seek and to submit to medical, surgical and hospital care and treatment, at considerable expense, and caused her to suffer physical pain and mental anguish and to lose time from gainful employment.

COUNT II

6. Paragraphs numbered 1, 2, 3, and 4 are by this reference made a part of Count II.

7. The plaintiff submitted to medical, surgical and hospital care and treatment at the University of Virginia Hospital at Charlottesville where such care and treatment were most conveniently and readily available. Said hospital is owned and controlled by the Commonwealth of Virginia, and it is located partly within the City of Charlottesville and partly within the County of Albemarle and wholly within this Court's jurisdiction by virtue of Section 17-118 of the Code of Virginia, 1950, as amended.

8. Inherent in the necessity of submitting to medical, surgical or hospital care and treatment is the risk of further injury resulting from negligence in the administering of such treatment; and this is particularly true when the administration of such treatment occurs at a state owned hospital, the officials of which assume that it and they are insulated from liability for their negligence and the

negligent acts of hospital employees which result in personal injuries to patients at said hospital.

9. At said hospital, the plaintiff became the patient of Dr. Jerry F. Baines, a medical doctor licensed in Virginia; and for compensation to him to be paid by or on behalf of the plaintiff, Dr. Jerry F. Bains undertook to treat the plaintiff and to relieve and cure her of her said injuries.

10. Dr. Jerry F. Bains was well qualified in the profession of a medical doctor and was highly competent to treat the plaintiff for the injuries she had sustained.

11. In his endeavor to relieve and cure the plaintiff of her injuries, Dr. Bains associated one Dr. Gaylord S. Williams who then was a medical doctor employed by said hospital as a resident physician.

12. Repair of the plaintiff's fractured jaw was accomplished by the alignment of the fractures through the use of intra-dental wiring and arch bar application.

13. On or about May 28, 1969, while preparing the plaintiff for the removal of said intra-dental wiring and arch bar, Dr. Gaylord S. Williams did inject a certain preoperative medication into the left arm of the plaintiff. As a direct result of said injection and the manner in which it was accomplished, the plaintiff's left hand becamed pained, swollen and, ultimately, gangrenous; and

notwithstanding corrective treatment undertaken on May 29, 1969 and continued thereafter, the plaintiff's left forearm was of necessity amputated on July 10, 1969 between the wrist and elbow.

14. The said medication was injected into the plaintiff's arm in a negligent manner and in a manner which did not accord with sound medical practice or with the care, knowledge and skill commonly used by physicians and surgeons in the community.

15. The plaintiff was maimed, disfigued and seriously handicapped and she has sustained loss of earnings and she has suffered and will permanently continue to suffer pain, inconvenience, impairment of normal life, humiliation, embarrassment, mental anguish, and diminution of earning capacity, all as a direct result of the negligence of the defendant.

WHEREFORE, the plaintiff prays judgment against the defendant in the sum of Five Hundred Fifty Thousand Dollars.

* * *

EXHIBIT ____, RENUMBERED #2

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

GLENAVIE L. FOWLER,

Plaintiff,

vs.

CHARLIE SMITH,

Defendant

ORDER

[Entered December 20, 1972]

On motion of the plaintiff, in which the defendant concurs, it is ORDERED that the plaintiff's motion for judgment be and it hereby is amended by striking and deleting therefrom all of Count II consisting of paragraphs numbered 6 (six) through 15 (fifteen) and by reducing the plaintiff's demand from Five Hundred Fifty Thousand Dollars ($550,000) to Fifty Thousand Dollars ($50,000).

ENTER this 20th day of December, 1972:

/s/ David F. Berry
Judge

* * *

EXHIBT ____, RENUMBERED #3

RELEASE

The Undersigned, first party, being of lawful age, in consideration of NINE THOUSAND TWO HUNDRED FIFTY AND 00/100 dollars, ($9,250.00) does hereby forever release, acquit and discharge CHARLIE SMITH, and only Charlie Smith, second party, from any and all rights of action, claims and demands whatsoever arising out of any act or thing done or omitted to be done by seond party up to the date of this instrument, including but not limited to rights of action, claims and demands for any and all injury to mind, body or property, sustained on or about April 5, 1969 in an automobile accident which occurred on that day in Albemarle County, Virginia, near Charlottesville, whether or not the injury or loss is now known or may hereafter develop.

In making this settlement first party does not rely on any representations or statements regarding the occurrence or her injuries or damage, or her right to payment therefor, made by second party or his representatives or any physician employed by them. First party realizes that her present belief and information as to the nature and extent of her injury and damage may prove to be mistaken or incomplete, but is willing to give up all

possibility of further payment in return for settlement being made now. This release is given and accepted in compromise, and is not an admission of liability by second party. Its terms are contractual, not a recital, and it contains the entire agreement between the parties.

