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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 74-0616

ARTHUR DAVID ROUSE, JR.,
Appellant,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.; CHARLES N. COOPER; JOEL B. COOPER; AND DUDLEY COOPER, TRUSTEE FOR CHARLES N. COOPER AND JOEL B. COOPER, UNITED VIRGINIA BANK/SEABOARD NATIONAL, EXECUTOR OF THE ESTATE OF ARTHUR COOPER, DECEASED, AND L. P. COOPER, T/A BAYFRONT PROPERTY ACCOUNT,
Appellees.

JOINT APPENDIX

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(Filed June 4, 1973)

AMENDED MOTION FOR JUDGMENT

The plaintiff herein, Arthur David Rouse, Jr., moves the Honorable Judges of the Court of Law and Chancery of the City of Norfolk, for a judgment and award of execution against The Great Atlantic & Pacific Tea Company, Inc., a corporation, Charles N. Cooper, Joel B. Cooper, and Dudley Cooper, Trustee for Charles N. Cooper and Joel B. Cooper, United Virginia Bank/Seaboard National, Executor of the Estate of Arthur Cooper, deceased and L. P. Cooper, t/a Bayfront Property Account, defendants herein, in the sum of Three Hundred Thousand Dollars ($300,000.00), with interest and costs of this proceeding, for this, to-wit:

FIRST: That on or about April 3, 1971, the defendant, The Great Atlantic & Pacific Tea Company, Inc. owned, operated and controlled certain premises along the north side of Ocean View Avenue, commonly referred to as 500 East Ocean View Avenue, Norfolk, Virginia, including the parking area to said premises.

SECOND: The defendants, Charles N. Cooper and Joel B. Cooper, owned, operated and controlled certain real estate immediately contiguous to the property owned, operated and controlled by the defendant, The Great Atlantic & Pacific Tea Company, Inc., more specifically

insofar as it related to the events in this case, the property contiguous to the parking lot of the A & P Store, which is located on the water side at Ocean View.

THIRD: The defendants, Dudley Cooper, Trustee for Charles N. Cooper and Joel B. Cooper, United Virginia Bank/ Seaboard National, Executor of the Estate of Arthur Cooper, deceased and L. P. Cooper, t/a Bayfront Property Account, owned, operated and controlled certain real estate upon which the plaintiff fell on or about April 3, 1971.

FOURTH: That on or about April 3, 1971, the plaintiff was lawfully and properly on the premises owned, operated and controlled by all of the defendants herein.

FIFTH: That on or about April 3, 1971, as a result of the negligence of all of the defendants herein, in placing and maintaining a metal chain at or near the area where the property owned, operated and controlled by the defendants, The Great Atlantic & Pacific Tea Company, Inc. and Bayfront Property Account, adjoins with the property owned by the defendants, Charles N. Cooper and Joel B. Cooper, the plaintiff was caused to fall by virtue of the presence of the chain, which was unbeknown to the plaintiff, causing plaintiff to receive serious and permanent injuries to his body.

SIXTH: As a direct and proximate result of the aforesaid negligence of the defendants, the plaintiff's pre-existing physical condition has been aggravated and made more difficult to cure.

SEVENTH: The plaintiff was caused to lose and he will in the future be caused to lose large sums of money which he otherwise would have earned.

EIGHTH: That he was caused to expend and will in the future be caused to expend large sums of money in an endeavor to be cured and healed of said injuries.

NINTH: That he was caused to be unable and he will in the future be caused to be unable to perform his necessary and lawful affairs.

TENTH: That he was caused to suffer and he will in the future be caused to suffer great physical pain and mental anguish.

ELEVENTH: The plaintiff requests a trial by jury.

WHEREFORE, plaintiff demands judgment in the sum of Three Hundred Thousand Dollars ($300,000.00), with interest and costs of these proceedings.

* * * * * * * *

(Entered March 4, 1974)

ORDER

WHEREAS on the 4th day of March, 1974, the Court entered a certain judgment order and it appears to the Court that said order was erroneous in certain respects, it is accordingly ORDERED that said order be amended as follows:

This day came the parties, the plaintiff, in person and by counsel and the defendant, The Great Atlantic & Pacific Tea Company, Inc., a corporation, by Mr. W. C. Shanks, its manager and by counsel, the defendants Charles N. Cooper, Joel B. Cooper, in person and by counsel and Dudley Cooper, Trustee for Charles N. Cooper and Joel B. Cooper, United Virginia Bank/Seaboard National, Executor of the Estate of Arthur Cooper, deceased and L. P. Cooper, trading as Bayfront Property Account, the said Dudley Cooper appearing in person and by counsel, the United Virginia Bank/Seaboard National by counsel, and L. P. Cooper in person and by counsel, and thereupon came a jury, to-wit: Sherry Schmitt Funkhouser, Richard C. Fonner, Mrs. Florence Barney, Mrs. Susan L. Johnson, Arthur M. Edwards, Lucy M. Rowell and Robert Leonard Hartman, who were duly sworn the truth to speak upon the issue joined.

Thereuopn at the conclusion of the opening statement,

the defendants, by counsel, moved the Court to strike the plaintiff's evidence and to enter summary judgment in their behalf, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendants, by counsel, duly except.

Thereupon at the conclusion of the plaintiff's testimony, the defendants, by counsel, moved the Court to strike the plaintiff's evidence and enter summary judgment in their behalf, which motion after having been fully heard and maturely considered by the Court, is sustained, to which action of the Court, the plaintiff, by counsel, duly excepts.

In view of the Court's action in striking the evidence and entering summary judgment in behalf of all defendants it was not necessary and the Court did not consider the Plea to the Statute of Limitations of Dudley Cooper, Trustee for Charles N. Cooper and Joel B. Cooper, United Virginia Bank/Seaboard National, Executor of the Estate of Arthur Cooper, deceased, and L. P. Cooper, trading as Bayfront Property Account.

Whereupon it is considered and ordered by the Court that the plaintiff take nothing for his motion for judgment and that the said defendants go hence without day

and recover of the said plaintiff their costs about their defense herein expended.

To all of which action of the Court, the plaintiff, by counsel, duly excepts.

Enter this order nunc pro tunc as of this 4th day of March, 1974.

* * * * * * * *

(Filed April 1, 1974)

NOTICE OF APPEAL

NOW COMES the plaintiff, by counsel, and, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, files this his Notice of Appeal and Assignments of Error to the final judgment order entered in this case on March 4, 1974, and the subsequent judgment order entered nunc pro tunc as of March 4, 1974.

ASSIGNMENTS OF ERROR

The plaintiff, by counsel, files the following Assignments of Error of the Trial Court of this case on March 4, 1974.

1. The Court erred in striking the plaintiff's evidence and entering summary judgment as to all of the defendants herein.

2. The Court erred in not permitting the plaintiff

to put on additional material evidence to make out a prima facie case against each of the defendants.

A transcript of testimony is to be hereafter filed.

* * * * * * * *

(March 4, 1974)

THE TESTIMONY

ARTHUR D. ROUSE, JR., called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

(Page 23, Line 2 through Page 29, Line 20)

Q And where do you live at the present time?

A St. Louis, Missouri.

Q With whom?

A My wife and two children.

Q What are the ages of your children?

A I have a four-year-old boy and a sixteen-month-old boy.

Q The four-year-old, is he the little boy that you had in the car with you when this occurred?

A Yes, sir, it was.

Q Now, when did you move to St. Louis, Missouri, approximately?

A It was May of '73.

Q And did you come here for the trial?

A Yes, sir, I did.

Q How did you get to live in Norfolk in April of 1971?

