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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 760572

S & C COMPANY, t/a The Palms Apartments at Malibu,
a Virginia general partnership, whose
partners are Marvin Simon and Herbert Cashvan,

Appellant

v.

MARY ANN HORNE, ADMINISTRATRIX of the Estate
of Robert Ricky Lovett, an infant, deceased,

Appellee

APPENDIX

John F. Rixey
Rixey & Heilig
15 Stoney Point
700 Newtown Road
Norfolk, Virginia

Counsel for Appellant

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

RIXEY AND HEILIG
ATTORNEYS AT COUNSELORS AT LAW
15 BONEY POINT
700 NEWTOWN ROAD
NORFOLK, VIRGINIA 23502

JOHN F. RIXEY
COMMISSIONER IN CHANCERY
CIRCUIT COURT OF NORFOLK
GEORGE H. HEILIG, JR.
COMMISSIONER IN CHANCERY
CIRCUIT COURT OF NORFOLK
THOMAS M. WHITEMAN

TELEPHONE
(804) 461-2500

August 20, 1976

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
AUG 23 1976
RICHMOND, VIRGINIA

Col. Howard G. Turner, Clerk
Supreme Court of Virginia
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Re: Record No. 760572
S & C Company, etc.
v.
Mary Ann Horne, Admrx., etc.

Dear Col. Turner:

In the above case wherein our appendix and brief were filed in advance of the deadline, it appears that we overlooked a designation of the Motion for Judgment.

Accordingly, we do hereby designate the Motion for Judgment as a part of the appendix. The printing firm, to whom a copy of this letter is being sent, will deliver the printed Motion for Judgment for insertion in the appendix and will mail copies to opposing counsel.

It would be appreciated if you would receive and mark the Motion for Judgment as a supplement or an addition to the appendix which has already been printed and filed.

I apologize for the oversight in this matter and any difficulties which this has caused.

Sincerely,

John F. Rixey

JFR:fep

cc: Grover C. Wright, Jr. Esq.
P. O. Box 51
Virginia Beach, Virginia 23458

cc: Fred R. Surface & Associates, Inc.
10th and Main Streets
Richmond, Virginia 23219

COPY

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MARY ANN HORNE, ADMINISTRATRIX
OF THE ESTATE OF ROBERT RICKY
LOVETT, AN INFANT, DECEASED,

Plaintiff,

AT LAW
NO. L- 2126

(WRONGFUL DEATH)

v.

S & C COMPANY (T/A THE PALMS
APARTMENTS AT MALIBU, A VIR-
GINIA GENERAL PARTNERSHIP WITH
ITS CERTIFICATE THEREOF FILED
IN THE CLERK'S OFFICE OF THIS
COURT IN BOOK 3, AT PAGE 277,
WHOSE GENERAL PARTNERS ARE
MARVIN SIMON AND HERBERT
CASHVAN),

Defendant.

Serve: Marvin Simon,
General Partner
7000 Oceanfront
Virginia Beach, Va.

MOTION FOR JUDGMENT

1. This action is brought by and in the name of the plaintiff, Mary Ann Horne, who is the personal representative and Administratrix of her deceased infant son, Robert Ricky Lovett, whose death on Friday, August 29, 1975, at approximately 4:45 p.m., in the common swimming pool owned, controlled supervised and operated by the defendant, S & C Company, a Virginia general partnership with its certificate thereof recorded in the Clerk's Office of this Court in Book 3, at page 277, and whose general partners are Marvin Simon and Herbert Cashvan, in the Palms Apartments at Malibu, 3600 Malibu Palm Drive, in the City of Virginia Beach, Virginia, to recover fair and just damages in the amount of $500,000, to be distributed to Mary Ann Horne, the parent of the said deceased, for sorrow, mental

GROVER C. WRIGHT, JR.
ATTORNEY AT LAW
3350 PACIFIC AVE.
VIRGINIA BEACH, VA.

A1

anguish, solace, society, companionship, comfort, compensation for reasonable expected loss of income of the decedent, services, protection, care and assistance provided by the decedent, expenses for the care and treatment of the decedent incident to the injury resulting in his death and reasonable funeral expenses, plus the cost of this action, the death of the said infant, Robert Ricky Lovett, having been caused by the wrongful act, neglect and default of the defendant, its agents, servants and employees.

WHEREFORE, the plaintiff moves for judgment for $500,000, plus costs.

MARY ANN HORNE, ADMINISTRATRIX OF THE ESTATE OF RBOERT RICKY LOVETT, AN INFANT, DECEASED.

By Counsel

Grover C. Wright, Jr., p.q.
P.O. Box 51
Virginia Beach, Va. 23458.

Filed in the Clerk's Office the 5 day of September 1975
Fees $25.00
$30.00
1.00
Sheriff
Total Paid $56.00
Barbara A. Nalls, Clerk

A 2

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DEPARTMENT OF HEALTH

SWIMMING POOL INSPECTION FORM

Name of Pool Palms Apts Pool Date 7-1-75

Name of Operator Harry Lurley

Location 3600 Malibu Point Dr.

01-0025

SIR: An inspection of your pool has this day been made, and you are notified of the violations marked with a cross (x).

1. PERSONNEL AND SUPERVISION:
   - Qualified operator in charge ..... (a) ( )
   - Adequate records kept ..... (b) ( )
   - Licenses, permits and certificates posted ..... (c) ( )
   - Rules and regulations posted ..... (d) ( )

2. BATH-HOUSE FACILITIES:
   - Walls, ceilings and floors ..... (a) ( )
   - Water closets, urinals, showers and hand basin ..... (b) ( )
   - Adequate ventilation and lighting ..... (c) (X)
   - Clothing, swim suits and towels properly handled ..... (d) ( )
   - Miscellaneous ..... (e) ( )

3. WATER QUALITY:
   - Approved drinking water facilities ..... (a) ( )
   - Source ..... (b) ( )
   - Cross connections ..... (c) ( )
   - Clarity scum, debris ..... (d) ( )
   - Algae ..... (e) ( )
   - Grease line ..... (f) (X)

	Deep End	Shallow End	Wading Pool		
Chlorine Residual	>1.0	>1.0		(g)	( )
pH	7.5	7.6		(h)	( )

4. SAFETY:
   - Life guard on duty ..... (a) ( )
   - Life saving equipment ..... (b) (X)
   - First aid kit ..... (c) ( )
   - Gas Mask properly stored ..... (d) ( )
   - Ammonia ..... (e) ( )
   - Life lines ..... (f) (X)
   - Depth markings ..... (g) (X)
   - Adequate fencing ..... (h) ( )
   - Adequate pool lighting ..... (j) ( )
   - Hazards within pool area ..... (k) ( )

5. EQUIPMENT:
   - Skimmers ..... (a) ( )
   - Overflow Gutters ..... (b) ( )
   - Filter room cleanliness, ventilation, lighting & drainage .. (c) ( )
   - Filter room placard ..... (d) ( )
   - Rate of flow meter(s) Main pool 107 gpm ... (e) (X)
   - Rate of flow meter(s) Wading pool ___ gpm ... (f) ( )
   - Gauges, Main pool 12-12 (influent) 10-0 (effluent) ___ (vacuum) (g) ( )
   - Gauges, Wading pool ___ (influent) ___ (effluent) ___ (vacuum) (h) ( )
     - closed
   - Hair and lint catcher ..... (j) ( )
   - Overflow Gutters ..... (k) ( )
   - Pumps ..... (l) ( )
   - Filters ..... (m) ( )
   - Vacuum cleaner (type) ..... (n) ( )
   - pH and Cl2 Test Kits ..... (o) ( )
   - Hypochlorinator Yes ☐ No ☐ (p) ( )
   - Gas Chlorinator (separate chlorine room) ..... (q) ( )
   - Chlorine room: ventilation ( ) cylinder storage ( ) cylinder scales ( ) (r) ( )

6. PREMISES:
   - Drainage ..... (a) ( )
   - Adequate refuse collection and disposal ..... (b) ( )
   - General cleanliness ..... (c) ( )

7. SALE OF FOOD AND DRINK:
   - Permit required ☐ Yes ☑ No ( )

PLTF. DEFD. EXHIBIT #3
Home v. S & C Company
DATE 1-8-76

REMARKS (1) Replace light bulb in mens rest room (2) Clean grease line (3) Life guard stand to be located at pools edge (deep end) (4) Replace ring buoy (5) Install divider between deep & shallow ends of the pool (6) Install new flow meter.

OPERATOR [illegible] SANITARIAN R. Parker

LHS-182—9-64

001

PLTF. DEPD. EXHIBIT #1
Hyme vs S & C Company
DATE 1-8-96

INSTRUCTION NO. 2

The Court instructs the jury that "Negligence" is a failure to exercise reasonable care or the violation of some positive duty imposed by law.

"Reasonable Care" is that care which a reasonably prudent person would have exercised under the same or similar circumstances.

Horne vs. S & C Company

Granted:
1-9-16
Case 13

INSTRUCTION NO. 3

The Court instructs the jury that a "Proximate Cause" of an event is a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred; it is an act or omission which immediately causes or fails to prevent the event; an act or omission where, had it not happened, the event would not have occurred.

The Court further instructs the jury that in order for an act or omission to be the sole proximate cause of the death, it must be such an act or omission as would naturally and probably result in the death complained of and it must also be the only cause of such death, that is, it must alone result in the death which is the subject of this action.

Horne vs. S & C Company

Granted: 1-7-76

INSTRUCTION NO. 6

The Court instructs the jury that it was the duty of the defendant, S & C Company to exercise ordinary care for the safety of the decedent and to make reasonable provisions to guard against those accidents which common knowledge and experience teach are likely to befall those engaged in swimming for which the defendant had provided facilities but that the defendant was not an insurer of the safety of the decedent, and if you believe from a preponderance of the evidence in this case that the defendant breached the foregoing duty and that such breach was the sole proximate cause of the death of the decedent, you shall find your verdict for the plaintiff.

Given as S & C Company

INSTRUCTION NO. 2

The Court instructs the jury that it was the duty of the defendant, S & C Company, at all times that its pool was open for use, to use ordinary care to keep the water reasonably clear and to have on duty at least one reliable and competent person as a lifeguard whose sole duty was the observation and protection of bathers and to furnish such lifeguard an elevated chair at the deep end of the pool for such observation; and if you believe from a preponderance of the evidence in this case that the defendant violated one or more of the foregoing duties then it was negligent; and if you further believe from such evidence that any such negligence was the proximate cause of the decedent's death then you shall find your verdict for the plaintiff.

Jones vs. S & C Company

Jan. 9, 1976 - Judge Owen

MARY ANN HORNE, Administratrix, ~~xxx~~ of the Estate of Robert Ricky Lovett, An Infant, Deceased.	)	
Plaintiff	)	
vs.	)	L 2136
S & C COMPANY, ~~xxx~~ (T/A the palms apartments at Malibu A Virginia General Partnership With its Certificate Thereof Filed in the Clerk's Office of this Court in Book 3 at Page 277, whose general partners are Marvin Simon and Herbert Cashvan	)	
Defendant	)	

This day came again the parties, and their counsel, and also came a jury heretofore sworn for the trial on yesterday, and after hearing all the evidence and argument of counsel, retired to their room to consider of a verdict, and after some time returned into court with the following verdict, to-wit: We, the jury find for the plaintiff and fix her damages at $30,711.75; of which, damages set forth above the sum of $711.75 represents damages for expenses of hospitalization of the decedent and his reasonable funeral expenses".

Whereupon, the defendant by counsel, moved the court to set aside the verdict as being contrary to the law and the evidence, and enter summary judgment for the defendant and, alternatively for a new trial, which motion the court doth overrule, to which action of the court the defendant by counsel, duly excepted.

Whereupon, it is considered by the court that the plaintiff recover of the defendant, the sum of Thirty Thousand Seven Hundred Eleven and 75/100 ($30,711.75) dollars, with interest from the date of judgment until paid, and her costs in this behalf expended.

Whereupon, the defendant by counsel, expressed an intention of applying to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas thereto and the court doth suspend the execution of said judgment for a period of thirty (30) days and thereafter until such petition is acted on by the Supreme Court of Virginia, if such petition is actually filed within thirty (30) days, and on the further condition of the defendant posting a suspending bond with approved surety in the amount of $35,000.00.

LAW DOCKET NO. L 2136

F-19846

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

The defendant, S & C Company, hereby files with the Clerk, pursuant to the provisions of Rule 5:6 of the Rules of the Supreme Court of Virginia, notice of appeal from the final judgment order entered herein on January 9, 1976 and assigns the following errors:

1. The Trial Court erred in refusing to strike the evidence of the plaintiff and refusing to enter summary judgment in behalf of the defendant, both at the conclusion of the testimony of the plaintiff and at the conclusion of all of the evidence.

2. The Trial Court erred in entering final judgment for the plaintiff against the defendant.

A transcript of a portion of the proceedings is to be hereafter filed.

S & C COMPANY

By _____
Of Counsel

John F. Rixey
RIXEY AND HEILIG
15 Stoney Point
700 Newtown Road
Norfolk, Virginia 23502
(804) 461-2500

I certify that a copy of the foregoing pleading was mailed this 29 day of January, 1976 to Mr. Grover C. Wright, Jr., P. O. Box 51, Virginia Beach, Virginia, 23458, counsel of record for the plaintiff.

_____

FILED
JAN 30 1976
W. EUNTRESS, Clerk
D. C.

1 THE COURT: All right. Would you ask
2 the jury to come in, please.
3 THE BAILIFF: Yes, sir, Your Honor.
4 MR. RIXEY: If Your Honor please, before
5 the jury comes in, Mrs. Hamilton is the manager of
6 the apartment complex for the defendant, and with
7 the permission of the Court will be here seated
8 with me as a representative of the defendant.
9 THE COURT: Any objection, Mr. Wright?
10 MR. WRIGHT: I see she is better looking
11 than either Mr. Simon or Mr. Cashvan, and it's
12 obvious why she is the designated representative.
13 No, I have no objection, Your Honor.
14 THE COURT: All right. Ask the jury to
15 come in.
16 THE BAILIFF: All right, Your Honor.
17 (The jury was called into the courtroom.)
18 THE COURT: Good morning, ladies and
19 gentlemen. In the matter of Mary Ann Horne,
20 administratrix of the estate of Robert Ricky Lovett,
21 an infant, deceased, versus S and C Company, trading
22 as The Palms Apartments at Malibu, a general
23 partnership whose general partners are Marvin
24 Simon and Herbert Cashvan.
25 Is the plaintiff ready to proceed?

MR. WRIGHT: Plaintiff is ready, Your Honor.

THE COURT: Defendant ready?

MR. RIXEY: Defendant is ready, Your Honor.

THE COURT: All right. Would you swear the court reporter, please.

(The court reporter was sworn.)

THE COURT: Ladies and gentlemen of the jury, as you have just heard, the matter before you today is an action brought by Mary Ann Horne in her capacity as administratrix of the estate of Robert Ricky Lovett, against S and C Company, which is a partnership in which the partners are Marvin Simon and Herbert Cashvan. In this action the plaintiff is represented by Grover C. Wright, Jr., seated at counsel table to my right nearest to you, and the defendant is represented by John F. Rixey of the law firm of Rixey and Heilig, seated at counsel table to my left. In this action the plaintiff alleges that the death of Robert Ricky Lovett on August 29, 1975, at the Palms Apartments at Malibu at Virginia Beach resulted from the wrongful act, neglect and fault of the defendant and seeks damages.

1 Now, are any of you related by blood or
2 marriage to Mary Ann Horne, Robert Ricky Lovett,
3 Marvin Simon, Herbert Cashvan or to Grover C.
4 Wright, Jr., or John F. Rixey or any member of the
5 law firm of Rixey and Heilig?
6 Have any of you in the recent past -- that
7 is, the last several years -- been represented in
8 a legal capacity by either Grover C. Wright, Jr.,
9 or John F. Rixey or any member of the law firm of
10 Rixey and Heilig?
11 Yes, sir?
12 MR. SCRIPTURE: Mr. Wright -- Mr. Wright
13 represented our combined civic leagues in an
14 action here in court on rezoning.
15 THE COURT: And your name, please, sir?
16 MR. SCRIPTURE: Earl Scripture.
17 THE COURT: Thank you, sir.
18 MR. PECK: Your Honor --
19 THE COURT: Yes, sir?
20 MR. PECK: You mention that. I'm a
21 member of a civic leage that Mr. Wright -- our
22 civic league participated in this action.
23 THE COURT: And you are Mr. Peck?
24 MR. PECK: Yes, sir.
25 THE COURT: Thank you, sir.

1 Are any of you presently or have any of you
2 in the past been employees of or have you employed
3 either Mary Ann Horne, Robert Ricky Lovett, Marvin
4 Simon or Herbert Cashvan?
5 Have any of you on the jury panel lost by
6 death any member of your family or any close relative
7 by virtue of drowning? Do any of you have any
8 interest in the outcome of this case? Have any of
9 you expressed or formed any opinion of this case?
10 Are any of you sensible of any bias or
11 prejudice in this matter? Do any of you know of
12 any reason whatsoever why you should not be able to
13 give a fair and impartial trial to the parties
14 according to the law and the evidence?
15 Hearing nothing further from you, I assume
16 that your answers to each of the questions would be
17 in the negative.
18 Do counsel have any additional questions
19 that they would like to propound to the jury at
20 this time?
21 MR. WRIGHT: No, Your Honor.
22 MR. RIXEY: Your Honor, I should like to
23 ask of Mr. Scripture and Mr. Peck as to whether or
24 not in the representation of their civic leagues
25 by Mr. Wright if they had personal or direct contact

Are any of you presently or have any of you in the past been employees of or have you employed either Mary Ann Horne, Robert Ricky Lovett, Marvin Simon or Herbert Casavant?

Have any of you on the jury panel lost by death any member of your family or any close relative by virtue of drowning? Do any of you have any interest in the outcome of this case? Have any of you expressed or formed any opinion of this case?

Are any of you sensible of any bias or prejudice in this matter? Do any of you know of any reason whatsoever why you should not be able to give a fair and impartial trial to the parties according to the law and the evidence?

Hearing nothing further from you, I assume that your answers to each of the questions would be in the negative.

Do counsel have any additional questions that they would like to propound to the jury at this time?

MR. WRIGHT: No, Your Honor.

MR. RIXEY: Your Honor, I should like to ask of Mr. Scripture and Mr. Peck as to whether or not in the representation of their civic leagues by Mr. Wright if they had personal or direct contact

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1 by Mr. Wright.
2 THE COURT: Mr. Scripture, would you
3 answer first, please.
4 MR. SCRIPTURE: No, sir.
5 THE COURT: Mr. Peck?
6 MR. PECK: I did not. I just happened to
7 be a member of the league.
8 THE COURT: All right. Thank you, sir.
9 MR. RIXEY: Well, could we follow that
10 further and ask these two gentlemen, Your Honor,
11 if -- whether or not the fact that Mr. Wright
12 represented their civic leagues would have any
13 influence on them in reaching a verdict in this
14 case?
15 THE COURT: All right. Again,
16 Mr. Scripture, would you answer first.
17 MR. SCRIPTURE: I will not be influenced,
18 sir.
19 THE COURT: All right. Mr. Peck?
20 MR. PECK: Not at all.
21 THE COURT: Thank you, gentlemen.
22 MR. RIXEY: That's all the questions we
23 have, Your Honor.
24 THE COURT: Ladies and gentlemen of the
25 jury, as your names are called, will you please

raise your right hand to identify yourself and at that time advise us as to your present employment; or, if you are retired, as to the position from which you retired.

Will you call the jury, please?

THE BAILIFF: Yes, sir, Your Honor.

(The jury was identified.)

THE COURT: Ladies and gentlemen of the jury, before the list is handed to counsel, something about rainy days seems to get me out of kilter, and I recall now we did not swear you before propounding the questions to you, so would each of you stand at this time and raise your right hand.

(The jury panel was sworn.)

THE COURT: Thank you. Be seated.

(A jury was impaneled and first duly sworn.)

THE COURT: Swear all witnesses, please.

THE CLERK: Yes, sir. All persons to testify in this case, please stand and raise your right hands.

(All witnesses were called up and first duly sworn.)

MR. RIXEY: We move the Court to separate the witnesses.

1 THE COURT: All right. Ladies and
2 gentlemen, all of you who intend to testify in this
3 matter, please retire to the hallway; and may I
4 remind you that you are not to discuss your testimony
5 with any other witness either before or after you
6 have testified during the course of this trial.
7 Will you please follow the bailiff outside.
8 (All witnesses were excluded from the
9 courtroom.)
10 THE COURT: Ladies and gentlemen of the
11 jury, as most of you certainly undoubtedly are
12 aware of at this time, in a civil action such as
13 this the plaintiff has the opportunity to first
14 make an opening statement outlining his or her
15 case. Thereafter the defendant may also make an
16 opening statement. Neither party is required to
17 make any opening statement. The plaintiff has the
18 right to introduce evidence first. After the
19 plaintiff's evidence, the defendant has the right
20 to introduce evidence.
21 After that there may be rebuttal evidence
22 introduced. At the conclusion of all of the
23 evidence further instructions will be given to you
24 after which the attorneys may make their closing
25 arguments, and then you will select a foreman,

1 deliberate and arrive at your verdict.

