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216 Va. 791
CLERK'S OFFICE SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 750551

THE CITY OF NEWPORT NEWS,
a Municipal Corporation in
the Commonwealth of Virginia,

Appellant.

v.

ETHEL ANDERSON,

Appellee.

# JOINT APPENDIX

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Counsel for Appellant.

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MOTION FOR JUDGMENT - FILED ON 11/28/72

TO THE HONORABLE HENRY D. GARNETT, JUDGE OF SAID COURT:

The Plaintiff, Ethel Anderson, moves this Honorable Court for judgment against the Defendant, the City of Newport News, Virginia, a municipal corporation, in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), together with the costs of this proceeding, all of which is justly due and owing unto said Plaintiff for the following causes, to-wit:

1. On or about December 2, 1970, at approximately 1:30 P.M. o'clock, the Plaintiff, Mrs. Ethel Anderson was a pedestrian on a certain public way owned, maintained and located within the boundaries of the Defendant, the Corporation or City of Newport News, Virginia, a municipal corporation then organized and existing under the laws of the State of Virginia; namely, the sidewalk bordering the northerly side of 30th Street in said City, and at a point approximately 50 feet west of the northwesterly corner of the intersection of 30th Street and West Avenue. Said point may be further defined as being approximately in front of a certain building known as Number 99 30th Street.

2. Plaintiff alleges that at said time and place, Defendant was subject to an affirmative duty owed to the Plaintiff and to others similarly engaged in the lawful use of said sidewalk to keep and maintain the same in reasonably safe and usable condition, free from cracks and other defects of a character constituting a hazard to pedestrians thereon, or failing in the exercise of such duty, said Defendant owed a duty to warn the Plaintiff and others similarly situated of the existence of an unsafe condition.

3. At the time and place aforesaid, Plaintiff was proceeding as a pedestrian in a normal manner, having due regard for

her own safety, when she encountered a defect in the said sidewalk which Defendant, notwithstanding its aforementioned duties, had negligently caused or suffered to occur; had negligently failed to correct, even though such defect had been present for a sufficient period of time so that the Defendant knew of it, or in the exercise of ordinary care ought to have known of it; and of which said defect Defendant negligently failed to give Plaintiff and others similarly situated notice or warning of any kind. The nature of said defect was a crack or depression between the sections of pavement at said place being approximately 3 inches wide and 1 inch deep. Plaintiff further says, and is prepared to show by competent evidence, that the nature of said defect made it difficult to detect in ordinary observation by a pedestrian using due care for his or her own safety and footing.

4. As the direct and sole proximate result of the aforesaid negligence of Defendant, Plaintiff caught her foot in said defect and was thrown violently forward onto the pavement, causing severe lacerations to her face and other parts of her body, and breaking her left wrist, which latter injury was accompanied by severe nerve and tendon damage.

5. As the further direct and proximate result of Defendant's negligence and Plaintiff's resulting fall as aforesaid, Plaintiff sustained severe, painful, incapacitating and permanent injuries, including emotional and psychiatric injuries. She lost the complete use of her left hand for approximately one year following said fall, and she continues to suffer, and will permanently suffer, partial loss of use and function in her left hand, and she has been permanently disabled and prevented from continuing her

employment, at which she was earning $65.00 per week at the time of her said fall. She has incurred sizable bills for doctors, hospitals, drugs and other therapeutic measures in and about her recovery; she has been permanently deprived of the ability to participate in her normal daily and recreational activities; and she has suffered and will continue permanently to suffer great pain and mental anguish, all as the direct and proximate result of the negligent acts and omissions of the Defendant and its employees.

6. Pursuant to the provisions of Section 8-653, Code of Virginia (1950, as amended), Plaintiff did, by her agent, prior to the expiration of 60 days after her above-described cause of action accrued against Defendant, give due written notice thereof to the Defendant's City Attorney, setting forth therein the time, place and circumstances of her said claim. Notice was further provided to the Defendant by its agents, members of the Newport News Police Department, who took a signed statement from Plaintiff, and who made photographs of the crack or defect which caused Plaintiff's fall and consequent injuries, all of which was done less than one week after said fall.

WHEREFORE, and for the reasons aforesaid, Plaintiff moves this Honorable Court for judgment against the Defendant in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), together with her costs herein expended.

ETHEL ANDERSON

By: _____
Of Counsel

Marcus C. Scheumann
1 East Queen Street
Hampton, Virginia 23369

## E X H I B I T S

Appellee's (Plaintiff's) Exhibits numbered 4, 5, 6 and 7 are contained in the record.

when you are not breathing on it, too.

THE COURT: Don't depend on it. I've said so many times it wasn't any good to start with. It hasn't improved with age.

BY MR. MONTAGUE:

Q Tell the jury what happened, Mrs. Anderson, on the second day of December, 1970, when you came to Newport News.

A Well, I was walking down 30th Street west towards Warwick, and I didn't have anything in my hand except my pocketbook. And so I was walking just in the ordinary fashion that you would be walking in, and I stepped in this hole, and somehow or another it caught my shoe heel, and I got out of balance, and I tried to catch, and when I did, I threw my arm out and, of course, all the weight fell on that. And I was bruised across here and across my eyes and cut my lip, my nose was bleeding, and so that was just about it.

Q Where did you go after that, Mrs. Anderson?

A I went over to a friend's apartment to wash the blood off my face.

Q Were you aware of any pain or anything unusual about your wrist at that point?

A Well, no. I mean I never thought much about that. My face was so cut up, and I was bleeding and everything, and I was really concerned about that, you know, and never one time thought about my arm at that time. * * *

1 MR. MONTAGUE: All right. Answer Mr. Roylance.

2 CROSS-EXAMINATION

BY MR. ROYLANCE:

3 Q Mrs. Anderson, let me ask you, which wrist is

4 it that was injured when you fell?

5 A The left.

6 Q And are you left-handed?

7 A No.

8 Q You are right-handed then. I presume that's

9 a logical conclusion. Going back to the day of your accident,

10 prior to that, have you ever had occasion to be on this sidewalk

11 on 30th Street before?

12 A Well, yes, when I had wanted to go down, if

13 I wanted to go down, to visit or anything like that.

14 Q Do you remember how many times you've been

15 on this particular portion of sidewalk before?

16 A I couldn't recall how many times, but I

17 know people all along there, and I visited.

18 Q Would you say,then,frequently you've been

19 on it?

20 A Well, I wouldn't say any time sooner. I

21 couldn't tell you just how soon I'd been-- It had been quite

22 some time because I had been out of town.

23 Q Well, over a course of years, have you been

24 on that sidewalk before?

25 A Oh, I'd say within maybe a year or something

like that.

1 Q Three times a year, once a week?

2 A Well, I don't know, about once a week. I

3 don't know. I told you I had been on a trip; I'd been away.

4 Q How long had you been away?

5 A I had been away three months.

6 Q All right. But during the course of visiting

7 friends, you had used the particular portion of the sidewalk on

8 30th Street that you were on at the time of your accident; is that

9 correct? In other words, over a period of time you've been on

10 that street before and on that sidewalk before?

11 A Oh, I've been over the sidewalk because I

12 used to work in Newport News.

13 Q Now, this depression that you caught your heel

14 in, have you ever seen that particular depression before?

15 A No, I had never paid any attention to it,

16 to tell you the truth.

17 Q On any of your previous trips down that

18 sidewalk, you'd never seen it?

19 A No, I hadn't noticed, I really hadn't.

20 Q All right. On the day in question, then, the

21 second of December, I believe you said the accident happened at

22 1:30?

23 A Approximately, somewheres around that time.

24 Q Do you recall what the weather conditions were

25 at that time?

1 A The weather was cloudy. It was not raining.
2 It was cold, but it was not raining.
3 Q Just a cloudy day more or less like today?
4 A That's right.
5 Q When did you first notice the defect or
6 depression in the sidewalk?
7 A I didn't notice until I fell.
8 Q And what drew your attention to it?
9 A My shoe was in the hole.
10 Q Now, as you were walking down the sidewalk, were
11 you distracted in any way?
12 A No, I was just walking in the ordinary
13 pattern, the manner that you would be walking.
14 Q Nobody called you?
15 A No; no.
16 Q Nothing like that. Did you have packages
17 in your hand?
18 A I only had my pocketbook.
19 Q After you noticed the defect that your shoe
20 was in, was there any debris in it, any leaves, anything like that?
21 A No, I never noticed any.
22 Q Was it obscured by any shadows?
23 A No, I never noticed any shadows.
24 Q As you were walking down the sidewalk, Mrs.
25 Anderson, you say you were walking in a normal way, can you tell us

you see, I got over, naturally, and I tried to catch with my hand.

