224 Va. 407
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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 800455

JACK L. FARREN, Administrator
of the Estate of Ellen E. Farren, Deceased

Appellant

V.

BOBBY EARL GILBERT and
ROANOKE RESTAURANT SERVICE, INC.

Appellees

JOINT APPENDIX

GLENN M. HODGE
RONALD D. HODGES
Wharton, Aldhizer & Weaver
90 North Main Street
Harrisonburg, Virginia 22801

Counsel for Appellant

WILLIAM R. SMITH
Attorney at Law
70 South High Street
P. O. Box 1266
Harrisonburg, Virginia 22801

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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Filed in the Clerk's Office ... 19 ... April ... 19 77.
Writ Tax $25.00
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L. L. 1.00
Misc.
Total $56.00

... W. KEMPER, Clerk
By Donna Frankhouser, D. C.

MOTION FOR JUDGMENT

Comes now the plaintiff, Jack L. Farren, Administrator of the Estate of Ellen E. Farren, deceased, and moves for judgment against the defendants, Bobby Earl Gilbert and Roanoke Restaurant Service, Incorporated, pursuant to Section 8.01-50 of the Code of Virginia, 1950, as amended, on the grounds and in the amount as hereinafter set forth.

(1) Plaintiff qualified and was duly appointed Administrator of the Estate of Ellen E. Farren, deceased, by the Circuit Court of the County of Rockingham, Virginia, on April 3, 1979.

(2) On January 2, 1979, at approximately 6:30 a.m. plaintiff's decedent was crossing the employees' parking lot at Liberty House Nursing Home in the City of Harrisonburg, Virginia.

(3) At the same time and place the defendant, Bobby Earl Gilbert, was backing a delivery truck over the parking lot in a northerly direction.

(4) Said delivery truck was owned by the defendant, Roanoke Restaurant Service, Incorporated, a Virginia corporation, having its office and principal place of business at 116 Hammitt Lane, Salem, Virginia. Defendant, Bobby Earl Gilbert, was an employee of the defendant, Roanoke Restaurant Service, Incorporated, and at the time and place aforesaid defendant, Bobby Earl Gilbert, was acting within the scope of said employment.

(5) At said time and place it was the duty of the defendant, Bobby Earl Gilbert, to operate his delivery truck free from negligence and with due regard for the safety of other persons in the parking lot.

(6) Notwithstanding his duties, said defendant, Bobby Earl Gilbert, did then and there so recklessly, carelessly and negligently operate his delivery truck that it backed over plaintiff's decedent, Ellen E. Farren. This collision was proximately due to the defendant's negligence and violation of his duties aforesaid.

(7) As a result of the aforesaid collision plaintiff's decedent was killed instantly on January 2, 1979.

(8) Plaintiff's decedent, Ellen E. Farren, at the time of her death was 46 years of age and was in good health and was employed by the Liberty House Nursing Home at wages of $2.90 per hour.

(9) Plaintiff's decedent died intestate survived by her statutory beneficiary, Jack L. Farren, her husband. Said beneficiary has sustained financial and pecuniary losses

as a result of the death of plaintiff's decedent and has suffered severe mental anguish at the loss of her company. Plaintiff claims damages against the defendants in the amount of Three Hundred Thousand Dollars ($300,000.00) on behalf of said beneficiary for pecuniary and financial losses; for sorrow, mental anguish and solace, loss of society, companionship and comfort of the plaintiff's decedent; and for funeral expenses in the amount of One Thousand Five Hundred Ninety-three Dollars ($1,593.00).

WHEREFORE, plaintiff demands judgment against the defendants, Bobby Earl Gilbert and Roanoke Restaurant Service, Incorporated, jointly and severally, in the amount of Three Hundred Thousand Dollars ($300,000.00) and costs expended.

JACK L. FARREN, ADMINISTRATOR OF THE
ESTATE OF ELLEN E. FARREN, DECEASED
By Counsel

GLENN M. HODGE
Of Wharton, Aldhizer & Weaver
P. O. Box 809
90 North Main Street
Harrisonburg, Virginia 22801
Counsel for Plaintiff

Filed in the Clerk's Office
Rockingham County, Va.

MAY 4 1979

Deputy Clerk

GROUNDS OF

DEFENSE

AT LAW NO. 6125

Comes now the defendants, Bobby Earl Gilbert and Roanoke Restaurant Service, Incorporated, by counsel, and for their Grounds of Defense to the Motion for Judgment filed herein states as follows:

1. Defendants admit the allegations contained in paragraphs (1) and (4) of plaintiff's Motion for Judgment.

2. Defendants admit that the plaintiff's decedent was found in the employees' parking lot at Liberty House Nursing Home in the City of Harrisonburg, Virginia on January 2, 1979 at approximately 6:45 AM, however, the defendants deny the remaining allegations contained in paragraph (2) of plaintiff's Motion for Judgment.

3. Defendants admit that Bobby Earl Gilbert, was backing a delivery truck over the said parking lot in a northerly direction at approximately 6:45 AM on the morning of January 2, 1979, but deny the remaining allegations contained in paragraph (3) of plaintiff's Motion for Judgment.

4. Defendants admit that it was the duty of the defendant, Bobby Earl Gilbert, to operate his delivery truck in a reasonable manner at the time and place aforesaid, as set forth in paragraph (5) of plaintiff's Motion for Judgment, and allege that said vehicle was operated with reasonable care and with due regard for others.

5. Defendants deny the allegations contained in paragraphs (6) and (7) of plaintiff's Motion for Judgment.

6. Defendants do not have sufficient knowledge to either admit or deny the allegations contained in paragraphs (8) and (9) of plaintiff's Motion for Judgment.

7. Defendants specifically deny that they are indebted to plaintiff in any amounts.

WHEREFORE, defendants demand judgment in their favor and their costs in this behalf expended.

Bobby Earl Gilbert
and
Roanoke Restaurant Service, Incorporated
By Counsel

Of William R. Smith, P.C.
P. O. Box 1266
70 South High Street
West Side Offices
Harrisonburg, Virginia 22801

I do hereby certify that I have this 4 day of May, 1979, mailed and/or delivered a copy of the foregoing GROUNDS OF DEFENSE to Glenn M. Hodge, Esquire, of Wharton, Aldhizer & Weaver, P. O. Box 809, 90 North Main Street, Harrisonburg, Virginia 22801, counsel of record for plaintiff.

Recorded In
Common Law
Order Book 31 Page 361
10/17/79

O R D E R

At a pretrial conference held on October 17, 1979, Glenn Hodge, Esquire appeared for the plaintiff and William Smith, Esquire appeared for the defendant.

The defendants admitted that their truck struck the plaintiff's decedent at the time and place alleged in the Motion for Judgment, and such collision constituted a proximate cause of the death of the decedent. The Court is of the opinion that although contributory negligence and assumption of risk were not pleaded, the jury may be instructed upon such issues, if the plaintiff's evidence includes sufficient evidence thereof to constitute a jury issue; however, if the defendant should supplement his grounds of defense by pleading contributory negligence or assumption of risk, including the particulars thereof, by October 31, 1979, such leave is granted.

The parties shall comply with local Rule 3:3(b) by filing with the Clerk and serving on opposing counsel not later than November 2, 1979.

The defendant admitted that the attached Funeral Bill in the amount of $1593.00 was incurred by the plaintiff as a result of the collision described in the Motion for Judgment.

The Court takes under consideration the plaintiff's oral motion in limine to exclude from evidence any information with reference to the remarriage of the decedent's widower; each party is requested to file a memorandum of not more than two pages by November 1, 1979.

The Clerk shall place this case on the Motions docket of the Court on the 5th day of November, 1979, for argument on the motion in limine and to reconfirm the trial date of November 14, 1979.

ENTER: _____

Filed in the Clerk's Office
Rockingham County, Va.

OCT 18, 1979

Marlene Kay Clerk

SUPPLEMENT TO
GROUNDS OF
DEFENSE
AT LAW NO. 6125

Comes now the Defendants, Bobby Earl Gilbert and Roanoke Restaurant Service, Incorporated, by counsel, with leave of Court, and file their Supplement to Grounds of Defense as follows:

(a) Defendants allege that the Plaintiff's decedent appreciated or should have appreciated that there was a hazard or danger involved in crossing the parking and loading area while the Defendant Gilbert was backing the subject truck and that she voluntarily exposed herself to such hazard or danger and thereby voluntarily assumed the risk of the injuries complained of.

(b) Defendants allege that the decedent's death was the proximate result of her negligence in crossing the parking and loading area without looking or if looking,

failing to see or heed the truck being backed by the Defendant Gilbert, or otherwise failing to use reasonable care to cross said parking area.

Bobby Earl Gilbert
and
Roanoke Restaurant Service, Incorporated
By Counsel

Of William R. Smith, P.C.
P. O. Box 1266
70 South High Street
West Side Offices
Harrisonburg, Virginia 22801

I do hereby certify that I have this 18 day of October, 1979, mailed and/or delivered a copy of the foregoing Supplement To Grounds Of Defense to Glenn M. Hodge, Esquire, of Wharton, Aldhizer & Weaver, P. O. Box 809, 90 North Main Street, Harrisonburg, Virginia 22801, counsel of record for Plaintiff.

We, the jury, on the issues joined, find for the defendants.

Foreman 11/15/79

Recorded In
Commission Book
Order Book 31 Page 404
12/5/79

O R D E R

On November 15, 1979, came the parties hereto, and by their respective attorneys, and likewise came again the jurors sworn to try the issue herein joined pursuant to their adjournment from the previous day, November 14, 1979.

And the jurors aforesaid having now heard the evidence and arguments of counsel, and having received the instructions of the Court, retired to their room to consider their verdict and after some time returned into Court with a verdict finding on the issues joined for the Defendants, and the jury was discharged.

Thereupon, the Plaintiff moved the Court to set aside the verdict of the jury as contrary to the law and evidence in this case; for errors committed by the Court in granting certain instructions of the Defendant, over the Plaintiff's objection, as more fully set out in the record; for the Court's failure, over Plaintiff's objection, to grant certain instructions requested by the Plaintiff, as more fully set out in the record; and for errors by the Court in permitting certain testimony, over Plaintiff's objections, as more fully set out in the record; which motion was denied and to which action

Plaintiff, by counsel, duly excepted.

Wherefore, it is considered by the Court and it is hereby ORDERED and ADJUDGED, pursuant to the aforesaid verdict of the jury, that the Plaintiff recover nothing of said Defendants about his action herein, but that the said Bobby Earl Gilbert and Roanoke Restaurant Service, Incorporated recover and have judgment against the said Jack L. Farren, Administrator of the Estate of Ellen E. Farren, Deceased, for their costs expended.

The execution of this judgment is suspended for twenty-one days pending the plaintiff's motion to set aside the verdict

ENTER:

Paul A. Holstein, Judge Designate

Date: December 5, 1979.

I ask for this:

William R. Smith p.d.

Seen:

Glenn M. Hagee p.q.