2 The faithful performance by you of your
3 duties is vital to the administration of justice,
4 and you must not be influenced in any degree by
5 any personal feeling of sympathy for or prejudice
6 against any party to this suit, for each party is
7 entitled to the same fair and impartial treatment
8 by you.

9 The law applicable to this suit is given to
10 you in these instructions and in the other
11 instructions that you will receive at the conclusion
12 of all of the evidence, and it is your duty to
13 follow all such instructions. It is your duty to
14 determine the facts and to determine them from the
15 evidence and the reasonable **inferences** arising from
16 such evidence; and in so doing, you must not indulge
17 in guess work or speculation. The evidence which
18 you are to consider consists of the testimony of
19 witnesses and the exhibits admitted into evidence.
20 The admission of evidence in court is governed by
21 rules of law, and from time to time it may become
22 the duty of the attorneys to make objections to
23 certain evidence and thereupon the duty of the
24 Court to rule upon those objections as to whether
25 or not you can consider certain evidence. You

1 must not concern yourself with those objections or
2 with the reasons for the Court's rulings upon those
3 objections, and you must not consider testimony to
4 which an objection has been sustained or which has
5 been ordered stricken from the record.
6 The opening statements and the closing
7 arguments of the attorneys are intended to help
8 you in understanding the evidence and in applying
9 the law, but those statements of counsel are not
10 evidence to be considered by you. No statements
11 or remark or ruling or gesture which I may make
12 during the course of this trial is intended to
13 indicate to you in any manner my opinion as to what
14 the facts are. In this determination you alone
15 must decide upon the believability of the evidence
16 and its weight and its value. In considering the
17 weight and value of any testimony of any witness,
18 you may take into consideration the appearance,
19 attitude and behavior of the witness, the interest
20 of the witness in the outcome of the suit, the
21 relation of the witness to any parties to the suit,
22 the inclination of the witness to speak truthfully
23 or not, the probability or improbability of the
24 witness' statements and all other facts and
25 circumstances in evidence. Thus, you may give to

1 the testimony of any witness just such weight and
2 value as you may believe the testimony of such
3 witness is entitled to receive.
4 Until this case is submitted to you for
5 your deliberation, you must not discuss this case
6 with anyone or permit anyone to discuss it with you
7 or within your presence or hearing, and in that
8 connection should you happen to know any of the
9 parties to the action, any witnesses or any
10 attorneys, I would suggest and request that you
11 refrain from talking with them during the course
12 of this trial in order to avoid any possibility of
13 the appearance of impropriety.
14 After this case has been submitted to you,
15 you must discuss this case only in the jury room
16 when all members of the jury are present. You are
17 to keep an open mind and you shall not decide any
18 issue in this case until the case is submitted to
19 you for your deliberation under the further
20 instructions of the Court.
21 Mr. Wright, would you like to make an opening
22 statement?
23 MR. WRIGHT: Yes, sir.
24 (Mr. Wright made an opening statement on
25 behalf of the plaintiff.)

(Mr. Rixey made an opening statement on behalf of the defendant.)

THE COURT: Mr. Wright, would you like to call your first witness?

MR. WRIGHT: Call Mr. Lively.

THE COURT: Mr. Lively, if you would, slide your chair forward a little bit. You can speak into the microphone, and I believe we can hear you a little bit better.

-----o0o-----

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

DIRECT EXAMINATION

BY MR. WRIGHT:

Q State your name.

A Harry Lively.

Q And your residence address?

A 338 Malibu, Virginia Beach.

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CERTIFIED SHORTHAND REPORTERS
COURT REPORTERS

1 Q Mailbu what?
2 A Drive.
3 Q All right. And your age?
4 A Fifty-five.
5 Q All right, sir. And by whom are you
6 employed?
7 A S and C Company.
8 Q All right. And who are the principals of
9 S and C Company?
10 A Mr. Cashvan and Mr. Simon, Mr. Harris.
11 Q Is it a partnership?
12 A I don't know, sir.
13 MR. RIXEY: We will agree that it is a
14 partnership, Your Honor.
15 THE COURT: All right, sir.
16 MR. WRIGHT: Will you agree that the two
17 partners are Mr. Herbert Cashvan and Mr. Marvin
18 Simon?
19 MR. RIXEY: We do so agree.
20 MR. WRIGHT: And not anybody else?
21 MR. RIXEY: I don't know about the others.
22 I only know about those two.
23
24 BY MR. WRIGHT:
25 Q All right. How long have you been employed

1 by S and C Company?
2 A About four and a half years, sir.
3 Q All right. Does S and C Company own
4 and operate the Malibu Palms Apartments?
5 A Yes, sir.
6 Q All right. And how many apartments are in
7 that complex?
8 A Three hundred twelve.
9 Q Three hundred twelve. All right. And
10 do you live there?
11 A No, sir. I live across the street.
12 Q All right. Across the street. Are these
13 apartments for rent?
14 A Yes, sir.
15 Q All right. Is there a swimming pool at
16 this complex that is operated and controlled by the owners?
17 A Yes, sir.
18 Q All right. Now, what is the depth of that
19 pool at its deepest point?
20 A Eight feet.
21 Q All right. What is the approximate length
22 of the pool?
23 A Approximately sixty feet.
24 Q All right. And the approximate width?
25 A Approximately fifty feet.

1 Q All right, sir. Can you approximate the
2 total square feet of water surface in this pool?
3 A It's hard to because the pool is not
4 rectangular. It's clover leaf.
5 Q All right. It's basically a cross that
6 is curved -- it's like a four-leafed clover?
7 A Yes, sir.
8 Q All right. Would you estimate that the
9 water surface is in excess of two thousand square feet?
10 MR. RIXEY: I object to leading.
11 THE COURT: Sustained.
12 MR. WRIGHT: I ask for permission to
13 examine him as adverse.
14 MR. RIXEY: He is only an employee of the
15 defendant. He cannot possibly be adverse to the
16 defendant.
17 MR. WRIGHT: He can't?
18 THE COURT: I don't think any adversity
19 has been shown at this time so I --
20
21 BY MR. WRIGHT:
22 Q All right. They pay you, don't they?
23 The defendant?
24 A Yes, sir.
25 Q All right. Can you estimate the square

1 footage of the water surface in that pool?
2 A No, sir. I have no -- I don't know.
3 I wouldn't know how to figure the surface.
4 Q You wouldn't know how?
5 A I would know how if it was rectangular.
6 Q But you wouldn't know how to put two
7 rectangles together; is that correct?
8 A It's not rectangular, sir.
9 Q All right, sir, Mr. Lively. Let me ask
10 you this. Did you go to the health department on behalf of
11 your employer on the 29th of May of 1975 and apply for a
12 permit to operate the pool?
13 A No, sir. It was done by mail.
14 Q Was done by mail?
15 A Yes, sir.
16 Q Did you do it?
17 A No, sir.
18 Q Now, I'm going to contradict you on that,
19 so I want you to think about it. Did you apply for the
20 operator's permit for the pool and was it issued in your name?
21 A Yes, sir. It was issued in my name, and
22 it was done through the office.
23 Q All right. So you want to change your
24 story? You did it?
25 MR. RIXEY: If Your Honor please, I think

1 that is a little unfair of Mr. Wright to say he
2 wants to change his story. We don't need those
3 kind of comments in the trial.
4 THE COURT: I think the jury heard the
5 questions and the answers, and they can conclude
6 for themselves, sir.
7
8 BY MR. WRIGHT:
9 Q All right. So you did apply for a permit
10 from the Health Department of the City of Virginia Beach to
11 operate that pool?
12 A Yes, sir.
13 Q All right. Now, as operator of the pool,
14 you are required on behalf of your employer to comply with
15 the city ordinance, are you not?
16 A Yes, sir.
17 Q All right. Now, did you hire a lifeguard
18 to look after the people using the pool?
19 A Yes, sir.
20 Q Now, are you aware that Robert Ricky Lovett
21 drowned in that pool on the 29th of August, 1975?
22 A Yes, sir.
23 Q What lifeguard was on duty the day of the
24 drowning?
25 A Mr. Hamilton.

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1 Q Mr. Hamilton. Is that Edward Hamilton?
2 A Yes, sir.
3 Q Did you hire him?
4 A Yes, sir.
5 Q All right. And when did you hire him?
6 A The exact date I don't remember. It was
7 the beginning of the season.
8 Q After you got the permit?
9 A Yes, sir.
10 Q So if you got the permit on the 29th of
11 May, it would have to have been after that?
12 A Yes, sir.
13 Q All right. Now, what investigation did
14 you make into the qualifications of Mr. Hamilton to be a
15 lifeguard when you hired him?
16 A I didn't make any investigation other than
17 to talk to him.
18 Q All right. Now, who is a Mr. Stithe,
19 S-t-i-t-h-e?
20 A I don't know, sir.
21 Q You don't know? How many lifeguards did
22 you hire?
23 A I hired --
24 Q Last summer?
25 A I hired two at the beginning of the season,

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1 and one of them was let go, and then another one come in.
2 Q Two at the beginning. Does that mean
3 Mr. Hamilton and another?
4 A And a girl. Yes, sir.
5 Q Mr. Hamilton and a girl?
6 A Yes, sir.
7 Q What was the girl's name?
8 A I'd have to look at my records.
9 Q You got them with you?
10 A No, sir.
11 Q All right, sir. So you can't even tell us
12 who the other lifeguard was. But it was a girl?
13 A Yes, sir.
14 Q How old?
15 A She was eighteen.
16 Q Eighteen. All right. How long did she
17 stay there?
18 A Two and a half months.
19 Q Two and a half months. And you don't
20 remember her name?
21 A No, sir.
22 Q Let me see if this will refresh your memory.
23 Take a look at this swimming pool inspection made by
24 Mr. Parker of the health department and tell us who signed
25 it as operator of your pool.

1 A The last name I don't know. The first name
2 is Sherry.
3 Q Have anybody like that working for you?
4 A The girl's name was Sherry.
5 Q All right. Did you ever see the -- this
6 report dated July 1, 1975, from the health department?
7 A Yes, sir.
8 Q All right. You were then aware that the
9 health department told you then that the lifeguard stand
10 should be located at the edge of the pool on the deep end?
11 A Yes, sir.
12 Q All right. Now, do you know why they
13 wanted the lifeguard stand to be on the edge of the pool at
14 the deep end?
15 A I didn't know at the time. No, sir.
16 Q You didn't?
17 A At the time he wanted it on the deep end
18 I didn't know. No, sir.
19 Q All right. Is it there for the lifeguard
20 to sit in?
21 A Yes, sir.
22 Q Well, why do you suppose the stand is there
23 for the lifeguard to sit in at the deep end at the edge of
24 pool?
25 A I don't understand your question.

1 Q Did it occur to you that it's there so
2 that the man can look down into the pool?
3 A Yes, sir.
4 Q All right. Now, prior to the accident,
5 if we may call it that for the moment, did you have to shut
6 down this pool?
7 A I shut it down twice through the season.
8 Q Before the accident?
9 A Before the accident.
10 Q All right. Why was it shut down?
11 A The water was cloudy two times.
12 Q Water was cloudy twice before the accident.
13 Okay. Now, when you applied for and obtained the permit from
14 the Health Department of the City of Virginia Beach, were
15 you furnished a copy of the City of Virginia Beach ordinance
16 that covered your swimming pool and the operation and safety
17 of it?
18 A Yes, sir.
19 Q All right. Have you given a copy of it
20 to Mr. Rixey?
21 A I didn't understand you.
22 MR. RIXEY: No, didn't give me a copy of it.
23 MR. WRIGHT: I'm asking him.
24 MR. RIXEY: I am just answering for him.
25 MR. WRIGHT: I don't want you.

1 Your Honor, I asked the man a question, and
2 I would appreciate it if his lawyer wouldn't answer.
3 THE COURT: All right. Would you answer
4 that question, please, Mr. Lively. Did you provide
5 a copy of the ordinance to Mr. Rixey?
6 THE WITNESS: No, sir.
7
8 BY MR. WRIGHT:
9 Q Okay. Well, let me show you then the
10 ordinance and ask you if this is --
11 MR. RIXEY: May I see it, please?
12 (Document handed to Mr. Rixey for
13 examination.)
14 MR. WRIGHT: Maybe we can stipulate it and
15 take care of it.
16 MR. RIXEY: We have no objection to the
17 Virginia Beach ordinance, Your Honor.
18 MR. WRIGHT: Well then, I will offer this
19 as Plaintiff's Exhibit 1 and ask that it be marked
20 as such and received into evidence.
21 THE COURT: All right. There are several
22 sheets of paper, 32A, Swimming Pools, will be
23 marked and received as Plaintiff's Exhibit Number 1.
24 (Marked in evidence by the Court as
25 Plaintiff's Exhibit Number 1.)

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1 BY MR. WRIGHT:
2 Q Now, Mr. Lively, prior to the drowning on
3 August 29th did you ever sit down and read that ordinance?
4 A Completely, no, sir.
5 Q Well, tell us what parts you read.
6 A I read the part pertaining to the water,
7 the purification.
8 Q When did you do this?
9 A The exact date I don't know, sir.
10 Q The day you got it?
11 A No, sir. It was after that.
12 Q But before the drowning?
13 A Yes, sir.
14 Q All right. Well, let me ask you this then.
15 What instructions did you give to your lifeguards when they
16 assumed their duties as lifeguards at that pool, if any?
17 A (No response)
18 Q Did you give them any?
19 A No, sir.
20 Q You didn't give them any. Okay.
21 A I --
22 Q Did you tell the lifeguards before the
23 accident where the elevated lifeguard stand was to be placed?
24 A No, sir.
25 Q All right. You just left it up to their

1 discretions; is that right?
2 A No, sir. I moved it myself.
3 Q Moved it from where to where?
4 A I moved it from the deep end of the pool
5 to the shallow end.
6 Q You moved it from the deep end to the
7 shallow end?
8 A Yes, sir.
9 Q All right, sir. And when was this?
10 A Approximately four days before it was moved
11 back to the deep end.
12 Q Were you aware that the ordinance required
13 that the elevated chair be at the deep end of the pool?
14 A No, sir.
15 Q If you'd have looked at it, you would have
16 known, correct?
17 A I didn't understand you.
18 Q If you had read it, you would have known
19 it?
20 A Yes, sir.
21 Q All right. When was the elevated chair
22 moved back to the deep end?
23 A When the health department came back and
24 said that it had to be moved.
25 Q After July 1st, the date of this inspection?

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1 A Yes, sir.
2 Q Did you tell the lifeguard that he belonged
3 in the chair or that the chair just had to be there with
4 nobody in it and that would satisfy the health department?
5 A No, sir.
6 Q What did you tell him?
7 A I didn't tell him anything about sitting
8 in the chair.
9 Q Didn't tell him anything. All right.
10 And was the lifeguard in the chair when this fourteen-year-old
11 boy drowned in eight foot of water right underneath the chair?
12 A I wasn't at the pool.
13 Q You don't know about that?
14 A No, sir.
15 Q And you didn't ask your employee, the
16 lifeguard?
17 A No, sir.
18 MR. WRIGHT: You didn't. Okay. I have
19 no more questions.
20 THE COURT: Mr. Rixey?
21 MR. RIXEY: Yes, Your Honor.
22
23
24
25

CROSS-EXAMINATION

BY MR. RIXEY:

Q Mr. Lively, I show you a photograph and ask you if that's a photograph of the pool at the Malibu Palms Apartments.

A Yes, sir.

Q Is that the way this pool looked on the day of the drowning as far as you know?

A Yes, sir.

MR. RIXEY: Now, we offer this.

MR. WRIGHT: I didn't understand his answer.

THE COURT: He said, "Yes, sir."

MR. RIXEY: We offer this as an exhibit for the defendant, please.

THE COURT: Any objection, Mr. Wright?

MR. WRIGHT: No, Your Honor.

THE COURT: If not, the photograph just described will be marked and received as Defendant's Exhibit Number 1.

MR. WRIGHT: I take it he did not take the picture.

MR. RIXEY: No, he did not.

MR. WRIGHT: Do we know when it's been

1 taken?

2 MR. RIXEY: Since the lawsuit was filed.

3 It's a Polaroid I believe. No. It's a Kodak.

4 (Marked in evidence by the Court as

5 Defendant's Exhibit Number 1.)

6

7 BY MR. RIXEY:

8 Q Mr. Lively, go ahead while some of the

9 jurors are looking at that photograph. Mr. Wright asked you

10 about a chair, the elevated chair. At the time of the

11 drowning where was the chair? Was it at the deep end or

12 shallow end or where?

13 A It was at the deep end I'm sure.

14 Q And was it in the place that is shown in

15 this photograph?

16 A Yes, sir.

17 Q But before that, before the drowning, you

18 had moved it, as I understand it, to the shallow end; is

19 that correct?

20 A Yes, sir.

21 Q And did you move it to the shallow end at

22 a place where the lifeguard sitting --

23 MR. WRIGHT: Leading, Your Honor.

24 MR. RIXEY: Which I can do on

25 cross-examination.

BY MR. RIXEY:

Q -- where the lifeguard in the chair could see both the major pool and the kiddy pool?

A Yes, sir. It was located between the two pools.

Q Right. And then the Health Department of the City of Virginia Beach came and made you move it back to the deep end; is that correct?

A Yes, sir.

Q So it was at the deep end when the unfortunate drowning took place; is that correct?

A Yes, sir.

Q Do you know, Mr. Lively, that the surface area of this pool is less than two thousand square feet?

A No, sir, I don't know it.

Q Do you know that it's more than two thousand square feet?

A No, sir.

MR. RIXEY: That's all we have of Mr. Lively, Your Honor.

MR. WRIGHT: I have something more. I'm looking at the photograph. Looking for that inspection report.

THE COURT: It was not introduced, Mr. Wright.

1 MR. WRIGHT: All right. Bear with me a
2 second while I blunder around and locate it if I
3 can.
4
5 REDIRECT EXAMINATION
6
7 BY MR. WRIGHT:
8 Q Okay. The inspection report which you
9 got says -- and you say you saw it -- lifeguard stand to be
10 located at pool's edge, deep end. Would you say that the
11 lifeguard stand in this photograph is located at pool's edge,
12 deep end?
13 A No, sir.
14 Q No, sir. Thank you. Now, it is a fact,
15 is it not, that --
16 MR. RIXEY: I object to leading, Your
17 Honor. Just right off the bat.
18 MR. WRIGHT: All right.
19 THE COURT: Would you rephrase, please,
20 Mr. Wright.
21 MR. WRIGHT: Yes, sir.
22
23 BY MR. WRIGHT:
24 Q The wading pool which Mr. Rixey refers to
25 as a kiddy pool -- what is the depth of the water in the

1 wading pool?
2 A About twelve inches.
3 Q About twelve inches. All right. Where
4 is that pool located?
5 A It's located -- I can show you in that
6 picture much better.
7 Q Doesn't show in the picture?
8 A No, sir. It's at the opposite end.
9 Q This photograph -- was it taken from the
10 wading pool?
11 A Let me see. Yes, sir. Beside of where
12 the wading pool is.
13 Q The wading pool -- how many feet would you
14 say that the wading pool is elevated above the ground level
15 of this big pool area?
16 A Approximately three feet.
17 Q How many?
18 A Approximately three feet above the level --
19 Q I been out there, Mr. Lively.
20 MR. RIXEY: I show you a picture of it.
21 Would you like it, Mr. Wright?
22 A It's approximately three feet.
23 MR. RIXEY: Suppose we give you a picture.
24 How would that be?
25 MR. WRIGHT: All right.

1 MR. RIXEY: We would offer this into the
2 evidence also.
3 (Photograph handed to Mr. Wright for
4 examination.)
5 MR. WRIGHT: All right.
6
7 BY MR. WRIGHT:
8 Q Does this look like the wading pool?
9 A Yes, sir.
10 MR. WRIGHT: Okay. Ask that that be
11 marked as Plaintiff's Number 2.
12 THE COURT: It will be Plaintiff's Exhibit
13 Number 2 and will be marked and received as such.
14 (Marked in evidence by the Court as
15 Plaintiff's Exhibit Number 2.)
16
17 BY MR. WRIGHT:
18 Q Is it physically possible for a man to sit
19 at the wading pool and watch that pool and the big pool at
20 the same time?
21 A No, sir.
22 Q All right. Did you ever consider hiring
23 two lifeguards? One to watch the wading pool and one to
24 watch the big pool?
25 A No, sir.