A Well, we were under orders of the Navy to be stationed here, USS L.Y. SPEAR, D&S Piers.

Q And where did you come from?

A Farmington, Connecticut.

Q And you were transferred in what year to Norfolk?

A October of '70 to Norfolk.

Q All right, sir. Then where did you live with your wife and child when you came to Norfolk?

A 1437 East Ocean View Avenue, 2-B.

Q Is that near where this injury occurred?

A Yes, sir.

Q How close, approximately?

A Approximately two miles.

Q Now, from the time that you moved to Norfolk from Connecticut, had you been in the particular A&P store that is the named defendant in this case on East Ocean View Avenue before your fall?

A Yes, sir. We shopped there quite frequently.

Q Who is "we"?

A My wife and myself.

Q Now, what time of day did you shop there normally?

A Well, it ranged from early in the morning on the weekends until late in the evening through the week.

Q On April 3, 1971, did you have occasion to be on the parking lot premises of the A&P in the nighttime?

A Yes, sir, I was. I went to take pictures of the fireworks.

Q Now, would you tell me what route you took to get onto the lot?

A Well, we come from our apartment west on Ocean View towards the A&P store.

Q What kind of car were you driving?

A A Volkswagen.

Q Who was in it?

A Myself, my wife, and my small child.

Q And what happened as you were approaching the A&P store?

A Well, I saw that there were quite a number of cars parked in there and figured this would be a very good vantage point for the pictures, so I pulled in there also.

Q On which driveway did you pull in?

A The one closest to the store.

Q Would this be on the west nearest the west wall of the A&P store?

A Yes, sir.

Q As you turned in, I assume you made a right turn, is that correct?

A Yes, sir.

Q Was there anything in the entranceway, that part of the driveway that runs over the sidewalk, was there anything there or in that area to tell you to keep off those premises?

A No, sir.

Q Other than a sign, was there any chain or rope or any type of encorachment that would put you on notice that you were not supposed to be on it?

A No, sir.

Q About how many cars were already in the parking lot of the A&P when you pulled in?

A Approximately twenty, maybe twenty-five.

Q Were they occupied by any persons as far as you can remember?

A Yes, sir.

Q How did you determine this?

A Well, you could see them sitting in the car waiting for the fireworks, the families waiting with the children.

Q All right, sir. Now, where did you ultimately park your car?

A At the north end of the parking lot west of the building, the very back part of the parking lot.

Q Well, so that the Court and the jury can follow you, before your fall did you know that there was a chain in the area where you fell?

A No, sir.

Q All right, sir. So through whatever knowledge you learned that there was a chain was after your fall?

A Yes, sir.

Q Now, with that in mind I have to make reference to the chain so that the Court and the jury can follow your testimony.

Mr. Rouse, how far was your car parked west of the opening where there are two large poles?

A Approximately six to eight feet.

Q And what happened to you? Did you get out of your car?

A Yes, sir. I got out of the car and went around to the back left corner of it so I could get my camera to take my pictures.

Q Did you do that?

A Yes, sir.

Q Then what course, if any, did you follow?

A After the fireworks were over and so forth, traffic cleared out, I went around behind the car and up between the poles over to the utility pole to take a time lapse of the rides.

Q Were there any signs there of any nature at the area of the two poles?

A None whatsoever.

Q And what did you follow to proceed in a northerly direction?

A There was a clear, well-defined path.

Q How did it appear? Would you describe it more fully?

A Well, like I say, there was brush and grass growing there, and through the brush and grass you could see the sand where people had walked and worn away the grass.

Q Did you follow this path?

A Yes, I did.

Q Would you tell me from that point on where you went on this path?

A I followed the path down next to the utility pole.

Q Is this the pole that is located behind the five little stores?

A Yes, sir.

Q West of the A&P store?

A In the northwest corner.

Q And what did you do on this pole?

A I placed my camera up against the side of the pole so it wouldn't move while I took this time lapse.

Q Did you complete the taking of your time shots?

A Yes, sir, I did.

Q What, if anything, did you do after that?

A I started walking back to my car.

Q What route did you follow on your way back to your car?

A I followed the same path that I had taken to the pole until I saw that branch path leading off which would have brought me closer to the front of my car where I was to enter it if I had gone back the same direction.

Q How would you define this branch path, as you describe it?

A Well, it was a little bit smaller path that led off to the right-hand side at an angle from the main path.

Q All right, sir. Were you looking where you were going?

A Yes, sir, I was.

Q And what could you see by looking on the branch path that you were walking on?

A I could see the pathway itself and the grass. I walked along it. As it went down the hill or terrace, you could see a spot in the brush that was broken down where people had walked through there, and I followed this course.

Q All right, sir. What happened as you were walking towards your car?

A I started down the hill and tripped over the chain.

Q Did you know the chain was there?

A No, sir.

(Page 30, Lines 2 through 12)

Q What, if anything, did you do after you fell?

A I rolled back over on my back and I looked over there and I saw something strung through the brush there. I could see the hill there and the chain going through it. It was hidden in the brush itself. You could just barely make out a faint outline of it.

Q Now, Mr. Rouse, you were walking in which fashion as you were taking the branch path on your way back to the car?

A I was walking in a normal fashion towards my car.

(Page 30, Line 23 through Page 31, Line 21)

Q And is there any question in your mind which way you were walking?

A No, sir. I was walking forward.

Q All right, sir. Mr. Rouse, after your fall, where were you taken?

A My wife took me to the dispensary at NOB, Naval Base, and they looked at me, removed my coat and my shirt, and x-rayed me, and said it was too serious for them to treat there, and transferred me to the Naval Hospital, Portsmouth.

Q All right, sir. Before I go into the further medical treatment that you had, let me ask you, since October of 1970 until your fall of April 3, 1971, did you have occasion to drive by the A&P store which is the subject of this suit on Ocean View Avenue, on the north side of Ocean View Avenue, at nighttime after it was closed?

A Yes, sir.

Q What, if anything, did you notice during the times that you drove from October until April 3, 1971?

A I noticed that there were numerous times that there were cars parked on these lots, the A&P lot in particular, and people using them in this area to get to the beach, to go fishing, walking on the beach at night.

Q Did you see people coming out of automobiles?

A Yes, sir, I did.

(Page 32, Lines 4 through 6)

Q Mr. Rouse, how many times would you say you observed the condition that you just described?

A Numerous times. I would pass by there daily.

(Page 39, Lines 17 through 23)

Q All right, sir. I hand you this picture and ask you to tell me who that person is, who appears to have a cast on his arm.

A That was me.

Q And what are you doing in that picture?

A Pulling a tape measure, measuring the distance from the chain itself down to the level of the parking lot.

(Page 40, Line 4)

THE COURT: Plaintiff's No. 1.

(Page 40, Lines 10 through 13)

Q I hand you this picture and ask you to tell me what that is.

A This is a picture showing the height of the chain from the actual terrace itself.

(Page 40, Lines 17 through 24)

Q At what point were the measurements taken, Mr. Rouse?

No. 2, and in this one that you are now talking about, do the conditions as shown in these three pictures accurately reflect the condition as it was on the night when you fell?

A Other than these were taken during the daytime and it was dark that night.

(Page 42, Line 8)

THE COURT: Plaintiff's 3.

(Page 42, Lines 14 through 21)

Q I hand you another picture and ask you to tell me what that picture represents.

A This is the pathway that I came down, encountered the chain from.

MR. COWARD: Looking what direction?

THE WITNESS: This is looking north from the parking lot up to the sandy parking lot directly behind the A&P.

(Page 43, Line 6)

THE COURT: Plaintiff's 4.

(Page 43, Lines 12 through 19)

Q Now, I hand you this picture and ask you to tell me what that represents.