MOTION TO SET ASIDE VERDICT AND AWARD A NEW TRIAL

Comes now the plaintiff, Jack L. Farren, by counsel, and respectfully moves that the Court set aside the jury verdict in favor of the defendant and award a new trial and for his grounds therefor states as follows:

(1) The Court erred in granting the defendant's instructions lettered "G" and "J".

(2) The Court erred in failing to sustain the plaintiff's motion to strike the defendant's evidence at the conclusion of the case and to direct that the jury find the defendant guilty of negligence as a matter of law.

(3) The Court erred in refusing to grant plaintiff's instructions numbered "5", "6", "10", "12" and "14".

(4) The Court erred in allowing the defendants' witnesses, Charlotte L. Ritchie and Virginia Whisler, to testify over plaintiff's objection.

(5) The verdict of the jury was contrary to the law and the evidence in this case and was without evidence to support it.

JACK L. FARREN, Administrator
of the Estate of Ellen L.
Farren, Deceased
By Counsel

GLENN M. HODGE
RONALD D. HODGES
Of Wharton, Aldhizer & Weaver
90 North Main Street
Harrisonburg, Virginia 22801
Counsel for the plaintiff

By Glenn M. Hodge

Filed in the Clerk's Office
Rockingham County, Va.

DEC 5 1979

Donna Fleischauer Deputy Clerk

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion to Set Aside Verdict and Award a New Trial was mailed this [illegible] day of December, 1979, to William R. Smith, Esquire, P. O. Box 1266, Harrisonburg, Virginia, 22801, counsel for defendants.

Of counsel for ~~plaintiff~~

ORDER SUSPENDING JUDGMENT

Upon motion of plaintiff, counsel for the defendant not objecting, the order entered in this case on December 5, 1979 is hereby suspended until January 23, 1980 for the purpose of permitting the plaintiff to file a memorandum in support of plaintiff's motion to set aside the verdict previously filed in this case. The plaintiff's memorandum in support of the motion to set aside the verdict shall be filed by January 4 and the defendant's reply memorandum shall be filed by January 14, 1980.

Date: 12/20/79

ENTER: Paul A. Holtzman Judge

I ASK FOR THIS:

Counsel for plaintiff

SEEN:

Counsel for defendants

Recorded In
Order Book 31 Page 417
12/20/79

Filed in the Clerk's Office
Rockingham County, Va.

JAN 28 1980

Deputy Clerk

OPINION
January 24, 1980

This is a wrongful death case in which the jury returned a verdict for the defendants, and is now before the Court on the plaintiff's motion to set aside the verdict and grant a new trial.

The principal issue is whether the court erred in granting an "unavoidable accident" instruction requested by the defendants.

Instruction "J", granted over the plaintiff's objection, told the jury, "the law recognizes that accidents may occur without negligence on the part of any party involved, and that persons may receive injuries as a result thereof. Such accidents are known as unavoidable accidents and if you believe from the evidence that Ellen E. Farren died as a result of an unavoidable accident, that is, without negligence on the part of the defendant Gilbert or on her part, then you should find your verdict in favor of the defendants."

The plaintiff argues that the defendant, Gilbert, while backing his truck, saw the decedent, Ellen Farren, or by the exercise of reasonable care should have seen her before his vehicle struck her; and that his failure to see her and avoid striking her was negligence as a matter of law. The plaintiff argues also that the decedent was without negligence.

The issue of the defendant's negligence and the issue of the decedent's contributory negligence were submitted to the jury on the following facts:

Ellen E. Farren, forty-seven years of age at the time of her death on January 2, 1979, was an employee of Liberty House Nursing Home in Harrisonburg, Virginia, where the accident occurred in the delivery area of the Nursing Home at or about 6:40 a.m., on a dark and rainy morning.

Bobby Earl Gilbert was an employee of Roanoke Restaurant Service, Incorporated, and at the time and place of the accident was driving his employer's refrigeration truck, and was making one of his usual deliveries to the Nursing Home as he had done more than five hundred times. Bruce Kelly, a fellow employee, was riding in the cab of the truck.

There were no eye witnesses to the accident. The last person to see Mrs. Farren was Mrs. Frances Mowbry, the Nursing Home's housekeeper, who saw Mrs. Farren sitting at the wheel of her parked automobile when Mrs. Mowbry got out of her parked automobile to unlock the door to the work area which was well lighted. She did not see Mrs. Farren alive after that.

The defendant drove his truck in the same manner as he had driven in making his past deliveries, he entered the area and backed to the unloading point at two or three miles per hour, and used the standard equipped mirrors to ascertain whether his movement could be made in safety.

Although he continued to look Gilbert did not see Mrs. Farren before she was struck. He felt a bump just as he set the brake to stop. He got out of the truck and found the decedent's body lying to the left of the truck's front wheel.

The record is void of any evidence to explain how and why the accident happened. It fails to establish the exact position of Mrs. Farren when she was struck. It fails to establish the exact part of the truck which caused the injury.

The plaintiff in support of his motion to set aside the verdict and grant a new trial on the ground that the court erred in granting an "unavoidable accident" instruction, cites Dameron v. Hagy, decided October 5, 1979.

In Dameron the sole issue was whether the trial court erred in granting an "unavoidable accident" instruction for the defendants, where the facts were:

"Two vehicles entered the intersection of two streets and collided. Traffic at the intersection was controlled by a traffic light. Each driver testified that the light facing the driver was green. Neither party offered evidence to show whether the traffic light was defective."

The Supreme Court held that it was reversible error to give the instruction, observing:

"An unavoidable accident is one which occurred in the absence of negligence upon the part of all of the parties charged therewith, and

We have declined to abolish the doctrine of unavoidable accident or to limit it to cases involving accidents resulting from unknown causes".

In Dameron, the defendants advanced the theory that the testimony that the traffic light was green facing both drivers raised an inference that the device malfunctioned and that, in light of this circumstance, neither driver was guilty of negligence, and that an unavoidable accident instruction was proper, to which the Court observed:

"We disagree. Defendant's argument fails because their theory involves a non sequitur. Even if the inference they draw from the testimony is reasonable, it does not follow that the drivers were free of negligence. A green traffic light does not suspend the duty a motorist owes other users of the highways; and

Even if the jury believed that the traffic light was green, it could have found that the collision resulted from the negligence of one of the drivers or from the concurring negligence of both."

In Holbert vs. Evans, 209 Va. 210, the Supreme Court approved the granting of an unavoidable accident instruction in proper cases. The Court observed:

"What is a proper case is, of course, the problem. We have made it plain that where the only evidence of the cause of an injury is that it resulted from human fault, an instruction on unavoidable accident is improper; and

At the other end of the spectrum is the case where the only evidence of the cause of an injury is that it occurred without human fault.

In the latter instance, the question of an unavoidable accident instruction would be moot since the matter would have to be decided by the Court, as a matter of law.

In between the two extremes lies the area where the instruction may be warranted. If, in a case otherwise proper for the jury decision, there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care notwithstanding that the accident occurred, the question of whether the injury was the result of negligence or of unavoidable accident should be covered by appropriate instructions and submitted to the jury."

In Farren the jury were told that if they believed from the evidence Ellen Farren died as a result of an unavoidable accident, that is, without negligence on the part of the defendant, Gilbert, or on her part then they should find their verdict in favor of the defendants.

They were also told that the burden was on the plaintiff to prove by a preponderance of the evidence that the defendant, Gilbert, while driving his truck at the time and place of the accident, was negligent, and that such negligence, when proven, was the proximate cause of Mrs. Farren's death.

The jury were also told that the burden was on the defendant to prove that Mrs. Farren was contributorily negligent unless such negligence was disclosed by the plaintiff's evidence.

The only negligence chargeable to the defendant was his failure to see Mrs. Farren while backing his truck and avoid striking her. The plaintiff argues that the defendant saw her, or by the exercise of reasonable care should have seen her.

The defendant says that he did not see the decedent, that he was keeping a proper lookout, and that for some unexplained

circumstance the decedent was struck by his vehicle, without fault of the defendant.

The question whether the defendant saw the decedent, or by the exercise of reasonable care should have seen her, and his failure to avoid striking her, was a factual issue for the jury.

The question whether the decedent was contributorily negligent was also a factual issue for the jury.

Both issues were submitted to the jury, and the verdict resolved the issues in favor of the defendants.

It is my considered opinion that the facts in Farren differ from the facts in Dameron. In the latter case the drivers were not free of negligence and the accident resulted from the negligence of one of the drivers or from the concurring negligence of both. In Farren, there is a reasonable theory of the evidence under which the parties involved may have been held to have exercised due care notwithstanding that the accident occurred, and the question of whether Mrs. Farren's death was the result of negligence or of unavoidable accident was properly submitted to the jury.

It is my further opinion that since the principal issue in Farren, the case at bar, is whether the court erred in granting an "unavoidable accident" instruction, it is unnecessary for the court to consider the plaintiff's other assignments of error. I disagree that the cumulative effect of the other errors cited in the plaintiff's memorandum prevented the plaintiff from receiving an impartial hearing.

This court finds that the plaintiff's motion to set aside the verdict, and grant a new trial should be overruled, and the verdict affirmed.

ENTER:

Judge Designate
January 24, 1980

NOTICE OF APPEAL

Pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, the plaintiff gives notice of his intent to file a petition for appeal in this matter. A transcript of the trial has previously been filed with the Clerk of the Court.

JACK L. FARREN, Administrator
of the Estate of Ellen E.
Farren, Deceased
By Counsel

GLENN M. HODGE
RONALD D. HODGES
Of Wharton, Aldhizer & Weaver
90 North Main Street
Harrisonburg, Virginia 22801
Counsel for plaintiff

By _____

Filed in the Clerk's Office
Rockingham County, Va.

JAN 25 1980

_____ Deputy Clerk

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed this 25th day of January, 1980, to William R. Smith, Esquire, P. O. Box 1266, Harrisonburg, VA, 22801, counsel for defendant.

_____
Of counsel for plaintiff

ASSIGNMENT OF ERROR NO. I

THE COURT ERRED IN GRANTING THE DEFENDANTS' INSTRUCTIONS "G" and "J".

Farren Estate v.
Gilbert, et al

INSTRUCTION G

One who voluntarily assumes the risk of injury from a known hazard or danger cannot recover for injuries received from such hazard or danger. And if you believe from a preponderance of the evidence that the Plaintiff's intestate fully appreciated that there was hazard or danger involved in the venture she undertook, and that she voluntarily exposed herself to such hazard or danger, and that she was injured as a result of such hazard or danger, then she cannot recover even though you may also believe that the Defendant Gilbert was negligent.

Farren Estate v.
Gilbert, et al

INSTRUCTION 7

The Court instructs the jury that the law recognizes that accidents may occur without negligence on the part of any party involved, and that persons may receive injuries as a result thereof. Such accidents are known as unavoidable accidents and if you believe from the evidence that Ellen E. Farren died as a result of an unavoidable accident, that is, without negligence on the part of the Defendant Gilbert or on her part, then you should find your verdict in favor of the Defendants.