1 MR. WRIGHT: Okay. Before he goes down,
2 I want to get this marked that I showed him before.
3 THE COURT: Any objection, Mr. Rixey?
4 MR. RIXEY: No objection, Your Honor.
5 MR. WRIGHT: That is the health department
6 report.
7 THE COURT: Document marked Virginia
8 Department of Health, Swimming Pool Inspection
9 form, will be marked and received as Plaintiff's
10 Exhibit Number 3.
11 (Marked in evidence by the Court as
12 Plaintiff's Exhibit Number 3.)
13 MR. WRIGHT: Okay. I don't have anything
14 further.
15 MR. RIXEY: No further questions, Your
16 Honor.
17 THE COURT: All right. You may step down,
18 Mr. Lively.
19 Mr. Wright, who do you have next?
20 MR. WRIGHT: Mr. Parker.
21 MR. RIXEY: Your Honor, if Mr. Lively is
22 not going to be used again, may he stay in the
23 courtroom?
24 THE COURT: Any objection, Mr. Wright?
25 MR. WRIGHT: No, Your Honor.

THE COURT: Yes, sir, you certainly may.

-----oOo-----

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

DIRECT EXAMINATION

BY MR. WRIGHT:

Q State your name.

A Richard Parker.

Q All right, sir. And what is your occupation, Mr. Parker?

A I am a sanitarian with the Virginia Beach Health Department.

Q All right, sir. And were you so employed last summer?

A Yes, sir.

Q All right, sir. Are you familiar with the apartment complex and particularly the community pool in it operated at the Malibu Palms Apartments?

1 A Yes, I am.
2 Q All right, sir. Do you keep a file in
3 your office on that pool?
4 A Yes, sir. I have it here.
5 Q Do you have that with you?
6 A Um-hum.
7 Q All right, sir. What does your file
8 reflect about, if anything, the issuance of a permit to
9 operate the pool, who applied for it, when was it issued?
10 A The application for the 1975 permit was
11 made in the name of Palms Apartments at Malibu. The owners
12 listed are Marvin Simon and Herbert Cashvan.
13 Q Okay. And who was designated as operator?
14 A Mrs. Hamilton being the resident manager.
15 Q And what's the date of that?
16 A The application is dated May 6, '75.
17 Q All right. And the permit that was issued --
18 what is the date of that?
19 A May 29, 1975, a permit was issued after a
20 preseasonal inspection.
21 Q Who is shown as the operator on the permit
22 that was issued on May 29th?
23 A Harry Lively being the maintenance
24 superintendent.
25 Q All right. Now, did you make any

1 inspection of that pool during its operation in the summer of
2 1975?
3 A Yes, sir.
4 Q And what was the date of that inspection?
5 A The inspection I made was July 1st.
6 Q All right. Now, there has been introduced
7 into evidence a Plaintiff's Exhibit 1, a copy of an
8 inspection.
9 THE COURT: That's Number 3.
10
11 BY MR. WRIGHT:
12 Q Excuse me. Number 3 of that date, July 1,
13 '75, which purports to bear your signature. Is that the
14 inspection that you completed?
15 A Yes, it is.
16 Q And did you leave a copy of that with the
17 operator?
18 A Yes. While it may not have been the
19 operator, it is more than likely the lifeguard who was on
20 duty at the time.
21 Q Right. Okay. Now, what were your
22 findings on that day?
23 A That inspection. I will read the
24 discrepancies off. Number 1, a light bulb was needed to be
25 replaced in the men's restroom. The pool needed to be

1 cleaned of a grease line that had formed on the water and
2 collects on the pool edge around the pool. The lifeguard
3 stand had been moved from its original position at the deep
4 end of the pool to the area between the main swimming pool
5 and the children's wading pool, and I instructed them to move
6 the lifeguard stand back to the deep end of the pool. The
7 throwing buoy life ring had been broken. I ordered that
8 this be replaced, and a flotation divider between the shallow
9 end of the pool and the deep end of the pool had pulled loose
10 from its anchor in the wall, and I told them that they would
11 have to repair this, and a flow meter was to be installed
12 on the filtering equipment to show the gallons a minute that
13 were being filtered.
14 Q All right. Are you aware of any shutdowns
15 of that pool that occurred during the summer of 1975?
16 A Yes, sir. After the preseasonal inspection
17 which Mr. Norm West made in May, the same date that the permit
18 was issued, the month of June we had no inspection because I
19 had gone by to check the pool and it was closed, and I got
20 in touch with Mr. Lively and he said that the filters were
21 throwing sand from the filter -- this is the filter media
22 that is used -- into the swimming pool itself because of a
23 faulty seal on the filters, and they voluntarily closed down
24 most of the month of June to have this part ordered and
25 repaired and what was needed to get it into operating

1 condition.
2 Q All right. How about after your inspection
3 of July 1st?
4 A I had gone by in August. I can't remember
5 if -- excuse me -- the pool had been closed for maintenance
6 in that month or not. I know I went by but the pool was
7 closed. The inspection wasn't made in that month.
8 Q Do you normally make your inspections how
9 often?
10 A We try to get by at least once a month.
11 Q All right. You did inspect it in July?
12 A Yes, sir.
13 Q But not in August.
14 A No, sir.
15 Q Because it was closed?
16 A The time I went by it was closed. Like I
17 say, we try to get by on a monthly basis, but summer being
18 our busiest season, we have other duties and might not have
19 been possible to get back in that time.
20 Q All right. Now, do you know what the
21 size of the pool is?
22 A It is approximately in the neighborhood of--
23 from fifteen to twenty thousand square feet. I don't have
24 figures on that exactly. It's an irregular shaped pool,
25 and it was an existing pool prior to the ordinance which

1 instructs us to inspect these pools and --
2 Q All right.
3 A -- and I don't have the size on it.
4 Q Okay. Now, what is it made of?
5 A It's a venite pool I believe. Reinforced.
6 Q Reinforced what? Concrete?
7 A Concrete with a tile rim at the top with a
8 concrete deck.
9 Q What color is it?
10 A The bottom liner is white.
11 Q White. All right. What are the
12 ordinance requirements as to clarity of the water?
13 MR. RIXEY: If Your Honor please, the
14 ordinance speaks for itself I believe. We don't
15 have to have Mr. Parker describe it for us, and I
16 object to it.
17 MR. WRIGHT: The jury hasn't read it, and
18 I would like to get this part into evidence.
19 MR. RIXEY: He doesn't have to give his
20 interpretation. It speaks for itself. I am not
21 saying that he is not familiar with it. We just
22 don't need his description of what it says.
23 THE COURT: I think he may not read it.
24 MR. WRIGHT: He may not?
25 THE COURT: He may read a certain portion

of the ordinance but not attempt to interpret it.

BY MR. WRIGHT:

Q All right. Would you read the pertinent part on clarity. That is under Filtration.

A Swimming pools, Section (c). Filtration. Filters shall be operated twenty-four hours per day during the season of use of the swimming pool. At all times when the pool is open for use, the water shall be sufficiently clear to permit a disc six inches in diameter, divided into alternate black and white quadrants, when placed in the bottom of the pool at the deepest point, to be clearly visible from the swimming pool deck at all distances up to ten yards in a horizontal direction from the projection of the disc on the swimming pool surface.

Q Then the ordinance requires -- do you test it with such a disc?

A No, sir. We generally use the main drain.

Q If you can see that?

A This is relatively the same size and it is located at the deepest portion of the pool.

Q All right. Okay. You say that was about six inches?

A Approximately.

Q So you ought to be able to see something

that small at the bottom of the pool at the deepest point. Do you know what the color was of the boy who drowned?

A I found out this morning. Not up until then.

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

CROSS-EXAMINATION

BY MR. RIXEY:

Q Mr. Parker, when you made your inspection on July 1st of '75, was that the only inspection that you ever made of that pool?

A No, sir.

Q Was it the only inspection that you made in 1975?

A The only formal inspection. Yes, sir.

Q And did you find that the pool measured up to the legal requirements of filtration when you inspected the pool on July 1st?

A On July 1st. Yes, sir.

Q All right. If it had not measured up, you would have noted it on your report, would you not?

A Yes, sir.

Q All right. Now, did you ever close this

1 pool down or anybody in your department close it down during
2 the '75 season?
3 A No, sir.
4 Q All right. If it was closed down, it was
5 closed down voluntarily and by the owners or the operator;
6 is that correct?
7 A Yes, sir.
8 Q Does the Virginia Beach ordinance require
9 a lifeguard for this pool?
10 A The ordinance requires lifeguards for pools
11 with a square footage area of 2,000 square feet or more.
12 MR. WRIGHT: Your Honor, that is not
13 correct, and I'm not going to stand for that
14 answer. That is incorrect.
15 MR. RIXEY: I think Mr. --
16 THE COURT: If it is covered by the
17 ordinance, I will permit the witness to read the
18 pertinent portion.
19 MR. WRIGHT: The square footage only
20 relates to the qualifications of the lifeguard.
21 It does not relate to the fact that you have to have
22 a lifeguard on duty, so I ask that the jury not be
23 misled and that the pertinent section be read to
24 the jury.
25 MR. RIXEY: Well, if Your Honor please,

1 when Mr. Wright's turn comes again, I assume that
2 he will handle the matter as he sees fit; but for
3 my purposes with Mr. Parker I just want to ask him --
4 his testimony and then obviously the ordinance
5 itself will go to the jury. It's already an
6 exhibit, and they can read it for themselves, and
7 even Mr. Wright can read it to them.
8 MR. WRIGHT: The basis of my objection is
9 the reason you don't ask people for their opinion
10 because they are sometimes wrong and it calls for
11 his conclusion, and he is giving an erroneous one,
12 and I ask that it be stricken.
13 THE COURT: I'm going to permit you to
14 have -- to have the appropriate section read when
15 Mr. Rixey is through questioning the witness.
16
17 BY MR. RIXEY:
18 Q Mr. Parker, I recognize that you are
19 Mr. Wright's witness. I further assume that you want to be
20 correct. Are you certain that a pool 2,000 square feet of
21 surface or more requires a lifeguard, but one with less than
22 2,000 does not require a lifeguard?
23 A In the terms that I think of a lifeguard
24 being a qualified person that has received either Red Cross
25 or YMCA or comparable training.

1 Q All right.
2 A A pool under this size, a competent adult
3 is required to be on station at the pool. This is the --
4 maybe this is the misunderstanding.
5 MR. WRIGHT: A misunderstanding on my
6 part.
7 MR. RIXEY: You are exactly right.
8
9 BY MR. RIXEY:
10 Q Mr. Parker, this pool was not a pool of
11 2,000 square feet or more, was it?
12 A No, sir, not to my knowledge.
13 Q It's less than 2,000 square feet?
14 A Yes, sir.
15 Q And I'm sure you've seen it and here is a
16 photograph of it. The computation of the surface square
17 feet would be -- would be extremely difficult, would it not?
18 A Yes, sir.
19 Q And you have never attempted to do that,
20 have you?
21 A No, sir.
22 Q And your department has never attempted to
23 do that, have they?
24 A No, sir.
25 Q And was there any requirement of your

1 department that it be computed?
2 A No, sir.
3 Q Was the elevated lifeguard stand moved at
4 the time of your inspection when you requested that it be
5 moved?
6 A It was moved several days later. Yes, sir.
7 When I returned after the inspection it had been moved.
8 Q And you were satisfied with what you found?
9 A Yes, sir.
10 Q Well, let me show you this photograph
11 again and see if you find that elevated lifeguard stand in
12 that photograph.
13 A Yes, sir.
14 Q And is that where the stand was when you
15 went back and checked upon the pool to see if they had
16 complied with your request?
17 A The approximate location. Yes, sir.
18 Q And did you approve of that location of
19 the lifeguard stand?
20 A Yes.
21 Q As shown in Defendant's Exhibit Number 1?
22 You did approve of that?
23 A Yes, sir.
24 MR. RIXEY: Thank you. That's all we
25 have, Your Honor.

REDIRECT EXAMINATION

BY MR. WRIGHT:

Q Okay. Will you read us the section on life guards and read it slowly so that we can understand it better than you do.

A This is the same section, Paragraph (e), Life guards. "There shall be at least one life guard on duty at all times when the pool is of 2,000 square feet of water surface or more and open for use. Pools which are of 2,000 square feet or less shall have on duty a reliable and competent person as a life guard. Life guards on duty shall be construed to be those qualified persons whose sole duty and observation and protection of bathers."

Q Whose sole duty is observation and protection of bathers, correct?

A "Whenever water is more than five feet deep, life guards must be furnished elevated chairs at the deep end. Any individual retained as a life guard of pools 2,000 square feet or more shall possess the qualifications for meeting the standards of currently trained senior life savers by the American Red Cross, Y.M.C.A. or other accredited agency for life saving personnel."

Q Okay. Was the water more than five feet deep at the deepest end?

1 A Yes, sir.
2 Q Okay. So, therefore, lifeguards have to
3 be furnished elevated chairs at that end, correct?
4 A If a lifeguard is required.
5 Q Doesn't the ordinance say that a lifeguard
6 is required no matter what the size of the pool is?
7 MR. RIXEY: Objection. The ordinance
8 says what it says, and I object to Mr. Wright
9 arguing with the witness.
10 MR. WRIGHT: I'm just amazed at his
11 ignorance.
12 MR. RIXEY: He is calling his own witness
13 ignorant. He is the city inspector. I didn't
14 call him.
15 MR. WRIGHT: Like Mr. Lively he is
16 employed by you all.
17 THE COURT: If you have objections, address
18 them to the Court. We are not going to engage in
19 arguments of counsel.
20 MR. RIXEY: I object to the question,
21 Your Honor.
22 MR. WRIGHT: Okay. Forget it. Let me
23 move on to another.
24
25

BY MR. WRIGHT:

Q You say that it's not necessary for your office to find out the size of a pool. Is that what you told Mr. Rixey?

A No, sir.

Q I thought you did.

A I said this particular pool being 2,000 square feet or less --

Q Are you saying that you know for a fact -- and you can testify under oath the size of this pool?

A Not for a fact. No, sir.

Q That's what I thought. Isn't it a fact that in order to determine whether they are required to hire somebody accredited with senior lifesaving or not you got to determine how big the pool is?

MR. RIXEY: I object to his leading the witness. This is his own witness. It's just one question after another.

THE COURT: Would you rephrase the last question, Mr. Wright.

BY MR. WRIGHT:

Q All right, sir. In order for your department to do an appropriate job, is it necessary for you to determine the size of the pool?

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1 A So far as the ordinance with requirements
2 to lifeguards, yes, sir.
3 Q Okay. But you have never done it, correct?
4 A Not on this particular pool. No, sir.
5 Q All right. Now, is it or is it not
6 within your knowledge that after your inspection in July that
7 this pool was shut down because the water was not clear?
8 A I don't know for what reason it was shut
9 down.
10 Q You know it was shut down?
11 A Yes, sir.
12 MR. WRIGHT: All right. That's all I
13 have.
14
15 RECROSS-EXAMINATION
16
17 BY MR. RIXEY:
18 Q Mr. Parker, did you determine yourself
19 without a computation but just in observing that this was a
20 pool of less than 2,000 square surface?
21 A It appeared to be a pool of less than 2,000
22 square feet surface.
23 MR. RIXEY: Thank you very much. That's
24 all we have, Your Honor.
25 THE COURT: Mr. Wright, anything further?

1 MR. WRIGHT: No, sir.
2 THE COURT: All right. You may step down,
3 Mr. Parker; and at this time the court will take a
4 brief recess.
5 Ladies and gentlemen of the jury, you may
6 retire to the jury room.
7 (The trial recessed at 11:50 A. M. At
8 12:05 P. M. the trial continued as follows:)
9 THE COURT: Ask the jury to come back in.
10 (The jury was recalled to the courtroom,
11 and the following took place in the presence of the
12 jury:)
13 THE COURT: I can only tell you ladies
14 and gentlemen that we are aware of the fact that
15 it's cold as can be in here, and we are doing what
16 we can. I know that is not a lot of comfort.
17 Mr. Wright, who will you have next?
18 MR. WRIGHT: Call Mr. Hamilton.
19 THE COURT: Just have a seat right there,
20 Mr. Hamilton; and, if you will, slide your chair
21 forward so that you can speak into the microphone,
22 please.
23 Thank you, sir.
24
25 -----oOo-----

1 EDWARD B. HAMILTON, called as a witness on behalf
2 of the plaintiff, having been first duly sworn, was examined
3 and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. WRIGHT:
8 Q State your name.
9 A Edward Brooks Hamilton.
10 Q All right. And where do you live?
11 A 3600 Malibu Palm Drive, Apartment 103,
12 Virginia Beach, Virginia.
13 Q All right. Is that the Palms Apartments
14 that are owned by S and C Company?
15 A Yes, sir, it is.
16 Q All right. You were served with a
17 subpoena duces tecum to produce today at 10:00 o'clock before
18 the Court the operating record of the pool at this apartment
19 complex. Have you produced it this morning?
20 A No, sir.
21 Q All right. Well, when you got that did
22 you advise anybody that you didn't have the record?
23 A Yes, sir.
24 Q Who did you tell?
25 A I asked Mr. Lively where it was.

1 Q You asked Mr. Lively where it was. And
2 you haven't been able to locate the pool's operating record?
3 A That is correct.
4 MR. WRIGHT: All right. All right.
5 At this point I then ask to recall Mr. Lively.
6 THE COURT: All right. Do you want to
7 recall him at this moment?
8 MR. WRIGHT: Yes, sir.
9 THE COURT: Will you step down a moment
10 then, Mr. Hamilton.
11 Mr. Lively, will you retake the stand,
12 please, sir?
13
14
15 -----o0o-----
16
17
18 HARRY LIVELY, recalled as a witness on behalf of
19 the plaintiff, having been previously sworn resumed the stand,
20 was examined and testified as follows:
21
22 DIRECT EXAMINATION
23
24 BY MR. WRIGHT:
25 Q Mr. Lively, are you aware that the Virginia

1 Beach ordinance requires that daily records of the operation
2 of your pool be maintained by the operator?
3 A Yes, sir.
4 Q Okay. And those records include the
5 clarity of the water and things of that nature. Is that
6 true?
7 A Yes, sir.
8 Q Okay. Do you have the operating records
9 of the pool?
10 A No, sir.
11 Q Well, who does?
12 A They were in the pump room of the pool
13 where the pumps are kept. The records are on a table, and
14 the door to this pump room had been broken off and the
15 records went with the door.
16 Q The records went with the door?
17 A Yes, sir. When the door was broken off,
18 the records -- I don't know what happened to them.
19 Q Now, when was this, Mr. Lively?
20 A I don't know. I went yesterday or day
21 before yesterday when they asked for the records. I went
22 to the pool to get the records, and this is when I discovered
23 that the door was off of the pool.
24 Q You didn't know that the door was off, huh,
25 before yesterday?

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1 A No, sir.
2 Q And you are the maintenance superintendent
3 of this apartment complex?
4 A Yes, sir.
5 Q Um-hum. And the record -- the daily
6 operating record that the law requires be kept and
7 maintained was just blown away with the four winds. Is that
8 it?
9 A I don't know what happened to the records.
10 They were on a table in the pump room.
11 Q Did you look for them when this suit was
12 filed back in September?
13 A No, sir.
14 Q When did the pool close?
15 A The pool closed in September.
16 Q When?
17 A The Saturday after Labor Day.
18 Q All right. So the pool was still open
19 when this suit was filed, and you can't find the operating
20 records for the day of this accident?
21 A No, sir. Some of the records are there.
22 Some of the papers, you know.
23 Q But the operating record that would show
24 the water clarity and so forth on the day of this death,
25 missing, unexplained, huh?

A (No response)

MR. RIXEY: Not unexplainable, Your Honor. I object to the choice of language by counsel. The witness has given his explanation.

THE COURT: The jury has been instructed previously that the remarks of counsel are not evidence to be considered.

BY MR. WRIGHT:

Q Can you tell us when they disappeared?

A No, sir, I don't know.

Q Well, were they there the last day the pool was open?

A Yes, sir.

Q So then they disappeared during the pendency of this suit?

A Yes, sir.

MR. WRIGHT: Okay. That's all.

CROSS-EXAMINATION

BY MR. RIXEY:

Q Mr. Lively, how long were you required to keep those operating records?

A Ninety days, sir.

1 Q And what is the practice and procedure that
2 you follow of keeping those records after ninety days?
3 A Prior to this year we have not had to keep
4 records. This is the first year that I have kept records
5 and I have a table in the pump room that I keep these records
6 on under a first aid kit. The records are kept under this
7 first aid kit.
8 MR. RIXEY: That's all we have. Thank
9 you Mr. Lively.
10 THE COURT: All right, Mr. Lively. You
11 may step down again.
12 MR. WRIGHT: Recall Mr. Hamilton then.
13 THE COURT: All right.
14
15
16 -----oOo-----
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25

1 EDWARD B. HAMILTON, recalled as a witness on behalf
2 of the plaintiff, having been previously sworn, resumed the
3 stand, was examined and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. WRIGHT:
8 Q All right, sir. How old are you,
9 Mr. Hamilton?
10 A Thirty-six.
11 Q Thirty-six. Where are you employed?
12 A I am a student.
13 Q Are you unemployed?
14 A Yes, sir.
15 Q Thirty-six. Okay. Were you hired by
16 S and C Company as a lifeguard last summer at the pool at
17 Malibu?
18 A As a pool attendant. Yes, sir.
19 Q As a what?
20 A Pool attendant.
21 Q Not as a lifeguard?
22 A Not strictly. No, sir.
23 Q Not strictly. Tell us what you were hired
24 to do. Clean out the pool?
25 A That was part of the job.