A This is a view from the upper parking lot looking down towards the A&P lot of the same area.

Q And do the conditions as depicted in that picture fairly portray the conditions as they were on the night of your fall of April 3, 1971?

A Yes, sir, other than the daylight difference.

(Page 43, Lines 25 through 25)

It will be received and marked as Plaintiff's No. 5.

(Page 44, Line 24 through Page 46, Line 11)

Q Mr. Rouse, I take it from your direct testimony that on this particular night, April 3, 1971, you and your wife had planned before you left your apartment to go to Ocean View Amusement Park or close thereby to see the fireworks display?

A Yes, sir.

Q And you left home for that purpose?

A Yes, sir.

Q And I suppose that the area around Ocean View Amusement Park was pretty crowded that night?

A Yes, sir, it was.

Q And when you approached the area where the A&P store was located, you decided to pull in the store parking lot and park?

A Yes, sir.

Q The store was closed, wasn't it?

A Yes, sir, it was.

Q The lights were off?

A Yes, sir.

Q The parking lights in the A&P parking lot were off?

A Yes, sir.

Q And your sole purpose in pulling into the A&P parking lot was to have a place to park in order that you and your wife and the baby could see the fireworks?

A Yes, sir.

Q And you viewed the fireworks, and you got out of the car, stood behind it, and took pictures of the fireworks display?

A Yes, I did.

Q And after the fireworks display was over, you left the A&P parking lot and went by foot into the vacant field in order to have a better position from which to take time exposures of some of the Ocean View Amusement Park rides, am I right?

A Yes, sir.

Q And you were on your way back to your automobile at the time that you fell and injured yourself?

A Yes.

(Page 52, Lines 9 through 22)

Q Now, the vacant lot on the north edge of the A&P property is two or three feet higher than the parking lot of the A&P, is it not?

A Yes, sir.

Q Had you ever been on it before?

A No, sir.

Q You saw no one else on it that night except yourself, isn't that correct?

A On the vacant lot?

Q Yes, sir.

A Yes, sir, there was.

Q There was? Who was on there?

A There were other cars viewing the fireworks also.

(Page 55, Lines 9 through 18)

Q Did you ask permission of anybody to go onto the lot north of the A&P?

A No, sir, I did not.

Q There was no artificial lighting in that area at all, was there, that is, in the A&P parking lot?

A The A&P, no, sir, other than the bleed-in from the park.

Q The what?

A There was, you know, light cast in from the bright lights of the park and from the moon and et cetera.

(Page 56, Lines 4 through 25)

Q So the lights that you talked about that are reflecting to give you vision down here are a good five hundred yards away, is that correct?

A The lights from the amusement park, yes, sir.

Q No lights on the rear of these little stores?

A No, sir.

Q So the light you had to depend on was the moon?

A Basically, yes, sir.

Q You didn't have a flashlight with you?

A No, sir.

Q You had never been over this property before?

A No, sir.

Q Getting back to the path, you stated there was a path that led directly north?

A Yes, sir.

Q It is about a three-foot opening.

A Yes, sir.

Q That would be towards the Bay, would it not?

A Yes, sir.

Q Now, you didn't follow that manmade path that you described, you turned left?

A Yes, sir.

(Page 57, Line 18 through Page 58, Line 2)

Q Then you started back and you decided rather than to go back the way you came, you would turn and take the shortcut to your car, is that correct?

A Yes, sir.

Q And when you took the shortcut, you were still on that vacant lot, were you not?

A Yes, sir, I was.

Q You were aware that there was shrubbery or whatever you want to call it all around, were you not?

A Yes, sir.

(Page 58, Lines 9 through 11)

Q All right. And it was mostly sand and old cans and that sort of stuff in there, wasn't it?

A Yes, sir.

(Page 58, Line 25 through Page 59, Line 3)

Q Okay. Is that the route you were taking?

A Yes, sir.

Q Is that the path that you are talking about?

A Yes, sir.

(Page 59, Line 9 through Page 60, Line 10)

Q Now, I gather this Exhibit No. 2 is taken from the level of the A&P parking lot?

A Yes, sir, it was.

Q Looking up?

A Yes.

Q Showing the rise in the ground and that is where you fell, is that right?

A Yes, sir.

Q And that fairly depicts the scene and the path you were taking, is that correct?

A Yes, sir.

Q Exhibit No. 1. It is taken from the level of the parking lot of the A&P?

A Yes, sir.

Q And what is that measurement? You can see your arm in the cast. Do you recall the measurement?

A It was approximately twenty-eight inches.

Q Twenty-eight inches from the ground?

A From the level of the A&P parking lot, yes, sir.

Q It was twenty-eight inches?

A Maybe closer.

Q My eyes aren't what they used to be.

So actually, you would have about thirty or more inches downhill to come on your return trip, then?

A Yes, sir.

Q And this is where you fell?

A That is where I encountered the chain, yes, sir.

(Page 60, Line 17 through Page 61, Line 21)

Q Referring to Plaintiff's Exhibit No. 3, can you show me on Plaintiff's Exhibit No. 3 where the path is that you took either going to the utility pole or returning?

A If you look here, you can see the place where it is worn through the grass. It is kind of a lighted area in there.

Q Where is the path in Plaintiff's Exhibit No. 3 that you took, the so-called branch path or shortcut?

A Well, it is back behind here.

Q What do you mean, back behind here?

A Off of the picture. This is standing --

Q You mean further to the east?

A North.

Q It is north?

A North of this picture. This is facing west.

Q Well, this shows the parking lot of the A&P?

A Yes, sir.

Q And it shows the overgrowth?

A Yes, sir.

Q But you say the path is further to the north towards the water?

A Yes, sir. This one here, it came up, down in this area here, and up and around.

Q Where is the path, the shortcut or branch path that you took back to the parking lot?

A Well, you can see where the weeds are worn down in here.

Q But you say the path, the shortcut that you took is shown in Plaintiff's Exhibit No. 3?

A Yes, sir.

(Page 69, Lines 11 through 17)

MR. ANNINOS: If it please the Court, we want to call Mr. Dudley Cooper as an adverse witness.

THE COURT: Before the doctor was called, counsel wanted to discuss some matter.

MR. WORRELL: Yes.

THE COURT: Members of the jury, retire to the Jury Room.

(Page 70, Line 4 through Page 92, Line 1)

MR. WORRELL: May it please the Court, for the record I would like for the court reporter to note that at the conclusion of the opening statement of plaintiff's counsel that the defendant, A&P, moved the Court for summary judgment, and it was also the case of counsel for the defendants Cooper, and that those motions were overruled; that at the conclusion of the testimony of the plaintiff Rouse --

THE COURT: I would also state that subsequent exceptions were noted by both defendants on the Court's overruling the motions based upon opening statement of counsel.

MR. WORRELL: Right, and at the conclusion of the testimony of the plaintiff Rouse, both counsel moved to strike the evidence and to enter summary judgment for both defendants, which the Court reserved because of the presence of Dr. Hinckley who has just finished testifying.

Now, on behalf of the defendant A&P, I move the Court to strike the plaintiff's evidence and to enter summary judgment for the defendant on the grounds, bearing in mind that the plaintiff's case can rise no higher than his own testimony, the evidence discloses that he has no case to submit to the jury as to A&P as a matter of law.

I am willing to assume for the purpose of this motion that the witness's testimony that he had seen automobiles parked in the A&P parking lot on many former occasions after the store had closed would be brought home to the knowledge of the A&P. That is not the evidence, but I will assume for the purpose of this motion that there will be such evidence.