ASSIGNMENT OF CROSS-ERROR

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANTS' MOTION TO STRIKE THE PLAINTIFF'S EVIDENCE AT THE CONCLUSION OF PLAINTIFF'S CASE AND ERRED IN FAILING TO GRANT DEFENDANTS' MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT MADE AT THE CONCLUSION OF THE CASE.

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November 15, 1979

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1. (Jury Impaneled and Sworn,
Opening Statements of Counsel)
2.

3. WITNESS - HUBERT B. MYERS

4. Direct Examination by Mr. Hodge:

5. Q. Would you state your name?

6. A. Hubert B. Myers.

7. Q. And what is your occupation?

8. A. Detective for the Harrisonburg Police Department.

9. Q. Lt. Myers, directing your attention to January 2nd, 1979,
10. did you have occasion to investigate an accident?

11. A. Yes, I did.

12. Q. And what was the location?

13. A. That would be 95 South Avenue, Harrisonburg, Virginia.
14. That is the Liberty Street Nursing Home located in the
15. middle of the block there on South Avenue. And South
16. Avenue is located in the south portion of the city.

17. Q. What time did you arrive at the scene of the accident?

18. A. Approximately 6:50 A.M.

19. Q. And did you determine what time the accident had approxi-
20. mately occurred?

21. A. Our department received the call at 6:40 A.M.

22. Q. What were the weather conditions at the time?

23. A. It was raining lightly and it was dark. That hour of
24. the morning it was dark.

1. Q. Lt. Myers, I am going to show you a series of pictures.
2. COURT: Could you read into the record your identifica-
3. tion number as you present them?
4. Q. These are of the area of the accident. Now, Plaintiff's
5. Exhibit #1, would you identify that?
6. A. That is the entire scene, Mr. Hodge, looking toward the
7. east.
8. Q. Would you point out to the jury which direction would
9. be east.
10. A. The east would be directly behind the building here.
11. More or less the picture is taken just about the way the
12. picture is laid out here. This would be the north and
13. this would be toward the south.
14. Q. Now, Plaintiff's Exhibit #2. Would you also identify
15. that.
16. A. This is the same scene, but the camera was a little bit
17. closer, and taking the western part of the nursing home.
18. Q. And would you identify Plaintiff's Exhibit #3?
19. A. Again, this is another picture closer to the nursing
20. home, taken on the west side of the building.
21. Q. This was in the parking area?
22. A. This was in the parking area and this shows part of
23. where the truck had been setting and where I found the
24. victim.

1. Q. Plaintiff's Exhibit #4.
2. A. This is a driveway coming off and South Avenue. This is
3. taken on the south side of the building. This driveway
4. runs east and west and then goes north down to the west
5. side of the building.
6. Q. And Plaintiff's Exhibit #5.
7. A. This shows the west side of the building, it shows the
8. loading doors on the west side of the building.
9. Q. Now, Officer Myers, these pictures, of course, were not
10. taken the day of the accident and would not depict the
11. scene of the accident at that time; is that correct?
12. A. No sir, they were not taken the day of the accident.
13. Q. And, in particular, these vehicles that are parked right
14. here were not present on the morning of the accident.
15. A. Was not. No sir.
16. Q. Now, showing you this picture.
17. A. No sir, these cars weren't in these places the morning
18. of the accident.
19. Q. Were there any cars though?
20. A. There was one or two cars parked there, Mr. Hodge, that
21. morning.
22. Q. Now, showing you a series of four pictures, they are
23. numbered Plaintiff's Exhibit #6 through #9. Referring
24. specifically to Plaintiff's Exhibit #6, would you des-

1. cribe and identify that.
2. A. I took this picture on the morning of January 2nd, approx-
3. imately 7:00 A.M. It was still dark at the time. This
4. is how I found the scene when I arrived there. I found
5. a body in the roadway, I found a White tractor with tan-
6. dem wheels on it parked just north of the victim.
7. Q. Would you identify Plaintiff's Exhibit #7.
8. A. I also took that picture on the morning and time in ques-
9. tion, just a different angle of the camera. This would
10. be taken from the east side. That one was taken, I be-
11. lieve, from the west side.
12. Q. Would you identify Plaintiff's Exhibit #8?
13. A. This also was taken on the morning and time in question.
14. This was the back of the White tractor truck, this is
15. taken back of the truck near the loading dock. This was
16. taken on the west side of the building.
17. Q. When you say White truck, you are referring to . . .
18. A. The kind of truck.
19. Q. The trade name, who makes it.
20. A. Yes.
21. Q. And then Plaintiff's Exhibit #9?
22. A. Yes sir. This picture was taken between the wall of the
23. nursing home and the right side of the truck here. It
24. showed the space between the truck and the wall of the

1. building. And this also shows the victim being picked
2. up.
3. Q. Now, Lt. Myers, in reference to this parking area, can
4. you describe to the jury the location of any lights which
5. would illuminate the area, and you may make reference to
6. any notes that you have in terms of refreshing your mem-
7. ory or the pictures you have. If you want to come down
8. here so we point them out to the jury . . .
9. A. Yes sir, it shows some floodlights--you'd have to look
10. real close to see them--there's a floodlight here and
11. a floodlight in the center here. I'm talking of the
12. two floodlights on the corner, these are small flood-
13. lights. Here and here is a big vapor light, I call them
14. vapor lights, right here in the center. That's the three
15. you can see.
16. Q. Now, are there any other floodlights that would be on
17. any other portion of the building?
18. A. There's two floodlights, Mr. Hodge, on up further, up
19. this way. We don't have a picture to show that. Yes
20. sir, it's on the other corner.
21. Q. It would be on the south portion of the building?
22. A. It would be on the north side of this corner.
23. Q. But this is the south portion of the total building, is
24. this not true?

1. A. Yes sir.
2. Q. Now, at the time you arrived you stated that it was
3. dark. Did the lights illuminate the parking area?
4. A. Mr. Hodge, it depends on how much illumination you're
5. talking about. You could see one end to the other and
6. you could see movement from one end of the lot to the
7. other; but the question is could you identify a person
8. at the far end. That would be questionable.
9. Q. In reference to these pictures, could you more precisely
10. have one of these pictures to identify the location of
11. the body in reference to a mark or an area of the parking
12. lot?
13. A. This would show better.
14. Q. You're pointing to Plaintiff's Exhibit #5?
15. A. Yes.
16. Q. Now, would you locate a reference point where the body
17. was located?
18. A. The body would be located up on the second mark here, and
19. these marks haven't been changed. I don't know when
20. these pictures were taken, but I was out there just sev-
21. eral days ago and the markings in the street hasn't chang-
22. ed as far as identification of the street. If you looked
23. here it would show . . .
24. Q. You're looking at Plaintiff's Exhibit #7?

1. A. In #7 it would show the victim on the north side of this
2. white line, the number two line on this one here.
3. Q. You said the number two line? Look at it again.
4. A. Pardon me, it would be number three line. It's the
5. number three line, my mistake on that, the number three
6. line. It would be the line that extends out here. It
7. wouldn't be this line.
8. MR. SMITH: Mr. Hodge, I wonder if you could explain
9. what number one, two and three lines are?
10. A. Number three line . . .
11. Q. Well, what are these lines for?
12. A. They are parking spaces. They are parking spaces and
13. this shows here, here and here; parking spaces here,
14. here and here. In other words, it's a place for two
15. cars. This car is improperly parked at the time, it
16. belongs up in this other place up here.
17. Q. Would you again point out the three lines that you are
18. talking about?
19. A. The three lines that we're talking about, there's one up
20. here near the door, there's one here and here. A place
21. for two cars to park. This car to be properly parked
22. should be there and that one should be in this place
23. here. They are not properly parked.
24. Q. So, we're talking about locations right immediately in

1. front of the middle of the three lines marking the park-
2. ing areas?
3. A. Yes sir.
4. Q. Now, what direction was the body lying?
5. A. It would be kind of an eastern--not necessarily north
6. and south, but kind of an eastward direction.
7. Q. Now, did you have occasion to measure--let me withdraw
8. that question. What is the parking--what other parking
9. area is involved in this parking . . .
10. A. Mr. Hodge, on the . . .
11. Q. You're referring to Plaintiff's Exhibit #1.
12. A. This would show, Exhibit #1 would show, the other parking
13. in the area, which cars parked east and west, and this
14. would be on the west side of the building. They have
15. parking on both sides, they have parking that's north and
16. south next to the building, and then we have parking east
17. and west further west of the building up next to the bank
18. there. You can see the side of the bank there.
19. Q. Did you have occasion to measure the distances between
20. the pull-in parking and the parallel parking for the . .
21. A. You want to know the distance between this mark here
22. and over to the other parking spaces?
23. Q. Yes.
24. A. I have that, I made a note of that yesterday, and you

1. should have it on the back of a sheet there.
2. Q. Is that your note there?
3. A. Yes sir.
4. Q. What is the distance then that you measured?
5. A. It would be twenty-one feet two inches. I took this
6. off, I measured it myself, and this was done with a
7. steel tape.
8. Q. Now, Officer Myers, did you have occasion to determine
9. where Mrs. Farren's automobile was parked that morning?
10. A. Yes sir, I did.
11. Q. Have you had occasion to go out and reconfirm the loca-
12. tion of this parking spot?
13. A. Yes sir, I did. She was parked at the fifth parking
14. place on the west side of the building, and we're talking
15. about the parking on the west side of the building that
16. goes east and west. This is the pull-in parking.
17. Q. Now, is there any mark out there at the scene that you
18. can use, physical mark, as a reference to which one of
19. these parking spaces.
20. A. Yes. It would be the first full space south of the pole
21. light. There's a pole there, an electric light pole
22. there, up on the bank right behind--and I don't believe
23. you have a picture to show that--right behind these cars
24. here. There's a pole, and it would be the first full

1. space behind--south of the pole there.
2. Q. Now, in reference to Plaintiff's Exhibit #2, Plaintiff's
3. Exhibit #1, could you locate where her car would have
4. been parked in reference to the cars that are here on
5. this picture?
6. A. That would be just about straight across from that third
7. mark. I believe it would be the . . .
8. MR. SMITH: Your Honor, I object to that. Unless he's
9. certain which one it is, I would object to him . . .
10. COURT: Unless you can state that that is--your objec-
11. tion is well taken.
12. Q. Officer Myers, in reference to Plaintiff's Exhibit #2,
13. showing a building that extends out from the main build-
14. ing of the Liberty House Nursing Home, was this material
15. on the concrete to the south side present at the time of
16. the accident that morning?
17. A. Yes sir. I think the picture that I took that morning
18. will show that same material there.
19. Q. This would be Exhibit #6?
20. A. Yes. As a matter of fact, the sand and the blocks are
21. still there.
22. Q. Officer Myers, would you tell the jury how many down
23. spouts are in back of that building?
24. A. I counted them yesterday, Mr. Hodge, and there's ten

1. down spouts on the west side of the Liberty Street Nurs-
2. ing Home.
3. Q. Officer Myers, I believe you previously testified with
4. reference to Plaintiff's Exhibit #1 that these two doors
5. represented a loading area.
6. A. Yes.
7. Q. Was the truck that morning backed up to these doors or
8. to other doors?
9. A. These three doors, it was backed up to these three load-
10. ing or unloading doors. It was parked right in that
11. area that they unload, in this area here. That's the
12. three doors right there together.
13. Q. Now, you are showing immediately to the side of the
14. utility building, three doors in a row.
15. A. Yes sir.
16. Q. And the truck was backed up to those doors?
17. A. Yes sir.
18. Q. Rather than the two at the end.
19. A. No, it was just north of this little offset in the pic-
20. ture here. It was backed up to these three doors out
21. there.
22. Q. Was the truck at an angle then to the driveway?
23. A. Yes, a slight angle.
24. Q. Did you determine who was driving the truck?