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1 Q What else?
2 A Checking pool passes.
3 Q Okay.
4 A Maintaining order in and around the pool.
5 Q Okay. You were a policeman, a cleanup
6 boy, and a checker of pool passes?
7 A Yes, sir.
8 Q What else were you hired to do? Did you
9 have any duties with regard to watching out for people's
10 safety?
11 A Yes, sir. Maintaining safety.
12 Q Was that the least of your duties?
13 A No, sir. Maintaining safety is primary.
14 Q That was your primary duty. Okay. When
15 were you hired?
16 A Either the latter part of May or first part
17 of June.
18 Q Okay.
19 A '75.
20 Q Who hired you on behalf of S and C Company?
21 A Mr. Harry Lively.
22 Q Okay. Did he give you any instructions
23 about your duties?
24 A Yes, sir.
25 Q He did? He says he didn't. You tell us

1 what he did.
2 A Showed me how to operate the various pumps
3 et cetera over there.
4 Q All right. Showed you how to operate the
5 pumps?
6 A Yes, sir.
7 Q Okay. All right. Now, were you on duty
8 on August 29, 1975, when Robert Ricky Lovett drowned in that
9 pool?
10 A Yes, sir, I was.
11 Q And were you at that time acting in your
12 capacity as an employee and pool attendant for S and C
13 Company?
14 A Yes, sir, I was.
15 Q Okay. Now, were you aware that the boy
16 who drowned was there and in the pool?
17 A Yes, sir, I was.
18 Q Okay. Have you ever read before this
19 accident the city ordinance on swimming pools?
20 A No, sir.
21 Q Okay. So then you were unaware that the
22 sole duty of a lifeguard was to watch out for and protect
23 bathers?
24 MR. RIXEY: Your Honor, I object to
25 leading. Could Mr. Wright just ask direct questions?

1 THE COURT: I will sustain the objection.
2 Mr. Wright, please try and phrase your questions
3 so that they are not leading.
4 MR. WRIGHT: All right. All right, sir.
5
6 BY MR. WRIGHT
7 Q Did you know what the duty of a lifeguard
8 under the ordinance was before the accident?
9 A Not having read the ordinance, no, sir.
10 Q Okay. While you were acting as lifeguard
11 did you ever clear the pool from time to time? Get
12 everybody out of the pool, make sure everybody was accounted
13 for?
14 A Yes, sir.
15 Q Is that normal practice at pools?
16 A Yes, sir.
17 Q Okay. Normal practice to do it about
18 every thirty minutes, isn't it?
19 A No, sir.
20 Q It's not? Tell us what it is then.
21 A I wouldn't know what the normal practice is,
22 but I never observed it.
23 Q You wouldn't know. Okay. Now, had
24 Robert Ricky Lovett ever been to the pool before the day he
25 drowned?

1 A No, sir.
2 Q Okay. And how long had he been at the
3 pool before he drowned?
4 A A couple of hours.
5 Q Okay. So then the only chance that you
6 ever had to observe him was for the couple of hours before he
7 drowned?
8 A That is correct, sir.
9 Q Okay. During that period of time you
10 never cleared the pool?
11 A No, sir.
12 Q All right. Now, I have got Mrs. Holland
13 here today. You know her?
14 A Yes, sir.
15 Q Okay. Was she in the pool at the time the
16 boy drowned?
17 A Yes, sir.
18 Q Okay. Tell us now how many people were
19 physically in the pool other than the boy who drowned at the
20 time he drowned.
21 A At that very instant?
22 Q Yeah.
23 A Six, seven, somewhere in that range. It
24 changed from minute to minute.
25 Q It did? What's the maximum load of that

1 pool in terms of bathers? If you don't know what I mean,
2 I'll explain it.
3 A I don't know.
4 Q You don't know. What's the maximum
5 number of people that you've allowed to be in the pool at one
6 time?
7 A I don't know. I never counted them per se.
8 Q Do you know that the ordinance specifies
9 maximum loads for pools?
10 A No, sir, I was not aware of that.
11 Q Okay. Is it safe to say it wasn't much
12 of a load on the pool?
13 A It was a light load.
14 Q At the time the boy drowned?
15 A Yes, sir.
16 Q And Mrs. Holland was in the pool with her
17 own two little children, wasn't she?
18 A Yes, sir.
19 Q So it's safe to say she was looking after
20 herself and those two children?
21 A Yes, sir.
22 Q Okay. So that left you about three other
23 people to look out for; is that right?
24 A No, sir. Everyone in the pool I was to
25 look out for.

1 Q Other than Mrs. Holland and her children,
2 who were there? You had about three others to watch, didn't
3 you?
4 A Yes, sir.
5 Q Okay. Tell us where you were sitting when
6 Robert Lovett died?
7 A At the west end of the pool.
8 Q Tell us in terms of shallow and deep which
9 end that is.
10 A It was to the right of the shallow end.
11 Q Okay. So you were sitting at the west end
12 of the pool, past the end of the pool, behind the shallow
13 end?
14 A No, sir. To the right.
15 Q Okay. You couldn't watch the kiddy pool
16 from there, could you?
17 A It was closed.
18 Q What?
19 A It was closed.
20 Q It was closed. All right. So you had
21 no duty at this point in time to watch the kiddy pool at all?
22 A No, sir.
23 Q Your sole duty was to watch the big pool
24 where there was Mrs. Holland and her two children and three
25 other people?

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1 A Yes, sir.
2 Q Okay. And you sitting in a chair at deck
3 level?
4 A Yes, sir.
5 Q Not elevated?
6 A Deck level.
7 Q Okay. Had you been sitting in the elevated
8 chair at the deep end where the body was found would you have
9 seen it?
10 A No, sir. It's on a direct line with the
11 late afternoon sun.
12 Q It is, huh?
13 A Yes, sir.
14 Q Well, suppose you explain that to me.
15 A The pool runs east and west.
16 Q Okay. That's fine. I'm going to draw
17 a little diagram here. Pool is like a clover leaf, four-leaf
18 clover, isn't it?
19 A Yes, sir.
20 Q And you say the shallow end is west?
21 A Yes, sir.
22 Q And the deep end --
23 A Slightly northwest -- slightly.
24 Q Northwest?
25 A Yes, sir.

Q Okay.

A The deep end is slightly southwest -- southeast.

Q Okay. That's northwest. North is going to be like this. (Indicating) Okay. Now, does that look pretty close?

A Well --

Q If it's not, you make such changes as you think are necessary.

MR. RIXEY: Would you like to draw your own, Mr. Hamilton?

THE WITNESS: I'm not a very good artist.

BY MR. WRIGHT:

Q Well, you got eyes, haven't you?

A It's reasonable.

Q It's reasonably close. All right. Right here. Is this the deep end right here? This is where you said you were.

A Okay. Deep end is right here. (Indicating)

Q All right. Let's mark that. Now, lifeguard stand sits right here, doesn't it?

A Yes, sir.

Q Okay. Now, if you were sitting in that

1 chair looking down in the deep end of the pool, you would be
2 looking to the southwest, correct?
3 A Yes, sir. Approximately.
4 Q Okay. Now, when you say that the reason
5 you didn't sit up there and look directly down into the
6 pool where the boy drowned is that the sun would be in your
7 eyes?
8 A That's correct, sir.
9 Q All right. Why was it that the lifeguard
10 stand couldn't be moved around to this side of the pool so
11 that the sun would be at your back? Answer me that one.
12 A I don't know, sir. I was a part-time
13 summer employee.
14 MR. WRIGHT: You don't know because you
15 were a part-time summer employee. Okay.
16 I ask that that be marked and introduced
17 as Plaintiff's Exhibit 4.
18 MR. RIXEY: I object.
19 THE COURT: Why?
20 MR. RIXEY: It's all in Mr. Wright's
21 handwriting.
22 MR. WRIGHT: It doesn't make any difference.
23 He said it's reasonably accurate.
24 MR. RIXEY: Not a thing on it from
25 Mr. Hamilton, and I just don't think that it has

1 any probative value when it's done by the attorney.
2 THE COURT: Well, the witness has
3 identified it as being reasonably accurate and
4 affirmed the various items on it, and I'm going to
5 admit it over your objection and mark it and
6 receive it as Plaintiff's Exhibit Number 4.
7 MR. RIXEY: Thank you and note our
8 exception, please, Your Honor.
9 (Marked in evidence by the Court as
10 Plaintiff's Exhibit Number 4.)
11
12 BY MR. WRIGHT:
13 Q What color was the boy who drowned?
14 A Black.
15 Q What color is the bottom of the pool?
16 A Blue.
17 Q Blue?
18 A Very pale type blue.
19 Q Would a black body contrast with the
20 background of the pool or would it blend in?
21 A It would contrast.
22 Q Okay. Were you sitting back there eating
23 an ice cream cone just prior to the drowning?
24 A No, sir, I was not.
25 Q Okay. Now, I'm going to warn you that I'm

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1 going to contradict you on that.
2 A No, sir. I have never eaten anything in
3 that pool.
4 Q Okay. Who brought the boy up from the
5 pool floor? Did you dive down and bring him up?
6 A No, sir. It was to the side of the pool
7 when they hollered for me.
8 Q So when you got there he was already up on
9 the side of the pool?
10 A He was still in the water.
11 Q But up on the edge?
12 A Yes, sir.
13 Q Somebody else got him up from the pool?
14 A Yes, sir.
15 Q Okay. Was it broad daylight when he
16 drowned?
17 A Yes, sir.
18 Q Okay. Had the pool at any time before
19 the accident been shut down?
20 A Yes, sir.
21 Q What were the reasons?
22 A Once the filters in the pool malfunctioned,
23 and it was closed down; and once the water was murky and
24 was closed down.
25 Q Now, had your lifeguard -- elevated

1 lifeguard stand been placed on the edge of the deep end so
2 that the sun would have been at your back, could you have
3 seen the body on the bottom of the pool if you had been
4 sitting on it?
5 MR. RIXEY: Objection. That calls for
6 pure conjecture on the part of this witness.
7 MR. WRIGHT: The law requires him to see
8 a little old six-inch disc on the bottom,
9 Mr. Rixey.
10 THE COURT: Let's don't argue between
11 counsel. The question has been asked and it's
12 a matter if the witness is unable to answer, then,
13 of course, he can so state; but if he knows
14 whether or not he could have seen it, then I will
15 permit him to answer.
16 A The west end of the pool was situated
17 such that on either side of it you would be in direct line
18 with the sun.
19
20 BY MR. WRIGHT:
21 Q Let me refer you back to the diagram.
22 In the summertime the sun goes down in the west, doesn't it?
23 A Yes, sir. Roughly the west.
24 Q Okay.
25 A Not directly west.

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1 Q Well, I have sat on the oceanfront and
2 faced dead west and had that sun right in my eyes.
3 MR. RIXEY: If Your Honor please, I object
4 to what Mr. Wright may have done.
5 THE COURT: I sustain the objection.
6 It's not a question.
7
8 BY MR. WRIGHT:
9 Q Okay. Show us then on this diagram where
10 the sun was at the time of the drowning.
11 A It was roughly in this vicinity right
12 back here. (Indicating)
13 Q You are saying that the sun was in the
14 northwest?
15 A Just about. Yes, sir.
16 Q Come all the way past west and go back to
17 north, huh?
18 A These are your directions, sir.
19 Q I know.
20 A This is just a rough approximation, and I
21 don't know if this is due east or due west or whatever, but
22 it faces roughly east and roughly west.
23 Q I will let the jury look at this diagram.
24 How many times was the pool closed because of poor water
25 clarity?

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1 A Once.
2 Q When was that?
3 A I don't recall.
4 Q Before the accident?
5 A Yes, sir.
6 Q A couple weeks before?
7 A I really don't know.
8 MR. WRIGHT: Okay. Nothing further.
9 THE COURT: Mr. Rixey?
10 MR. RIXEY: Yes, sir.
11
12 CROSS-EXAMINATION
13
14 BY MR. RIXEY:
15 Q Mr. Hamilton, on the day of the drowning
16 do you recall when the Lovett boy came to the pool?
17 A Yes, sir.
18 Q And tell this jury if you will what you
19 did when the Lovett boy first came to the pool.
20 A Well, I didn't recognize him so I checked
21 his pass. He told me he had just moved in and -- excuse me.
22 He went on in swimming; and so I walked to the edge and
23 watched him for the ten or fifteen minutes I do for each new
24 person coming in to make sure they are capable of swimming.
25 Q And what did you observe about the Lovett

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boy in regards to his capabilities to swim?

A He could swim.

Q Did you talk to him as to -- about whether or not he could swim?

A I asked him when he first come in.

Q And what did he respond?

A That he could swim.

MR. WRIGHT: Your Honor, I don't think that he can tell what the deceased said.

THE COURT: Well, I believe the question has already been asked and answered.

MR. WRIGHT: All right.

BY MR. RIXEY:

Q What background and experience do you have in working in and around water? Can you tell this jury?

A Yes, sir. I was in the Navy roughly ten years. I took a Red Cross lifesaving course in '58, got my senior lifesaver's badge. I took another Red Cross -- I was in the Navy course sponsored by the Red Cross in Pensacola, Florida. I took two courses in Japan in roughly '65 or so.

Q Well, have you ever been employed as a lifeguard or done lifeguard work before the summer of '75?

A Yes, sir, I have.

1 Q Where was that?
2 A Pensacola, Florida.
3 Q And what is your current position or
4 occupation?
5 A Student. Full time.
6 Q Where are you in school?
7 A Tidewater Community College.
8 Q And what are you studying?
9 A Business administration.
10 Q Mr. Hamilton, where were you with reference
11 to the pool when you first learned of the difficulty with
12 the Lovett boy?
13 A To the right of the shallow end.
14 Q All right, sir. I'm going to show you
15 some photographs.
16 Mr. Wright, you want to look at those?
17 MR. WRIGHT: Is there any difference?
18 MR. RIXEY: Just slightly. Same pool.
19
20 BY MR. RIXEY:
21 Q First of all, I'm going to show you a
22 photograph and ask you if you can identify that as the pool
23 area.
24 A Yes, sir, I can.
25 MR. RIXEY: All right. Let me have that

1 marked as an exhibit, Your Honor, for the defendant.
2 THE COURT: All right. The photograph
3 just described will be marked as Defendant's Exhibit
4 Number 2.
5 (Marked in evidence by the Court as
6 Defendant's Exhibit Number 2.)
7
8 BY MR. RIXEY:
9 Q And I show you another photograph which
10 also shows a pool. Can you identify that as the pool in
11 question?
12 A Yes, sir.
13 MR. RIXEY: All right. We offer this
14 next photograph as an exhibit for the defendant,
15 Your Honor.
16 THE COURT: Any objection, Mr. Wright?
17 MR. WRIGHT: No, sir.
18 THE COURT: Second photograph just
19 described will be marked and described as
20 Defendant's Exhibit Number 3.
21 (Marked in evidence by the Court as
22 Defendant's Exhibit Number 3.)
23
24 BY MR. RIXEY:
25 Q Now, Mr. Hamilton, step down here if you

1 would before the jury and let's look at this photograph.
2 Would you do that.
3 A Yes, sir.
4 Q Referring now to Defendant's Exhibit
5 Number 2, I ask you if you will point out for the jury where
6 the deep end is.
7 A Right down here, the diving board.
8 (Indicating)
9 Q And where is the shallow end?
10 A Right here. (Indicating)
11 Q And with reference to that pool, where is
12 the wading pool or the kiddy pool?
13 A In this enclosure, the wooden post.
14 Q All right. Does this photograph,
15 Defendant's Exhibit Number 2, show where you were seated at
16 the time that the Lovett boy's trouble was first called to
17 your attention?
18 A Yes.
19 Q Where was that?
20 A Directly in front of this stone bench right
21 here. (Indicating)
22 MR. WRIGHT: Can we have him mark this
23 with a pen where he says he was?
24 MR. RIXEY: I will get him to.
25

1 BY MR. RIXEY:
2 Q I want you to get -- I have got a pen over
3 here.
4 MR. WRIGHT: I got one right here.
5
6 BY MR. RIXEY:
7 Q Take this photograph if you will and
8 rather than mark right where it is, just draw an arrow up
9 to the point where you were seated. Would you, please.
10 A (Witness complied.)
11 Q All right. And put your initials on the
12 back of this photograph so that we will know that you did
13 that.
14 A (Witness complied.)
15 Q All right. And, Mr. Hamilton, what is
16 the approximate distance of where you were to the pool itself?
17 A Which part of the pool?
18 Q Well, to the nearest portion of the pool.
19 A About ten feet.
20 Q All right.
21 A Fifteen maybe.
22 Q Now, I show you Defendant's Exhibit Number
23 3 and ask you if this picture is taken from the opposite
24 direction of the previous picture and shows the bench where
25 you were seated.

1 A Yes, sir.
2 Q And will you point out to the jury on this
3 Defendant's Exhibit Number 3 where you were seated at the
4 time of the Lovett boy's difficulty being called to your
5 attention?
6 A Right in here. (Indicating)
7 Q Now, let's repeat the previous process
8 if you will and draw an arrow leading up to where that
9 bench is and then put your initials on the back of that also.
10 Here is a heavier one. Try this one. This is a wide one
11 now so watch out. Put your initials.
12 A (Witness complied.)
13 Q All right. Thank you. You may resume
14 your seat.
15 A (Witness complied.)
16 Q Mr. Hamilton --
17 A Yes, sir?
18 Q -- before your attention was called to
19 the Lovett boy's difficulty, what did you observe about him
20 while he was in the pool?
21 A He was diving a great deal for a rock or
22 a penny or something of that nature, searching for it on the
23 bottom, splashing around, playing, just having a good time.
24 Q And for how long did you observe him
25 during -- doing this splashing around and having a good time?

1 A All off and on continuously the entire time
2 he was in there.
3 Q Was there any time that you observed that
4 he got out of the pool and rested or went somewhere else?
5 A Yes, sir. He got out of the pool on
6 several occasions. Once to answer the telephone that is
7 near the deep end.
8 Q And before your attention was called to
9 his difficulty, how long had it been since you had observed
10 him or seen him?
11 A He had answered the telephone just a matter
12 of minutes, very few minutes prior to this on the side.
13 Q Was it a call for him?
14 A No. It was a call for one of the teen-agers
15 that was at the pool at the time.
16 Q Well, where was the Lovett boy the last
17 time you recall seeing him?
18 A You mean prior?
19 Q The last time you saw him before he drowned.
20 A He was diving.
21 Q He was diving. In what area of the pool?
22 A Deep water. Well, five or six-foot-type
23 section.
24 Q When you say diving, diving from where?
25 A From the side of the pool in the water.

1 Q Did you hear any distress call?
2 A No, sir. None at all.
3 Q Was there any indication to you of distress
4 from Lovett?
5 A No, sir. None at all.
6 Q Any outcry from Lovett?
7 A No, sir. None at all.
8 Q How long was it before the -- you were
9 notified of the drowning or difficulty that you last saw him?
10 How many minutes had gone by?
11 A Two, three, four, five. Somewhere in that
12 range. A very short period of time.
13 Q Who were you with at the time?
14 A There were six or seven or eight people
15 in the vicinity of where I was sitting there.
16 Q Was there a conversation going on?
17 A Off and on. At that particular instant
18 I couldn't tell you.
19 Q Was there any activity going on which was
20 distracting your attention?
21 A No, sir.
22 Q What was your first knowledge, Mr. Hamilton,
23 of the Lovett boy's difficulty?
24 A A lady in the pool hollered to call the
25 rescue squad.

1 Q Tell us what she hollered if you remember.
2 A I won't give you the exact words because I
3 don't honestly know. There was something to the effect,
4 "Call the rescue squad. He's not playing."
5 Q You heard that? Did you hear that said?
6 A Yes, sir. Something along that line.
7 Q And do you know who said it?
8 A Yes, sir.
9 Q Who was it?
10 A It was Mrs. Holland. I did not know her
11 first name.
12 Q All right. When you heard that what did
13 you do?
14 A I jumped and ran all at one motion type
15 thing to the side of the pool where he was.
16 Q And when you got there what did you observe?
17 A She had hold of him. She was holding on
18 to the side of the pool holding him, and I reached down and
19 pulled him out.
20 Q And in what fashion did you pull him out?
21 A Very fast, very rough.
22 Q And if you know, where did you grab him if
23 you know?
24 A Arm.
25 Q And after you got him out of the water what

1 did you do?
2 A Put him on the side of the pool and cleared
3 his -- well, at the same instant I was reaching down to him,
4 I took a dime out. I kept a pocket full of dimes, and I
5 flipped it to a young lady to call the rescue squad, and I
6 reached down and pulled out his tongue to make sure it
7 wasn't choking him.
8 Q Where was the rescue squad located with
9 reference to this pool?
10 A About two blocks on the other side of the
11 highway.
12 Q All right. Did you request someone to
13 call the rescue squad?
14 A Yes, sir.
15 Q And then what did you do before the rescue
16 squad got there?
17 A Administered respiration.
18 Q And in what fashion did you administer it?
19 A Stomach hold, chest push.
20 Q Did you try the mouth-to-mouth?
21 A No, sir, because when I cleared his throat
22 he was frothing, and I didn't want to choke him.
23 Q How long was it after you got him out of
24 the pool, Mr. Hamilton, that the rescue squad got there?
25 A A matter of a couple minutes.