It is understood and agreed that this instrument is modified to the extent that any and all claims and causes of action against Charlie Smith (but only those against Charlie Smith) are released and that any and all claims and causes of action against any other parties arising from or subsequent to said accident are not affected. It is particularly understood and agreed that the undersigned does not release any person not herein named who is or may be liable for injury inflicted upon the undersigned while she was being treated for the injuries she had received on April 5, 1969.

As a separate and further agreement, the first party does hereby promise and bind herself, her heirs, administrators and executors, to indemnify and hold forever harmless the said Charlie Smith from all further loss on account of any further claim by herself or anyone in her behalf arising out of the accident described above; but no person other than Charlie Smith is to be or will be so indemnified.

FIRST PARTY HAS CAREFULLY READ AND UNDERSTANDS THIS RELEASE AND SIGNS IT FREELY AND WITHOUT RESERVATIONS.

CAUTION! READ BEFORE SIGNING

January 8, 1973 /s/ Glenavie L. Fowler Washington

* * *

EXHIBIT ____, RENUMBERED #4

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

GLENAVIE L. FOWLER,

Plaintiff

vs.

CHARLIE SMITH,

Defendant

ORDER

[Entered January 17, 1973]

This day came the plaintiff, Glenavie L. Washington nee Glenavie L. Fowler, and the defendant by their respective attorneys, and it being represented unto the court that all matters in controversy in this action have been compromised and settled, it is ORDERED that this

case be and the same hereby is dismissed agreed, with prejudice.

ENTER this 17th day of January, 1973

/s/ David F. Berry
Judge

[END OF EXHIBIT RENUMBERED #4]

* * *

* * *

ORDER

[Entered February 16, 1973]

Come now the defendants in the foregoing action, all by counsel, on motion of defendants to file a special plea of release herein. And it appearing to the Court that such motion is proper, it is accordingly ORDERED that defendants and each of them be, and they hereby are, granted leave to file a special plea of release, and each defendant having tendered his special plea of release to the Court, such pleadings are hereby ORDERED filed.

ENTER: /s/ David S. Berry
Judge

DATE: February 16, 1973

EIGHTH JUDICIAL CIRCUIT

DAVID F. BERRY, JUDGE
CHARLOTTESVILLE, VIRGINIA

May 23, 1973

TO ALL COUNSEL OF RECORD

IN RE: Glenavie L. Fowler v. Gaylord S. Williams

Gentlemen:

After having thoroughly reviewed all of the cases cited in memoranda filed by counsel in the above case I am of the opinion that the release by the plaintiff of the original tort feasor acts as a release of the defendants in the mal-practice suit. While the injury involved in the mal-practice suit affected a different limb, the injury complained of occurred while the doctors were treating the plaintiff for her original injury and would not have occurred except for the original injury.

Therefore, the defendants may present an order sustaining the special plea of release and dismissing the action.

Very truly yours,

/s/ David F. Berry, Judge

DFB/je

MOTION FOR LEAVE TO AMEND
TO ALLEGE GROSS NEGLIGENCE

[Filed June 4, 1973]

The plaintiff moves the court for leave to amend her motion for judgment by inserting the word "grossly" before the word "negligent" in paragraph 10 of said motion for judgment.

* * *

JUDGMENT ORDER

[Entered July 30, 1973]

This day came the plaintiff and defendants in the foregoing matter, all by counsel, upon all matters of record heretofore filed by defendants, and in particular upon the Pleas of Release filed by the defendants by leave of Court, the memoranda in support of and in opposition to such pleas, and the appearance and oral argument of counsel for all parties.

Thereupon, the Court took judicial notice of the pleadings and orders in the suit of Glenavie L. Fowler v. Charlie Smith instituted in this Court on January 19, 1971, by the same plaintiff as in this action, and particularly the Motion for Judgment and orders of December 20, 1972,

(L.O.B. 61 p. 16) and January 17, 1973 (L.O.B. 62 p. 84); copies of which are attached to the Plea of Release of Gaylord S. Williams as exhibits and also read as a part of the record for the Plea of Release of Jerry W. Bains. Accordingly, the Court doth incorporate such pleadings and orders as a portion of the record in this action.

The Court having found that the allegations of facts contained in the pleas of release are correct, did render its decision on the pleas, by a letter to all counsel dated May 23, 1973, that the pleas were well taken and should be sustained and thereby this action should be dismissed.

Whereupon, the plaintiff filed a Motion for Leave to Amend to Allege Gross Negligence and the Court being of the opinion that the filing of the Motion is untimely, it having been filed after the Court had rendered its decision, it is ORDERED that the Motion for Leave to Amend to Allege Gross Negligence is denied.