The most that can be said for that would be that it has changed the status of the plaintiff from that of a trespasser to that of a bare licensee. I don't believe it is necessary to refer to or argue at any length to the Court that the duty owed to a bare licensee is simply not to the full extent of the injury and to warn him of dangers which he is not likely to disclose if that warning were to be given at a time when the defendant owner would be able to prevent the injury by such warning.

I simply refer to the case of Thalhimer Brothers versus Casce, 160 Virginia 439, and that was a case in which the plaintiff was an invitee, business invitee in the store of Thalhimer Brothers in Richmond, but did go to a part of the store which was beyond the scope of her invitation. The Court held that she was a trespasser, or at most a bare licensee, and the Court said, "A trespasser or bare licensee takes the situation as she finds it. The duty to each is the same. No prevision is required. Of course, no wanton or willful injury can be inflicted. Beyond this she must depend upon herself.

"so also with respect to a bare licensee, that is to say, one who is permitted by the passive

acquiescence of the owner to come on his premises for his own convenience. He takes upon himself all the ordinary risks attached to the place and the business carried on there. The owner must not intentionally or willfully injure him, but he owes him the active duty of protection only after he knows of his danger, or might have known of it and avoided it by the use of ordinary care. These principles have been repeatedly announced by this Court and are conclusive of the case.

"The general rule is that a landowner does not owe to a trespasser, and the same is true of a bare licensee, the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant being present could have prevented the injury by the exercise of ordinary care after discovering the danger."

Now, that is still adhered to in Virginia and in the most recent case decided January 14, 1974, of Appalachian Electric and Power Company versus Nancy LaForce, Administratrix. In that case the deceased boy --

MR. ANNINOS: What is the citation?

MR. WORRELL: That is 201 SE 2nd, Page 768. It is not out in Virginia actually as yet.

In that case an electric line had broken in a rural area and had been broken for some time. The boy and his brother were gathering herbs when he came in contact with the line. The Court let that case go to the jury and the jury's verdict was for the plaintiff, which the Supreme Court set aside and entered final judgment for the defendant.

The Court after referring to the fact that a company engaged in the production and distribution of electricity was required to use a high degree of care, nevertheless case law in Virginia establishes the duty owed by owners and occupiers of land to invitees, licensees and trespassers. To an invitee the owner or occupant owes the duty of prevision, preparation and lookout as well as the duty of ordinary care to see that the premises are in a

reasonably safe condition, but where the injured party is a trespasser or bare licensee, the company owes him no duty of prevision or of having the place of accident in a safe condition, and the Court quotes with approval from the Pettyjohn case citing an older case of Lunsford against Colonial Coal, 115 Virginia 346, and says Ricky Lee was on the right of way of Appalachian for the purpose of hunting for ginseng. He was either a trespasser or a bare licensee on the property for his own convenience by the passive acquiescence of Appalachian.

There was evidence in the case that people in the community generally used the right of way and that there was a well-worn path which was generally used for some length of time, that Appalachian was bound to have known about it. There was no showing that Appalachian was guilty of intentional or willful neglect. Appalachian was therefore under no duty to anticipate Ricky Lee's presence in this remote, uninhabited area, or to keep the land in reasonably safe condition.

What we have here as to A&P is the plaintiff and his wife and child going to A&P at a time when they

knew the store was closed. They had no intention of contracting any business with A&P. They utilized his premises for his own convenience and pleasure, not for any business of A&P. The most that can be said is that A&P knew that the people used their parking lot for their own purposes after the store was closed, but that was transplanted from a position of trespasser to that of a bare licensee.

As I said at the outset, this case can rise no higher than his own testimony. I submit that there is no evidence of negligence to submit to the jury.

I don't think it necessary on behalf of A&P at this time to deal with the question of contributory negligence or assumption of risk, which, of course, will come at a later time.

I ask, therefore, for summary judgment to be entered for A&P.

THE COURT: Mr. Coward.

MR. COWARD: May it please the Court, at this juncture I represent two different sets of defendants, one, Joel and Charles Cooper who own the vacant lot immediately to the north and contiguous to the parking lot leased to A&P. Insofar as they are concerned, the evidence is clear from the plaintiff's

own testimony that he was not invited on the property, that he had no permission to go onto the vacant land, that he had never been on it before, and that he was exercising a privilege or attempted privilege solely for his own convenience and benefit, and that the very most he would be under the law would be either a trespasser or a bare licensee. A trespasser or a bare licensee takes the situation as he finds it. The duty of each is the same, no prevision is required. The only duty that is owed by Joel and Charles Cooper would be not to intentionally harm anyone.

I say to you insofar as they are concerned, and I have cases and I have cites from Am.Jur. and Michie's Jurisprudence, there is no evidence that the fence was a dangerous instrumentality; there is no evidence it was reasonably foreseeable by either Joel or Charles Cooper that that man would come onto their property at ten-fifteen at night and attempt to take pictures of something five hundred yards away.

That is our position insofar as the Coopers, Joel and Charles, are concerned.

We get next to Bayfront Properties. Insofar as Bayfront Properties is concerned, leaving aside for

the moment the question of reasonable foreseeability or knowledge, these premises had been leased to A&P. There has been no evidence that Bayfront Properties in any way knew that anybody ever parked on the A&P lot after the store was closed. There has been no evidence that Bayfront Properties in any way is involved.

Now, Your Honor, I can go on, but we have the question which I thought, I don't know which you want to get to first.

I also have a plea to the statute of limitations insofar as Bayfront Properties is concerned. It is fairly complicated and goes on with a series of duties. I don't know whether you want to take that up and make the ruling now, maybe we won't get to that.

THE COURT: Well, suppose you let Mr. Anninos pick up from here.

MR. COWARD: All right.

THE COURT: I want you to cover it, Mr. Anninos. It depends on what he says. I may want you to cover it further.

MR. COWARD: Yes, sir.

MR. ANNINOS: If it please the Court, in view

of the motion of Mr. Worrell and also the motion of Mr. Coward at this time, we feel that, first of all, the motion is premature. We recognize the rule that the plaintiff's case can rise no higher than his own testimony, but because of Mr. Worrell's willingness to concede that there is evidence in the case, which it so happens that there is, that on prior occasions A&P had numerous cars parked on the A&P lot, I think it makes the defendant's motion to strike much weaker.

Although, as I said, there is evidence from the plaintiff that from October, 1970, to about the time of his injury, he had driven at night and seen many automobiles on the lot with the people in them. We concede that there was no express invitation by any of these defendants to the plaintiff to come on the premises.

However, the cases cited by Mr. Worrell are clearly distinguishable from the case at Bar. He cites the Thalhimer case, 160 Virginia, but the law is clearly stated in 207 Virginia, Busch versus Gaglio, which I am sure Your Honor is familiar with, 207 Virginia 343, Busch, B-u-s-c-h, versus Gaglio, G-a-g-l-i-o.

THE COURT: 207 Virginia 343?

MR. ANNINOS: Yes, sir, Your Honor.

This case goes on to say what is the duty owed to a licensee and it adopts the exception to the general rule. Busch versus Gaglio tells us that there are exceptions to the general rule, the general rule previously being to prevent accidental tort of a trespasser or a licensee, but before I get to Busch, I want to distinguish the unreported case, or at least it hasn't come down yet on the Virginia cites.

Mr. Worrell cites a Southeastern citation, Appalachian, or something, power line company, but that case said that there was no duty owed by Appalachian to this youngster, fourteen-year-old youngster, and there was no way that you can hold the power company responsible to anticipate the presence in, and I am quoting, "the presence in a remote, uninhabited area." There is a clear distinction there, remote, uninhabited area.