1 Q And when they arrived who took charge of
2 the -- of the further rescue efforts?
3 A The rescue squad. I maintained respiration
4 until they actually knocked me off and grabbed him theirself.
5 Q They grabbed him what?
6 A Theirself.
7 Q And then what did you do?
8 A I just sat down.
9 Q And then what did you observe about the
10 rescue squad and the Lovett boy?
11 A I watched their efforts to revive him.
12 Q And how long did they make an effort to
13 revive him?
14 A I'd -- it's approximately ten minutes.
15 Q And then what took place next?
16 A Sometime during this interval I called
17 Mrs. Hamilton to find out -- so she could tell the mother,
18 and they started packing him up to take him to the hospital.
19 Q And then did they take him to the hospital?
20 A Yes, sir. Virginia Beach General.
21 Q And did he go -- well, ambulance?
22 A The rescue squad truck.
23 Q All right. And who went with the boy in
24 the truck?
25 A Half a dozen different rescue squad members.

1 I don't know any of them.
2 Q Was the mother present at the time that
3 the boy was being taken off in the truck?
4 A Yes, sir. She was inside the lodge to
5 the best of my knowledge.
6 Q Did Mrs. Hamilton, your wife, come over?
7 A Yes, sir.
8 Q Did the mother go on to the hospital?
9 A Yes, sir. My wife took her.
10 Q Your wife took Mrs. Horne to the hospital;
11 is that correct?
12 A Yes, sir.
13 Q Thereafter did you have occasion to see
14 the Lovett boy?
15 A I went down to the hospital myself just as
16 soon as I settled down and got outside, closed everything up;
17 but everyone had gone. The hospital wouldn't tell me
18 anything so I came on back.
19 Q Did you see the Lovett boy after that?
20 A No, sir.
21 MR. RIXEY: All right. That's all I
22 have, Your Honor.
23 THE COURT: Any further questions,
24 Mr. Wright?
25 MR. WRIGHT: A couple of questions.

REDIRECT EXAMINATION

BY MR. WRIGHT:

Q Who went down to the bottom of the pool to bring the body up?

A It is my understanding that it was Mrs. Holland's daughter.

Q How old is she?

A Twelve or thirteen.

Q So a twelve-year-old child is the one that brought the body up off the bottom of the pool?

A That is correct, sir.

Q Do you know how many times she had to go down and dive down before she could get him up?

A I don't know, sir. No one has ever mentioned it.

Q Nobody ever mentioned it. Is there any resuscitation equipment at the pool?

A Resuscitation equipment. No, sir.

MR. WRIGHT: Um-hum. That's all.

THE COURT: All right, sir. You may step down, Mr. Hamilton.

Let me see counsel just a moment, please.

MR. RIXEY: I think Mr. Hamilton might wait outside in case I need him again if that's all

right.

THE COURT: All right. In case you are recalled, you are not to discuss your testimony with any other witness.

Mr. Wright?

MR. WRIGHT: Oh, yes, sir.

(A side-bar conference was had out of the hearing of the jury.)

MR. WRIGHT: Call Mrs. Holland.

-----oOo-----

MARGARET C. HOLLAND, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Mrs. Holland, were you here this morning to be sworn?

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. WRIGHT:

Q State your name.

A Margaret C. Holland.

Q All right. Mrs. Holland, were you present at the Malibu Palms pool on August 29, 1975, when Robert Ricky Lovett drowned?

A Yes, sir, I was.

Q All right. Now, who was the lifeguard on duty at the time of the drowning?

A To my knowledge it was Mr. Hamilton. I don't know his full name.

Q You don't know his full name. You recognize him?

A Yes, sir.

Q Okay. Now, at the time of the drowning how many people were in the pool?

A Six.

Q Okay. Were you in it?

A Yes, sir.

Q And two of your daughters?

A Yes, sir. Sherry and Chris.

Q Were you watching them?

A Yes, sir. I was playing with them.

1 Q How old are they?
2 A Sharon had just turned twelve and Chris
3 is seven.
4 Q Now, how deep is the pool at the deepest
5 point?
6 A I believe eight feet.
7 Q Okay. At the time of the drowning where
8 was Mr. Hamilton?
9 A There is a kiddy pool with a wall up on
10 a higher level from the adult pool, and Mr. Hamilton was
11 sitting up against the kiddy pool wall.
12 MR. RIXEY: I didn't hear. Up against --
13 THE COURT: Up against the kiddy pool
14 wall.
15
16 BY MR. WRIGHT:
17 Q He was sitting up against the kiddy pool
18 wall?
19 A Yes, sir.
20 Q Okay. Is that past the shallow end of
21 the pool?
22 A Yes, sir.
23 Q Okay. Was there a lifeguard stand at
24 the deep end of the pool?
25 A To the best of my knowledge. Yeah.

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1 Q All right. Was anybody using it?
2 A No, sir.
3 Q Was the body found down below the lifeguard
4 stand?
5 A Yes, sir.
6 Q All right. What was the condition of the
7 water in terms of clarity at the time of the drowning?
8 A Very, very cloudy.
9 Q All right. Now, who went down to get
10 the body off the floor of the pool?
11 A My daughter Sherry did.
12 Q How many attempts did she have to make
13 before she could get him up?
14 A Well, she dove down three times. It was
15 the third time that she brought him up.
16 Q She made three attempts. Where was
17 Mr. Hamilton, the lifeguard, while she was doing that?
18 A Sitting where I previously stated. By
19 the kiddy pool.
20 Q Had he been eating anything there?
21 A While I was there I noticed he was eating
22 some ice cream.
23 MR. WRIGHT: Okay. That's all.
24 THE COURT: Mr. Rixey, any questions?
25 MR. RIXEY: Yes, just a few.

CROSS-EXAMINATION

BY MR. RIXEY:

Q Mrs. Holland, your address, please?

A 3425 Alcott Road, Malibu.

Q You live in the Malibu Palms?

A No, sir. I live in the Malibu subdivision.

Q Is that the same place you lived last summer?

A Yes, sir.

Q And being in that subdivision, you have the right to use this pool; is that correct?

A No. To my knowledge, I had that right because my estranged husband rents an apartment at the Palms, and he let us as his guests go there and use it and, of course, our children.

Q And you did that on many occasions last summer in '75, did you?

A Frequently. Especially during July and August.

Q After the drowning did you take them back again?

A We went back there I believe once for the closing of the pool, the party type of thing.

Q Was that a swimming type party?

1 A Most -- there was some swimming going on,
2 but mostly there was records in the clubhouse, that type
3 of thing. Some food, eating.
4 Q Did you have your children with you?
5 A Yes.
6 Q And did they swim?
7 A They got in the pool but very little
8 swimming. I did not get in.
9 Q You described the water as being very,
10 very cloudy. Had you seen it very, very cloudy on
11 occasions before the drowning?
12 A Yes.
13 Q And did you see it on occasions after the
14 drowning?
15 A I didn't notice the condition of the pool
16 that one time I went there afterwards.
17 Q Are you an expert on the clarity of pools?
18 A I have been to other pools. That's the
19 only comparison I can give.
20 Q Did you ever make any complaint about the
21 cloudiness of the pool?
22 A No.
23 Q On the day of the drowning and just prior
24 to the drowning were you seated on the side of the pool?
25 A I could have been. I don't remember

1 offhand.
2 Q Your children were playing in the water,
3 were they?
4 A At the time of the drowning all three of
5 us were in the water.
6 Q And just before the drowning you had
7 observed the Lovett boy, the boy who drowned, had you not?
8 A Yes, sir.
9 Q And tell the jury what you observed him
10 doing, what you had observed of him. Would you, please.
11 A I noticed very little about him because
12 he was a new boy, but I did notice that he had been diving
13 off the diving board a little bit. Just generally playing
14 in the water.
15 Q Splashing around and playing?
16 A Well, one time I did notice his splashing.
17 Q But he seemed to you to be playing; is that
18 correct, in the water?
19 A That was the impression I got.
20 Q All right. Now, did there come a time
21 when you had not seen him for a moment or two?
22 A Yes.
23 Q And when that time came what did you do?
24 A When I noticed that he wasn't around, I
25 didn't do anything. I hadn't seen him leave, but then I

1 wasn't paying close attention to his activities.
2 Q Had several minutes gone by since you had
3 seen him?
4 A From the time I last saw him until the
5 time I found out he was at the bottom, it was about five to
6 ten minutes.
7 Q How did you find he was on the bottom?
8 A There was a young child there playing with
9 us, and she came up from the bottom and said, "There is
10 somebody on the bottom. There is a boy on the bottom,"
11 and I sent my daughter to make sure that this child just
12 wasn't pulling our leg.
13 Q You thought somebody was playing?
14 A At first I didn't believe there was anybody
15 on the bottom because there were only four of us at the deep
16 end so --
17 Q But even if there was somebody on the
18 bottom, you thought they were playing around on the bottom?
19 A Yes. When we first found out that there
20 was somebody on the bottom, my first thought was that he
21 was down there playing.
22 Q All right. So did you send your daughter
23 down to get him?
24 A At first I sent her down to make sure he
25 was down there. Then I sent her down a second time to make

1 sure that he wasn't playing, and she came back and said,
2 "Mommy, he doesn't move"; and I said, "For God's sake, go
3 down there and bring him up if you can." I still believed
4 he was playing. It didn't register in my mind that somebody
5 was actually dead below us.
6 Q And was it when your daughter brought the
7 body up that you then let out the loud -- fairly loud --
8 whatever it was -- outcry, "He is not playing. Get the
9 rescue squad"?
10 A I think the first thing I said was,
11 "Mr. Hamilton, quick. Get the rescue squad. Get the
12 rescue squad." He ran very quickly, and I believe I said
13 then, "He is not playing. He is not playing."
14 Q At this time was the boy up on the surface
15 of the water?
16 A The Lovett boy. Yes, sir.
17 Q He had already been brought up?
18 A By my daughter and I.
19 Q The two of you?
20 A I helped with the last half. She was
21 struggling, and I grabbed down and pulled his arm up.
22 Q And at the time you were pulling the Lovett
23 boy up from down below, Mr. Hamilton had not been notified,
24 had he, to your knowledge?
25 A No, sir.

1 Q And at that time there had not been any
2 outcry by anybody as far as you know?
3 A No, sir.
4 Q And no indication of any distress by the
5 Lovett boy?
6 A No, sir. Only the splashing.
7 Q All right. And that splashing was a
8 playing around, was it not?
9 A The impression I received, it was.
10 MR. RIXEY: Yeah. All right. Thank
11 you, Mrs. Holland. I appreciate your help.
12 That's all I have, Your Honor.
13 THE COURT: Any other questions,
14 Mr. Wright?
15
16 REDIRECT EXAMINATION
17
18 BY MR. WRIGHT:
19 Q Mr. Rixey attempted to get you to say he
20 was splashing or playing around. Do you know whether he
21 was playing or whether he was dying?
22 A No, sir. I thought about that moment
23 many times since August, and it's worried me.
24 Q You weren't hired to look out for Lovett's
25 safety, were you?

1 A No, sir.
2 Q All right. Could you see the bottom of
3 the pool?
4 A No, sir. And I had a mask on and
5 couldn't see.
6 Q And you still couldn't see the bottom of
7 it?
8 MR. RIXEY: Had a what?
9 THE WITNESS: A mask.
10 MR. WRIGHT: She had a mask on. She
11 still couldn't see the bottom.
12 All right. That's all.
13 THE COURT: All right. Thank you,
14 Mrs. Holland. You may step down.
15
16
17 -----o0o-----
18
19
20 MR. WRIGHT: At this point I'd like to
21 offer the death certificate. Mr. Rixey has
22 agreed that it may be introduced not only to show
23 the fact of death but the cause of it as being
24 drowning.
25 MR. RIXEY: No objection, Your Honor.

THE COURT: All right, sir. The death certificate then will be marked and received as Plaintiff's Exhibit Number 5.

(Marked in evidence by the Court as Plaintiff's Exhibit Number 5.)

MR. WRIGHT: Also I might as well at this point introduce the hospital bill and the funeral bill.

MR. RIXEY: We have no objection to them, Your Honor.

MR. WRIGHT: Hospital bill first.

THE COURT: All right. The hospital bill will be marked and received as Plaintiff's Exhibit Number 6.

(Marked in evidence by the Court as Plaintiff's Exhibit Number 6.)

THE COURT: And the funeral home bill will be marked and received as Plaintiff's Exhibit Number 7.

(Marked in evidence by the Court as Plaintiff's Exhibit Number 7.)

MR. WRIGHT: While I am at this documentary stage, I will introduce the qualification certificate.

MR. RIXEY: No objection, Your Honor.

1 THE COURT: All right. A copy of the
2 qualification certificate of Mary Ann Horne will
3 be marked and received as Plaintiff's Exhibit
4 Number 8.
5 (Marked in evidence by the Court as
6 Plaintiff's Exhibit Number 8.)
7 THE COURT: Is there any more documentary
8 evidence at this time, gentlemen?
9 MR. WRIGHT: Not unless I've forgotten
10 something.
11 THE COURT: If not, it appears that this
12 is a convenient time to recess for lunch. Ladies
13 and gentlemen of the jury, I want to remind you
14 before the recess the cautions I gave you this
15 morning against discussing the case with anyone or
16 permitting anyone to discuss it with you or in your
17 presence. The court will now recess until 2:15,
18 at which time I will ask you to return to this
19 courtroom. Everyone else please remain seated
20 until the jury leaves the courtroom.
21 MR. RIXEY: If Your Honor please, I have
22 no further need for Mrs. Holland. I didn't know
23 whether she was staying around here because of us or
24 not. As far as I am concerned, she may be excused.
25 THE COURT: Mr. Wright, do you have a desire

for Mrs. Holland to remain in the courtroom?

MR. RIXEY: How about her daughter? Are you going to use her daughter?

MR. WRIGHT: The daughter is one of my witnesses.

MR. RIXEY: Excuse me.

THE COURT: All right. Would one of you be kind enough to hand me those two photographic exhibits.

THE BAILIFF: I will get them, Your Honor.

THE COURT: All right. Court is recessed until 2:15.

(The trial recessed at 1:00 P. M. At 2:15 P. M. the trial continued as follows:)

THE COURT: All right. Mr. Wright, who will you have as your next witness?

-----o0o-----

1 SHERRY JANELLE HOLLAND, called as a witness on
2 behalf of the plaintiff, having been first duly sworn, was
3 examined and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. WRIGHT:
8 Q State your name.
9 A Sherry Janelle Holland.
10 Q Is your mother Mrs. Holland sitting back
11 here who testified earlier?
12 A Yes, sir.
13 Q Okay. How old are you, Sherry?
14 A Twelve.
15 Q And do you go to school?
16 A Yes.
17 Q Where do you go to school?
18 A Malibu Elementary.
19 Q Malibu Elementary. All right. What
20 grade are you in?
21 A Seventh.
22 Q Okay. Now, were you at the pool with
23 your mother back in August of this year when the drowning
24 occurred?
25 A Yes, sir.

1 Q All right. Now, just before the drowning
2 occurred, will you tell us where the lifeguard was sitting?
3 A He was down near the kiddy pool near the
4 shower room.
5 Q All right. All right. Where was the
6 lifeguard stand, the elevated chair?
7 A It was down at the eight-foot end.
8 Q Down at the deep end?
9 A Yes.
10 Q Was the lifeguard sitting up there on the
11 chair?
12 A No, sir.
13 Q All right. Now, what was the condition
14 of the water at the time of the accident with respect to
15 whether it was clear or murky?
16 A It was cloudy.
17 Q It was cloudy. All right. Could you
18 see the bottom of the pool from the top at the deep end?
19 A No, sir.
20 Q All right. Now, before the accident did
21 you observe the lifeguard with reference to what he was doing?
22 A Yes, sir.
23 Q What was he doing?
24 A He was sitting down talking to some
25 friends.

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1 Q All right. Did you see him eating anything?
2 A Yes, sir.
3 Q What?
4 A Ice cream.
5 Q Ice cream. All right. Now, it's been
6 testified to that you brought the boy up off the bottom.
7 How many times did you have to dive down to retrieve the boy
8 from the bottom?
9 A Three times.
10 MR. WRIGHT: Three times. All right.
11 I think that's all.
12 MR. RIXEY: We have no questions of
13 Sherry, Your Honor.
14 THE COURT: All right. You may step
15 down. Thank you very much.
16 MR. WRIGHT: Mrs. Pickens.
17 Mrs. Pickens, leave your coat and bag here
18 and go up and take the stand.
19 THE COURT: Are you here to be sworn?
20 Would you stop there and raise your right hand.
21 (Mrs. Pickens was sworn.)
22 THE COURT: Have a seat right here if you
23 will, please.
24
25 -----oOo-----

1 SHIRLEY PICKENS, called as a witness on behalf of
2 the plaintiff, having been first duly sworn, was examined
3 and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. WRIGHT:
8 Q Okay. Will you state your name?
9 A Shirley Pickens.
10 Q Is it Mrs.?
11 A Right.
12 Q Now, is Mary Ann Horne here your daughter?
13 A Yes.
14 Q All right. How many children did she
15 have?
16 A Only one.
17 Q All right. Is that Robert Ricky Lovett?
18 A Right.
19 Q Okay. And how old was he at the time of
20 the drowning?
21 A Fourteen.
22 Q All right. Now, did he have any brothers
23 and sisters?
24 A No, he never had none.
25 Q All right. This is a dumb question, but

1 I just want to get it in the record. Was he ever married?
2 A No.
3 Q Did he have any children?
4 A No.
5 Q All right. Now, give us the name of
6 Ricky's father.
7 A Robert Lee Lovett.
8 Q All right. Did Robert Lee Lovett support
9 Ricky?
10 A No, he did not.
11 Q Did he spend any time with him?
12 A No.
13 Q All right. Did he support your daughter?
14 A No.
15 Q All right. Did the boy live with your
16 daughter since he was born?
17 A Right.
18 Q All right. Will you describe the
19 relationship between the boy and his mother?
20 A They was very close. They was always
21 together. Wherever she go, she always take him with her.
22 He was always helping her around the house.
23 Q All right. All right. Did she ever
24 have any trouble with him?
25 A No, she never had any trouble. He never

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1 been in any trouble. He always stayed home like she tell
2 him while she go to work.
3 Q All right. Did he have any particular
4 interest that he followed?
5 A That he liked to do?
6 Q Um-hum.
7 A Ball. He played basketball, football.
8 Q All right.
9 A Art.
10 Q What did you say? Art?
11 A Yes.
12 Q All right. Did he have any talent?
13 A Yes. He sang. Sang on TV.
14 Q He sang on TV?
15 A Right.
16 Q Did he help his mother at home?
17 A Yes, he did. On her off days he bring
18 her coffee. The days she had to go to work he set the
19 clock to wake her up, and he would wake up and go wake her
20 up so she can go to work on time.
21 Q Did the two of them live alone together?
22 A Yes, they did.
23 Q All right. Now, had he gone to work just
24 before this accident?
25 A Yes.

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1 Q All right. Tell us about his general
2 intelligence. Was he -- did he have trouble in school or
3 did he get along all right?
4 A No. He got along fine. He never did
5 bother anybody. He always got along with the children.
6 Q All right. Now, what about his general
7 health? Tell us about that.
8 A He never been sick.
9 Q All right.
10 MR. RIXEY: I'm not hearing at all.
11
12 BY MR. WRIGHT:
13 Q Speak a little louder so that everybody
14 can hear you, Mrs. Pickens. I know this is an unpleasant
15 subject.
16 A I say when he was a baby he wasn't sick.
17 He never been sick.
18 Q All right. What has been the effect that
19 you have observed of his death on your daughter?
20 A Terrible. I just hope she can pull
21 through it. The only child she had, and that was all she
22 had to live for. Like to work and take care of and that
23 was her child and she just --
24 Q Has she done any crying since it occurred?
25 A Crying -- well, she do cry a lot. She has

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1 been sick. I do too.

2 MR. WRIGHT: That's all I have of this

3 witness.