1. A. Yes sir.
2. Q. And who was that?
3. A. Bobby Earl Gilbert, Route 1, Elliston, Virginia.
4. Q. Did Mr. Gilbert make any statement to you concerning
5. anything that he saw or felt before the accident happen-
6. ed?
7. A. Yes, he did.
8. Q. And what was that?
9. A. He said he was in the process of backing up, starting
10. at South Avenue coming on around the building, somewhat
11. in the driveway, he felt a thump. When he parked it--
12. after he got to where he was to be parked, he looked out
13. and saw a body in the road. He made the statement that
14. he felt a slight thump.
15. Q. As he was backing?
16. A. Yes sir.
17. Q. Did he make any statement concerning seeing any auto-
18. mobiles?
19. A. Yes sir . . .
20. Q. Or lights.
21. A. He said he said car lights. As he got straightened out
22. to back up he could see the end of the building and he
23. saw car lights. That would be in the parking area, Mr.
24. Hodge.

1. Q. Do you recall that morning whether there was any machinery
2. or any equipment that you could hear from the Liberty
3. House Nursing Home complex; making any noise or anything
4. running?
5. A. No sir.
6. Q. Exhausts or so forth?
7. A. No sir, I don't.
8. Q. Now, Officer Myers, when you observed the decedent,
9. Ellen Farren, what part of her body had been injured?
10. A. The best I could determine, her head.
11. Q. Is that the only part?
12. A. Yes sir.
13. Q. Was there any indication of tears or abrasions or scrapes
14. or pieces of cloth that indicated that she had been
15. knocked down or rolled or drug by the truck?
16. A. No sir, I couldn't find anything.
17. Q. Were you able to determine what part of the truck had,
18. in fact, struck her?
19. A. No sir, I did not.
20. Q. Do you recall how many cars were in the parking lot
21. at the time you got there parked on the pull-in side or
22. the west side?
23. A. I don't believe it was over four at the most, Mr. Hodge.
24. I remember the victim's car being there and Mrs. Mou-

1. bray's--I don't recall her car being there, but I think
2. there were several other cars there. And I think maybe
3. one of the photos would show that.
4. Q. I show you Plaintiff's Exhibit #7. Does that show auto-
5. mobiles parked on the pull-in or west side?
6. A. Yes sir.
7. Q. Now, are either of these two automobiles Mrs. Farren's?
8. A. No sir. Her automobile would be parked further south.
9. MR. HODGE: Your Honor, we have no other questions of
10. this witness. We would move that these photographs be
11. introduced.
12. COURT: As I understand, it was agreed that these pho-
13. tographs would be introduced without objection. They
14. may all be marked accordingly. Mr. Smith.
15.
16. Cross Examination by Mr. Smith:
17. Q. Mr. Myers, since Mr. Hodge has asked you concerning
18. statements made by Mr. Gilbert, which I believe were tak-
19. en on the day of the accident; is that correct?
20. A. Yes sir.
21. Q. What time were these statements taken with respect to
22. when the accident occurred?
23. A. Approximately an hour after the accident, Mr. Smith.
24. Q. Did you have anything to make you believe that he was

1. upset at the time?
2. A. Yes sir. He was very upset at the time.
3. Q. Okay. In regard to the thump that he allegedly felt or
4. at least told you that he had felt, did he indicate that
5. the thump was a body or . . .
6. A. No sir, Mr. Smith. He just said he felt a thump.
7. Q. Are you sure that he used the word "thump"?
8. A. "I felt a slight thump."
9. Q. Did he say where he felt it?
10. A. When he was in the process of backing up.
11. Q. How did he feel the thump? Did the truck move or the
12. steering wheel move, or . . .
13. A. No, he felt something--the way I understood him to say--
14. he felt something when the truck was in motion. He felt
15. a slight thump. He used the words, "slight thump."
16. Q. Do you have any idea where it was or where the truck was
17. in respect to where you ultimately found the body that
18. he felt this thump?
19. A. No sir, there's no way--you know, he said in the process
20. of backing up, a slight thump, and when he went to get
21. out of the truck, you know, opened the door of the truck,
22. he looked out and saw the body out in front of the truck.
23. Q. So, he could have felt a thump up around the corner when
24. he was first coming in as far as you know.

1. A. He didn't say, Mr. Smith.
2. Q. All right, Mr. Myers, would you describe these lights
3. around the building, and what I'm getting to was whether
4. they were spotlights, floodlights; and, again, how many
5. there were in each set.
6. A. On the northwest corner there is two small floodlights.
7. Q. All right, why don't we refer to these photographs.
8. I refer to Plaintiff's Exhibit #4, which shows the en-
9. trance actually to the parking lot on the west side of
10. the building.
11. A. Yes sir.
12. Q. All right, now, where would the floodlights be . . .
13. A. On the north side of the building.
14. Q. All right, so it's not shown in this picture . . .
15. A. No, on the north side of the building there's two right
16. on the corner.
17. Q. In other words, if you come to the end of the roof here
18. where it starts on down the other way, there's two flood-
19. lights just around the corner.
20. A. Yes sir.
21. Q. Are they underneath the eaves?
22. A. Yes sir.
23. Q. And how many are there?
24. A. There's two there.

1. Q. And they are . . .
2. A. They're a little bit smaller that that system there (in-
3. dicating speakers in jury box).
4. Q. And they're of the flood-type?
5. A. Flood-type, yes sir. They're probably maybe four inches
6. across.
7. Q. To your knowledge were they working at that time?
8. A. Yes sir. As a matter of fact, I think one of the pictures
9. should show two of them on.
10. Q. Now I refer to Plaintiff's Exhibit #1 and I wish you'd
11. point out to me so the jury can see the location of each
12. of these floodlight sets.
13. A. You can see them up under the edge, the eaves of the
14. roof we're talking about, the twin lights there. There's
15. the vapor light and there's two out here on the corner.
16. Q. And would you describe the vapor light?
17. A. This vapor light hangs there, it's not a huge vapor
18. light. Again, the size, it might be ten inches across;
19. it's kind of on an elbow-type pole.
20. Q. Does it tend to give off more light than the other?
21. A. Yes, it would give off more light than the twin lights,
22. yes sir.
23. Q. Mr. Myers, you stated that it was raining, lightly I
24. believe your words were, on this particular morning.

1. A. Yes sir.
2. Q. Was the pavement slippery?
3. A. I would say it was, yes sir.
4. Q. All right, was the pavement wet?
5. A. Yes sir.
6. Q. Were there puddles from place to place?
7. A. Yes sir.
8. Q. In regard to the down spouts that you counted, did you
9. notice any particular gushes of water coming out of these
10. down spouts?
11. A. That morning, no sir, I did not.
12. Q. Did any of these down spouts present an obstruction to
13. the passageway of a pedestrian in that parking lot to
14. your knowledge?
15. A. To my knowledge it didn't, Mr. Smith.
16. Q. Where were these located?
17. A. They were located on the west side of the building;
18. they come straight down and they elbow off into the
19. hard surface.
20. Q. All right, and how far out do they elbow off?
21. A. It . . .
22. Q. To a matter of inches, feet?
23. A. Just a matter of inches, Mr. Smith. I didn't measure
24. those things.

1. Q. The measurements you took of the distance from the parking
2. lot on the west side of the building, in other words,
3. where most of the cars were parked, I believe; in fact,
4. where Mrs. Farren's car was parked. The measurements
5. that you took from that parking area to the lines across
6. the way close or most closely to the building, would you
7. tell us exactly from what point you measured?
8. A. Let me get the measurements straight.
9. Q. All right, you gave a measurement of twenty-one feet
10. two inches by a steel tape.
11. A. That would be a steel tape . . .
12. Q. Tell me where you measured is what I want to know.
13. A. That is measured from the white line extending out from
14. the west side where the cars park over to where the
15. cars parked on the right side.
16. Q. All right, so the measurement would have been made from
17. the very end of the white line?
18. A. Yes sir. I can probably show you in this one.
19. Q. All right, let me do this. There's a white line here.
20. A. Yes sir.
21. Q. And there's other white lines on up the road here.
22. A. Yes sir.
23. Q. You measured from the end of a white line . . .
24. A. Yes sir.

1. Q. . . . over to which of these?
2. A. The nearest one here. It would be where I found the vic-
3. tim.
4. Q. All right, and that would have been the middle of these,
5. the T-shaped white line?
6. A. Yes sir.
7. Q. Of those three lines you referred to.
8. A. Yes sir.
9. Q. The T-shaped middle white line.
10. A. That would be the number two line.
11. Q. The one in the middle.
12. A. Yes sir.
13. Q. The only one that's shaped like a "T"?
14. A. I don't know, sir, but if that's right. . .
15. Q. Did your investigation disclose what portion of the
16. truck struck Mrs. Farren?
17. A. No sir, it did not.
18. Q. Did you make an attempt to find out?
19. A. I sure did, Mr. Smith.
20. Q. Did you make a thorough examination?
21. A. I sure did.
22. Q. Why don't you tell us what you did?
23. A. I examined that truck from the front bumper to the back
24. bumper, all the wheels, the load housing in the rear end,

1. the back of the truck. I went over it completely.
2. Q. How about underneath the truck? Did you look up under-
3. neath the truck?
4. A. Underneath the truck, Mr. Smith. I couldn't find a
5. thing.
6. Q. Did you do it with the light that was available, or
7. did you bring in auxiliary lights?
8. A. No, with the available light there, because I was there
9. approximately an hour. And I think it was breaking day-
10. light at that time. I went over that with a flashlight
11. and the available light there, and I just couldn't find
12. anything. As a matter of fact, I examined the truck
13. after about nine o'clock in daylight, and I still could
14. not find it.
15. Q. All right. Was there any portion of the truck that you
16. do not recall examining that could have reasonably come
17. in contact with her?
18. A. Well, . . .
19. Q. In other words, I would assume you didn't get up on
20. top of the bed and examine it.
21. A. That's what I was going to say, I didn't get up on top;
22. but I examined everything that was in reach distance
23. all the way around the truck.
24. Q. And what was the condition of the truck? Was it clean,