ACCORDINGLY, it is ADJUDGED and ORDERED that the pleas of release be, and they hereby are sustained and that this action be, and it hereby is, dismissed with prejudice. And it is further ADJUDGED and ORDERED that the plaintiff recover nothing of the defendants and that defendants be, and they hereby are, awarded their reasonable costs in this behalf expended.

The Court notes the plaintiff's exception taken on grounds previously argued and on the further ground that the dismissal of this action precludes further evidence and a jury's finding that the injury inflicted by the defendants is separable from the earlier injury for which the defendants were treating the plaintiff or that the negligence of the defendants was gross and, hence, could not reasonably have been anticipated by the person who inflicted the earlier injury.

ENTER: /s/ David F. Berry
Judge

DATE: July 30, 1973

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

[Filed August 27, 1973]

The plaintiff, Glenavie L. Washington, nee Fowler, gives notice that she will apply to the Supreme Court of Virginia for a writ of error to the final order of the Circuit Court of the County of Albemarle entered in the above-captioned action on the 30th day of July 1973 by which the defendants' pleas of release were sustained and said action was dismissed with prejudice.

The assignments of error are:

1.

The court erred in holding as a matter of law that the negligence of the defendants was not gross and in foreclosing the plaintiff's right to submit to a jury the issue of gross negligence.

2.

The court erred in refusing leave to amend the motion for judgment to expressly allege gross negligence.

3.

The court erred in holding that the original wrongdoer was liable for the subsequent injury merely because the subsequent injury would not have occurred except for the original injury.

4.

The court erred in holding as a matter of law that the injury which the defendants inflicted was not separable from the injury for which they were treating the plaintiff and in foreclosing the plaintiff's right to submit to a jury the issue of separability.

5.

The court erred in holding that the defendants and the person who inflicted the original injury were joint tort feasors; or in holding that the defendants merely aggravated the original injury; or in holding that the plaintiff has received compensation for the loss of her forearm; or in holding that the plaintiff was estopped to assert that the injury inflicted by the defendants was separable from the original injury.

6.

In ruling on plaintiff's requests for admissions numbered 4 through 12 which suggest that the hospital records show that the defendant Bains was the plaintiff's attending physician, that he was a medical doctor licensed in Virginia and that he submitted certain bills for his services in treating the plaintiff, the court erroneously sustained the objections of the defendant Williams, e.g., that he has no standing to admit any information sought therein and that his knowledge of the facts is only secondary.

7.

In ruling on plaintiff's request for admission numbered 13 which suggests that the defendant Bains was the only

hysician or surgeon connected with the hospital who submitted a bill for professional services to the plaintiff between April 5, 1969 and June 18, 1969, the court erroneously sustained the defendants' objections, e.g., that the information called for is not within the independent knowledge of the defendant, that the request is factually non--objective and stated in an argumentative fashion and is fundamental to a contested issue of fact.

8.

In ruling on plaintiff's requests for admission numbered 14 through 19, which suggest that the defendant Williams acted under the authority, direction, supervision or control of the defendant Bains, the court erroneously sustained the defendants' objections, e.g., that said requests seek statements on issues of fact which are contested, are non-objective and argumentative, call for opinion or legal conclusions, and are too general and broad.

9.

In ruling on the plaintiff's requests for admissions numbered 20 and 21 which suggest that defendant Williams injected Vistaril into the plaintiff's left brachial artery, the court erroneously sustained the objections of the defendant Bains, e.g., that the requests call for speculation

about information more likely within the knowledge of the defendant Wiliams, that they are directed toward a contested issue of fact, that they call for medical opinion, and that they are argumentative.

10.

In ruling on plaintiff's request for admission numbered 23 which quotes the warning given in the Physicians' Desk Reference with respect to the intravenous use of Vistaril, the court erroneously sustained the defendant Williams' objections, e.g., that the establishment thereof should be made by competent testimony of witnesses and may not be elicited by a request for admission.

11.

In ruling on plaintiff's requests for admissions numbered 24 and 25 which suggest that the defendant physicians knew that particular attention should be directed to insure that Vistaril would be injected only into a vein to avoid either intra-arterial injection or extravasation, the court erroneously sustained the defendants' objections, e.g., that the requests are argumentative and go to a contested issue of fact and that such information may not be elicited through a request for admissions.

In ruling on plaintiff's requests for admissions numbered 28 and 29 which suggest that the injection of Vistaril into the artery caused thrombosis and, in turn, gangrene, the court erroneously sustained the defendant's objections, e.g., that the requests call for a medical opinion, are clearly argumentative, call for a legal conclusion, and involve a clearly contested issue of fact, the basis for which must be established by formal proof and may not be elicited through a request for admission.

No transcript or statement of facts, testimony or other incidents of the case is to be hereafter filed.

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