4

5 CROSS-EXAMINATION

6

7 BY MR. RIXEY:

8 Q Mrs. Pickens, where do you live?

9 A In New Jersey.

10 Q I'm sorry. I can't hear you.

11 A In New Jersey.

12 Q What is your address there?

13 A 211 Pleasure Vale Apartments.

14 Q What apartments?

15 THE COURT: Pleasure Vale Apartments.

16 MR. WRIGHT: That's right.

17

18 BY MR. RIXEY:

19 Q Where in New Jersey? What city?

20 A Long Branch.

21 Q What city?

22 A Long Branch, New Jersey.

23 Q Long Branch. And where does your

24 daughter live?

25 A With me because I have to take care of her.

1 Q You are taking care of her up in New Jersey?
2 A Right.
3 Q Now, did the boy Ricky have a history of
4 cramps?
5 A No.
6 Q Had you ever known the boy to have cramps?
7 A No.
8 MR. RIXEY: No further questions, Your
9 Honor.
10 MR. WRIGHT: Come on down.
11 THE COURT: All right. You may step
12 down, Mrs. Pickens.
13 MR. WRIGHT: I hate to do this, but I
14 want you to take the stand.
15 Can she stay in the courtroom?
16 MR. RIXEY: Grover, if you need a recess,
17 say so.
18 MR. WRIGHT: Okay.
19
20
21 -----oOo-----
22
23
24
25

1 MARY ANN HORNE, the plaintiff, called as a witness
2 on her own behalf, having been first duly sworn, was examined
3 and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. WRIGHT:
8 Q All right. You are Mary Ann Horne?
9 A Right.
10 Q Okay. And what is your age?
11 A Thirty.
12 Q Thirty. Okay. Robert Ricky Lovett
13 was your son?
14 A Yes, he was.
15 Q All right. And at the time of his death
16 he was fourteen?
17 A Yes.
18 Q All right. Had he lived with you from
19 the date of his birth?
20 A Yes.
21 Q All right. Now, did he have any other
22 brothers or sisters?
23 A No.
24 Q All right. Were you a tenant at the
25 Malibu Palms Apartments owned by the defendant, S and C

1 Company?
2 A Yes, I was.
3 Q All right. And how long had you been
4 there before the day of the drowning?
5 A About a week I guess.
6 Q About a week. All right. Had you
7 signed a year's lease?
8 A Yes.
9 Q All right. And who lived in the apartment
10 with you?
11 A My son.
12 Q All right. Now, on the day that he
13 drowned, was that the first time that he had ever been to the
14 pool?
15 A Yes, it was.
16 Q All right. Were you at home when he went
17 over there?
18 A Yes, I was.
19 Q All right. What time of day was it when
20 you went over there?
21 Let me say something. If you want to
22 think about something, now think to yourself and then when
23 you are ready to answer, go ahead and answer. What time was
24 it when he went over to the pool is what I asked.
25 A About 5:00 I guess.

1 Q About 5:00 o'clock?
2 A Yes.
3 Q Before he went over had you found out that
4 the lifeguard was on duty?
5 A Yes.
6 Q And about what time were you advised that
7 this accident had happened?
8 A Oh, I'm not sure of the time exactly, but
9 I say about -- half an hour after he left home.
10 Q Now, did you go to the pool?
11 A Yes, I did.
12 Q All right. Did you see him when you got
13 to the pool?
14 A Yes.
15 Q And where was he when you got there?
16 A He was lying on the ground.
17 Q All right. Were the rescue squad people
18 there then?
19 A Yes, they were.
20 Q All right.
21 A They wouldn't let me near him.
22 Q They wouldn't let you near him. All right.
23 Had your son gone to work before he drowned?
24 A Yes.
25 Q All right. And had he gotten his first

1 paycheck?
2 A Yes.
3 Q All right. And was that for a week's
4 work?
5 A Right.
6 Q All right. And what was the amount of the
7 check?
8 A Sixty dollars.
9 Q Sixty dollars?
10 A (Witness nods head affirmatively.)
11 Q All right. Now, were you expecting that
12 he would work when he was not in school to help you with your
13 expenses?
14 A We both worked because they was building
15 this place across the street, and he wanted to get a job over
16 there.
17 Q All right.
18 A After the other place closed down.
19 Q Did your son have something called sickle
20 cell trait?
21 A That's what I was told at the autopsy. Yes.
22 Q All right. Now, did having the trait
23 curtail his activities at all?
24 A Pardon?
25 Q Did having having the trait mean that he

1 could not engage in sports or that sort of thing?
2 A No.
3 Q All right. I take it he did not have
4 sickle cell anemia; is that true?
5 A True.
6 MR. WRIGHT: All right. I think that's
7 all. Answer Mr. Rixey.
8
9 CROSS-EXAMINATION
10
11 BY MR. RIXEY:
12 Q Mrs. Horne, did your son's father have a
13 sickle cell trait?
14 A I don't know.
15 Q Do you have to your knowledge sickle cell
16 trait?
17 A Yes. I found out shortly after his
18 autopsy.
19 Q That you have it?
20 A Yes.
21 Q Do you have sickle cell trait or sickle cell
22 anemia?
23 A Sickle cell trait.
24 Q Did your son before the accident have a
25 history of cramps?

1 A When he was young. It wasn't a history I
2 don't guess. When he was young, about nine or ten years old,
3 he had cramps; and I took him to the doctor about it.
4 Q Is that what you meant when you were talking
5 with Mrs. Hamilton at the hospital when the two of you went
6 and you told her in answer to her question that yes, your son
7 had had cramps in the past?
8 A She asked me. She asked me and I said
9 that he had had cramps in the past, and I thought they had
10 came back. You know, he had started back to having them
11 without me knowing it.
12 Q You told Mrs. Hamilton that yes, he had --
13 your son had had cramps in the past and you thought maybe
14 they had come back?
15 A Yes.
16 MR. RIXEY: No further questions, Your
17 Honor.
18
19 REDIRECT EXAMINATION
20
21 BY MR. WRIGHT:
22 Q Had he had any cramps within the past four
23 years of the accident?
24 A No, he hasn't.
25 Q Okay. If he had had cramps in the pool,

would you have expected the lifeguard to help him?

MR. RIXEY: If Your Honor please, I object to that.

THE COURT: Sustained.

A Yes, I would.

MR. WRIGHT: Withdraw it.

Come on down, Mrs. Horne.

THE COURT: You may step down, Mrs. Horne, and watch your step, please. Step down as you go out of the box.

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MR. WRIGHT: Jack, with the exception of putting in the mortality table, that would be all we have.

(Conference between attorneys)

MR. WRIGHT: Judge, we are going to agree that the mortality table will be made part of the evidence.

THE COURT: All right, sir. The record will so show; and I understand with that, you rest.

MR. WRIGHT: Yes, sir.

1 MR. RIXEY: We would like to be heard,
2 Your Honor, please.
3 THE COURT: All right. Ladies and
4 gentlemen of the jury, may I ask you to retire to
5 the jury room for a moment while the Court hears
6 a motion.
7 (The jury was excluded from the courtroom,
8 and the following took place out of the presence
9 of the jury:)
10 MR. RIXEY: If Your Honor please, the
11 defendant moves the Court to strike the evidence
12 of the plaintiff and to render summary judgment
13 in behalf of the defendant on two grounds. First,
14 that there is no showing of any negligence on the
15 part of the defendant acting through its agents
16 and employees, and, secondly, on the grounds that
17 any alleged evidence of negligence was not a
18 proximate cause of the drowning of the defendant --
19 of the deceased. Excuse me.
20 The evidence very briefly here is that --
21 that there was a lifeguard on duty, that the
22 lifeguard was complying with the legal requirements
23 of the ordinance. No requirement in the ordinance
24 that he has to sit in a chair. The chair was
25 apparently in the proper position. The lifeguard

1 and pool attendant was on duty. He was there in
2 the vicinity of the pool. He is not an insurer
3 of the safety of people who use it. We know that
4 the duty upon the defendant, the operator of a pool,
5 is to exercise reasonable care to provide a
6 reasonably safe place for patrons of the pool to
7 engage in those activities which are normally
8 associated with the pool; and I submit to Your
9 Honor that there is no evidence of any negligence
10 or anything to the contrary.
11 Now, on the second point, the matter of
12 proximate cause, I say to Your Honor that this
13 case is controlled in its entirety and on all fours
14 by a 1964 case, a case of first impression in
15 Virginia and only impression in Virginia in a
16 decision by Mr. Chief Justice I'Anson. It is the
17 case of Blacka, B-l-a-c-k-a, v. James, 205 Va. 646;
18 and I offer Your Honor a copy of it. It can be
19 read in just a few moments.
20 It is a case which we submit entirely
21 controls the present situation. This was a case
22 involving a commercial swimming pool.
23 MR. WRIGHT: Wait a minute. It's a
24 three-acre lake. There is no sense in Mr. Rixey
25 distorting the case. All fours. A three-acre

lake.

MR. RIXEY: Well --

MR. WRIGHT: I think that goes a little -- going a little too far.

MR. RIXEY: The headnote starts off, "The owner of a commercial swimming pool." It was a commercial swimming operation, and here a drowning took place late in the afternoon in a lake owned and operated by the defendant. The general public was invited to use it. The lake covered some three acres. The opinion goes on as to the size of the lake and the depth of it and the ropes that were used and that sort of thing.

On the afternoon of the drowning two young boys went to the lake about 2:30 in the afternoon. They were diving and swimming and riding the cable line and that sort of thing. There was evidence that there were no lifeguards present. There was evidence that there were lifeguards present. Along about 5:00 o'clock one of the parents of one of the boys came to pick the boys up, and the son of the parent told the father he had not seen the other boy for some time, so he was paged over the public address system. Certain telephone calls were made to see if the other boy had left the

grounds, and they checked the bath house and found that his clothes were still there, and then the lifeguards began a search of the lake, and the body of the boy was found ten feet from the tower in nine feet of water. The county medical examiner testified that the death was due to drowning just as in our case, and he put the time of death at 4:35 P. M. in the afternoon.

As I say, the surviving boy testified that he did not see any lifeguards on duty at the lake during the afternoon. The allegations of negligence from the plaintiff against the defendant were several. I want to make -- I want to tell you what they are. They were, one, that the defendant did not have properly trained and adequate number of lifeguards on duty; two, that the defendant did not take prompt and effective action to locate the person of the deceased; three, that the defendant did not provide suitable rescue and safety appliances; and, four, that the defendant did not place signs to indicate the depth of the water.

Now, the trial court submitted this case to a jury, and the jury returned a verdict for the plaintiff in the sum of $6,000. Judgment was

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1 entered on the verdict. Defendant went to the
2 Virginia Supreme Court on a writ of error.
3 Mr. Chief Justice I'Anson wrote the opinion in
4 which he says the facts present a case of first
5 impression. He first cites the general rule of
6 what the duty that the owner of a swimming pool
7 owes to the general public, and that is what I just
8 recited to you I think.
9 The opinion goes on to recite cases from
10 other jurisdictions, and then it gets to the point
11 of proximate cause, and he says on Page 650 of
12 the opinion, which is the next to last page, "There
13 was evidence, however, from which the jury could
14 find that the defendant did not exercise ordinary
15 care for the protection of the patrons of the lake
16 and thus he was negligent. But mere proof of an
17 accident and negligence does not establish a cause
18 of action. There must be in addition a causal
19 connection between the negligence and the injury
20 or death complained of. Evidence tending to show
21 a causal connection must be sufficient to remove
22 the case out of the realm of speculation and
23 conjecture and into the realm of legitimate
24 inference before submitting it to a jury for its
25 determination."

1 And they say, "It is the universally
2 accepted rule that in negligence cases one of the
3 prerequisites to liability is that a defendant's
4 negligence must have been the proximate cause of
5 an injury or death. Thus it has been held that
6 the mere fact that a person has drowned in a
7 swimming pool or lake, even though the owner and
8 operator is negligent in not using reasonable care
9 to protect his patrons, does not, without more,
10 establish the liability of a defendant. The
11 negligence of the defendant must have a causal
12 connection with the drowning, and in the absence of
13 a showing that a defendant's negligence was the
14 proximate cause of the death there can be no
15 recovery.
16 "Thus the crucial question is whether the
17 plaintiff's evidence supports the jury's verdict
18 that the negligence of the defendant was the
19 proximate cause of the drowning of young James,"
20 and in that last paragraph on Page 650 I call
21 particular attention of the Court to this paragraph
22 because it's from this paragraph that we
23 cross-examined the witnesses for the plaintiff.
24 "The evidence shows that when the James
25 boy was last seen he was swimming normally and there

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1 was no indication that he was in distress. None
2 of the several hundred people in or around the lake
3 saw James in distress or heard him make an outcry."
4 Just like our case. None of the six or
5 seven or five people in that pool heard him make
6 any outcry, and there is no evidence that he did.
7 "He simply disappeared below the surface
8 of the water without anyone observing when, how or
9 why." That's just like our case. The Lovett boy
10 simply disappeared below the surface of the water
11 without anyone observing when, how or why. There
12 being no reason given for his doing that.
13 "Surely if there had been any indication
14 that the boy was in trouble someone in the lake
15 could have come to his rescue or given an alarm."
16 In this case the Hollands were right there. They
17 didn't have any reason to be alarmed or go to his
18 rescue.
19 It says when the surviving boy, Cline,
20 "did not see the James boy after returning to the
21 tower he was not alarmed and had no cause to believe
22 that he had drowned. No report was made to the
23 defendant or to any of his employees that James was
24 missing until thirty minutes after Cline had missed
25 him."

1 It's significant in this case that even
2 Mrs. Holland and her daughter Sherry dove three
3 times for the body without being alarmed because
4 they thought he was playing. No indication of
5 distress whatsoever, and it wasn't until the body
6 was brought up after the third dive that there was
7 reason for the Hollands to say, "He is really not
8 playing. You know, this is for serious. Get
9 the rescue squad, Mr. Hamilton," and they called.
10 Mr. Chief Justice goes on to say that,
11 "Lifeguards are to aid those in distress, and
12 unless there is some cause to believe that one is
13 in distress they cannot be expected to act. It
14 cannot be inferred, without resorting to pure
15 speculation, that if there had been one lifeguard,
16 or any number of lifeguards, on the tower or
17 around and in the lake, James would not have
18 drowned." They said that is speculation.
19 "The facts are not such as would indicate
20 with reasonable probability that the drowning
21 would not have occurred if the defendant had
22 provided an adequate number of lifeguards. This
23 is not a case where a lifeguard failed to do his
24 duty after he knew, or should have known, a
25 swimmer was in distress. It cannot be said, under

1 the facts and circumstances of this case, that any
2 act or omission of the defendant or any of his
3 lifeguards placed young James in a position of
4 danger which was the proximate cause of his death.
5 Hence there was no proof of causal connection
6 between the drowning of the plaintiff's decedent
7 and the negligence of the defendant.
8 "Since the trial court limited the jury's
9 consideration of the negligence of the defendant
10 to the adequacy of the lifeguards, and there was
11 no cross assignment of error, we need not consider
12 the other allegations of specific acts of
13 negligence." Case reversed and final judgment
14 entered for the defendant.
15 I submit to Your Honor that the facts in
16 the instant case before you today are on all fours
17 with the case I just cited to you, that there is
18 no evidence before this Court of any causal
19 connection between any allegations of negligence
20 from the plaintiff directly to the defendant and
21 the subsequent drowning of the decedent. This
22 is a tragic case, and we are certainly sorry that
23 this young boy drowned, but in all fairness we
24 submit to Your Honor that the Court must in the
25 light of this case, the facts before you -- as

1 meager as they might have to be -- that the
2 inescapable conclusion is that consistent with the
3 opinion of the Chief Justice of the Virginia
4 Supreme Court that there was no causal connection
5 between the actions of the defendant and the
6 drowning of the deceased; and, therefore, summary
7 judgment should be entered in behalf of the
8 defendant.
9 THE COURT: Mr. Wright.
10 MR. WRIGHT: I don't think there is any
11 need for you to read the case. Mr. Rixey read
12 the whole case word for word, but we are here now
13 on a motion to strike my evidence, which tests
14 the sufficiency of my evidence; and I need not
15 remind the Court that it is only when the question
16 is so clear and its legal significance is so
17 plain that no other possible interpretation can be
18 given to the facts that the Court should strike the
19 plaintiff's evidence.
20 Traditionally questions of negligence and
21 proximate cause are for the trier of fact, the
22 jury. Now, Mr. Rixey -- I am absolutely amazed
23 that he would say that the Blacka case in 205
24 Virginia is on all fours with this case. It
25 hardly should be dignified with a response, but in

1 that case, as he read to you, it didn't involve
2 a swimming pool. There was no city ordinance
3 that set forth the standards that should be adhered
4 to. There was no state law. There was no county
5 ordinance. There was no city ordinance. There
6 was no local town regulation of any kind. It was
7 open season. Just simply a question of that sort
8 of negligence and ordinary care.
9 Now, on that ground alone, that case is
10 completely distinguishable from the case at bar
11 today because we have a very specific, a very
12 rigid pool ordinance in this city which is designed
13 and intended to provide safety provisions for the
14 protection of people who are invited to use pools
15 by people who are making a profit by furnishing
16 them.
17 Now, in the Blacka case you had a three-acre
18 lake. You had 300 to 500 people using it and no
19 law applicable. You had towers out in the middle
20 of the lake, cables, people flying all around into
21 the water, and the boy seen a half hour before he
22 was missed. Now, if that case is on all fours
23 with this case, I am a monkey's uncle.
24 Now, what do we have in this case? And
25 we are on a motion to strike, so that means you

1 look at the evidence and all inferences in the
2 light most favorable to me. Not to Mr. Rixey.
3 To my client. You got a swimming pool ordinance
4 that says that the water should be so clear that
5 you can see a six-inch-diameter disc on the bottom
6 of the pool at the deepest point for thirty feet
7 is all directions all around. Here you couldn't
8 see a black boy fourteen years old on the bottom
9 of the eight-foot pool because the water was so
10 dirty and murky in violation of the ordinance. The
11 ordinance further says you will have an elevated
12 lifeguard stand at the deep end. Why, just put
13 it there and then go on across the street and eat
14 ice cream and you have satisfied the ordinance
15 according to Mr. Rixey. That is all you got to do.
16 Well, that is absurd.
17 Lifeguard not in it. Sitting down on a
18 chair at pool level all the way down past the other
19 end of the pool. Now, did we have 300 to 500
20 people using the pool? No. Five people in there.
21 Mrs. Holland, her two little children, nine years
22 old and twelve years old; and she is looking after
23 them, so what is left for this great lifeguard to
24 protect? One other little girl and the deceased,
25 who he knew was in the pool.