1. was it soiled?
2. A. As you know, Mr. Smith, it was wet. It had--no, I
3. wouldn't say it was a dirty truck, I wouldn't say it was
4. a clean truck either. The truck had been on the road.
5. Q. Did you examine all of the wheels?
6. A. Yes sir, I did.
7. Q. Did you examine the steering linkage underneath the
8. truck, the transmission housing, differential, all of
9. that?
10. A. Yes sir, and I examined the victim to determine if she
11. had been rolled, trying to figure out what part of the
12. truck struck that victim. And I can't tell you today
13. what part of that truck struck that victim.
14. Q. Did you also examine the parking area to determine
15. whether or not you could find any debris or anything
16. that would be associated with either her body or the
17. truck itself?
18. A. Everything was checked from five feet, at least five
19. feet south of the victim, to five feet back of the truck.
20. If anything could have flew off, a door could have been
21. opened, or anything at all could have happened. And I
22. can't tell you today, Mr. Smith, what part of that truck
23. struck that victim.
24. Q. How about the victim? Was there any blood anywhere other

1. than in the location of her body?
2. A. Just the head, Mr. Smith.
3. Q. Okay, there was none anywhere else, no other . . .
4. A. No sir.
5. Q. No other materials whatsoever?
6. A. No sir.
7. Q. You stated that she was lying, and I think you used
8. east and west, or something like that, which tends to
9. confuse me. I wonder if you would relate the position
10. of her body, not using compass directions, but relate
11. the position of her body, how she was lying, in respect
12. to something. For instance, in respect to that "T" . .
13. A. She was lying parallel with the "T", parallel with the
14. truck.
15. Q. Okay.
16. A. And we should have a picture to show that. This picture
17. right here would show that. She was lying parallel with
18. the truck and parallel with the back of the building--
19. with the truck being just at a slight angle.
20. COURT: What number is that?
21. MR. SMITH: I'm sorry. This is Plaintiff's Exhibit #7.
22. Q. All right, this marking right here is that "T" marking.
23. Is that correct?
24. A. Yes sir.

1. Q. All right, so in other words, if you'd come on down here,
2. part of this marking would go below this picture.
3. A. Yes, right.
4. Q. Would you say that if one were to walk with this white
5. line I'm pointing to here, that you would walk directly
6. into the back of the body of Mrs. Farren?
7. A. You sure would, yes sir.
8. Q. You would walk directly along that body?
9. A. Yes sir.
10. Q. Again referring to Plaintiff's Exhibit #7, would you
11. describe the position of her legs, her feet, and her
12. arms, if you can remember.
13. A. I did this two ways. I took this picture and she hadn't
14. been moved at all, she was lying face down, again parallel
15. with the building, parallel with the truck, parallel with
16. the line, with her feet--one foot laying flat, one with
17. toes down, and the pictures will show that.
18. Q. All right, and how about her arms?
19. A. Her arms, her left arm was up near her forehead and her
20. right arm looked like it was under her in some way, some-
21. how.
22. Q. But her right arm was lying on the pavement?
23. A. You mean her left arm?
24. Q. Excuse me, her left arm was lying on the pavement.

1. A. Yes sir.
2. Q. And it was extended up around . . .
3. A. Around her forehead, yes sir.
4. Q. Did you notice any abrasion marks, scuff marks, tears,
5. in either her skin or her clothing on her left arm?
6. A. I did not, no sir.
7. Q. Did you notice anything unusual at all about her hands
8. or her fingers or things of that sort?
9. A. No sir. The only one that I looked at real closely was
10. the one that was visible there. I could find nothing
11. on her legs, body, outside of her head.
12. Q. Did you see any dirt or scuff marks or anything on any
13. of her clothing?
14. A. No sir, I did not.
15. Q. How about her feet and her legs? Did you see any abra-
16. sions or . . .
17. A. I found nothing, Mr. Smith.
18. Q. Did you examine the truck in regard to lights, running
19. lights, back-up lights, anything like that?
20. A. I did not, no sir.
21. Q. Did you notice any lights on the truck when you arrived?
22. A. Yes sir. All of the--as for examining lights, no--but
23. it looked like everything was intact.
24. Q. When you arrived at the scene, were all the lights on?

1. A. No sir.
2. Q. They were not on?
3. A. There was none on, no sir.
4. COURT: We'll have a recess for about ten minutes.
5. (Recess)
6. Cross Examination by Mr. Smith continued:
7. Q. Officer Myers, during the recess I looked at those pho-
8. tographs, which are exhibits in this case, and I noticed
9. that at least to me it appeared that some of the lights
10. on the truck, in fact, all of the lights on the truck
11. were on. I would like to ask you again, when you arrived
12. at the scene of the accident, did you observe the lights
13. on the truck as being either on or off?
14. A. At that particular point I didn't know if they was on
15. or off. But if the photo shows that they were on, they
16. must have been on when I got there. I don't recall Mr.
17. Gilbert getting back in the truck for anything. So,
18. they must have been on when I got there.
19. Q. When did you take the photographs in relation to the time
20. that you arrived?
21. A. The first five minutes I was there, I was taking photo-
22. graphs.
23. Q. And to your knowledge Mr. Gilbert was not in the truck
24. after you arrived?

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1. A. No sir, he was not.
2. Q. Would you describe this truck to the jury? What kind of
3. a truck was it?
4. A. It's a 1975 White, what we call a White tractor refriger-
5. ator truck. That's a tandem, meaning I believe it's a
6. ten wheeler; it would be tandem wheels on the back, of
7. course two wheels on the front. And it's all one--I say
8. tractor, the tractor and the bed is all on the same
9. frame.
10. Q. It's all one unit?
11. A. Yes sir.
12. Q. Did it have mirrors on it?
13. A. Yes sir, it did, on each side. It's the bit what I call
14. truck mirrors on each side.
15. Q. Did Mr. Gilbert when you questioned him indicate to you
16. that he had used those mirrors in backing the truck?
17. A. Mr. Smith, he demonstrated there in the office, he said,
18. "I first looked to my left and I looked to my right,"
19. you know, he kept revolving his head, "I kept looking as
20. I was backing up." He demonstrated that to me.
21. Q. So, he described how he proceeded back.
22. MR. HODGE: Your Honor, we object. He can call Mr.
23. Gilbert if he wants to have him to testify as to what
24. he . . .

1. COURT: Well, everything thus far has been testimony
2. related between what Mr. Gilbert said to the detective
3. and what the detective said to him. There hasn't been
4. any objection, except the objection now. I think that's
5. permissible. It will move the case along, gentlemen.
6. Q. Did you question Mr. Gilbert in detail about his proce-
7. dure in backing the truck into the loading area?
8. A. Yes sir, I did.
9. Q. And you feel he adequately described in detail how he
10. did it?
11. MR. HODGE: Objection.
12. COURT: Objection sustained. You're asking for his
13. opinion.
14. Q. Did he answer most of the questions that you asked?
15. Concerning the details of his backing.
16. A. All the questions, as far as I'm concerned, were answered.
17. Q. Mr. Myers, I take it that your investigation disclosed
18. basically where the body was lying when you arrived there,
19. is that correct?
20. A. That is correct.
21. Q. Did your investigation disclose how Mrs. Farren had got-
22. ten to that point?
23. A. Yes sir, more or less by hearsay I did, yes sir.
24. Q. All right.

1. A. How she got where she was--in other words, I base this
2. on where her car was parked and . . .
3. Q. Did you have occasion to question Mrs. Moubray?
4. A. I did, yes sir.
5. Q. There were no actual eyewitnesses to the accident it-
6. self, were there?
7. A. No sir.
8. Q. You've already testified to that.
9. A. No sir.
10. Q. Was not Mrs. Moubray, at least from your investigation,
11. the last person that saw Mrs. Farren alive?
12. A. Yes sir.
13. Q. And did she tell you where she had seen Mrs. Farren?
14. A. Yes sir.
15. Q. All right, and where had she seen her?
16. A. In her car; Mrs. Farren's car.
17. Q. All right, and what did Mrs. Moubray tell you?
18. MR. HODGE: Your Honor, we would object.
19. COURT: The objection is sustained.
20. MR. SMITH: May I say something, Your Honor, before
21. you sustain the objection?
22. COURT: It will have to be out of the hearing of the
23. jury.
24. MR. SMITH: Well, that's up to the judge.

1. COURT: Would you gentlemen like to go back in chambers?
2. MR. SMITH: We maybe could just approach the bench.
3. It won't take but a second. Well, it's up to Your Honor.
4. COURT: I think it would be better if we would retire
5. to chambers.
6. (In Chambers)
7. MR. SMITH: Your Honor, my only point is that Mr. Hodge
8. rather than calling the defendant sought to obtain an
9. answer from the defendant by asking Mr. Myers the ques-
10. tion. In other words, he's the one that started by ask-
11. ing Mr. Myers what did the defendant tell you about back-
12. ing the truck. And that's why I felt it was only fair
13. that I be able to, you know, continue with that line of
14. questioning.
15. COURT: Well, if that were so you just wouldn't have
16. to introduce any evidence in chief, you could just ask
17. different people. You certainly would violate the hear-
18. say evidence rule.
19. MR. SMITH: Did you say I would or wouldn't?
20. COURT: You would.
21. MR. SMITH: But he violated the evidence rule also.
22. COURT: There was no objection made to it.
23. MR. SMITH: Well, there's no objection, but why then
24. is there an objection when I do it?

1. COURT: I don't know, that's up to you attorneys.
2. MR. HODGE: Mrs. Moubray is going to be testifying.
3. MR. SMITH: Well, you could have easily called Mr. Gil-
4. bert too. And that's the same with Mrs. Moubray. Now,
5. he questioned Mr. Myers about Mrs. Moubray, about some
6. of the things that she--was she a witness or was she
7. there.
8. COURT: Well, that's not asking what she said. In
9. other words, gentlemen, I'm not trying your case for you,
10. but certainly you know what the hearsay evidence rule
11. is, and I think the objection is well taken. If you had
12. objected, I would have sustained your objection to any-
13. thing that may have been told. I'm sorry you feel that
14. way, but I think the objection is well taken. Now, for
15. impeachment purposes, say Mrs. Moubray, if she were to
16. testify and you feel that she had told a conflicting--made
17. a conflicting statement to Detective Myers, you could ask
18. her whether she did and call Detective Myers. And if she
19. says no, you can call Detective Myers back on the stand.
20. MR. SMITH: I realize that. Usually what's good for
21. the goose is good for the gander, so to speak.
22. COURT: Oh, sure. Gentlemen, while you're here, on
23. these two photographs, I was going to ask Detective Myers
24. in the absence of the jury what probative value these

1. photographs have. I am referring to Plaintiff's Exhibit
2. #10, which I have refused to admit. What does that . . .
3. MR. MYERS: It doesn't show anything, Judge. As you
4. say, when we take pictures we take pictures of everything.
5. I didn't know what might be disclosed later, but these
6. are just extra pictures that we took.
7. COURT: When you took those did you think that was
8. blood on there?
9. MR. MYERS: That was some kind of oil or grease or
10. something on there. It was not blood, I'll assure you.
11. And to this day, gentlemen, I'm sorry to tell you, I
12. can't tell you what part of that truck hit that victim.
13. COURT: Now, this lady laying there, does that show
14. anything more than what Exhibit #7 shows?
15. MR. MYERS: No sir, that's more or less--we took all
16. different angles in case we'd see something in the pho-
17. tograph.
18. COURT: I felt this might be prejudicial, this lady
19. laying there with that pool of blood under her. I felt
20. that there was no probative value to this, and I felt
21. that this picture here might inflame the jury.
22. MR. HODGES: That's #11, Your Honor?
23. COURT: Yes. You have excepted to my ruling on both
24. of those.