Q Was the shoe wedged in the hole, or did your foot come out of it?

A My foot came out of it, and it was in the hole.

Q Do you wear glasses, Mrs. Anderson?

A No.

Q Can you tell us, if you can, why you didn't see the defect, the hole?

MR. MONTAGUE: I think that's an argumentative question, Your Honor. She said she didn't see it.

THE COURT: She can tell whether or not anything obscured her vision, or she was looking in some other direction. I would agree it's a rather wide open question, but do you know of any reason why you didn't see it?

THE WITNESS: No, Your Honor. I was just walking in the usual manner.

THE COURT: She doesn't know why she didn't see it.

BY MR. ROYLANCE:

Q Can you describe the hole in the sidewalk as you remember it?

A Well, no, really. I mean I just know it's a slight hole, but it was just enough to catch that shoe and trip

me. That's all I can tell you, really.

Q It was just a slight little hole?

A It was kind of raggedy jaggedy, you know, enough to catch my shoe heel.

Q Did it go straight down in the sidewalk, or was it a depression?

A Well, it was there when I --

Q It was there when you got there?

A Well, yes. I guess that's what you would say. Excuse me. When I fell, I tried to catch, and I threw my hand out because I had my pocketbook on this side, and my hand must have give away because my face hit the sidewalk, and I was cut here and here, and my lip was all swollen, and my nose bled. So then when I got up, I just was all over the sidewalk; so I sat up for a few minutes because I just felt real sick. I sat there for a while before I got up.

Q Would you say that a depression of this nature is common on the sidewalks of the city?

A Well, that -- I mean, I haven't really noticed too much other places, but --

Q All right. Now, in relation to your working at the Parisian Shop --

A Yes.

Q -- would you tell us a little bit about your duties while you were there? * * *

1 MR. MONTAGUE: Yes, sir.

2 MR. ROYLANCE: Yes, sir.

3 THE COURT: Are you ready to proceed now?

4 MR. MONTAGUE: I wonder if we could have Mr.

5 Joseph Walker as the next witness.

6 THE COURT: All right. Mr. Walker, please.

7

8 JOSEPH P. WALKER, called as a witness

9 on behalf of the plaintiff, having been first

10 duly sworn, was examined and testified as follows:

11 DIRECT EXAMINATION

BY MR. MONTAGUE:

12 Q Tell the jury your name and address, please,

13 sir.

14 A Joseph P. Walker, C-2 Saint James Terrace,

15 Newport News, Virginia.

16 Q Are you acquainted with the plaintiff in

17 this case, Mr. Walker, Mrs. Ethel Anderson?

18 A Yes, I am.

19 Q How do you know her?

20 A I've known her for many years - a friend.

21 Q All right, sir. Now, did you have occasion

22 to see her on the date of her fall, which this case is all about,

23 which was December 2, 1970?

24 A Yes, I did, that afternoon.

25 Q Where did you see her, sir? * * *

a fall?

A Yes, she did.

Q Did you see any visible signs that she had such a fall?

A Yes, I did.

Q What were they?

A Well, she had a cut in her lip, and she had some bruises on her face and a lot of dirt-like gravel embedded in her face.

Q Did she make any complaint at that time of her left arm?

A She said she had hurt her hand.

Q Now, subsequent to that, did you go out with her and her show you where she fell?

A Yes, I did.

Q What did you see there?

THE COURT: Don't let your voice go down.

THE WITNESS: Yes, sir, I did. I observed the hole.

BY MR. MONTAGUE:

Q What did it look like, sir?

A Well, I would say the hole is approximately two-and-a-half inches in diameter and about two to three inches deep, and it was kind of raggedy around the edges.

Q You say -- Was it more or less round but

raggedy, did you say?

A I'd say more or less round. It was kind of an oblong shape.

Q What did the edges of the hole look like?

A They were sort of ragged.

Q Well, I'm talking about the color.

A It was deteriorated. It was concrete deteriorated with age.

MR. ROYLANCE: I object to that.

THE COURT: He only asked you about the color.

Ladies and gentlemen, you will have to disregard this statement that the concrete had deteriorated. I don't believe we can qualify this gentleman as an expert in concrete. He can only describe what he had seen. The question was: What color was it?

THE WITNESS: I'd say a dark gray.

THE COURT: Dark gray.

BY MR. MONTAGUE:

Q What was the color of the edges of the hole as compared to the color of the surface of the sidewalk? Was it lighter or darker if you recall?

A I would say it was darker.

Q Now, Mr. Walker, how far was that hole from where you live?

A Well, it's actually in the next block.

1 Q Do you ever use 30th Street, the north
2 sidewalk on 30th Street?
3 A Yes, I have at times.
4 Q Had you ever had occasion to observe that hole
5 before?
6 A No, I had not.
7 Q Where was the hole in relation to the expansion
8 joint on the -- in the sidewalk?
9 A It seemed to me it was with the expansion
10 joint, right in the expansion joint or close to it, if I recall
11 correctly.
12 Q Where are you employed, Mr. Walker?
13 A Newport News Shipbuilding and Drydock
14 Company.
15 Q How long have you worked there?
16 A Sixteen years.
17 Q Now, after you and Mrs. Anderson went out and
18 looked at the hole, did you go anywhere else?
19 A Yes, we did. I took her to the hospital.
20 Q Which hospital did you take her to?
21 A Riverside, Newport News.
22 Q Did you take her to the emergency room?
23 A Yes, I did.
24 Q Do you recall whether or not you had to wait
25 before seeing a doctor? * * *

CROSS-EXAMINATION

BY MR. ROYLANCE:

Q Mr. Walker, you said you lived in Saint James Terrace Apartments?

A Yes, sir.

Q And they are on the next block from where this defect in the sidewalk is?

A Yes, sir.

Q How long have you lived there?

A Almost twelve years, sir.

Q So you also stated, I believe, that you had been on this particular portion of 30th Street before; is that correct?

A Yes, sir, I have.

Q Could you indicate how many times you've been on it?

A No, sir, it's rather hard. You see, I park my car there sometimes, and I travel that route frequently. Sometimes I go down 30th, sometimes I don't.

Q So over the course of twelve years you've been living in that neighborhood, you've been down that road frequently?

A I would say so, yes.

1 Q And you never saw this particular defect?
2 A No, sir.
3 Q The first time you saw it is when you went up
4 there with Mrs. Anderson, and she pointed it out; is that correct?
5 A Yes, sir.
6 Q When you were looking at it with her, did you
7 actually measure the defect with a ruler?
8 A No, I did not.
9 Q Did you get down on your hands and knees and
10 look at it?
11 A No, I did not.
12 Q Or did you just stare at it?
13 A No, sir.
14 Q Was it obscured in any way? Were there any
15 leaves or trash or anything around it?
16 A Not that I noticed.
17 Q Would you say that it was open and in plain
18 sight?
19 A I would.
20 MR. ROYLANCE: That's all the questions I have.
21 MR. MONTAGUE: I have a couple more questions,
22 if Mr. Roylance has no objection, that I should have
23 asked in my direct examination. This is not really
24 redirect, and this will pertain to Mrs. Anderson's
25 condition subsequent to this fall, if you have no
objections. * * *

A No.

Q When was the last time you actually saw her regarding her wrist?

A May 10, '74.

Q That was about her wrist?

A Yes, sir.

MR. ROYLANCE: I think that's all the questions I have.

THE COURT: Mr. Montague?

MR. MONTAGUE: That's all.

THE COURT: May the doctor be excused?

MR. MONTAGUE: Yes, thank you, Doctor.

THE COURT: You're excused, Doctor. You may leave. Thank you.

(Witness excused.)

MR. MONTAGUE: I wonder if we could have Detective Shockley next, please.

DETECTIVE HOWARD SHOCKLEY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MONTAGUE:

Q State your name, please, sir.

A Howard Shockley.

Q Where do you reside?

A 214 Denbigh Boulevard, Newport News.

Q And where are you employed?

A By the City of Newport News Police Department.

Q Were you so employed on the second day of December, 1970, Detective Shockley?

A Yes, sir, I was.