The evidence in this case is that it is in Ocean View. The stores are located on the north side. There is an amusement park there. On cross-examination it was brought out, "Did you know that on

the advertisements that it said they had twelve hundred or some five hundred", whatever it was, "parking spaces available?" So we are in a central location in this case as opposed to the case of the Southeastern citation, 210 SE 2d, 768, and the correct style of the case is Appalachian Power Company versus LaForce. So there is a clear distinction as between our case, and we are not in an isolated, uninhabited area because we are talking about anticipation of people being present whether they be trespassers there or whether they be licensees.

Now, let me go back, if Your Honor please, to Busch versus Gaglio in which the Court -- this involved a lady, a person, a social guest, who was treated as a licensee, at nighttime, when on the premises of a friend at her home, and it happened there was a pole or a metal pole that could not be seen in the place where it was located. The plaintiff fell over it and injured herself.

The Court said that a social guest is treated as a licensee and found on appeal and took the position that the law as set out in Bradshaw versus Minter, 206 Virginia 450, was applicable.

THE COURT: 450?

MR. ANNINOS: Yes, sir, 206 Virginia 450.

THE COURT: All right.

MR. ANNINOS: But in Busch, 207, the Court said, "But there is another well-recognized exception to the general rule, an exception which directly relates to condition of the premises cases and which was not involved or considered in Bradshaw versus Minter" and not involved. "This exception applies to the case before us, and contrary to the ruling of the trial court, provides a theory upon which liability may be imposed upon the defendant within the framework of the plaintiff's motion for judgment, the evidence and the instructions of the trial court.

"This exception is set forth in the Restatement of the Law of Torts, an authority upon which this Court relied in the Bradshaw case to impose liability upon a landowner for active negligence."

If Your Honor recalls, that was the case that says there are two types of negligence, passive and active.

In the Restatement of the Law of Torts, Second Edition, social guests are classified as licensees, and in paragraph 342, page 210, this rule is stated.

The Court quotes, "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, A, the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and, B, he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and, C, the licensees do not know or have reason to know of the conditions and the risk involved."

So this is the law that is applicable in this case, it seems, the restatement that is adopted in Busch versus Gaglio.

I might say, Your Honor, we have other evidence to show that in an area of fifteen years this chain was present and known to A&P to be present. You have other evidence to show that the defendants Joel and Charles Cooper knew that this chain was present from the time the building was erected on these premises over fifteen years ago. So they knew, under the exception adopted in the Restatement of Torts, Second Edition, that the dangerous condition existed under

the Busch versus Gaglio case and should have warned or taken reasonable steps to have remedied the condition. I think the evidence you can infer in the reasonable fashion from the evidence of the plaintiff that it was hard to see, the pictures show that even in the daytime, some pictures, that in the daytime it blends in with the bushes and the weeds and the grass.

So reasonable inferences on a motion to strike, and at this stage all reasonable inferences most favorable to the plaintiff must be considered by the Court in determining whether to sustain or deny the motion. So the reasonable inference is that this chain blended in with the environment as shown in Exhibits 1 through 5 respectively.

There are a slew of cases. We have them. May it please the Court, we have the case of Pettyjohn that Mr. Worrell cited to Your Honor, and Pettyjohn supports the plaintiff's theory under the facts in this case, Pettyjohn versus Basham, 126 Virginia 72, and this case sets out the law as to the duty on 126 Virginia, page 72. The language I am reading now is from page 78, and this case goes on to say that "If, however, the trespass is of such nature and so

frequent", that is the key word, if it please the Court, "so frequent as to charge the occupant with notice thereof, and of the danger likely to ensue to the trespasser, then the owner is chargeable with the duty of lookout for such trespasses with such equipment and appliances he is then using in the ordinary conduct of his business; but he does not owe him the duty of prevision and prepreparation."

Now, the question of whether they have notice, we have many cases which go on to say, I will cite those to Your Honor, that hold for the proposition that when a dangerous, defective condition exists. One instance is a Federal case involving a defective sidewalk in front of a Post Office. The condition existed for six weeks. The Court held that it was for the jury to determine whether the government had knowledge, or should have had knowledge.

Of course, here we have years of condition which is not in evidence, but I am representing to Your Honor, and so has counsel for the Coopers and counsel for the A&P. They represented in opening statement that this was there for a number of years and that the chain was on the property of the A&P people.

We have other cases in Virginia holding for that proposition, that it is for the jury to determine once we show the existence of a long duration, to determine whether they had knowledge of it.

The Federal case, may it please the Court, says that six weeks the defective condition in front of a government Post Office is sufficient for the jury to infer that they had knowledge or should have had knowledge.

The other group of cases that would be applicable, may it please the Court, are the cases which say that a defendant -- the Federal case involving notice of six weeks as sufficient is Gilroy versus United States decided June 4, 1953, may it please the Court, 112 Federal Supplement, 664, but the other cases are many cases in Virginia holding that a defendant cannot be heard to say that "I did not authorize or invite the plaintiff to come on my premises", are those cases which say, "Yes, but you have acquiesced in the presence of the complainant. You have tolerated" is the phrase the Supreme Court of Virginia uses. "You have acquiesced in and tolerated his presence." Then he comes out of the category of a trespasser and goes into the category of a licensee.

Busch versus Gaglio 207 Virginia, tells us what that duty is to a licensee. Many cases where you acquiesced in and you tolerated, the Court of Appeals of Virginia says you are then estopped from asserting once you know of a condition, or should know of a condition.

Now, I am saying to Your Honor that in addition to the stipulation of Mr. Worrell that that evidence is in, I am not holding him to it, the plaintiff has said from October to April on many occasions at night he has seen automobiles and people there, but there is other evidence that we have in that regard. So then they are estopped from saying --

THE COURT: Unless it is an assumption that they knew of it and I think that would be a reasonable assumption to make if there wasn't anything on this lot in which they fell or injured themselves.

MR. ANNINOS: No, on the A&P property.

THE COURT: On the A&P property?

MR. ANNINOS: Yes, sir. There is chain that is hidden in the bushes. It is like a hole in the ground.

THE COURT: This was not something which you might say was normally used in connection with the defendant A&P's business?

MR. ANNINOS: That is immaterial. It is there.

THE COURT: Well, you go ahead.

MR. ANNINOS: This is why I say the motion is premature, but the evidence as of now, I think there is a concession that, and I can represent to you, sir, that you have the --

THE COURT: No issue about this?

MR. ANNINOS: I am not concerned about it. When they lease premises, it is their duty, you see, under their preparation and control.

THE COURT: All right.

MR. ANNINOS: And it may be a different question as to Dudley Cooper, trustee. I am not saying there may not be a different question as to them, because they have recently acquired control, the owners of the property, Dudley Cooper, trustee for Joel and Charles and so forth.

THE COURT: All right.

MR. ANNINOS: There may be a different question as to the A&P. It is undisputed, sir. If I am in error, I will ask Mr. Worrell to say it because it is important in Your Honor's mind. They have a lease, A&P has a lease.

THE COURT: I am not concerned about that.

That was alleged and I accept that.

MR. ANNINOS: I thought you were concerned about that.

THE COURT: No.

MR. ANNINOS: It is not required in the operation of a grocery store, but it is something that they requested be put on their premises and it was put in. I don't think a chain eight and a half inches high -- it may not be a dangerous condition on premises, but once you put those weeds as shown on Exhibits 1 through 5 at nighttime, may it please the Court, then it becomes a dangerous condition. This is for the jury to determine.

THE COURT: All right.