1. (In Open Court)

2. Cross Examination by Mr. Smith Continued:

3. Q. Officer Myers, as I asked you before, the only actual
4. witness to where Mrs. Farren was was Mrs. Moubray?
5. A. Yes sir.
6. Q. Did your investigation disclose where Mrs. Farren had
7. come from?
8. A. Well, . . .
9. Q. How did she arrive at the location where you found her?
10. Did your investigation disclose that?
11. A. I came to the conclusion she had to . . .
12. Q. No, don't give us your conclusion. Just tell us whether
13. your investigation disclosed--did you find factual evi-
14. dence to show how she arrived at where she was?
15. A. No sir, I did not.
16. Q. Did your investigation disclose how long she had been
17. lying there?
18. A. No sir.
19. Q. How long she had been lying there in relation to when
20. the truck arrived?
21. A. No sir. There's no way I could tell.
22. Q. She could have been there before the truck arrived?
23. Your investigation did not disclose that that could not
24. have been the case.

1. A. I don't know how to answer this, Mr. Smith. We just
2. went into this hearsay, talking to Mrs. Moubray.
3. Q. Well, you . . .
4. A. I know she wasn't there before the truck got there.
5. Q. Okay. I'm talking about when the truck was coming down
6. into the parking . . .
7. A. I don't know who got there first, Mr. Smith, or who
8. got there last.
9. Q. Did your investigation disclose whether she was to the
10. rear of the truck as the truck backed in, or was to the
11. front of the truck as the truck backed in, or was on the
12. side of the truck as the truck backed in?
13. A. Mr. Smith, I don't know how she got in that position.
14. Q. To your knowledge had her body been moved at all?
15. A. It had not been moved.
16. MR. SMITH: I have no further questions.
17.
18. Re-Direct Examination by Mr. Hodge:
19. Q. Officer Myers, I want to make sure I clarify the one
20. distance that you measured. You said you measured from
21. the "T" of this parking marker to this line that runs
22. into the grass area. Is that correct?
23. A. Yes sir.
24. Q. Now, which end of the line did you measure? Did you

1. measure the end out toward the center . . .
2. A. The center, the front of these cars, Mr. Hodge. It would
3. be the end furtherest from the grass.
4. Q. And that distance from the front, where the line is in
5. front of the cars across the area to the other parking
6. is twenty-one feet two inches I believe you said?
7. A. Yes, that is correct.
8. Q. Lt. Myers, you testified that it was raining, that there
9. were puddles of water on the pavement that morning.
10. A. Yes sir.
11. Q. There was no ice?
12. A. No sir.
13. Q. Two other questions. Do you have the distance from Mrs.
14. Farren's head to the wall area here on the north side?
15. A. Yes sir, I do.
16. Q. What was that distance?
17. A. That would be fifty-five feet.
18. Q. So, her laying here . . .
19. A. That would be from this wall to the top of her head.
20. Q. Fifty-five feet?
21. A. Yes sir.
22. Q. Now, did you have the distance or the approximate dis-
23. tance from Mrs. Farren to the corner of this building
24. where the driver had to make his turn?

1. A. No sir, I do not have that.
2. Q. You don't have that distance?
3. A. No sir.
4. Q. Do you have the measurements of the sidewalks that are
5. shown on this picture?
6. A. Yes sir, it's an eight foot sidewalk where that building
7. comes out from, right here. It's an eight foot sidewalk
8. where you see this building. And I wouldn't be sure
9. about this one back here.
10. Q. This building then would be . . .
11. A. No, the only measurement I took was right here.
12. Q. On the sidewalk. Does the sidewalk come out flush to
13. the building here?
14. A. Yes sir.
15. Q. Officer Myers, you indicated that you've made an inves-
16. tigation, and I asked you previously about the distance
17. from Mrs. Farren's body to the corner of the building.
18. Is there any way from your investigation or report that
19. you can determine an approximation of the distance?
20. A. No sir, I wouldn't know. I don't have that.
21. MR. HODGE: We have no further questions.
22. COURT: Thank you very much.
23. (Luncheon Recess)
24.

1. WITNESS - FRANCES MOUBRAY

2. Direct Examination by Mr. Hodge:

3. Q. Would you state your name and address for the record,
4. Mrs. Moubray?

5. A. Frances Moubray. I live at 99 South Avenue, Harrison-
6. burg.

7. Q. And what is your occupation?

8. A. Housekeeper at Liberty House Nursing Home.

9. Q. At Liberty House Nursing Home?

10. A. Right.

11. Q. Whereabouts is your house located in reference to the
12. Liberty House Nursing Home?

13. A. Well, it sets on the corner of Central and South Avenue;
14. it's on an angle from the nursing home.

15. Q. If I show you this picture, about where would your house
16. be if you could . . .

17. A. My house is down this way more. On this end, only down
18. further.

19. Q. Now, Mrs. Moubray, what is your working shift?

20. A. Seven to three thirty.

21. Q. And how do you normally get to work?

22. A. Well, usually I run down across the road down the bank.
23. But that morning it was raining and I had the sore throat
24. and had been sick, and I drove. I don't usually drive.

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1. Q. I understand you had driven that morning?
2. A. That morning because it was raining.
3. Q. What time had you left the house that morning?
4. A. I think I left around 6:30.
5. Q. And it's just a short drive.
6. A. Right.
7. Q. And what had you done when you got to the nursing home?
8. A. I drove in the parking lot and I backed my car in.
9. Q. Is that where you normally park?
10. A. Right.
11. Q. Is this in the back?
12. A. This is in back of the nursing home.
13. Q. Do you recall how many cars were there when you got there?
14. A. I can't recall how many was there, but there were some
15. cars there. And then Ellen came in and parked beside of
16. me.
17. Q. Was this immediately as you pulled in?
18. A. Right, right. Right after I parked. And I had my C.B.
19. on and I was listening at the weather, and I don't know
20. how long I sat there, but just a short while. And I got
21. out and as I put my umbrella up I yelled at Ellen that
22. I would go ahead and unlock the door for her to come on
23. in before she got wet. And I could see a truck and I
24. could hear the truck and see the lights coming around

1. the side of the building.
2. Q. At that time.
3. A. At that time.
4. Q. And Mrs. Farren was sitting in her car?
5. A. She was sitting in her car with the steering wheel like
6. this, and she was sort of looking straight over the
7. hood.
8. Q. She did not respond?
9. A. She didn't.
10. Q. Now, could you identify from this picture right here
11. which door you were intending to go in.
12. A. This door right here (indicating on photograph), the
13. one with the window.
14. Q. It has a window.
15. A. Right.
16. Q. Now, this is Plaintiff's Exhibit #2 that you have iden-
17. tified. You were going in that door?
18. A. That's right.
19. Q. What was the purpose for going in the door?
20. A. I ran in there and the next door inside was the laundry
21. room and I got the keys for the housekeeping door.
22. Q. Now, which door, which door is the housekeeping door?
23. A. The housekeeping door is this door.
24. Q. Okay. Now, I will show you Plaintiff's Exhibit #1.

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1. A. Yes.
2. Q. Would you also identify the housekeeping door.
3. A. Right here. No, I'm sorry, right here in the corner.
4. This one.
5. Q. Okay, what is this portion of the building?
6. A. This is part of the housekeeping right here, but this
7. is the door here you go in, in the corner.
8. Q. In the corner?
9. A. Right there in the corner.
10. Q. Toward the main part of the building.
11. A. Right.
12. Q. Now, what happened then?
13. A. Well, I got the keys and I came out and the door was
14. jammed, and I was trying to get the door unlocked. And
15. while I was unlocking the door the truck backed into the
16. loading dock. Two men got out and went inside. They
17. came out with two women and asked for a blanket. And I
18. finally got the door unlocked, and I ran in and grabbed
19. a spread off of a carton of linens. And when I went
20. around in front of the truck, I saw Ellen lying on the
21. ground.
22. Q. Now, I show you Plaintiff's Exhibit #6. Is this the
23. relative position that you found Mrs. Farren?
24. A. Yes, that's right.

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1. Q. Now, from the time that you had gone in to get a key
2. until the time you had come out and were working on the
3. door, opening the door into the housekeeping area, had
4. the truck backed up before you got the door open?
5. A. The truck had backed up before I got the door open.
6. I was still working with the lock.
7. Q. You were having trouble with it?
8. A. I was having trouble with it.
9. Q. Now, which way did you come around when you came out
10. with the covering or the blanket? Which side of the
11. truck did you come on? I show you Plaintiff's Exhibit
12. #9.
13. A. I came around on the side, this side.
14. Q. Toward the building.
15. A. Right. That's the way I came.
16. Q. Now, showing you Plaintiff's Exhibit #7, there appears
17. to be two cars setting here in the background. Approxi-
18. mately where would your car have been located?
19. A. I can't see good enough to tell.
20. MR. SMITH: Then I object, Your Honor, to her pro-
21. ceeding.
22. MR. HODGE: Well, if I may inquire further as to the
23. witness.
24. COURT: Can you show her the photograph and ask her to

1. identify what's on there?
2. Q. Could you identify what appears to be on this photograph?
3. A. Yes, Ellen's on the ground, but I can't identify my car.
4. Q. Okay. Can you identify any cars, do there appear to be
5. any cars in the picture?
6. A. There's two cars; I see two cars.
7. Q. Are either of these two cars your car?
8. A. No.
9. Q. So, it would be fair to say that your car was somewhere . .
10. A. Somewhere, I just can't tell exactly where.
11. Q. Do you recall which way you went to the door, what
12. manner you went to the door?
13. A. I ran straight, I went on an angle.
14. Q. Across the lot?
15. A. Right, across the lot.
16. Q. A straight line to the door?
17. A. Yes, right to the door.
18. Q. Did you have an umbrella up at that time?
19. A. Right, I did.
20. Q. Other than seeing Ellen Farren when you left your car,
21. you did not see her again until you looked and saw her
22. on the ground.
23. A. Right, on the ground.
24. Q. Mrs. Moubray, can you describe what type of lighting, if