1 Well, so he is back there eating ice cream
2 talking.
3 Could this jury legitimately infer that the
4 fact that the lifeguard didn't sit up in that chair
5 where the body was found right below it and look
6 down in that pool have contributed to cause this
7 boy's death? Could they infer that if they had
8 kept the pool cleaned so that you could see the
9 bottom that that could have saved this boy's life
10 if it had been clear? Could they legitimately
11 infer this? I think so. If they can't, then the
12 only way you can recover in a swimming pool
13 drowning is if the -- if somebody is in the pool
14 flailing around saying, "Hey, hey, I am drowning.
15 Come help me. Lifeguard, come help me," and the
16 lifeguard says, "Go to hell." That is the only
17 way you can win the case under Mr. Rixey's theory.
18 That is not the law. This case -- and the
19 evidence presented is overwhelming at this point
20 of gross negligence on the part of the defendant.
21 No instructions to the lifeguard of any kind. No
22 investigation of his qualifications. Didn't even
23 know whether he can swim or not, but most of all,
24 a pool with practically nobody in it. Nothing
25 else to do but look at a couple of people, and he

1 didn't do it. As a result of it, a fourteen-year-
2 old boy is dead.
3 Now, if this jury can't infer reasonably
4 or if they can't differ on it, not necessarily infer
5 it but can they differ on it collectively? If they
6 can't, then nobody can ever recover. I move that
7 the motion be overruled.
8 MR. RIXEY: If Your Honor please, in
9 response I would say to Your Honor that we rest and
10 rely on the Blacka case. I don't think there is
11 any significance to the fact that there is a city
12 ordinance involved in this particular case of ours.
13 The ordinance and the provisions of it don't have
14 anything to do with proximate cause between why
15 the boy drowned and the actions of the defendant.
16 We are talking about being able to see -- Mr. Wright
17 says -- that doesn't have anything to do with the
18 cause of the drowning. We don't know why this boy
19 drowned, and there isn't anybody who can tell us
20 why he drowned, but there is certainly no evidence
21 of any causal connection between the drowning and
22 what the defendants did.
23 Why, even in the Blacka case, whether it's
24 a pool or a lake or whether it was a city ordinance
25 or not, there was evidence there of no lifeguards,

1 and that was the issue in the case. No lifeguards.
2 And the Virginia Supreme Court said there is just
3 no evidence of a causal connection between alleged
4 negligence and the drowning itself.
5 This case -- the instant case is on all
6 fours so far as the Blacka case so far as the
7 factual indication is concerned around the
8 determination of that Blacka case, and we ask for
9 summary judgment for the defendant and let's
10 terminate this litigation.
11 THE COURT: I have previously read the
12 Blacka case and have refreshed my memory by
13 glancing through it again during the course of
14 this argument. First, I think that quite clearly
15 there are several areas within which the jury could
16 properly find that the defendant was negligent.
17 I really don't think that counsel for the defendants
18 seriously questions that.
19 Dealing with the proximate cause, taking
20 the language itself from the Blacka opinion, the
21 evidence tending to show a causal connection must
22 be sufficient to remove the case out of speculation
23 and conjecture and into the realm of legitimate
24 inference before submitting it to a jury. This
25 case is dintinguishable from the Blacka case in a

1 number of respects, most of which have been already
2 pointed out by counsel for the plaintiff; and if
3 you are dealing with what has been described by
4 all persons as a small pool with a very small
5 number of patrons at the time of the drowning in
6 question with indications that the water was so
7 murky that a person in difficulty could not be
8 observed, I think that the circumstances are such
9 that the jury properly and legitimately might infer
10 that the proximate cause of the injury resulted
11 from one or more acts of negligence on behalf of
12 the defendants; and I'm going to overrule your
13 motion to strike.
14 MR. RIXEY: If Your Honor please, let me
15 argue with the Court and say that murky water
16 couldn't possibly have anything to do with the
17 drowning of the boy. I mean murky water might
18 deter somebody from seeing him, but there is no
19 evidence of why the boy drowned and has nothing to
20 do with the drowning -- the cause of the drowning.
21 MR. WRIGHT: He drowned because he stopped
22 breathing.
23 MR. RIXEY: It couldn't be because of the
24 location of the lifeguard stand. Couldn't be
25 because of a lifeguard eating ice cream or where

1 he is. That isn't why the boy drowned, and I
2 submit to Your Honor that there is no evidence of
3 why the boy drowned or any relationship to the
4 drowning and what the defendant did. I just can't
5 see any -- whatsoever any evidence or any
6 distinction there.
7 THE COURT: Well, I disagreed with you,
8 Mr. Rixey. I think that had either the lifeguard
9 or the other patrons of the pool been able to
10 observe the boy as soon as he reached the bottom
11 of the pool that they would not have had the
12 unfortunate drowning.
13 MR. RIXEY: Well, that may have been true
14 in the Blacka case, too. If they had been seen
15 by a lifeguard going down to the nine-foot depth,
16 then they could have seen him in the Blacka case
17 but --
18 THE COURT: The distinction between the
19 two is that here but for the murky water -- I think
20 the jury can legitimately infer that but for the
21 murky water he would have been seen because of the
22 small area with which we are dealing, and I think
23 that is of primary importance in distinguishing
24 the two cases.
25 MR. RIXEY: Let me say for the record --

1 MR. WRIGHT: He has now argued three times,
2 and I think three times is enough.
3 MR. RIXEY: You want to say something
4 before I finish?
5 MR. WRIGHT: The Court ruled.
6 MR. RIXEY: You let me take care of my
7 case.
8 THE COURT: I will permit him to state it
9 for the record.
10 MR. RIXEY: I submit for the record that
11 it is the duty of this Court despite a desire or
12 a trend or -- or indications from the Supreme
13 Court that factual issues should be determined by
14 a jury and an indication of a natural and normal
15 reluctance on the part of a Court to take a case
16 away from a jury. There is a duty on this Court
17 to rule as a matter of law that cases where there
18 is no factual dispute and where there is legitimate,
19 where there is decision law which is controlling --
20 and I submit to Your Honor that letting this case
21 go to the jury flies in the case of and is
22 strictly contrary to the Blacka case and amounts
23 to this Court not being willing to take the bull by
24 the horns and rule as a matter of law in a case but
25 instead it is sending the matter on to the jury and

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1 just inviting further litigation and appeal in the
2 case. I think it is evading the real issue, and
3 I say very strongly to the Court and respectfully
4 that there just isn't any difference in the Blacka
5 case and this case as far as causal connection
6 between the drowning and the acts of the defendant.
7 THE COURT: I agree with you fully as to
8 the duty of the Court. I just happen to disagree
9 with you on the interpretation put on the particular
10 ruling.
11 MR. WRIGHT: I haven't cited it, but there
12 is an A.L.R. annotation which is more on the point
13 than anything Mr. Rixey has offered you. The
14 bull is coming from the other side of the room.
15 39 A.L.R. 3d 824.
16 MR. RIXEY: What is?
17 MR. WRIGHT: The bull by the horns.
18 MR. RIXEY: I want to know what kind of
19 bull you are talking about.
20 MR. WRIGHT: Well, that case is on all
21 fours. 39 A.L.R. 3d 824 is a collection of cases
22 involving drownings in swimming pools.
23 MR. RIXEY: What is the citation?
24 MR. WRIGHT: I will give it to you again.
25 39 A.L.R. 3d 824. They are very recent cases in

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1 Florida. 1970, Florida Appellate, 241 Southern
2 2d 874 and a case in 273 Atlantic 2d 372, where
3 the questions of negligence and contributory
4 negligence are properly for the jury, and they
5 involve violations of local ordinances designed to
6 protect people who are using an apartment swimming
7 pool. These are cases on apartment swimming pools
8 that are provided by the owner of the apartments
9 for the common use of the tenants and their guests,
10 and they are used as a sales pitch to get people to
11 rent these apartments, and they offer lifeguard
12 and all the other amenities. Don't involve lakes.
13 THE COURT: Gentlemen, I have made my
14 ruling and see no reason to change it.
15 MR. RIXEY: We note our exception, Your
16 Honor.
17 THE COURT: All right, sir.
18 MR. RIXEY: I have Doctor Springate
19 scheduled for 3:30, and I only have one witness to
20 put on before he gets here, so we may be just --
21 if it please the Court -- delayed a moment or two --
22 MR. WRIGHT: Well, it's a half hour.
23 MR. RIXEY: -- in the process of our
24 evidence.
25 THE COURT: You do have one witness prior

to Doctor Springate?

MR. RIXEY: I will put Mrs. Hamilton on.

THE COURT: Suppose we hear her then at this time.

MR. RIXEY: All right, sir.

THE COURT: Would you ask the jury to return, please, Mr. Bailiff.

THE BAILIFF: Yes, sir, Your Honor.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

MR. RIXEY: We call Mrs. Hamilton to the stand if Your Honor please.

-----o0o-----

1 SHARON HAMILTON, called as a witness on behalf of
2 the defendant, having been first duly sworn, was examined and
3 testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. RIXEY:
8 Q Mrs. Hamilton, state your name, please.
9 A Sharon Hamilton.
10 Q I want you to speak up if you will loud
11 enough so all of these jurors can hear you if you will.
12 Where do you live, Mrs. Hamilton?
13 A 3600 Malibu Palm Drive, Apartment 103,
14 Virginia Beach.
15 Q Thank you. And are you employed?
16 A Yes.
17 Q By whom?
18 A S and C Company.
19 Q And what is your occupation?
20 A I am the resident manager of the Palms
21 Apartments.
22 Q And for how long have you been the
23 resident manager of that apartment?
24 A Eight years.
25 Q Eight years?

1 A Yes, sir.
2 Q Fine. And as the resident manager are
3 you familiar with the swimming pool operation?
4 A Maintenance takes care of the operation
5 of the swimming pool.
6 Q But are you familiar with it?
7 A The technical things of it I do not know,
8 but I am aware of the swimming pool and the rules. Yes.
9 Q All right. And are you the wife of
10 Mr. Hamilton who previously testified in this case?
11 A Yes, I am.
12 Q Now, on the day of this drowning at the
13 time it took place where were you if you recall?
14 A I was in the office. I had worked late
15 and I didn't get off until -- at the time I got off, the
16 phone was ringing and was my husband telling me to come to
17 the pool. At the same time one of the little children from
18 the apartments came and told me that they needed me at the
19 pool. I was in the process of closing the office.
20 Q All right. So when you got that -- the
21 call and the information, what did you do?
22 A I ran as fast as I could to the pool area.
23 Q And when you got to the pool area what did
24 you observe, please.
25 A The little boy was lying there. The rescue

1 squad was there when I got there, and they were taking care
2 of him, and I said immediately, "Who is it?" and I wanted to
3 know if the mother and father had been notified, and they
4 told me who it was, and I knew that Mary was at home. I
5 knew that she was not there, so I went to get her.
6 Q Where was she?
7 A She was at home.
8 Q And when you went to get the mother, what
9 took place after that?
10 A Well, when I got to her apartment, I told
11 her that there had been an accident at the pool and that she
12 was needed and to please come; and one of the other tenants
13 was with me who lives in the apartment complex, and we went
14 to the pool; and when we got there, the rescue squad was
15 still working on the little boy; and I stayed with her, and
16 Mary had just moved into the apartments, and I knew that she
17 only had one relative in town because when I rented to her she
18 had a contact to get in touch with her, so I went back to my
19 office and called her sister and asked her to come because I
20 knew that she was needed.
21 Q All right. And then what took place
22 thereafter between you and Mrs. Horne?
23 A I stayed with her after I called her
24 sister. I believe her name -- I'm not sure, but I believe
25 her name is Terry. I called her and asked her to come to the

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1 pool area. When I got back to the pool, they were in the
2 process of getting ready to put him into the rescue squad to
3 take him to the hospital, so I didn't have my purse with me.
4 I had to go back to my apartment, and I told Mary -- they
5 wouldn't let her ride with him, and I told her that I would
6 take her to the hospital because I didn't want her to be
7 alone, and I had to go back to my apartment and get my purse
8 and car keys to take her to the hospital, and I stayed with
9 her at the hospital until after the child passed away, and I
10 stayed with her even then until her sister and her brother-in-
11 law came.
12 Q All right. And how long thereafter did
13 Mrs. Horne stay in that apartment complex before she moved
14 out? Do you recall?
15 A I don't remember the exact date, but it was
16 the following week that she moved back home with her mother.
17 Q Moved back to where?
18 A At that time they were living in Goldsboro,
19 North Carolina.
20 Q All right. Mrs. Hamilton, was any complaint
21 made to you on the day of the drowning of the water being
22 cloudy or murky?
23 MR. WRIGHT: Objection.
24 THE COURT: What is the basis of your
25 objection, Mr. Wright?

1 MR. WRIGHT: Hearsay.
2 THE COURT: I'm going to overrule the
3 objection and permit the question.
4
5 BY MR. RIXEY:
6 Q Was there any?
7 MR. WRIGHT: Why would any complaint be
8 made to her? She didn't run the pool.
9 THE COURT: Answer the question if you can,
10 please, Mrs. Hamilton.
11 A No, sir.
12
13 BY MR. RIXEY:
14 Q Did you have occasion to observe the water
15 in the pool that day yourself?
16 A I was over at the pool that afternoon. I
17 don't remember the exact time. Somewhere between 4:00 and
18 4:30 I was at the pool. At the time that I was there, there
19 was a lot of people in the pool area; and I didn't really
20 pay that much attention to the water itself.
21 Q Were people swimming in the pool at that
22 time?
23 A Yes, sir.
24 Q Did the pool remain open after the drowning,
25 Mrs. Hamilton?

1 A After the drowning, the pool was closed;
2 but it was open the next morning.
3 Q And for how long did the pool stay open?
4 A Until the pool closed at the end of the
5 season.
6 Q And that was approximately when?
7 A It was Labor Day Sunday was the Sunday
8 after Labor Day if I remember correctly was the last day it
9 was open.
10 MR. RIXEY: Thank you very much,
11 Mrs. Hamilton. Answer Mr. Wright if he has some
12 questions.
13 MR. WRIGHT: I don't have any.
14 THE COURT: All right. You may step
15 down, Mrs. Hamilton.
16 MR. RIXEY: If Your Honor please, with the
17 exception of waiting for Doctor Springate, that
18 would be our case.
19 THE COURT: All right. Ladies and
20 gentlemen, we have a physician who is going to
21 testify and is on the way here but has not yet
22 arrived so we will recess briefly awaiting his
23 arrival. You will, of course, retire to the
24 jury room.
25 (The trial recessed at 3:13 P. M.)

THE COURT: May I see counsel for a moment in chambers. I wonder if we could be working on instructions while we wait.

MR. WRIGHT: All right, sir.

MR. RIXEY: All right, sir.

(The Court and counsel went into chambers.)

(At 3:55 P. M. the trial continued as follows:)

THE COURT: Ladies and gentlemen of the jury, the Court and counsel understand that at least one member of the jury has a commitment for this evening; and so that you will not be concerned during the course of the additional evidence to be presented to you, I want to advise you that we will not hold you much after 5:00, if any, after 5:00 today.

MR. RIXEY: Yes, Your Honor. Call Doctor Springate. He has not been sworn, Your Honor.

THE COURT: All right. Doctor Springate, would you come forward and stop here just a moment and raise your right hand, please.

(Doctor Springate was sworn.)

-----oOo-----

CHARLES SPRINGATE, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RIXEY:

Q Doctor, would you state your name and address, please.

A Doctor Charles Springate. My office address is 401-A Colley Avenue in Norfolk.

Q And, Doctor, what is your occupation? Would you tell us how you are employed.

A I am a forensic pathologist employed as deputy chief medical examiner for the Commonwealth of Virginia.

Q All right, sir. And for how long have you been in that position?

A A little over three years.

Q Tell us, if you would, please, your educational background and your qualifications for the practice of medicine.

A After obtaining a bachelor's degree in general science, I attended medical school in Saint Louis at Washington University, graduating in 1961. I then had

1 five years' training in pathology including anatomic
2 pathology and clinical pathology for four years at the
3 Institute of Pathology, Western Reserve University in
4 Cleveland. I then had a year's training in forensic
5 pathology at the Cuyahoga County coroner's office in
6 Cleveland. I then worked for over six years as assistant
7 medical examiner for the State of Maryland.
8 Q And when did you come to Virginia,
9 Doctor Springate?
10 A A little over three years ago.
11 MR. RIXEY: If Your Honor please, we would
12 submit that Doctor Springate's qualifications have
13 been proven in this case.
14 THE COURT: Do you have any questions,
15 Mr. Wright?
16 MR. WRIGHT: I don't have any questions
17 other than that.
18 THE COURT: The Court will accept
19 Doctor Springate as an expert witness in his field.
20
21 BY MR. RIXEY:
22 Q Doctor Springate, I call your attention to
23 a young fourteen-year-old boy by the name of Robert R. Lovett
24 and ask if you are familiar with this boy as of August 29th
25 of this year.

1 A Yes, sir. It was as of August 31, 1975.
2 Q All right, sir. And when did you first
3 come in contact with the body of young Robert Lovett?
4 A On that day, August 31, 1975.
5 Q Where?
6 A At our office in Norfolk.
7 Q And for what reason was he brought to your
8 office in Norfolk?
9 A The body was sent in for a medical-legal
10 autopsy.
11 Q And did you perform an autopsy on the
12 young boy?
13 A Yes.
14 Q And before you performed the autopsy did
15 you have a report of an investigation that had been made by
16 a medical doctor at Virginia Beach?
17 A Yes. I had a report over the telephone
18 from Doctor Gray.
19 Q And what was reported to you as having been
20 wrong with the boy?
21 MR. WRIGHT: That has to be hearsay, Your
22 Honor.
23 THE COURT: I understand that it's hearsay,
24 and I don't know whether it has anything to do with
25 the basis of the opinions that the doctor is going

1 to offer or not.

2

3 BY MR. RIXEY:

4 Q Well, had any opinion been expressed to you

5 by Doctor Gray as to the cause of the boy's death?

6 A Well, he said that the boy as I recall was

7 found at the bottom of a pool, was taken out of the pool and

8 had been pronounced dead and that he was sending the body in

9 for an autopsy.

10 MR. RIXEY: All right, sir.

11 MR. WRIGHT: I don't have any objection

12 then.

13 THE COURT: All right, sir.

14

15 BY MR. RIXEY:

16 Q And did Doctor Gray -- did Doctor Gray

17 complete this report of investigation and list the probable

18 cause of death?

19 A Yes. We call our CME-1, which is report

20 of investigation by a medical examiner.

21 Q What was the probable cause of death

22 according to Doctor Gray?

23 A Drowning.

24 Q Now, tell us if you would briefly without

25 going into too many details of your autopsy of this young

1 man and what you found. Would you, please.
2 MR. WRIGHT: Your Honor, unless it relates
3 to the -- it's been stipulated that death was caused
4 by drowning. I question the materiality of this.
5 No issue that death was caused by drowning.
6 MR. RIXEY: Anything that pertains to the
7 autopsy has got to be material in this case.
8 MR. WRIGHT: I don't see how.
9 MR. RIXEY: And if there can be some
10 explanation of the drowning, we will want to show
11 that, and if there is no explanation of it, I want
12 to show that also; but I think certainly the jury
13 would want to have all the facts concerning the
14 autopsy.
15 THE COURT: I will permit the question.
16 A The autopsy consisted of an external and
17 internal examination of the body. The appearance of the
18 lungs first of all was consistent with the diagnosis of
19 drowning. The external examination of the body showed a
20 number of abrasions. Those are superficial scrapes of the
21 skin such as one would get from being scraped across the
22 sidewalk or something of that sort. These abrasions were
23 located on the left side of the face from forehead to chin.
24 They were also on the neck, upper chest and the extremities.
25 The autopsy and subsequent laboratory

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1 examination also showed the presence of sickle cell trait,
2 which is a congenital abnormality of the hemoglobin, which
3 is a pigment in the red blood cells.
4
5 BY MR. RIXEY:
6 Q Doctor, was there anything in your autopsy
7 which would indicate to you the reason that this boy
8 drowned?
9 A No.
10 Q Do you have any probable explanation as to
11 why the boy drowned?
12 A Probable -- no.
13 Q What are the possibilities, Doctor, in
14 terms of why the boy drowned? Are there one or more
15 possibilities?
16 MR. WRIGHT: Your Honor, this is real
17 speculation.
18 THE COURT: I sustain the objection.
19 The doctor stated that he cannot state any
20 probability of the cause of the drowning, and I
21 think his speculation would not be helpful.
22
23 BY MR. RIXEY:
24 Q All right, sir. Doctor, are there --
25 don't tell me what they are. Are there one or more

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1 possibilities to the cause of the drowning of this young boy?
2 Just yes or no.
3 MR. WRIGHT: Same objection.
4 THE COURT: What would be the relevancy?
5 MR. RIXEY: Your Honor, I'm going to put
6 it into the record in just a moment. I'm going to
7 ask the Court to permit me to let Doctor Springate
8 testify so that the record will be complete with
9 the testimony of Doctor Springate.
10 MR. WRIGHT: Then he better do it out of
11 the presence of the jury.
12 MR. RIXEY: That is what will be done,
13 and I think the Court can take care of that.
14 THE COURT: I sustain the objection. I
15 don't think it's relevant.
16 MR. RIXEY: Then I would like to put the
17 evidence on outside of the presence of the jury.
18 THE COURT: All right, sir.
19 MR. WRIGHT: Can we do it after you finish?
20 THE COURT: Ladies and gentlemen, will you
21 retire to the jury room at this time?
22 MR. WRIGHT: Couldn't we complete his
23 examination and let the jury go?
24 THE COURT: We will in just a moment,
25 Mr. Wright.

1 MR. WRIGHT: All right, sir.
2 (The jury was excluded from the courtroom,
3 and the following took place out of the presence of
4 the jury:)
5 THE COURT: I understand there is going
6 to be an additional witness; and, therefore, the
7 jury cannot be dismissed.
8 All right. Make your presentation for the
9 purpose of the record.
10 MR. RIXEY: Thank you, Your Honor.
11
12 BY MR. RIXEY:
13 Q Doctor, are there some probable explanations
14 to why this boy drowned? Could you speculate to the drowning
15 cause?
16 A Oh, I could speculate on possibilities.
17 Yes.
18 Q What are some of the possibilities of the
19 cause of drowning of this young man?
20 A Well, just plain fatigue from being in the
21 pool too long, of course, would be a possibility. Then
22 leading to accidental inhalation of water which would then
23 cause spasm of the glottis or just cause him to inhale more
24 and more water until he finally drowned; or without the
25 fatigue factor this is also a possibility -- just getting

1 relatively small quantities initially causing him to sort of
2 gag, be unable to breathe, then lose consciousness and sink
3 in the pool and then begin inhaling water.
4 Q All right, sir. Is there any way for you
5 to know which of these possibilities may have been the reason
6 for the drowning of the young Lovett boy?
7 A No.
8 Q Was there anything in your autopsy or in
9 any of the information which you have gathered about this
10 young boy which would indicate the reason for the drowning?
11 A No.
12 Q Is there any -- and I know I have asked you
13 this before, but I want to get this in the record. Is there
14 any probable explanation medically for the drowning of the
15 Lovett boy?
16 A No.
17 MR. RIXEY: That's all we have of
18 Doctor Springate, Your Honor.
19 THE COURT: Mr. Wright, do you desire
20 to question him at all on this portion of the
21 testimony?
22 MR. WRIGHT: Not on this.
23 THE COURT: Ask the jury to return to the
24 jury box, please.
25 THE BAILIFF: Yes, sir.