MR. ANNINOS: Yes, sir, but the cases in Virginia are many dealing with the question of toleration and acquiescence, and they say to the defendant "But you tolerated it for so many years. This condition is going on and you have never taken any steps to do anything, to tow cars in and put chains there, put a sign 'Do Not Enter'. So now you are estopped in asserting he is a trespasser once you tolerated the condition over a reasonably long period of time."

Some of these cases, may it please the Court, Norfolk and Western Railroad versus Wilson, an old case decided in 1893 involving a path, the Court in this case said "This acquiescence amounted to a license that imposed upon the company the duty to exercise reasonable care or ordinary care to avoid injuring pedestrians crossing at that point."

In this case the railroad asserted that it had no duty except to refrain from willfully harming pedestrians.

The other case is Norfolk Railroad Company versus DeBoard, 91 Virginia 700, Chesapeake and Ohio Railroad versus Corbin, 110 Virginia 700, Engle versus Clinchfield Railroad Company, 169 Virginia 131, and for the same policies, acquiescence and toleration of a condition which they ruled on the trial level as being one where the plaintiff should be treated as a trespasser. The Court of Appeals disagreed in all these cases.

So in this case, may it please the Court, there is no question as to the defendant, Great Atlantic and Pacific, that it ought to be a jury question resolving all reasonable inferences from the plaintiff's evidence in favor of the plaintiff.

As to the two individual Cooper defendants who own the contiguous property, I think that they cannot be estopped to say -- that they cannot be heard to say that they had no knowledge, although the offense was not on their property but on a path that was there for a long period of time, this is the inference of the testimony of the plaintiff, and it was owned for many years, and they should reasonably expect that people would come across it in a bathing beach area.

May it please the Court, this is not a remote, isolated, uninhabited area as it was situated in the case of Appalachian, the unreported case of 201 Virginia, the case Mr. Worrell cited. We are talking about an inhabited area, one that is in close proximity to the beach, and it should be expected and anticipated that people will use that path from the A&P premises to their contiguous property.

As to the owners of the property that is leased to the A&P, I think that the motion is premature as to them. It may be, and I am not conceding it at this point, but I am being very candid with the Court that as to that defendant, Bayfront Properties, we may fall short on that as to them, but I don't think

Your Honor ought to strike either as to them at this point. They placed the chain on there, they will admit that, because of the lease, the landlord-tenant lease and negotiations between them even before the A&P became the tenants was created before the erection of the building was put on, but we strongly feel as to A&P, may it please the Court, that the Court ought not to strike and that all reasonable inferences should be ruled on and resolved in favor of the plaintiff, letting it go to the jury as to Great Atlantic and Pacific Tea Company and as to the two individual Coopers. We do not have any position at this time as to the owners of the A&P property, the defendants known as, short style, Dudley Cooper, trustee, et cetera. We may fall short as to him. I am very candid to admit that, but I think all motions should be reserved until all the plaintiff's evidence is in.

THE COURT: Mr. Anninos, let me ask you this: There isn't any other evidence that is contrary to the plaintiff's statement in this case as to how the accident occurred, is that correct?

MR. ANNINOS: As to how, no, sir.

THE COURT: In other words, he was perfectly aware of the passageway; there was never any question about exactly where he went or exactly what happened during the course of this fall up to and leading onto it?

MR. ANNINOS: Well, he testified he went through the two posts.

THE COURT: Yes, he did. You said there was no additional evidence other than the evidence that the defendant A&P knew or should have known over a long period of time of the existence of this chain?

MR. ANNINOS: No. They admit they knew it. They will admit that, and the owner of the premises will admit that it was there, put on there some fifteen, sixteen years ago, whatever it was, by the first, original tenant, but we have evidence to show that over a long period of time the condition, in addition to what the plaintiff said, other automobiles came on the premises after it closed and stayed on them and no action was taken by the A&P.

THE COURT: Yes, but as to the plaintiff's theory, that is the plaintiff's theory, what the plaintiff testified?

MR. ANNINOS: Yes, sir.

(Page 94, Line 13 through Page 96, Line 23)

Gentlemen, I have been over this and I have concluded that the plaintiff in this case must be bound by his own evidence.

It has been stated to the Court that there isn't any further evidence on the issue of liability as to the happening, the actual happening of the occurrence, and I say, therefore, that the plaintiff's case can rise no higher than his own testimony.

Now, in this case, this is not a case of house-guest type thing, which is one of the exceptions mentioned in the Busch versus Gaglio case. It is not a particular type negligence matter. The accepted law is that as to a bare licensee, he is certainly no higher than a bare licensee. To such a person the owner of the premises, the occupant of the premises, owes no prevision. He has no duty of prepreparation in this case.

This gentleman sustained an injury, for which I think we are all very sorry, but to allow this case to go to a jury on the question of liability is in my opinion improper.

Moreover, on the issue of contributory negligence, his own testimony in this case would

indicate that he went out in this field, or what he says was a manmade path, or what counsel has termed as a manmade path.

Under these circumstances, I must conclude that the evidence should be stricken as to all three defendants, and I will do so and I enter summary judgment for all three defendants.

If you will, call the jury in.

MR. ANNINOS: Just a minute, Your Honor. Of course, we except to the Court's ruling. However, in order to complete the record for appeal, I either want this stipulation as to some facts that I have ready to prove --

THE COURT: The record already shows everything.

MR. ANNINOS: Mr. Worrell, can you stipulate as to the witnesses? I will call the witnesses.

MR. WORRELL: You won't call the witnesses unless the Court says so.

MR. ANNINOS: I can always tender. Nobody can stop me from tendering.

THE COURT: Wait a minute, gentlemen. The record stands as it is shown at this time, and I think we have all the things in the record that are required. I do not permit you to go ahead.

MR. ANNINOS: No, but, Your Honor, you only considered the evidence and the ruling in this case based on the plaintiff's testimony, that is, Mr. Rouse himself.

THE COURT: I have also considered the statement of counsel in the case, and in that you have conceded that cars were parked on this area for some considerable time, and that the chain around the place was on the premises for some twenty years or more.

MR. ANNINOS: After that they were parking after closing hours. Your Honor took that into consideration? I just want to complete the record for appeal purposes.

* * * * * * * * *

DEPOSITION TESTIMONY

(January 12, 1973)

DELORES JANE ROUSE, called as a witness on discovery, having first been duly sworn, was examined and testified as follows:

(Page 3, Line 11 through Page 4, Line 16)

Q Do you remember, Mrs. Rouse, the night of April the 3rd, 1971, which was the night that your husband

suffered an injury to his wrist and arm?

A Yes, I do.

Q And I believe that you and your husband had driven from your home to the parking lot of the A&P store on East Ocean View Avenue; right?

A Yes, we did.

Q And had taken your child with you?

A Yes.

Q About what time of the day or night did you-all arrive at the A & P parking lot?

A About quarter 'til ten.

Q About quarter of ten in the evening?

A Yes.

Q And I take it that at that time of year it was completely dark?

A Yeah, it was.

Q What was your purpose in going to the A & P parking lot?

A We went to see the fireworks at the Amusement Park. It was the first night, I think, that they have them.

Q That was the sole purpose of the trip?

A Yes.

Q I believe the A & P store was closed for the night when you arrived there; wasn't it?

A Yes.

Q The store was dark and the lights in the parking lot were off?

A Yes.

(Page 5, Lines 21 through 24)

Then, as I understand it, you had never been to the A & P parking lot prior to this night except on occasions when the A & P store was open; is that right?

A That is true.

(Page 14, Lines 10 through 13)

Q How many cars were there when you-all were watching the fireworks, if you know?

A I wasn't really counting. There were quite a few, it seemed like.