1. any, there is in the area on the morning that this acci-
2. dent occurred, in reference to Plaintiff's Exhibit #1.
3. A. We have spotlights on the corners, here's one and here's
4. one, and then also there's one on this corner.
5. Q. Are there any other lights?
6. A. No, that's all.
7. Q. What is this object here, is that . . .
8. A. That's a light too, I think. That's a light, right.
9. There are four or five lights outside.
10. Q. Four or five?
11. A. Right. Big lights.
12. Q. Can you describe how the parking lot, the visibility of
13. the lot.
14. A. It was raining and it seems to me it was foggy that mor-
15. ning. It was a very bad morning, and it's been so long . .
16. MR. HODGE: We have no further questions.
17.
18. Cross Examination by Mr. Smith:
19. Q. Mrs. Moubray, you indicated that after you pulled your
20. car in and were listening to the C.B., that Mrs. Farren
21. backed her car in.
22. A. Right.
23. Q. And I don't know whether it's been covered, but your
24. cars were backed in rather than being driven into the

1. lot?
2. A. Backwards, side by side.
3. Q. And her car would have been to your right?
4. A. Right.
5. Q. What kind of a car do you own?
6. A. A Maverick, a blue Maverick.
7. Q. And what kind of a car did she drive?
8. A. I think she drives a Buick.
9. Q. So, her car was larger than yours?
10. A. Right.
11. Q. All right. And would you state again what occurred
12. when you got out of the car as you were putting up your
13. umbrella?
14. A. When I got out of the car I was putting up my umbrella,
15. I yelled at Ellen that I would go in and unlock the door,
16. for her to come on in before she got wet. And I also
17. could see the truck, I could see lights, and I could
18. hear--I could tell it was a truck approaching that cor-
19. ner, the side of the building; but he hadn't come around
20. when I went in.
21. Q. Did you yell loud enough for her to hear you?
22. A. Well, I think I did. I yelled pretty loud.
23. Q. Did she in any way respond to you?
24. A. No, she didn't.

1. Q. What was her position in regard to the steering wheel?
2. A. She was sitting up close to the steering wheel like this
3. (indicating), and then like she was looking straight
4. ahead, just like this position (indicating).
5. Q. All right. Did you think it was unusual that she did
6. not respond?
7. MR. HODGE: Objection.
8. COURT: I think the objection is well taken.
9. Q. Mrs. Moubray, I call your attention to an interview that
10. you had with Detective Myers, I believe on the same day
11. of the auto accident.
12. A. Yes.
13. Q. And at that time he questioned you concerning what you
14. knew about this accident.
15. A. Yes.
16. Q. And on reading a transcript of that statement, or I'm
17. reading what purports to be a statement that you made,
18. and I . . .
19. MR. HODGE: Objection, Your Honor. There has been no
20. identification of the statement being a transcript or
21. anything of that nature. I believe this is a summarized
22. statement and not a verbatim transcript. I know what
23. statement he's talking about, and it's identified as a
24. summary.

1. COURT: The proper procedure would be to ask her wheth-
2. er or not she did make such a statement.
3. MR. SMITH: I am going to do that, Your Honor.
4. COURT: Without reading from that. And if she denies
5. it, you can bring the detective back.
6. Q. Did you make a statement to Detective Myers?
7. A. Yes, I did.
8. Q. To the effect that this was unusual for her because
9. she . . .
10. MR. HODGE: Objection.
11. COURT: Objection overruled. Go ahead.
12. Q. Did you make a statement to Detective Myers to the effect
13. that when Mrs. Farren did not respond, that that was un-
14. usual for her because she really was a friendly person?
15. A. I think I did.
16. Q. All right, and again, as I understand it, you went into
17. a door and got some keys and then came back out and were
18. trying to open up one of the other doors?
19. A. Yes.
20. Q. The door that you first went into, which I believe you
21. described as the door with the window on it?
22. A. Right.
23. Q. Is that the door that normally everyone uses to enter
24. the building?

1. A. That's the main door to the back.
2. Q. Okay. And I think you stated that you went in a direct
3. line from the side of your car to that door?
4. A. Right.
5. Q. All right. You also stated that when you heard that
6. somebody had been hurt or was out in the lot that you
7. came out and saw where Mrs. Farren was lying.
8. A. Right.
9. Q. Was her body in a direct line between the door and her
10. car?
11. A. I don't remember that.
12. Q. You don't recall?
13. A. I don't recall that.
14. Q. Would you describe this truck? Just tell the jury what
15. this truck looked like?
16. A. Well, it's not a tractor trailer, but it's one of these
17. refrigeration trucks, I assume.
18. Q. Just tell the jury.
19. A. A refrigeration truck, I assume, is what it is.
20. Q. Is it big, small, or what?
21. A. It's a right large truck. I'm sure you've all seen them.
22. It's a truck that delivers groceries.
23. Q. Would you describe the noise that a truck like this
24. makes.

1. A. Oh, you can hear them a good ways away.
2. Q. Did you have any doubt that it was backing up?
3. A. Yes, I heard the truck and I saw the lights on the side
4. of the building; but I couldn't tell what company it
5. was. Because, you see, we have trucks coming in at all
6. hours.
7. Q. You say you could not tell?
8. A. I could not tell who it was.
9. Q. But you knew it was backing up?
10. A. I knew it was a truck coming in from the lights and
11. from the noise.
12. Q. Now, describe the lights that you saw.
13. A. Well, I could see the lights real bright overtop of the
14. building. It's a flat roof.
15. Q. And you could hear it?
16. A. Right.
17. Q. Did you notice or see the truck as it got closer?
18. A. No, I was working with the door.
19. Q. Did you notice any difference in the lighting as the
20. truck moved back?
21. A. No. Because I had my back turned.
22. Q. Okay. Are you familiar with the defendant, do you know
23. the defendant?
24. A. I've talked with Bobby several times, right.

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1. Q. Has he been there with his truck on other occasions?
2. A. Right, a number of times.
3. Q. Have you ever been inside--with this same truck, inci-
4. dentally--have you seen him there with the same truck
5. that he was driving that morning?
6. A. Right.
7. Q. Have you ever been inside the building when he was back-
8. ing his truck up?
9. A. Well, we're in and out of housekeeping and we always cut
10. up with them, and we've seen him a number of times, I
11. have.
12. Q. Okay, the question is though, have you been around when
13. he backed the truck up on previous occasions?
14. A. Yes.
15. Q. Have you been able to hear the truck from inside the
16. building?
17. A. Yes.
18. Q. When you walked out or were outside working on the door
19. and then turned around, do you recall whether or not the
20. lights were still on on the truck?
21. A. Well, I had my back turned, I was working with the door
22. and I wasn't paying any attention until they hollered
23. at me.
24. Q. Okay, but that's what I'm saying, Mrs. Moubray. When

1. you turned around when they hollered, do you recall
2. whether the lights were on the truck?
3. A. I can't recall that.
4. Q. Do you know whether the truck was a diesel or a gas power-
5. ed truck?
6. A. I don't know.
7. Q. How long have you worked there?
8. A. Five years.
9. Q. And over what period of time have you gotten to know Mr.
10. Gilbert?
11. A. Well, as long as he's been coming there, because we al-
12. ways talked to him a lot, all of the housekeepers.
13. Q. And approximately how long would that be? Prior to the
14. accident, up until the day of the accident?
15. A. Well, now, oh, maybe I've cut up with him maybe a year
16. or two.
17. Q. When someone hollered and you turned, you indicated to
18. Mr. Hodge that you then walked between the truck and the
19. building.
20. A. Right.
21. Q. Did you have any difficulty getting between the truck and
22. the building?
23. A. No, because I had my umbrella up on my head, it was rain-
24. ing then.

1. Q. Okay, so you and your umbrella both made it through with-
2. out any problem?
3. A. Right.
4. MR. SMITH: I have no further questions.
5.
6. Re-Direct Examination by Mr. Hodge:
7. Q. Mrs. Moubray, I believe you testified that you hollered
8. to Mrs. Farren that you were going to go unlock the door
9. and you then identified the door you were going to unlock
10. as the housekeeping area, is that not correct.
11. A. I went in that door, right. That's the door I had to
12. unlock.
13. Q. And that was the one you were hollering you were going to
14. unlock for her to get into?
15. A. Right.
16. Q. Is this her normal work station?
17. A. That's right, that's where we go.
18. Q. Now, you also testified, you told Mr. Smith that you
19. had no problem getting between the corner of the build-
20. ing and the truck with your umbrella. Now, are you re-
21. ferring to this in Exhibit #6, the small building there,
22. the utility room.
23. A. Right. That's the way I came around, through there.
24. Q. Do you recall whether or not the back end of the truck,

1. looking at Exhibit #6, was overhanging the sidewalk
2. slightly behind this building.
3. A. Well, the way that truck is setting, see, that's the
4. reason you can't see it on the corner there; but you
5. could get by there.
6. Q. You had no trouble getting by there?
7. A. I had no trouble getting by.
8. Q. By the corner.
9. A. Right. That's the way I went around.
10. Q. But my question is, was the back end of the truck . . .
11. A. Now I don't remember that.
12. Q. Whether it was overhanging or not?
13. A. I can't say.
14. Q. Mrs. Moubray, you have testified that you first noticed
15. the truck, you saw the headlights I believe over the
16. building.
17. A. It was big lights, you could see the lights.
18. Q. Now, then next you noticed or you knew the truck was
19. backing back.
20. A. Right.
21. Q. While you were working right there trying to get the
22. door unlocked, do you recall whether the truck did any
23. jockeying back and forth, or whether it just came back
24. with one stop.

1. A. Nothing unusual. Nothing unusual.
2. Q. Did it appear to just come back and one stop.
3. A. Right, the normal manner that they always do.
4. MR. HODGE: We have no further questions.
5.
6. Re-Cross Examination by Mr. Smith:
7. Q. I just want to make absolutely certain that I'm clear
8. and the jury is clear on the doors. I show you Exhibit
9. #2, and it shows a door on this side and then three doors
10. along here. Which door did you enter?
11. A. I entered the one with the window. This is the linens
12. door for the dirty linen, and this is the laundry, and
13. this is the housekeeping.
14. Q. Okay, and which door were you trying to open and having
15. difficulty?
16. A. This door right here.
17. Q. All right, which is a larger door.
18. A. Right.
19. Q. And it's on the other wall, not on the same wall as
20. these three.
21. A. Right.
22. Q. Did anyone come in or out of the two doors on this
23. little building that protrudes?
24. A. No.

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1. Q. Did that have anything to do with this accident at all?
2. A. No.
3. Q. And where would Mrs. Farren have been going to to enter
4. the building?
5. A. She would have been entering the door back there where
6. I was unlocking.
7. Q. She would have gone through the door that was being un-
8. locked, not the one with the glass in it.
9. A. Not the one with the glass.
10. MR. SMITH: That's all. Thank you.
11.
12. MR. HODGE: Your Honor, at this time we would move
13. that we be permitted to treat Mr. Kelly as an adverse
14. witness. He is an employee . . .
15. COURT: I have read the deposition. I don't think
16. you have the right to call him as an adverse witness.
17. MR. HODGE: Please note our objection to the ruling.
18. COURT: All right, sir. You're calling him as your
19. witness by my order.
20. MR. HODGE: Yes sir, and we have objected to it.
21. COURT: All right, go ahead.
22.
23.
24.