Q Do you recall investigating a sidewalk fall-down case involving Mrs. Ethel Anderson that date?

A I do.

Q Do you have your notes with you to that, sir?

A Yes, sir.

Q Would you tell the jury the results of your investigation of that occurrence, sir?

A At approximately 4 p.m. on December 2, 1970, I went to the no hundred block of 30th Street at which time I met Officer Keeton. He had informed me that a personal injury accident had occurred in the area of No. 95, at which time he pointed out to a portion in the sidewalk. I measured the hole, which was in

the sidewalk. It measured approximately four inches in diameter and approximately one-half inch deep and also photographed the scene.

Q All right, sir. I have your photographs if I could show them to you at this point. I hand you two photographs and ask you if these were the two that were made at the scene under your supervision?

A Yes, sir, these are the photographs that I took.

Q And is that Officer Keeton, your referred to, holding the ruler?

A Yes, sir.

MR. MONTAGUE: All right. If Your Honor please, I would offer these as Plaintiff's Exhibit Numbers four and five.

THE COURT: We better make it four and five. It doesn't make any difference which order they are in.

(Whereupon, the aforementioned photographs were received in evidence as Plaintiff's Exhibit Numbers 4 and 5.)

BY MR. MONTAGUE:

Q Now, Detective Shockley, did you examine the hole with reference to its edges and particularly the color of the

edges?

A I cannot recall the coloring around the hole, but it appeared to me it was a result of the --

MR. ROYLANCE: I object to that, Your Honor. I don't think he can testify as to how the defect would have occurred.

THE COURT: No, sir, I don't believe the gentleman can do that either.

BY MR. MONTAGUE:

Q Let me hand you the photographs again, Mr. Shockley, and ask you if either of these refresh your memory in regard to the state of color or discoloration of the hole?

A No, sir, I don't recall any coloring.

Q All right, sir. The photograph itself as I'm looking at it would appear to indicate that the hole was full of dirt; is that correct? Is that your recollection?

MR. ROYLANCE: I object to that. That's his --

THE COURT: Mr. Montague, I don't believe you can testify in this case now. I think that's gone beyond the realm of a leading question.

MR. MONTAGUE: Well, I don't intend to be, Your Honor.

THE COURT: Yes, I understand that. You can ask him to describe what he sees, and that's all he can do.

BY MR. MONTAGUE:

Q Let me ask you what you remember in regard to the contents of the hole and what the bottom consisted of and so forth, if you recall.

A As I recall, the hole was as is shown in this photograph.

Q What is shown in the photograph? I answered what it looked like to me, and I got called down, so what's shown in the photograph?

A It shoes what appears to be a recess in the sidewalk of approximately one inch in depth, four inches in diameter.

Q Did you stick your finger down in it, do you recall that, or any instrument?

A The ruler.

Q And do you recall whether or not it was something you could penetrate on down through or not?

A Not that I recall. It was firm.

Q All right, sir. Now, following the making of these photographs, what further investigation did you conduct, if any?

A I drew a diagram of where the incident occurred.

Q Is this -- Would you want to detach this?

MR. ROYLANCE: Leave it off. No, detach it why don't you.

1 MR. MONTAGUE: Is this the diagram that you
2 drew?
3 THE WITNESS: Yes, this is a copy of the
4 diagram that I drew on that day.
5 MR. MONTAGUE: All right, sir. Let me take it
6 out of here. I would like to offer this, if Your Honor
7 please.
8 MR. ROYLANCE: No objection.
9
10 (Whereupon, the aforementioned
11 diagram was received in evidence
as Plaintiff's Exhibit No. 6.)
12
13 BY MR. MONTAGUE:
14 Q Did you subsequently interview Mrs. Anderson?
15 A Yes, sir, I did.
16 Q Where did that interview occur, sir?
17 A That took place in her home in the City of
18 Hampton the following day.
19 Q And did you observe any signs of injury about
20 her person?
21 A I cannot recall exactly.
22 Q Did she report that she had been injured to you?
23 A Yes, sir, she did.
24 Q And do you recall whether or not you had any
25 reason to doubt that statement?

1 A No.

2 Q In other words, you did not challenge in your

3 report that she had been injured in her fall?

4 A No, sir.

5 Q Do you recall, maybe you've already answered

6 this, but do you recall what injuries she reported to you as

7 having had?

8 A May I refer to my notes?

9 Q Yes, sir. At least I think you can. As far

10 as I'm concerned you may, yes, sir.

11 A She stated that when she fell, she struck her

12 face and left arm on the sidewalk in the area of No. 95 30th

13 Street.

14 Q To whom was your report made, Mr. Shockley?

15 A My report was directed to Captain H. T.

16 Williams.

17 Q And would you know where it went beyond him?

18 A To my knowledge, a copy of the report would

19 be forwarded to the city attorney's office.

20 Q Do you know whether or not it is routine

21 within the police department to investigate sidewalk falls?

22 A Yes, sir, we do investigate them any time

23 that they are reported.

24 Q How did you know where the hole was? Did

25 Mrs. Anderson show it to you?

1 A Officer Keeton pointed the area out to me.

2 Q What do you mean pointed the area out, you

3 mean the actual defect in the sidewalk?

4 A Yes, sir.

5 Q How did he know, if you know?

6 MR. ROYLANCE: I object to that, Your Honor.

7 THE COURT: Yes. Well, is there any question

8 that this is the place where she fell?

9 MR. ROYLANCE: I don't really think so.

10 THE COURT: Well, I don't think it makes

11 any difference.

12 BY MR. MONTAGUE:

13 Q All right, sir. Referring to your diagram,

14 do I understand that West Avenue would be this way on the diagram;

15 in other words, east of where you had drawn this spot?

16 A West Avenue would be as indicated by the arrow

17 on the diagram running north and south.

18 Q Right, but is it to the east of this spot?

19 A Yes.

20 Q Is this sidewalk still the way it was then?

21 A I don't know.

22 Q Do you know whether or not any construction

23 has been done along there, such as curb cuts or tearing up the

24 pavement in any way?

25 A I don't know.

1 Q Do you know the place indicated as driveway,
2 do you know what business or residence that may have served?
3 A I can only speculate. I don't know.
4 Q Do you know what the distance from the
5 westerly edge of West Avenue would be to the spot of the fall?
6 A No, sir. In this diagram the measurements
7 were taken from the house located at No. 95 30th Street.
8 Q Yes, sir. Getting now to the reason for the
9 question, are you familiar with the diagram or sketch done by
10 Mr. C. R. Rex of the public works department?
11 A I don't believe I am.
12 MR. ROYLANCE: I would object to his using
13 that particular diagram.
14 THE COURT: Well, he just asked if he was
15 familiar with it. I don't think he's using it yet, and
16 he says he's not familiar with it.
17 MR. MONTAGUE: Well, I would like to offer it
18 to the officer and ask him to compare it to his to see
19 if he feels they are in agreement.
20 THE COURT: Well, I don't think that you could
21 do that, sir, because the question is,whether or not
22 they coincide or don't coincide would be a question
23 for the jury.
24 BY MR. MONTAGUE:
25 Q Well, all right, sir. Let me ask you this about

your drawing: You are showing a little gum ball-looking thing that's the hole; is that right?

A That's correct.

Q And you are showing that --

A At the point of impact.

Q Is that the point of impact or the point of the hole?

A This is the location of the hole.

Q So at the point of impact, as you call it, she fell forward.

A Right.

Q Anyway, this shows the hole as being west of the driveway, correct?

A Correct.

Q All right, sir. Was there anything further involved in your investigation, Mr. Shockley, other than what you've related to us?

A No, sir.

Q When you made your report, was there any follow-up that you did or were required to do?

A I don't think I understand the question.

Q Well, I think I know the answer, so I don't think there's any need, really, to ask it.

MR. MONTAGUE: That's all I have.

CROSS-EXAMINATION

BY MR. ROYLANCE:

Q Now, Detective Shockley, I believe you stated Officer Keeton was on the scene when you arrived?

A That's correct.

Q Where is Officer Keeton at this point?

A I do not know.

Q Is he still in the police force?

A I don't know.

Q Is he still in the City of Newport News?

A I don't know.

MR. MONTAGUE: I would be glad to stipulate what I know about it, Bob. I think it's a joint understanding of counsel that Mr. Keeton has left the employment of the City and is now in Fairfax, as far as I understand.

MR. ROYLANCE: I just wanted that in the record.