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(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: All right, Mr. Wright.

MR. RIXEY: Let me ask him one more question if I may, Your Honor.

BY MR. RIXEY:

Q Doctor Springate, you have testified to a sickle cell trait having been found in the young boy?

A Yes.

Q Does that play any part at all in the explanation of the drowning?

A No.

MR. RIXEY: Fine. We have no further questions, Your Honor.

THE COURT: Mr. Wright?

CROSS-EXAMINATION

BY MR. WRIGHT:

Q Just a couple of questions. The scrapes that you observed on the boy's body --

A Yes.

Q -- were they consistent with being dragged

1 out of the pool, across the pool deck and then being given
2 artificial respiration with his chest on the concrete?
3 A Yes, that plus probably rubbing on the
4 bottom of the pool either during recovery or before recovery
5 as the body might have moved back and forth somewhat on the
6 bottom due to water action.
7 Q All right. About one out of ten of the
8 pro football players in the NFL has sickle cell trait,
9 doesn't he?
10 A I don't know about the NFL, but that is
11 the approximate percentage in the United States among black
12 people.
13 Q Are you familiar with a study made of the
14 NFL in 1973?
15 A I have a vague recollection of there being
16 a study or at least a report. Yes.
17 Q All right. And it's a fact that sickle
18 cell trait never turns into sickle cell anemia, isn't it?
19 A That's correct.
20 MR. WRIGHT: Okay. That's all.
21
22 REDIRECT EXAMINATION
23
24 BY MR. RIXEY:
25 Q Doctor, was there -- is there any way that

1 you can tell from your examination of the body how long the
2 young boy was submerged under the water?
3 A No.
4 Q What period of time does it take, Doctor,
5 for a human being to drown under water?
6 A Well, he would lose consciousness quite
7 rapidly, but heart action could continue for, say, three to
8 five minutes.
9 Q Is there any hard and fast rule as to the
10 time that it takes for a person to drown to the extent that
11 they cannot be revived?
12 A Well, damage to the brain occurs with lack
13 of oxygen and build up of waste products, carbon dioxide
14 and other things; and the period of time that's quoted for
15 irreversible brain damage to occur varies somewhat depending
16 on what you read and where you read it; but on the order of --
17 we will say three to five minutes -- just giving very broad
18 limits -- brain damage does occur from lack of oxygen.
19 MR. RIXEY: All right. Thank you very
20 much, Doctor.
21 That's all we have, Your Honor.
22 THE COURT: Anything else, Mr. Wright?
23
24
25

RECROSS-EXAMINATION

BY MR. WRIGHT:

Q Is it a fair statement then that it would be important for a lifeguard watching the pool to be on the lookout to retrieve somebody who was on the bottom pretty quickly?

A Yes. The sooner, the better.

MR. WRIGHT: Right. Thank you.

MR. RIXEY: We have no further questions. May he be excused?

THE COURT: Mr. Wright, you have no objection?

MR. WRIGHT: No, sir. He may be excused.

THE COURT: Thank you very much for coming, Doctor.

MR. RIXEY: Call Mr. Hamilton back to the stand, Your Honor, just for a few questions.

THE COURT: All right, sir.

-----oOo-----

1 EDWARD B. HAMILTON, recalled as a witness on behalf
2 of the defendant, having been previously sworn, resumed the
3 stand, was examined and testified as follows:
4
5 DIRECT EXAMINATION
6
7 BY MR. RIXEY:
8 Q Mr. Hamilton, directing your attention to
9 the afternoon of the drowning of the Lovett boy, I ask you
10 if you had occasion to have some ice cream that afternoon.
11 MR. WRIGHT: Your Honor, he already asked
12 him this question, and he answered no. He denied
13 it.
14 MR. RIXEY: That's not what I asked him
15 before at all.
16 THE COURT: I think that this is a
17 different question. I will permit the question.
18
19 BY MR. RIXEY:
20 Q Did you have occasion to have some ice
21 cream that afternoon?
22 A I don't understand.
23 Q Did you purchase some ice cream?
24 A I purchased some ice cream. Yes, sir.
25 Q And where did you purchase the ice cream?

1 A From an ice cream truck that travels
2 throughout the city.
3 Q And when with reference to the drowning did
4 you purchase the ice cream?
5 A Well, roughly twenty minutes, half an hour
6 before, something like that.
7 Q And what ice cream did you purchase,
8 Mr. Hamilton?
9 A I don't recall the name of it right offhand.
10 It was something for my little daughter, a little rainbow
11 colored thing in a cup.
12 Q And what did you do with it after you
13 purchased it?
14 A I had one of the teen-agers that was
15 present put it into the freezer compartment inside the lodge
16 at the pool.
17 Q Did you yourself consume any ice cream?
18 A No, sir, I did not.
19 Q Did you eat any ice cream at the pool on
20 the afternoon of the drowning?
21 A No. Nor at any other time.
22 Q Were there people around you who ate ice
23 cream?
24 A Yes, sir. About five or six.
25 Q And who were they? Five or six who?

1 A People at the pool. Do you want names?
2 Q Well, were they young people or adults or
3 what?
4 A Teen-agers, one adult.
5 Q And where had they gotten the ice cream?
6 A Same place.
7 Q And were these people around you consuming
8 or eating ice cream at the time of the drowning?
9 A Yes, sir. Two or three of them.
10 Q But were you consuming any ice cream?
11 A No, sir, I was not.
12 MR. RIXEY: That's all we have, Your Honor.
13 No further questions.
14 THE COURT: All right. Any questions,
15 Mr. Wright?
16
17 CROSS-EXAMINATION
18
19 BY MR. WRIGHT:
20 Q Do you own any sunglasses?
21 A Yes, sir, I do.
22 MR. WRIGHT: Nothing further.
23 THE COURT: All right, sir. You can step
24 down.
25 -----oOo-----

1 MR. RIXEY: That's our case, Your Honor.
2 We rest.
3 THE COURT: All right, sir. Mr. Wright,
4 do you have anything further?
5 MR. WRIGHT: No, Your Honor.
6 THE COURT: Ladies and gentlemen of the
7 jury, in order to avoid keeping you late this
8 evening, the court will recess at this time, and
9 the Court will consider the instructions to be
10 given to you. I would hope that none of you will
11 find it inconvenient to report back at 9:00
12 tomorrow rather than 10:00. Is that an available
13 hour to all of you?
14 All right. Then, if you will, please
15 return to this courtroom, directly here at 9:00 A. M.
16 At this time the Court will instruct you the
17 lawyers will argue the case to you and then you will
18 retire to consider your verdict. It's of the
19 utmost importance that you recall the admonition
20 that the Court gave you this morning that you should
21 not discuss this case with anyone nor permit anyone
22 to discuss it with you nor within your presence.
23 Everyone please remain seated until the
24 jury has left the courtroom, and I will also tell
25 you we will do our best to get some heat. Just in

1 case, bring your coats.

2 (The jury left the courtroom.)

3 THE COURT: All right. Gentlemen, any

4 other matters for the record before court adjourns

5 for the day?

6 MR. WRIGHT: No, sir.

7 THE COURT: If not, then I would like to

8 see counsel in chambers so that we can continue

9 work on the instructions.

10 MR. RIXEY: Your Honor, perhaps I

11 misunderstood the Court. I would renew for the

12 record the motion which we previously made to

13 strike the evidence of the plaintiff and to enter

14 summary judgment for the defendant, and I would

15 cite the same reasons that have previously been

16 stated to the Court.

17 THE COURT: All right. The Court for the

18 same reasons will overrule the motion, and we will

19 now adjourn for the day.

20 MR. RIXEY: Will you note my exception,

21 please?

22 THE COURT: So noted. Do either of you

23 desire the court reporter to remain here this

24 evening?

25 MR. RIXEY: I certainly would not find it

1 necessary. If it's all right with the Court,
2 Mr. Wright, we can dictate such exceptions as we
3 might have to the court reporter while the jury
4 is out tomorrow morning.
5 THE COURT: Is that agreeable to you,
6 Mr. Wright?
7 MR. WRIGHT: Yes, sir.
8 THE COURT: All right, sir.
9 (The court adjourned at 4:18 P. M.,
10 January 8, 1976, until 9:00 A. M. January 9, 1976.)
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1 In the Circuit Court of the City of
2 Virginia Beach before Hon. Austin E. Owen, Judge,
3 and jury at 9:35 A. M., January 9, 1976, pursuant
4 to adjournment.
5 Appearances, same as heretofore noted.
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11 THE COURT: Ladies and gentlemen of the
12 jury, I first want to apologize to you for getting
13 you here at 9:00 o'clock and then not being ready
14 to go; but the weather being what it was, this
15 happened to be the morning that the secretary's
16 car wouldn't get her here in time to finish typing
17 the instructions, so we been delayed slightly.
18 You will recall at the commencement of the
19 proceedings on yesterday I advised you that at the
20 conclusion of all of the evidence I would have
21 further instructions for you. Now I ask your
22 attention now to the reading of those further
23 instructions.
24 (The Court read the instructions to the
25 jury.)

1 THE COURT: Mr. Wright, would you like to
2 make a closing statement to the jury?
3 MR. WRIGHT: Yes, Your Honor. Thank
4 you, sir.
5 (Mr. Wright made a closing argument on
6 behalf of the plaintiff.)
7 (Mr. Rixey made a closing argument on
8 behalf of the defendant.)
9 THE COURT: Ladies and gentlemen of the
10 jury, you've now heard all of the evidence in this
11 matter, the instructions of the Court and the
12 argument of counsel; and it's time for you to
13 retire to deliberate and consider your verdict.
14 I would suggest that your first order of business
15 be the election of a foreman or forewoman to guide
16 you in your deliberations and to sign your verdict
17 slip when you have arrived at your verdict. In
18 this case there are two possible verdicts; and to
19 assist you in returning your verdict, we have
20 prepared for you two alternative verdict slips.
21 One verdict slip merely reads, "We, the jury, find
22 for the defendant," and if that be your verdict,
23 that's what should be signed by the foreman and
24 returned to the Court. The other verdict slip
25 would read, "We, the jury, find for the plaintiff

1 and fix her damages at" -- and then there is a
2 blank in which you will insert the amount of damages
3 which you find from the evidence and the law, and
4 then different from most of the cases in which we
5 have heard, there follows, "of which damages set
6 forth above the sum of blank dollars represents
7 damages for expenses of hospitalization of the
8 decedent and his reasonable funeral expenses."
9 For clarification, just as you would in any of the
10 other cases which you may have tried, you will
11 arrive at one total sum representing the damages
12 which you feel that the plaintiff has sustained if
13 you feel that should be your verdict. Then as a
14 part of that total sum, you set forth in the
15 second blank which portion of that first award you
16 are awarding on account of hospitalization and
17 funeral expenses; and if that should be your verdict,
18 that's the one that will be signed by your foreman
19 and returned as your verdict. Only the slip
20 that represents the jury's verdict is to be signed
21 by the foreman.
22 I remind you again at this time that the
23 statements counsel made to you in both their opening
24 and closing arguments are not evidence but merely
25 intended to help you in understanding the evidence

and in applying the law and remind you further that no statement, no remark that the Court may have made at any time during the course of this trial is intended in any way to indicate to you the Court's opinion as to what the facts are. You are the sole judges of the facts.

You may now retire to consider your verdict. When you have reached your verdict or if you should need assistance beforehand, if you will knock on the door, the bailiff will notify the Court.

(At 10:50 A. M. the jury retired to consider its verdict.)

THE COURT: The Court will recess to chambers at this time, and counsel may at this time dictate to the reporter their objections, if any, to the Court's instructions.

MR. WRIGHT: I don't have any.

(The Court went into chambers.)

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OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

MR. RIXEY: Defendant renews its exceptions and objections to the Court's failure to strike the evidence of the plaintiff on the grounds previous stated.

The defendant further objects and excepts to the Court's granting of any instructions to the plaintiff for the reasons previously stated in regards to its motions to strike.

Defendant objects and excepts to the Court's granting of Instruction 3 without the language -- and the words "and without any contributory negligence or contributing cause" in the third from the last line of the instruction -- make that in the next to the last line of the instruction after the words "it must alone". Strike that. As originally offered, the instruction would have read, "It must alone and without any contributory negligence or contributing cause result in the death which is the subject of this action." The defendant contends that contributory negligence was just as much an issue of this case as was the negligence of the defendant, however speculative both of them might have been, and the failure of the Court to submit that issue to

1 the jury constitutes prejudicial error to the
2 defendant and is contrary to the law and the evidence.
3 The defendant excepts and objects to the
4 Court's granting of Instruction Number 8. This
5 instruction constitutes grievous error to the
6 defendant. It is prejudicial to the defendant and
7 contrary to the law and the evidence. What this
8 instruction does is to submit three issues of
9 negligence to the jury. One, to keep the water
10 reasonably clear; two, to have on duty at least one
11 reliable and competent person as a lifeguard; and,
12 three, to furnish such lifeguard with an elevated
13 chair at the deep end of the pool. The evidence
14 is clear that we did have a reliable and competent
15 person as a lifeguard. There is no evidence to the
16 contrary, no evidence that we didn't have a person
17 there who didn't have -- who did not possess the
18 qualifications as set forth in the city ordinance of
19 a reliable and competent person. He is a man in
20 his middle thirties with training in lifesaving and
21 other experiences in the U. S. Navy. It's
22 ridiculous that the Court would submit to the jury
23 an issue of negligence as to having on duty a reliable
24 and competent person when all of the evidence is
25 that we did have on duty a reliable and competent

1 person. He was right there at the pool and at the
2 scene of the swimming and the drowning.
3 The third item is to furnish an elevated
4 chair. The evidence is that we furnished an
5 elevated chair. We had it in the position that we
6 were directed to put it in by the department of
7 health. There is no evidence to the contrary, and
8 it is further ridiculous that the Court would submit
9 to the jury an issue of negligence on the part of
10 the defendant having to do with the furnishing of
11 an elevated chair when it was right there and there
12 is nothing to the contrary. The net result is
13 that in Instruction 8 two of the three items of
14 negligence set forth as being duties of the
15 defendant and wherein the jury was permitted to find
16 if they wanted to violation of duties. Two of
17 those three things were uncontradicted -- were
18 uncontradicted in the evidence as far as already
19 being furnished; and, therefore, no issues could
20 have been presented as to Items 2 and 3, the
21 competent, reliable person and the furnishing of
22 an elevated chair.
23 This instruction is further evidence of
24 the effort on the part of the plaintiff and the
25 effort on the part of the Court to look for and try

1 to find some evidence of negligence on the part of --
2 of the defendant. The defendant is greatly
3 prejudiced by the language of this instruction,
4 the way in which it is worded and the fact that a
5 jury is told that they can find a defendant
6 negligent in regard to the furnishing of a lifeguard
7 and having a chair when in fact they did furnish
8 a lifeguard and did have a chair. This instruction
9 is not designed to go to the proximate cause
10 question although it does refer to proximate cause.
11 We submit that the instruction is further
12 prejudicial in that it is contrary to the law as
13 set forth in the case of Blacka, B-l-a-c-k-a, v.
14 James at 205 Va. 646. In this case which was
15 discussed at length by the -- before the Court in
16 the motions to strike, the Virginia Supreme Court
17 determined that there was no proximate cause of
18 drowning when there had been no distress, no
19 indication of distress on the part of the deceased,
20 no outcry for help and no report that he had been
21 missing.
22 Those same facts apply to this case, and
23 the Court's refusal to support the law as set
24 forth in this case constitutes prejudicial error.
25 This case never should have gone to the jury.

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There is no proximate cause shown or proven by the evidence, and there certainly is no basis for Instruction Number 8 which would have submitted the issue to the jury.

The same remarks about proximate cause apply likewise to Instruction Number 6 which is language taken from the Blacka case setting forth in general terms the duties of the defendant to exercise ordinary care and to make provisions to guard against accidents. This case never should have gone to the jury, and there is no way that the jury could have been instructed properly as to the evidence and the law in this case wherein a verdict could come in for the plaintiff against the defendant.

Defendant further objects and excepts to the granting of Instruction Number 9 and Instruction Number 10 wherein both refer to compensation being awarded to the plaintiff for the expected loss of income of the decedent. Number 10 is a general damages instruction. Number 9 is a further elaboration on the loss of income element of damages, and the Court erred and prejudiced the defendant by granting Instruction Number 9 and permitting an undue reference and an undue calling

of attention of the jury to the matter of loss of income to the mother because of the death of the son.

Further, both instructions are in error as they are contrary to the cases found in 212 Virginia at Pages 841, 591 and 771. The trial Judge saw fit to grant the instruction as to loss of income in accordance with the case at 197 Va. 572, but he totally disregarded the three other cases found in 212 Virginia which constitute the most recent pronouncements on the subject by the Virginia Supreme Court.

The defendant has been prejudiced greatly by the granting of Instruction 9 and that portion of Instruction Number 10 which deals with loss of income.

Finally, the defendant objects and excepts to the Court's refusal to grant Instruction 4A which was an instruction dealing with the contributory concurring negligence on the part of the deceased infant. This matter has previously been covered with reference to another instruction.

We submit that if there is an issue of negligence to the defendant and its being a proximate cause of the drowning, then the issue of

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contributory negligence was likewise for the jury. The two balanced each other. There was no more evidence of one than there was of the other; and since the case is going to the jury, the Court has prejudiced the defendant by failing to grant Instruction 4A; and, further, the defendant sayeth naught.

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(At 11:44 A. M. the jury indicated they had arrived at a verdict and were recalled to the courtroom, where the following took place:)

THE COURT: All right. Ladies and gentlemen of the jury, you have reached your verdict.

THE CLERK: We, the jury, find for the plaintiff and fix her damages at $30,711.75, of which damages set forth above the sum of $711.75 represents damages for expenses of hospitalization of the decedent and his reasonable funeral expenses; and it's signed James L. Peck, foreman; date, January 9, 1976.

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1 Ladies and gentlemen of the jury, is this
2 your verdict? So say you all?
3 JURORS: Yes.
4 MR. RIXEY: I would ask the Court to poll
5 the jury if Your Honor please.
6 THE COURT: All right. Would you please
7 poll the jury.
8 THE CLERK: Betty Bourdon, is this your
9 verdict?
10 MRS. BOURDON: Yes, it is.
11 THE CLERK: James Peck, is this your
12 verdict?
13 MR. PECK: Yes.
14 THE CLERK: William Wright, is this your
15 verdict?
16 MR. WRIGHT: Yes, it is.
17 THE CLERK: Veronica White, is this your
18 verdict?
19 MRS. WHITE: Yes.
20 THE CLERK: Earl Scripture, is this your
21 verdict?
22 MR. SCRIPTURE: Yes.
23 THE CLERK: Virginia Murden, is this your
24 verdict?
25 MRS. MURDEN: Yes.

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THE CLERK: Edmond Morgan, is this your verdict?

MR. MORGAN: Yes.

THE COURT: All right. Ladies and gentlemen of the jury, the Court wants to thank you for your attention to this matter and your attendance here, and this completes your duties with respect to this matter and you are now discharged from further consideration.

Everyone else please remain seated while the jury leaves the court.

(The jury left the courtroom.)

THE COURT: All right. Gentlemen, are there any motions at this time?

MR. RIXEY: If Your Honor please, the defendant moves the Court to set aside the verdict as being contrary to the law and the evidence and to enter final judgment in behalf of the defendant, or in the alternative to grant the defendant a new trial.

We would ask the Court to -- if the motion is overruled, to suspend the execution of -- upon this judgment. I would ask the Court to set a bond for an appropriate appeal amount for a period of sixty days pending filing of Notice of Appeal and

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1 Assignments of Error and presentation of the case
2 to the Virginia Supreme Court.
3 THE COURT: Well, it's on a motion to
4 set aside the jury verdict as contrary to the law
5 and the evidence, and the Court overrules the
6 motion. On the motion for a new trial, for the
7 same reason the Court overrules that motion. On
8 the motion for suspension of the execution of the
9 judgment pending appeal, upon posting of an
10 appropriate bond, the judgment may, of course, be
11 suspended; and if counsel are unable to agree on
12 the amount of that bond, the Court will set it.
13 MR. RIXEY: Your Honor, I would think
14 something in the neighborhood of $35,000.00 would
15 be appropriate if Mr. Wright --
16 THE COURT: Is that figure agreeable?
17 MR. WRIGHT: Um-hum.
18 THE COURT: Then bond will be set in the
19 amount of $35,000.00 to be posted with the Court
20 with appropriate corporate surety satisfactory to
21 the Court.
22 MR. RIXEY: Let the record show our
23 exceptions if you will, please --
24 THE COURT: All right, sir.
25 MR. RIXEY: -- to the failure to -- to

sustain our motion.

THE COURT: So noted.

Thank you, gentlemen. That completes this matter for today.

MR. RIXEY: Thank you, Your Honor.

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