* * * * * * * * *

(November 2, 1972)

WINSTON C. SHANKS, called as a witness on discovery, having been first duly sworn, was examined and testified as follows:

(Page 31, Lines 2 through 11)

Q All right, sir, and on April 3, 1971, which we all agree here is when something unusual happened. A man was injured on this A & P lot on East Ocean View Avenue.

Were you there working at the A & P on East Ocean View Avenue?

A I was there when the man came in and told me.

Q Were you working there at the A & P on the 3rd?

A Yes, sir.

(Page 31, Lines 22 through 25)

Q Mr. Shanks, what was your capacity, that is -- what type of work did you do at the East Ocean View A & P?

A Store manager.

(Page 32, Line 5 through Page 35, Line 18)

Q How long had you been store manager before April of 1971, roughly?

A Since December 28, 1958.

Q From December '58 to April 3rd, 1971, the date of this occurrence that happened, can you tell me about the chain that is located north of your building, that low chain?

A What do you mean tell you about it. It was there when I went there. It was not installed at the time I was there.

Q You knew it was there?

A Yes, sir.

Q Did you know about right after you went there? In '58 you learned about it?

A Yes, sir. The chain has always been there as far as I know.

Q Did it run all the way across -- I'm talking about before April 3rd, 1971, or did it come to a stop before following north on somebody else's property?

A It had an opening of I would say three or four feet for pedestrians to walk through.

Q All right, sir, and that -- there was brush all the way along that line?

A On the back side.

Q Is that correct, sir?

A Right.

Q And that brush consisted of weed-like things? It was greenery?

A It was grass except when it needed cutting, that's all.

Q All right, sir. Did you ever have anything removed or make any effort to get it removed?

MR. WORRELL: What things?

MR. ANNINOS: The chain.

A The chain was put up there for a purpose.

BY MR. ANNINOS:

Q What purpose?

A To keep cars, bicycles, et cetera from going across the property.

Q It blended in and it was right through the greenery, wasn't it?

A At nighttime it would be hard to see. There were no lights there at night.

Q You had no lights at nighttime?

A After 9:15.

Q Sir?

A The lights went out at 9:15 in the parking lot.

Q Who would control that A & P or somebody else?

A The store manager controlled it, but it was on a time clock.

Q I see. You had it set for 9:15?

A We closed at nine.

Q On April 3, 1971, you closed at nine o'clock?

A I don't know what day --

Q This was the day --

A We close at six on Sunday, nine every other day.

Q And when the lights go off, it's dark on the parking Lot?

A Right.

Q The only light would be whatever nature provides, the stars and the moon, anything --

A There were lights on the back parking lot which belonged to the fishing pier.

Q But that's a few hundred feet north?

A I would say so.

Q By the ocean or the water?

A Yes, sir.

Q But in the immediate area there are no artificial lights?

A Right.

Q And in that state with no lights, its very hard to see this chain that was going through the brush?

A I would say it would be hard to see, right.

Q All right, sir. Did you have or did your predecessor place any signs on the lot pertaining to anyone -- any pedestrian or any automobile? Any signs whatsoever? Will you tell me what they were, if any?

A I don't remember the exact words, but there was one sign that said "For customer parking only."

Q Where was this?

A It was on the building as well as I can remember.

(Page 36, Lines 8 through 19)

Q Other than "For customer parking only" do you remember any other language on the sign?

A No.

Q Do you know whether it had a sign such as no parking after so and so time or did it --

A No, it didn't have any specified time.

Q It didn't have any specified time, but it did say "For customer parking."

A Yes, sir.

Q All right, sir. Was this sign on the building attached to the building?

A Attached to the building.

(Page 39, Lines 10 through 23)

Q I understand, but when you saw these people coming there not knowing they were going to come, did you do anything to keep them off the premises?

A No, I wasn't there. I left at 9:15. If I worked at ten o'clock there normally wasn't anybody there when I left.

Q But you learned about it after you left that people would park in the A & P parking lot?

A I could tell. They left trash in the lot.

Q You took no steps to notify your superiors to do something to keep these people off each year?

A (No response.)

(Page 40, Lines 15 through 18)

Q During this whole time that you were manager at these premises of A & P they did not place any signs in the area where the chain was at all?

A No, sir.

(Page 41, Lines 1 through 6)

MR. WORRELL: I understand from your previous answer, the only way you ever knew that anybody used the A & P parking lot was from the debris you found the next day?

THE WITNESS: Well, I had driven by there and seen cars in the lot late, you know.

* * * * * * * * *

(November 2, 1972)

WILLIAM EARL WHITEHURST, called as a witness on discovery, having been first duly sworn, was examined and testified as follows:

(Page 44, Line 7 through Page 46, Line 16)

Q Where are you now employed?

A A & P, Southern Shopping Center.

Q Uh-huh. On April 3, 1971, were you employed at the A & P on East Ocean View Avenue?

A Yes, sir.

Q For how long before that were you employed there? Before April 3, 1971?

A Roughly a year.

Q All right, sir. What was your job description or title?

A Assistant manager.

Q Assistant manager? And that would have been to the manager, Mr. Shanks?

A Right.

Q Mr. Whitehurst, did you know of a chain that was in the back part of the A & P building behind the store?

A Yes, sir.

Q All right, sir. Did you know it from about when you started working there until the time of April 3, 1971?

A Yes, sir.

Q All right, sir, and to your knowledge did anyone on the part of A & P, Great Atlantic and Pacific Tea Company is what you're known, put any sign there while you were working there from April 3, '71, to warn people of this chain being there?

A No, sir.

Q Did you know of the brush and the greenery that was growing there in the area where the chain is? Did you know that it was there?

A The brush?

Q Yes, sir?

A Yes.

Q And this chain sort of runs between the brush, is that right?

A It's not exactly between.

Q Through it?

A Through it, yeah.

Q And running through it at nighttime when there are no artificial lights from the A & P parking lot, it would be hard to see?

A It would be hard to see at nighttime.

Q Yes?

A It would be in some parts.

Q Yes, sir.

A In some parts. I don't know where this gentleman fell or anything like that, but I know in some parts its brush and some parts its clear due to the fact that people have walked to the beach. They have walked through it.

Q In other words from custom people going to and from the beach have made paths?

A Yes.

Q And you were familiar with those paths?

A Yes, sir.

Q And you were familiar that people would use those paths as means of getting on your property and off your property of what we lawyers call ingress and egress?

(Page 46, Line 20 through Page 47, Line 7)

Q From A & P property to the fishing pier or property next to the A & P, say, north of the chain?

A Right.

Q And both paths were there for some time?

A Yes, sir.

Q And they were made by pedestrian people walking?

A Yes, sir.

Q Now, do you know from your own knowledge who placed these chains there?

A No, sir, I don't.

Q They were there when you got there?

A Yes, sir.

* * * * * * * * *

(January 12, 1973)

CHARLES N. COOPER, a defendant, called as a witness on discovery, having been first duly sworn, was examined and testified as follows:

(Page 2, line 21 through Page 3, Line 9)

On April 3, 1971, what was your relationship insofar as ownership is concerned to the land immediately contiguous on the ocean side which is next to the premises where the A & P grocery store is located on East Ocean View Avenue or West Ocean View Avenue where this fall occurred?

A Well, I don't know where the fall occurred. We own -- I am a half-owner with my brother of part of the

land that is to the east of that land, but it does not go all the way to the ocean.

Q Well, since this fall of April 3 --

A Excuse me. North. North. The ocean side. But it does not go all the way through the bay.

(Page 4, Lines 6 through 16)

Q That part that is contiguous to it is the only thing I am interested in. And by north of it you are referring to the ocean side?

A The bay side.