BY MR. ROYLANCE:

Q In your measurements of the hole, would you read them off again, if you would, please?

A The measurements?

Q Right.

A One-half inch in depth by four inches in diameter.

1 Q And this was done with a ruler?

2 A That's correct.

3 Q Was the depth uniform all around, or was it

4 sort of cup shaped, or how was it?

5 A At the deepest point in the center of the hole

6 it was one-half inch.

7 Q And it sort of tapered upward from there?

8 A Correct.

9 MR. MONTAGUE: I think counsel is leading

10 the witness. Obviously, he is the city's witness.

11 THE COURT: Well, I don't believe he's the

12 city's witness, Mr. Montague. I believe you put him

13 on the stand.

14 MR. MONTAGUE: Well, I did, yes, sir.

15 I didn't call him as an adverse witness.

16 THE COURT: No, sir. This gentleman may

17 cross-examine him.

18 BY MR. ROYLANCE:

19 Q At the conclusion of your investigation, did

20 you take any actions at the scene? Did you put up a barricade

21 or anything like that?

22 A No, sir, I did not; however, I did contact

23 Mr. Rex.

24 Q Who does he work for?

25 A The city. * * *

PROCEEDINGS IN THE COURTROOM IN THE PRESENCE OF THE JURY

THE COURT: Now, we'll note your exception for the record.

MR. MONTAGUE: Thank you, sir.

THE COURT: Do you waive the polling of the jury?

MR. MONTAGUE: Yes, sir.

MR. ROYLANCE: Yes, sir.

THE COURT: Get Mr. Hunt, please, sir.

CHARLES H. HUNT, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MONTAGUE:

Q State your name, please, sir.

A Charles H. Hunt.

Q Where are you employed, Mr. Hunt?

A City of Newport News, street superintendent.

Q Were you so employed -- Let me ask you this: How long have you held that job?

1 A Nine years.

2 Q What does the job of street superintendent

3 consist of, Mr. Hunt?

4 A Well, sealing, paving, general maintenance,

5 streets, sidewalks, frequent snow storms like last night, all night.

6 Q What policy does the City of Newport News

7 have, if you know, sir, regarding the detection and repair of

8 sidewalk defects?

9 A We don't have any set policy.

10 Q How are sidewalk defects detected?

11 A From complaints and through the director's

12 office and police department.

13 Q What is the director's office?

14 A Mr. Womack's office, the director of public

15 works.

16 Q And how would it come from him, or you mean

17 it comes to Mr. Womack or from Mr. Womack?

18 A It would come, some of it through the police

19 department and a letter from them stating the defects, and then

20 he passes it down to me.

21 Q And how is it decided what defects to fix

22 and what not to fix?

23 A Well, that's more or less judgment.

24 Q What is the basis of that judgment?

25 A Now, if it's an accident that's investigated

1 through Mr. Womack's office, I don't know that.
2 Q You say it's a matter of judgment as to
3 what sidewalk defects to fix and what you don't fix. What
4 is the judgment based on?
5 A What condition it's in, if it's broken up,
6 pushed up.
7 Q If -- What is -- You mean a section?
8 A A concrete or curb, whatever it may be.
9 Q A section of sidewalk, for example,
10 higher than another section?
11 A That's right.
12 Q What is your policy if that condition occurs?
13 A Well, if it warrants being fixed, it's
14 policed up, which you have a lot of tree roots and that kind
15 of stuff.
16 Q Suppose it were pushed up a quarter of an
17 inch, would you replace it then?
18 A In most cases.
19 Q A quarter of an inch?
20 A Um-hum.
21 Q How about breaks or holes in a section of
22 concrete?
23 A Well, there's a lot of different kinds of
24 breaks. You have hairline cracks and a lot of different kinds
25 of breaks.

1 Q Well, is there any policy, or who makes the
2 decisions when there's a hole in the pavement as to whether
3 or not that hole needs to be fixed or that hole doesn't need
4 to be fixed?
5 A Usually, I would.
6 Q You would, personally?
7 A Right.
8 Q Well, suppose you were called upon, and I
9 am sure you are from time to time, to examine holes in the
10 sidewalk, which ones do you say should be fixed and which ones
11 do you say should not, and what is the basis of making the
12 decision between them?
13 A Well, if it's pushed up, it's broken, or
14 has holes in it, then I'd replace it.
15 Q How big a hole would it take for you to think
16 it ought to be filled?
17 A Well, I'd have to be able to see it.
18 Q What does that mean, sir? You mean as big as
19 a pencil or --
20 A No, it would have to be larger than a pencil.
21 Q Well, would it have a relation -- Would the
22 size that would decide you to fix a hole have a relation to shoes
23 or heels that people wear? In other words, assume a pencil is
24 smaller than any lady's shoe heel but something a little larger than
25 that, maybe the same size or larger than a lady's shoe heel?

1 A No, I don't believe I'd go that far. It's
2 more of a judgment thing if I think it warrants fixing. I
3 wouldn't go as far as a pencil, but --
4 THE COURT: I think what he's asking you,
5 if there was a hole in the sidewalk big enough for a
6 lady to hang her heel in, would you cause that to be
7 fixed?
8 THE WITNESS: Yes, sir.
9 BY MR. MONTAGUE:
10
11 Q Well, now, these photographs, Mr. Hunt,
12 I think you have seen before.
13 A Yes, sir.
14 Q But these were offered by a previous witness,
15 a police officer, these pictures of the hole that is the hole
16 involved in this case.
17 THE COURT: All right, sir. Now, they are
18 Exhibits four and five.
19 MR. MONTAGUE: Yes, sir. Excuse me. Exhibit
20 four shows an officer holding a ruler to show the maximum
21 length of the hole, and Exhibit five shows an officer
22 holding a ruler to indicate the depth, apparently,
23 approximately the center of the hole. Now, Officer
24 Shockley described the hole as being approximately
25 four inches in diameter and approximately a half an inch

1 deep. Have you ever seen this hole?

2 A Not until about a year ago when I was first

3 subpoenaed to look at it.

4 Q In your judgment would you say you were called

5 upon to exercise -- By your job was that the sort of hole that

6 you would fix?

7 A No, sir, it's still there. Not in my opinion,

8 of course, that's my opinion. It's there for everybody to see.

9 Q Yes, sir, but in answer to a previous

10 question you said a hole large enough to catch a shoe heel in

11 probably should be fixed; was that your testimony?

12 A It's more of judgment thing to me.

13 THE COURT: Sir, that wasn't the question.

14 The question is: Was your testimony to the effect

15 that if the hole were large enough for a lady to catch

16 her heel in, you would order it fixed? Was that your

17 testimony?

18 THE WITNESS: If that was my testimony.

19 THE COURT: Sir?

20 THE WITNESS: If that was my testimony.

21 THE COURT: He's not asking you if it were,

22 he's asking you is it; is that your testimony as you

23 recall it?

24 THE WITNESS: (No response from the witness.)

25 THE COURT: Well, let's ask you again.

1 If the hole were big enough to catch a lady's
2 heel, as I asked you, would you order it fixed?
3 THE WITNESS: I don't think we'd have men
4 in the city enough to fix all those places.
5 THE COURT: That's not the answer to my
6 question, sir, and I thank you to listen to my
7 question and answer it. The question is: If there
8 were brought to your attention if there was a hole in
9 the sidewalk large enough for a lady to catch her heel
10 in, would you order it fixed?
11 THE WITNESS: Not necessarily, no.
12 I don't have the personnel.
13 THE COURT: Is there any reason why you
14 would answer that question differently than the last
15 time I asked you?
16 THE WITNESS: I'm looking at this picture here
17 from my naked eye. I'm being honest with you. I'm
18 not trying to be smart about this thing.
19 THE COURT: Just a moment. I'll thank you
20 to listen to my question. I wasn't referring to that
21 hole. I was referring to a hole large enough to catch
22 a lady's heel in. Now, I understood you to say the
23 first time I asked the question that you would order it
24 fixed. The second time I asked the question you said
25 not necessarily. Now, I want to know if there's any

reason why you take two different positions on this.

THE WITNESS: Well, you have a hairline crack sometimes in concrete. It could have been poured when it was too cold, which could cause it, or from the mixture or several different reasons.

THE COURT: Sir, you are not answering my question.

THE WITNESS: I'm trying to.

THE COURT: I want to know if there's any reason why you would take two different positions when I ask you the same question, one, that you would order it fixed and --

THE WITNESS: If it's big enough for a heel to trip in?

THE COURT: Yes, sir. That was the question.

THE WITNESS: No, sir, I wouldn't recommend --

THE COURT: You would not. Now, I want to know if there's any reason why. Did you understand the question when I first asked it? Well, did you?

THE WITNESS: Not if you are talking about a heel. You are talking about a mighty big --

THE COURT: Do you understand me?

THE WITNESS: Maybe I didn't. I've been up all night and all day and going on another day, and I'm a little bit tired.

MR. MONTAGUE: Nobody is trying to trip you up.

THE WITNESS: No, sir. I'm here to tell the truth, the whole truth to the best I know how.

MR. MONTAGUE: What's the smallest hole you can recommend to be fixed, Mr. Hunt?

MR. ROYLANCE: I think that's irrelevant, Your Honor, at this point.

THE COURT: Well, I don't know that it's irrelevant.

MR. ROYLANCE: We're at the point of talking about this particular hole.

THE COURT: Yes, sir, we're talking about this particular hole.

BY MR. MONTAGUE:

Q Do you ever recall directing a hole to be fixed that was just one isolated hole in the middle of a long sidewalk?

A Oh, yeah. We've used plant mix at times to do a patch like that, but hairline cracks --

Q I'm talking about a depression or hole that actually penetrates and leaves some space between the surface and the bottom of the hole. What is the smallest hole of that type that you can ever recall thinking ought to be fixed and having it fixed?

1 A Well, it's a million different kinds. Now,
2 I'm not trying to cover up on anything or tell you anything
3 different.
4 Q I understand this, sir, but this hole was said
5 to be four inches. Would it be five or six or ten or twenty?
6 A I wouldn't say that. If it's anything that I
7 consider dangerous, whether it be a hairline crack or whatever,
8 it would be -- I'd fix it to the best of my judgment.
9 Q All right, sir. So, it is based upon your
10 perception of what is dangerous, then. That's the main thing;
11 in other words, your fixing is to prevent danger and injury;
12 is that correct? That's the main reason for fixing the sidewalk?
13 A (Witness nods affirmatively.)
14 Q All right, sir. Now, I understand that the
15 location of sidewalk defects is by chance; is that what you said,
16 sir? If somebody calls about it, then you go look at it?
17 A Yeah, we have several complaints every day.
18 Q But is there no person or a group of persons
19 within the City of Newport News whose job it is or part of whose
20 job it is to check the condition of the streets and sidewalks
21 in the city?
22 A The streets? I mean, we're always observing.
23
24 Q Excuse me, the sidewalks.
25 A Sidewalks, we don't make a daily check on

them or have any kind of setup to make a check on them.

Q And would it be generally true, sir, that you don't hear about a bad place in the sidewalk until somebody has gotten hurt on it?

A I haven't heard of that, many people being hurt on them. I've been here a long time.

THE COURT: Sir, the question -- I don't think you're listening to the questions. Now, I don't want you to be on the defensive. I just want you to listen to the questions and answer them. The question is substantially like this: Do you ever hear of a defect in the sidewalk before someone is hurt by that defect?

THE WITNESS: Yes, sir.

THE COURT: He does.

BY MR. MONTAGUE:

Q What is the usual source of notice coming to you that there is a defect somewhere?

A Well, it comes from the citizens, police department, the director's office. They call in there and we make an investigation on it.

Q A citizen or police officer who has seen a place that they think you ought to look at. All right, sir. Do you have any idea how many such complaints you get in a month?

A No, I'd say it's a daily thing - complaints

on the sidewalk and curb. It's a daily thing from day to day.

THE COURT: I think what he wants to know is are these complaints made by people who just happen to run upon this alledged defect or is it -- Do you have someone scheduled to look for them?

THE WITNESS: No, sir. We don't have any schedule to look for them.

THE COURT: Well, then people would report them that just happened upon them; is that right?

A Partly.

BY MR. MONTAGUE:

Q Now, Mr. Hunt, is your nine years with the city, is that your total experience in concrete, or have you been involved in working?

A No, sir, I've been general superintendent for twelve years with one company, and I worked with the old City of Warwick when I came out of the army for five years.

Q Dealing with concrete all the time?

A Concrete, streets, etc.

Q When a piece of concrete is laid, and I am talking about what I will call sidewalk concrete, which to me is gray in color, I'm not talking about any of the fancy but normal sidewalk concrete, when it is laid, is it a fact that

it assumes a uniform color once it hardens?

A Um-hum.

Q Now, if a place is broken out of that concrete are the edges of the break a different color than the surface?

A If it's broken out?

Q Yes, if a new piece is knocked out of it?

A Yeah, it would be a different color.

Q Is it lighter or what?

A It would be lighter.

Q Now, over a period of time, will that lightness gradually assume the same shade or color as the rest of the block of concrete?

A It would take quite a while.

Q Well, how long do you think it takes given conditions similar to those existing on 30th Street in the City of Newport News? Let's say you knocked a hole in it.

A I think it would take a number of years. I don't know whether it would ever be the same color.

Q But it would be a gradual process as those edges get darker and gradually blend in with the --

A No, I don't think it would ever really blend in. I've never seen any blend in and be the same thing when you replace it.

Q Well, the process of aging of a hole in concrete, I believe you said that the edges do get darker, they

are initially whiter or lighter; is that right? And then they get darker as it gets older?

A Yeah, they'd get darker.

Q Now, calling on your experience and background in dealing with concrete, sir, I ask you once again to look at these photographs, which were taken, according to the defendant, the day following this accident, and tell me in your judgment if that is an old break, a new break, or somewhere in between.

A Well, the break could have been there for years, what you have here.

Q Would it be your best judgment that according to those photographs it had been there for years?

A In my judgment it isn't looking like this when I go and look at it.

Q I'm asking you to analyze these photographs. Now, is it your answer that the hole shown in the photographs appears to have been there for years?

A Well, I think all this concrete has been there for years. I'm sure it has.

Q Well, my question relates to the hole, and, of course, nobody knows when or how that hole got there, but in your practiced eye, does that look like an old hole that had been there a long time or a new one?

A Well, sir, I can't find this hole there now, and I look at it just about every day since this came out, and

I can't find this now, and I haven't made any replacements on it.

THE COURT: Well, now, sir, I want you to listen to his question.

THE WITNESS: Well, sir, I am, to the best of my recollection. I don't know how to answer it any other way.

MR. MONTAGUE: Well, let's take it out of the context of this case.

THE COURT: Let's get the answer to the one question first. Just a minute, Mr. Montague.

Are you able from looking at that photograph to tell whether that hole or depression, or whatever it is in the sidewalk, was new or old?

THE WITNESS: No, I'm not.

THE COURT: He couldn't tell.

BY MR. MONTAGUE:

Q Now, with reference to the picture again, and particularly with reference to the edges of the hole, does that have the appearance of having aged, having turned color, as we were discussing before?

A Well, it very well could be.

Q Does it appear to you that that's what has happened with the edges of this hole, that the color has gotten dark again?

A That's hard for me to say with all my years'

1 experience. I've been there and looked at it several times myself.
2 Q Yes, sir, but I thought you said this is not
3 there any more. You can't find it.
4 A I can't, not really. It took me about ten
5 minutes to find it when I went to look at it. I'm not saying this
6 to hurt anybody. I'm just telling you the truth.
7 THE COURT: He didn't ask you whether you could
8 find it. What he asked you is whether or not you could
9 tell from looking at the edge from that picture
10 examining the edges whether it's an old break or a new
11 break.
12 THE WITNESS: No, sir, I can't.
13 THE COURT: That's all he's asking you.
14 BY MR. MONTAGUE:
15 Q But you did say that the edges have darkened.
16 I'm not trying to put words in your mouth. Wasn't that your
17 answer to me just now?
18 A Well, all the sidewalk in that section is
19 darker or a lot darker than it was when it was poured.
20 Q But isn't it so, sir, by the same token, if
21 you went down there with a maul and busted the heck out of it,
22 the edges would be dark, wouldn't there be a stark contrast?
23 A I can't answer that.
24 Q Now, you've looked at a lot of broken concrete
25 in your day I expect, have you not, and you don't know a piece

of aged gray concrete if you break it, the edges are much lighter in color?

A Much lighter?

Q Yes, sir.

A I wish I could answer your question. I mean you are asking --

THE COURT: You either know or you don't know.