Q The bay side. All right, sir. And that is you and your brother, Joel, is he the other half-owner?

A That's right.

Q All right, sir. And that was so on the 3rd of April, 1971?

A Yes.

* * * * * * * * *

(January 12, 1973)

DUDLEY COOPER, called as a witness on discovery, having been first duly sworn, was examined and testified as follows:

(Page 11, Lines 2 through 14)

Q Now, Mr. Cooper, do you know approximately when your two sons acquired title to this property?

A Oh, about --

Q Approximately?

A Longer than ten years ago.

Q All right, sir. Approximately 1962 or thereabouts?

A I don't know precisely because I am not good on dates. I would have to review my records for that if you want the precise information. But certainly beyond ten years.

Q All right. From today?

A Yes.

(Page 15, Line 14 through Page 16, Line 5)

Q Now, did you know that this chain existed before April 3, 1971 in the general area where the A & P parking lot and premises were that property owned by your two sons come together? Did you know that it was there before April 3, '71?

A Yes

Q And for how long did you know that?

A Since the beginning of the A & P lease.

Q Which was approximately?

A About ten or twelve years ago.

Q All right, sir.

A It was erected at their specifications.

Q At their specifications?

A That's right.

Q By whom was it erected?

A By the owners.

Q Now, the owners of what, of A & P?

(Page 16, Lines 10 through 12)

A A & P leases from Bay Front Property Account.

Q Yes, sir.

(Page 16, Lines 16 through 22)

A Bay Front Property Account is owned by -- at that time it was owned by Arthur Cooper of a certain percentage; L. P. Cooper a certain percentage, Arthur Cooper a certain percentage and Dudley Cooper, trustee for Charles N. and Joel B. Cooper one of the indentures or something for Mary T. Cooper, their mother. In 1943 was the date of the indenture.

(Page 17, Line 5 through Page 18, Line 6)

Q Now, the chain was put on approximately, you said ten years ago?

A In excess of ten years ago.

Q In excess of ten years ago?

A I don't know the date of the original lease.

Q Yes, sir.

A But I think they opened it ten or twelve years ago.

Q And that was at the request of the A & P Company, Incorporated?

A Which built the building and put in all the specifications according to their lease.

Q I see. All right, sir. And the way Bay Front Property came into your answer, I think, was in response to who actually put the chain up, and you said the lessor, the Bay Front at the request --

A Well, that's right.

Q -- at the request of the Tea Company?

A Under the terms and conditions of the lease.

Q Of the lease. All right, sir. And was there any specific agreement as to who was going to maintain this chain?

A The lessee.

Q That was the Great Atlantic and Pacific?

A That's right.

(Page 19, Line 3 through Page 20, Line 2)

Bay Front Property installed or put in this chain?

A Yes, sir.

Q For the Great Atlantic and Pacific Tea Company, and when it was put in it was intended to be put in on the leased property to the Great Atlantic?

A That's right.

Q And that no portion of it was to go over into the contiguous land whatever?

A No reason for it.

Q All right, sir.

A It is a separation between the two properties but it is on the A & P side of the properties.

Q All right, sir.

A We built it according to their specifications.

Q Prior to April 3, 1971 were you familiar with the growth, if any, of grass or weeds or any type of plant that was in the general area of this chain?

A Separating the two properties?

Q Yes, sir.

A On the north side of the chain there was quite a bit of debris and shrubbery, lots of undergrowth and so on.

Q So you knew that before April 3, '71?

A Yes.

(Page 22, Lines 15 through 19)

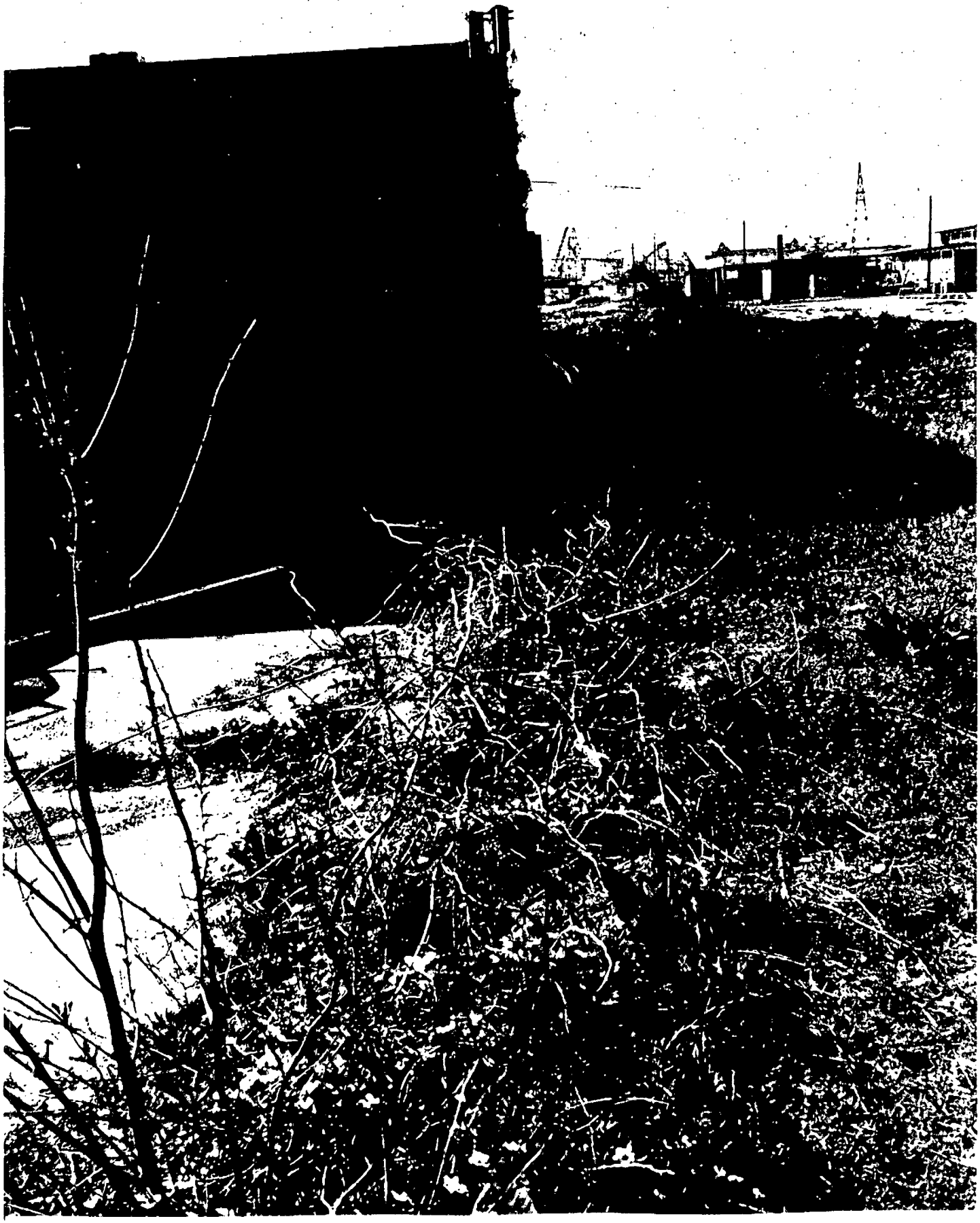
Q All right, sir. But you know that there is shrubbery and green growing in the area where the chain is located?

A And bricks and everything else are growing there.

* * * * * * * * * * * *

Plaintiff's Exhibit No. 1

Plaintiff's Exhibit No. 2



Plaintiff's Exhibit No. 3

Plaintiff's Exhibit No. 4

Plaintiff's Exhibit No. 5