THE WITNESS: I don't know, no, sir.

BY MR. MONTAGUE:

Q I believe you did say in answer to one of my questions that for the aging and darkening process to take place in a break would generally take years, was that your answer?

A I believe it was.

Q Sir?

A I believe it was.

Q All right, sir. Are you familiar with the sketch of this accident seen drawn by Mr. Rex?

A No, sir.

Q You were not involved in making that sketch?

A No, sir.

CROSS-EXAMINATION

BY MR. ROYLANCE:

Q Mr. Hunt, I believe you stated that your duties

1 are with the city or street repair superintendent?

2 A Right.

3 Q Where does that fit in the structure of the

4 city's organization? What department is a part of it?

5 A What department? Public works department.

6 Q Part of the public works department. All right.

7 Now, with respect to your duties, I believe you stated that you

8 didn't have any setup to inspect sidewalks; is that correct?

9 A Correct.

10 Q And what you said that you refer only to your

11 street repair department?

12 A Right. We are always observing, but as far

13 as having anything directly set up for that, I don't have the

14 personnel for it.

15 Q So then the extent of your job is merely to

16 act on repair orders; is that correct?

17 A Right.

18 Q In other words, you just do the physical

19 repair itself?

20 A Right.

21 Q Now, when you say you are always observing, you

22 mean when you are making repairs, you are observing when you are

23 driving around town, what do you mean by that?

24 A If we're doing a piece of sidewalk in any one

25 block, we try to check that one block out on both sides and replace

1 what needs to be replaced while we're there.

2 Q So you would do whatever would be necessary

3 in the block?

4 A Right.

5 Q Can you recall to the best of your knowledge

6 ever having made any repairs in the no hundred block of 30th Street?

7 A Not to my knowledge, no.

8 Q In reference to these pictures, have you been

9 making repairs on 30th Street? Would that have been one that you

10 would have repaired?

11 MR. MONTAGUE: I object to that. I think we've

12 already answered --

13 THE COURT: Yes, I think that's self-serving.

14 BY MR. ROYLANCE:

15 Q I believe you stated, also, that your method

16 of getting these repair orders comes from citizens and the police

17 department. On what basis could you get it from the police

18 department? How do you get it?

19 A Well, they put in calls to my office, and a

20 lot of it will go through the public works department director's

21 office, and it's passed from the director down to me and through

22 citizens. I mean, we have daily calls from citizens.

23 Q So taking all these things together, that's

24 what you work on?

25 A Right.

MR. ROYLANCE: I think that's all the questions I have.

THE COURT: All right. May this gentleman be excused?

MR. ROYLANCE: Yes, sir.

MR. MONTAGUE: Yes, sir.

THE COURT: All right, sir. You are excused. Thank you.

THE WITNESS: Thank you.

(Witness excused.)

MR. MONTAGUE: I will call Mr. Rex, briefly.

THE COURT: All right, sir. Will it take very long?

MR. MONTAGUE: No.

CHARLES R. REX, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MONTAGUE:

Q State your name, please, sir.

A Charles R. Rex.

1 Q And where were you employed, Mr. Rex?

2 A Public works engineering, City of Newport News.

3 Q Were you so employed on or about the month of

4 December, 1970?

5 A Yes, sir.

6 Q And did you have occasion in that job to make

7 a sketch of the site of a fall by Mrs. Ethel Anderson?

8 A Yes, sir.

9 Q And is this the sketch that you made, sir?

10 A It is.

11 MR. MONTAGUE: Any objection to -- I have

12 forgotten what number we're on now, Your Honor.

13 THE COURT: Seven. Receive and mark it

14 Plaintiff's Exhibit No. 7.

15 MR. MONTAGUE: I have one question after it's

16 marked.

17

18 (Whereupon, the aforementioned sketch was received in evidence

19 as Plaintiff's Exhibit No. 7.)

20

21 BY MR. MONTAGUE:

22

23 Q Sir, I call your attention to the legend written

24 between the right-of-way line and the sidewalk line in which you

25 refer to a spall; is that correct?

A That's right.

Q What is a spall?

A It's a chip, flake out of the concrete section.

Q Approximately three inches long, four inches wide, and one inch deep. How did you arrive at those dimensions?

A With a rule in the field. I used two rules to ascertain the depth placing one surface on the top and the other one vertically.

Q And it came up to approximately an inch deep at the deepest point?

A Yes, sir.

MR. MONTAGUE: All right, sir. Thank you.

CROSS-EXAMINATION

BY MR. ROYLANCE:

Q In your observation of this hole, was it of uniform depth all around it?

A No, sir.

Q And what does this one-inch measurement represent?

A The deepest point.

Q So the deepest point, is that approximately in the center?

A Yes, sir, from my recollection approximately in the center.

Q When did you make these measurements?

MR. MONTAGUE: The Court has the date.

THE COURT: Well, it's dated December 9, as far as the drawing is concerned. It doesn't say when he made them.

THE WITNESS: On the seventh of December, I made them.

MR. ROYLANCE: I think that's all the questions I have at this time.

THE COURT: All right. May this gentleman be excused?

MR. ROYLANCE: I would like to have him retained. I think I would like to call him as my own witness.

MR. MONTAGUE: With that, the plaintiff rests, Your Honor.

THE COURT: All right, sir. You may stand outside please.

If you will be so kind as to retire the jury, please.

(Whereupon, the jury retired to the jury room at 12:55 p.m.)

PROCEEDINGS IN THE COURTROOM OUT OF THE PRESENCE OF THE JURY

MR. ROYLANCE: May it please the Court, I have a motion to

* * *

(Whereupon, the jury returned to the jury box at 2:35 p.m.)

PROCEEDINGS IN THE COURTROOM IN THE PRESENCE OF THE JURY

THE COURT: Do you gentlemen waive the polling of the jury?

MR. ROYLANCE: Yes, sir.

MR. MONTAGUE: Yes, sir.

MR. ROYLANCE: Call Major Austin, please.

GEORGE C. AUSTIN, a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYLANCE:

Q State your name and your occupation, please.

A George C. Austin, major in Newport News Police Department.

Q How long have you been on the police force?

A Twenty-seven years.

Q What is your present duty?

A I'm the commander of the administrative

1 operations branch.

2 Q What were your duties in 1970?

3 A Commander of the uniform branch.

4 Q What responsibilities did this entail?

5 A The operations of the uniform and traffic

6 patrols.

7 Q Is that throughout all areas of the city?

8 A Yes, sir.

9 Q Can you state, if you know, if the police

10 department has any policy in effect, or did it have in 1970, with

11 respect to defects in city property being streets, sidewalks,

12 whatever?

13 A Yes, sir, we do at this time, and we did

14 in 1970.

15 Q Can you tell us what it is, please?

16 A Whenever an officer is responsible for his

17 district, the area in which he is assigned, he is responsible for

18 any and all defects found in the area. He writes reports to me

19 with reference to these defects, and I report them to the proper

20 office in the city so that they may be corrected.

21 Q What nature of defects might this entail?

22 A This would be trees, poles, street conditions,

23 holes, curb conditions, sidewalk conditions, any type of defect

24 that would endanger vehicular or pedestrian traffic.

25 Q What's the time element involved between when

he sees it, you get it, and you take care of it or you report it?

A Between eight a.m. and five p.m. it would be reported to me immediately. Between five p.m. and eight a.m. it would come in the form of a letter, and I would report it to the department responsible the next morning.

Q And which departments would these be?

A Public works, traffic engineers, Vepco, telephone company, wires, poles, this type of thing. Any department that would be responsible for the operation of the particular defect or management of stores or what have you, where a sign would be found that would endanger a life, glass would be hanging in a window or anything that would cause a problem to the public.

Q Do your police officers have any responsibility with respect to these defects other than just reporting them?

A Yes, sir. They do if they find the defect, and if the defect presents an immediate danger, they are to remain at the scene of the defect until it can be properly barricaded and until someone can arrive to make the necessary corrections.

Q And this policy was in effect in 1970?

A Yes, sir. This policy was in effect in 1947.

Q Now, with respect to the area of the city in the vicinity of 30th Street and West Avenue, are there regular police patrols in this area?

A Yes, sir. We have two vehicle patrols, one patrol car, a motorcycle, and a foot patrol because the no hundred block of 30th Street is an area in which it's no parking, and we do have parking enforcement in that particular area.

Q When you say there's no parking, you mean limited parking?

A Limited type of parking, yes.

Q And was this area covered in 1970 in this manner?

A Yes, sir, it was.

Q Do you recall of your own knowledge of any defects in the area of 30th Street and West Avenue that were reported to you prior to December of 1970?

A I don't remember, sir. I don't recall any was reported in that area.

MR. ROYLANCE: I believe that's all the questions I have at this time.

CROSS-EXAMINATION

BY MR. MONTAGUE:

Q Major Austin, do you have any idea of the frequency with which your patrolmen report sidewalk defects, just as rating that as one class of defects?

A Mr. Montague, I would say that the average sidewalk defect reported in the City of Newport News that's called to my attention would be about four or five a week of sidewalk defects.

1 This is over the entire city. This is done on a daily basis
2 plus a monthly report that also contains information, and on the
3 reverse side would be these, a culmination of the entire activity
4 for that particular month. So, I'm averaging four or five a week.
5 Q Is there -- I'm sure the answer to this must
6 be yes, but is there a judgment factor on the part of the officer
7 if he thinks the defect is insignificant or doesn't pose a
8 public hazard that he would not report it?
9 A If it did not cause, in the judgment of the
10 officer, a public hazard.
11 Q It didn't present a public hazard was my question.
12 A Well, I would say that this would definitely
13 be in the judgment of the officer. I could only put myself in
14 the officer's place and say, no, I would not report all; yes, I
15 would report some.
16
17 Q And are there any departmental standards or
18 standards existing in any other way which help the officer to
19 decide what to report and what not to report?
20 A No, sir. Other than that, what would present,
21 in his judgment, a danger or a hazard.
22 MR. MONTAGUE: All right, sir. Thank you.
23 MR. ROYLANCE: I have no further questions.
24 THE COURT: All right, sir. May the officer
25 be excused?

MR. ROYLANCE: Yes, sir.

I call Mr. Womack.

(Witness excused.)

JOSEPH L. WOMACK, JR., called as a witness on behalf of the defendant, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROYLANCE:

Q State your name and occupation.

A Joseph L. Womack, Jr., Public Works Officer, City of Newport News.

Q How long have you worked for the City of Newport News?

A About nine years.

Q What are your relative duties and the nature of your duties with the city?

A I'm director of the public works, and I am in charge of some six or seven divisions, including the street division, the sanitation division, mosquito control, building inspection,

1 engineering administration.

2 Q So the street department is one of your areas?

3 A That's correct.

4 Q Do you have any policies within your department

5 with respect to the handling of any defects in the streets or

6 sidewalks of the city?

7 A Instances are reported to us or that are

8 observed by my people. It is in their opinion a hazardous condition

9 to put a barricade on it or fix it immediately.

10 Q How do you receive information as to these

11 defects?

12 A We have a number of ways that we receive

13 information. Occasionally, they are observed by other city

14 employees. They are reported by the police department, and a

15 large number of calls, of course, come in from citizens to various

16 departments in the city.

17 Q What do you do once you find out about the

18 defect? Who do you notify?

19 A If I personally receive a report about a defect

20 in a street, I notify the supervisor of the street department.

21 Q You don't receive all notices, then. Obviously,

22 some of them are just directed to other departments; is that

23 correct?

24 A I probably receive a very small percentage of

25 them.

1 Q Can you estimate the number of miles of
2 streets in the City of Newport News?
3 A About 325.
4 Q How do you know that that's what we have?
5 A That's my recollection from the State Mileage
6 Report that we make.
7 Q Do all these streets have sidewalks on them
8 or next to them?
9 A No.
10 Q Do you have any idea of the number of miles
11 of sidewalks?
12 A I do not.
13 Q Would it be fair to say it would be
14 substantial?
15 MR. MONTAGUE: Well, I object to that.
16 THE WITNESS: Shall I answer the question?
17 THE COURT: I think that's right. I
18 don't think--What's substantial to you, Mr. Womack,
19 might not be substantial to me, and I don't think we
20 can guess at that.
21 MR. ROYLANCE: I believe that's all the
22 questions I have at this time.
23
24
25

CROSS-EXAMINATION

BY MR. MONTAGUE:

Q Did Mr. Charles Hunt work directly under your supervision, Mr. Womack, or is there somebody between you two?

A He works directly under me with the exception of Mr. McNamara, the assistant director of public works. There are times that he reports directly to both of us.

Q But he would be on the second organizational level on the organizational chart, if there is such a thing?

A Yes, sir.

Q In the case of a sidewalk defect, which consists of a hole, I was trying to elicit from Mr. Hunt, and I don't know that I really did, what the standards of the department would be as to what size the hole ought to be before your department would feel that it should be fixed?

A I don't think that we have any standard that would say just what size a hole is, sir. We look at them and try to determine whether or not we think it's something hazardous, but to my knowledge, there's never been given any instructions to the size of the hole and configuration, etc.

Q It would be true, I presume, that a very small hole, if you were to fix it, would be very easy to fix, is that a fair assumption?

A Well, if you've got to get men and got to get material, whether you pour a half a yard of concrete or one cubic

foot of concrete, it really doesn't begin to make that much difference. I don't know any better way to answer your question than that.

Q But this is what you do with your street patching crew, isn't it? You go around and fill little holes and big holes and in-between size holes?

A In the riding surfaces of the streets.

Q Yes, sir, but there is some type operation where, say, a truck with one small mixer of concrete would go around from time to time and fill little holes in the sidewalk?

A No, sir. It is not.

Q So, that's done strictly on a spot basis as reported?

A That's correct.

MR. MONTAGUE: All right, sir. That's all I have.

REDIRECT EXAMINATION

BY MR. ROYLANCE:

Q Would there be any reason why the concrete mixer doesn't ride around the city filling up small holes in the sidewalk?

MR. MONTAGUE: I'm going to object to that.

1 THE COURT: Well, he may have a reason.
2 Do you know of any reason, Mr. Womack, why that's not
3 done?
4 THE WITNESS: Well, usually in instances where
5 concrete repairs are made, it's necessary for somebody to
6 have an air compressor and so forth, and there's more work
7 in cutting out and preparation. So, you wouldn't ride
8 around with a load of concrete. We don't use small
9 concrete mixers, anyway. We don't even have one.
10 Where with a plant mix truck, you can, with just a
11 minimal amount of work with the men on the truck with
12 the tools, go ahead and complete the jobs.
13 BY MR. ROYLANCE:
14 Q Let me ask you, Mr. Womack, when you are going
15 around with a plant mix truck, which I take it is inside language
16 for asphalt, why wouldn't that, at least on a temporary basis, fix
17 a broken sidewalk?
18 A It could.
19 Q And isn't that done? In fact, aren't sidewalks
20 frequently repaired with asphalt?
21 A I think that there are times that they do this.
22 Q And that would be particularly true, would it
23 not, where you have these irregularities in the pavement where
24 one section had buckled up because of a root or something of that
25

1 kind, and you kind of make a ramp with asphalt to tie them together?

2 A It could be done that way.

3 Q And it is done in the City of Newport News

4 that way, is it not?

5 A I can't really say that I've seen it. I

6 wouldn't say that it has or has not been.

7 Q And similarly a small four-inch diameter hole

8 could be filled with a half a shell full of asphalt, could it not?

9 A Correct.

10 MR. ROYLANCE: That's all.

11

12 THE COURT: Are you all through with this gentleman?

13

14 MR. ROYLANCE: Yes, sir.

15 THE COURT: Thank you.

16 MR. ROYLANCE: I'd like to recall Mr. Rex

17 for a moment.

18

19 (Witness excused.)

20

21 CHARLES R. REX, previously duly sworn,

22 resumed the stand, and testified further as follows:

23 DIRECT EXAMINATION

24 BY MR. ROYLANCE:

25 Q Mr. Rex, when you were previously here, you

1 testified, I believe, that you were notified of the accident
2 in question; is that correct?
3 A Yes, sir.
4 Q How were you notified?
5 A I believe a phone call from Sargeant Henley.
6 Q That would be of the police department?
7 A Yes, sir.
8 Q Is it part of your -- How about describe what
9 your duties are in respect to sidewalk areas?
10 A Well, when notified of a sidewalk accident,
11 we ascertain a location from the police department and prepare
12 a sketch showing details of the scene.
13 Q This is done by going out to take a look at
14 it as you testified that you did?
15 A Yes, sir.
16 Q Do you keep any record of the times you
17 are notified of sidewalk injuries?
18 A Yes, sir. We keep a log.
19 Q Do you keep that yourself?
20 Let me rephrase that. In 1970, did you
21 keep that record?
22 A I did in 1970, yes.
23 Q Does that record reflect any entry from
24 Mrs. Anderson's particular sidewalk incident?
25 A Yes, sir. I recorded them when I was
notified.

Q Would you read what that says, please?

MR. MONTAGUE: I'll object to that until I've had a chance to look at it.

THE COURT: Yes, sir. I'd like to look at it, too.

MR. MONTAGUE: I would object to his reading that. I think the Judge ought to have a chance to read it.

THE COURT: I don't see where that's objectionable.

MR. MONTAGUE: Well, I would object to it on the grounds that it is a hearsay recitation of somebody else's opinion according to the --

THE COURT: I don't think this statement is going to obtain a view of a police sergeant. This does not go to the truth or falsity of his statement. We do not consider his opinion. This is merely a part of the notice that the city received that reflects their law. Let him read it. Then, I'll explain to the jury.

BY MR. ROYLANCE:

Q Would you read the particular entry.

A December, 1970, Sargeant Henley of the detective bureau called about seventeen hundred hours to report a Mrs. Ethel Anderson fell on the sidewalk at 95 - 30th Street

about one p.m. He also stated that there was a small hole in the sidewalk that he did not consider hazardous enough to justify a barricade.

Q Does your log there reflect any other injuries in this area of 30th Street prior to the one in question?

THE COURT: Let me explain to the jury. You are to consider this statement attributed to the police sargeant only as an entry in this book. His statement has no probative value one way or the other. It's just a statement in the book. Consider it in that light.

BY MR. ROYLANCE:

Q Does your log there contain other entries regarding sidewalk accidents in this particular area prior to the one we're dealing with here?

A No, sir.

MR. ROYLANCE: All right. Then, I would like to introduce this into evidence as Defendant's Exhibit 1.

THE COURT: Well, I'm not going to receive your book because we'll be holding the city's records. If it becomes necessary, we can take a picture of that.

MR. ROYLANCE: All right, sir. I think that's all.

THE COURT: Excuse me, Mr. Clerk. We have

* * *

as Defendant's Exhibit
No. 1)

MR. ROYLANCE: Well, I would like to renew my motion to strike, now, that all the evidence has been submitted.

THE COURT: Yes, sir.

MR. ROYLANCE: Particularly, with respect to the fact that I don't think there's any actionable negligence on the part of the city, both because of the size of the defect and the fact that I think we've shown reasonable inspection, and as a matter of law, I think that certainly the Court will find that this is not an actionable defect.

THE COURT: Well, whether or not it should be reported or whether it should have been found is a question for the jury. The evidence is that you have to put patrolmen out there who walk that beat, and among other things, that the police have a policy to look and see if there is a defect, and it's dangerous. They are supposed to report it. The question this jury is to determine is whether or not they feel this was such a defect that should have been discovered by this patrolman or other people, whose duties are to report these defects. I think it's purely a jury question.

MR. ROYLANCE: I'll note my exception to that.

(Whereupon, instructions were taken up with the Court.

Instructions 1, 3, and 4 were granted for the plaintiff. Instruction 2 was refused.

Instructions A thru L and J-1 were granted for the defendant. Instruction J was refused.

Counsel for the defendant noted an exception to instruction No. 3.)

(Whereupon, the jury returned to the jury box and were instructed by the Court, following which closing arguments were made by counsel, and the jury returned to the jury room at 4:55 p.m. to consider their verdict.)

(Whereupon, the jury returned to the jury box at six o'clock p.m., and returned a verdict for the plaintiff in the amount of $5000.00.)

(Whereupon, the jury was released.)

MR. ROYLANCE: If it please the Court, may I make a motion?

I would move the Court set the verdict aside as being contrary to the law and the evidence and enter up judgment for the defendant.

THE COURT: All right. Well, sir, after letting it go to the jury, I feel it was a serious question, and I don't think the damages were excessive. I think if they are liable, if the suit is liable, I think it was fair in the amount. Whether you have other grounds for appeal or not, I don't know. You'll have to see about that at a later date, but I overrule your motion, now.

MR. ROYLANCE: I would note my exception to that.

THE COURT: Note the defendant's exception.

(Whereupon, Court was adjourned.)

* * *

Instruction No. 4

The Court instructs the jury that in order to hold the city liable for defects in its sidewalks it must be shown that the city had actual or constructive notice of the defect which caused the accident, and had reasonable time to repair it or guard against any accident that might reasonably be expected to result therefrom, after having such notice. ~~and~~ ~~That~~ By constructive notice is meant that the defect by which the injury is alleged to have been caused had been so open and notorious and continued for such a length of time before the injury that the city, by its proper officers, exercising reasonable diligence, should have acquired knowledge of such defect. If, therefore, the jury believe, from the evidence, that the city had no actual knowledge of such defect, and that the defect had not remained in said sidewalk and been so open and notorious for a sufficient length of time so that the city, by the exercise of such reasonable diligence, should have known of its existence, and had time to repair the same, or take reasonable precautions to prevent such injury as might reasonably be expected from such defect, then they will find for the Defendant.

Instruction No. 2

The Court instructs the jury, that a municipal corporation is not an insurer against accidents upon its streets and sidewalks, nor is every defect therein, though it may cause injury, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day, and it is only the duty of the City of Newport News to use reasonable care to keep its sidewalks in a reasonably safe condition for pedestrians.

The Court further instructs the jury that a reasonably safe condition does not mean an absolutely safe condition, nor does it mean that the entire sidewalk shall be smooth and even for its entire width, nor that it shall be entirely free from obstructions.

If you believe from the evidence that the Defendant, the City of Newport News exercised such care then you shall find your verdict for the Defendant.

This day came the plaintiff in person and by counsel, and also came the defendant by counsel, and Diane M. Gray of Associated Court Reporters was sworn to transcribe and record the evidence and events of the trial of this cause, and thereupon came a Jury, to-wit: Cecil L. Compton, William F. Blake, Jr., Matt Bordeauz, John Griffin, C. S. Hardaway, Herbert F. Feagan, Sr. and Dorothy Long who were sworn to try the issue joined, and after hearing the evidence of the plaintiff, the defendant, by counsel moved the Court to strike the evidence of the plaintiff, which motion to strike the Court doth overrule, to which ruling of the Court the Defendant, by counsel excepts and after hearing all the evidence, the defendant, by counsel renewed its motion to strike the evidence of the plaintiff, which motion to strike the Court doth again overrule, to which ruling of the Court the defendant, by counsel again excepts, whereupon the Court on its own motion allowed the plaintiff to re-open her case to present additional evidence and additional evidence being heard by stipulation, and the arguments of counsel, and the instructions of the Court, the Jury retired to their room to consider of their verdict and after some time returned into Court with the following verdict, "We the Jury find in favor of the Plaintiff and assess her damages in the sum of $5,000.00, William F. Blake, Jr., Foreman".

The defendant, by counsel, moved the Court to set aside the verdict of the Jury as being contrary as to the law and the evidence, (and urged leave to argue same), which motion to set aside the Court doth overrule, to which ruling of the Court, the defendant, by counsel excepts.

Therefore, it is considered by the Court that the plaintiff, Ethel Anderson, recover from the defendant, The City of Newport News, the sum of five thousand ($5,000.00) dollars, the amount by the Jury in its verdict ascertained after the rate of eight (8) per centum per annum until paid and her cost in this behalf expended.

(s) Henry D. Garnett
Judge

A COPY. TESTE: GEORGE D. DASHAZOR, Clerk
BY Linda Weatherly D. C.

## ASSIGNMENTS OF ERROR

Filed 2/19/75

1. The trial court erred in refusing, on Defendant's motion, to set aside the verdict of the jury as being contrary to the law and the evidence in that:

a) The evidence disclosed that, as a matter of law, there was no actionable negligence on the part of the Defendant, City of Newport News.

b) The evidence was insufficient to show that the Defendant, City of Newport News, had either actual or constructiv notice of the defect complained of.

2. The trial court erred, in refusing on Defendant's motion after all the evidence was in to strike the Plaintiff's evidence in that:

a) The evidence disclosed that, as a matter of law, there was no actionable negligence on the part of the Defendant.

b) The evidence was insufficient to show that the Defendant had actual or constructive notice of the defect complained of.