1. WITNESS - BRUCE ALLEN KELLY

2. Direct Examination by Mr. Hodge:

3. Q. Would you state your name, address, age and occupation.

4. A. Bruce Kelly. I live at 601 King George. I'm a truck

5. driver.

6. Q. Who do you work for?

7. A. Roanoke Restaurant.

8. Q. How long have you worked for Roanoke Restaurant Service?

9. A. A little bit over two years and about six months.

10. Q. And what are your duties at Roanoke Restaurant Service?

11. A. To take trucks out and deliver food to different places.

12. Q. How many trucks does the company have?

13. A. I couldn't exactly tell you.

14. Q. Do you have a particular truck you drive, or do you drive

15. any of them?

16. A. I drive any of them they've got.

17. Q. Were you present or were you in the truck that was involv-

18. ed in this accident on January 2nd?

19. A. Yes sir.

20. Q. And what were you doing, what were your duties?

21. A. I was just riding and helping him unload it.

22. Q. What were your duties, what was your assignment that

23. day?

24. A. To help him unload it.

1. Q. Had you drive this route yourself before?
2. A. Yes sir. Not by myself, but with him.
3. Q. Had you actually driven it as a driver?
4. A. Just by myself?
5. Q. Well, as a driver, either by yourself or with another
6. party, another rider. Had you driven this route? I'm
7. talking about driving it now.
8. A. No, I've never drove it by myself.
9. Q. You had been along on this delivery though with Mr.
10. Gilbert prior?
11. A. Yes sir.
12. Q. Can you--would you describe the truck that you all were
13. using that day?
14. A. It was a ten wheeler. In other words, I couldn't remem-
15. ber how big it was or nothing, but it was a ten wheeler.
16. Q. A ten wheeler?
17. A. Yeah.
18. Q. You don't know the length of it?
19. A. No, not right offhand.
20. Q. You don't know the height of it?
21. A. No.
22. Q. Now, on the morning in question, where did you leave
23. from?
24. A. Moultry--I can't say it--Moultry Poultry, or whatever

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1. it is. It's a Macke out in Dayton.
2. Q. Whereabouts had you first picked up the truck, where had
3. your route started at?
4. A. It started--our first stop was the White Truck Stop.
5. Q. Where is that at?
6. A. I don't remember whereabouts the town is, but it's
7. White's Truck Stop out there off the interstate.
8. Q. I-81?
9. A. Yes.
10. Q. And then I believe you stated that you stopped at a
11. poultry place?
12. A. Yeah, that was right after White's.
13. Q. Would that be Marval Poultry?
14. A. Yes.
15. Q. In Dayton?
16. A. Yes.
17. Q. What time had you all left your warehouse that morning?
18. A. 2:30.
19. Q. And what were the weather conditions at the time you got
20. to Liberty House?
21. A. It was drizzling.
22. Q. How did you get to Liberty House, do you know the route?
23. A. I can't--I don't remember streets or nothing.
24. Q. What did you do when you got to Liberty House?

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1. A. What do you mean when we got there, how we drove in or
2. delivered?
3. Q. Yes. Would you describe what you did once you got off
4. of the public street coming into Liberty House.
5. A. Well, we come down the street by it, when you come down
6. the street you've got to take a left-hand turn, you turn
7. in the parking lot, and then you back up and come around
8. the curve and back up to the dock.
9. Q. Now, you've been back to Liberty House since this acci-
10. dent?
11. A. Yes sir.
12. Q. Now, I show you Exhibit #4. Is that the entrance where
13. you would come in?
14. A. Yeah, come down this way and pull up this way, up towards
15. the front of the building.
16. Q. Okay, and then what would you do?
17. A. Then you'd back in this way and come around this way.
18. Q. And you have to back around a ninety degree turn?
19. A. Yes.
20. Q. Now, as you were approaching Liberty House and this area
21. in the back, what did you see in the area behind the
22. building?
23. A. As we was coming down in front of it?
24. Q. Yes.

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1. A. Parking lights on a car.
2. Q. You saw a car setting in the parking lot with its lights
3. on?
4. A. Yes.
5. Q. Now, do you know whether there were any other cars in the
6. parking lot besides the one with the lights on?
7. A. Well, there was some in there, but I don't know how many.
8. Q. You don't know how many?
9. A. No.
10. Q. And what were you doing during the time of this backing?
11. A. Sitting in the seat.
12. Q. Was there any conversation at that time between you and
13. the driver?
14. A. No sir.
15. Q. Now, do you recall what you saw after you got around the
16. corner to the back of the lot.
17. A. No sir.
18. Q. Did you see the car that was parked there with its lights
19. on at that time?
20. A. I don't know. I don't remember right now if I would or
21. not. I didn't look. I was just sitting back in the
22. seat letting Mr. Gilbert do all the driving.
23. Q. Now, was that after you got straightened out around the
24. corner or as you were coming around the corner?

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1. A. As we was coming in the corner. I just sat back and let
2. Mr. Gilbert take it all.
3. Q. Now, after you got around the corner, did you have a
4. clear view of the area which you were going to be backing
5. into?
6. A. Yes sir.
7. Q. Was there anything to obstruct either your view or Mr.
8. Gilbert's view of that area?
9. A. No sir.
10. Q. What was the lighting in the area behind the Liberty
11. House Nursing Home?
12. A. It was excellent.
13. Q. Pardon?
14. A. It was excellent.
15. Q. It was excellent?
16. A. Yes.
17. Q. So, you did not have to use or rely on any back-up lights
18. to be able to see; is that correct?
19. A. It . . .
20. MR. SMITH: Your Honor, I object to him leading the
21. witness.
22. COURT: He's your witness, you can't lead a witness.
23. Just rephrase your question.
24. MR. HODGE: Yes sir, I will.

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1. Q. In back, would you state whether or not it was necessary
2. to have back-up lights.
3. A. There's back-up lights back there. Whether they were on
4. or not, I couldn't tell you.
5. Q. Was it necessary to have them on to be able to see?
6. A. You mean . . .
7. Q. Do you understand what I'm saying?
8. A. Not really.
9. Q. Okay, I'll withdraw that question then. Now, in backing
10. up--you've done this before, have you not?
11. A. Yes.
12. Q. In this particular area?
13. A. Yes sir.
14. Q. Would you state whether or not there are any guides or
15. marks that you back toward; and, if so, what they are?
16. A. You mean like some kind of a . . .
17. MR. SMITH: Your Honor, I'm going to object to this
18. line of questioning because, you know, he was not the
19. driver of the truck at this particular time. And I don't
20. think he should be called upon . . .
21. COURT: My recollection of his testimony is that he had
22. accompanied Mr. Gilbert on other occasions.
23. MR. SMITH: Yes, that's correct.
24. COURT: And he can relate what he saw as a passenger

1. in the truck.
2. MR. SMITH: But that's not what he's being asked.
3. COURT: Repeat your question then, please.
4. MR. HODGE: I asked him, I established first of all
5. that he had backed over this area before.
6. COURT: Well, he said that he was sort of an assistant
7. in the loading and unloading of the truck.
8. MR. HODGE: Yes sir.
9. COURT: Now, it hasn't been established that he had
10. ever driven the truck.
11. MR. HODGE: Yes sir, I believe it has. I had asked
12. him whether or not he had ever driven this route.
13. A. I've driven it since the accident, but not before the
14. accident.
15. Q. You had not driven it before the accident?
16. A. No.
17. Q. But you had been on the route?
18. A. I had been on the route before, yes.
19. Q. Mr. Kelly, the morning in question, do you know whether
20. or not the driver, Mr. Gilbert, was using any portion of
21. the building or any object as a landmark which to back
22. his truck?
23. A. No sir.
24. Q. Did he make any statements to you whether or not he was

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1. having any trouble seeing behind him?
2. A. No sir.
3. Q. Did he make any statements to you before he got out of
4. the truck?
5. A. Yeah.
6. Q. What did he say?
7. A. He said, "There's a bump in the road."
8. Q. "There's a bump in the road."
9. A. Yeah.
10. Q. And when was that in relationship to your stopping?
11. A. About the time he got ready to get out of the truck.
12. Q. That there had been a bump in the road.
13. A. Yeah.
14. Q. When did you all first see the victim, Ellen Farren?
15. A. I didn't see her until I got out of the truck and come
16. around the front of the truck.
17. Q. Mr. Kelly, what type of equipment do you have on the
18. truck to enable you to back up? For vision.
19. A. What do you mean, like mirrors or something.
20. Q. What type of mirrors do you have on the truck?
21. A. I don't know what kind of mirrors. Just plain old regu-
22. lar mirrors on a trailer truck.
23. Q. Do you know how many are on the truck?
24. A. No sir. I know there's just two, and sometimes they've

1. got little spot mirrors.
2. Q. Do you recall this truck, how many it had?
3. A. Not at the time, I don't know, I know just them two.
4. Q. Where were they located?
5. A. It's one on the driver's side and one on the passenger's
6. side.
7. Q. I'm showing you Exhibit #7. Would you describe and point
8. to the jury where the mirrors are located at on this
9. truck?
10. A. There's one right there, and I can't quite see the other
11. one over there.
12. Q. But it's on the other side?
13. A. Yeah.
14. Q. You've mentioned a spot mirror. Can you tell me what a
15. spot mirror is.
16. A. It's a little bitty mirror on the bottom of the passenger's
17. side. Where you can catch everything on the ground or if
18. you're getting too close to a curb or something.
19. Q. It gives you vision of curbs and low down objects?
20. A. Yeah.
21. Q. Is there one on each side of the vehicle?
22. A. Some of them there are, and some of them there ain't.
23. Q. Do you recall whether this truck had one on each side?
24. A. I don't remember.

1. Q. When you're sitting in the cab of this truck looking out--
2. not with the spot mirrors, but with the big mirrors--can
3. you see the back wheels on your truck?
4. COURT: Are you asking him as a passenger or as a
5. driver?
6. MR. HODGE: As a driver.
7. A. Yeah.
8. Q. You can see the back wheels of your truck.
9. A. Yeah.
10. Q. Did Mr. Gilbert say anything to you or tell you to get
11. out and check anything behind him when he was backing
12. up?
13. MR. SMITH: Your Honor, I object to the request for
14. hearsay. It's been going on for quite a while.
15. COURT: Not only that, it's a leading question also.
16. Your objection is sustained.
17. MR. HODGE: I'll withdraw the question.
18. Q. Would you state whether or not any instructions were
19. given to you by Mr. Gilbert concerning checking the back
20. of the truck?
21. A. No sir.
22. Q. Would you state whether or not you got out of the truck.
23. A. No sir.
24. Q. To check.

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1. A. No sir.
2. Q. One further question. What place, what door were you
3. going to make a delivery, do you know, in looking at
4. this picture, Exhibit #2.
5. A. I believe it would be that one right there.
6. Q. Is that the door with glass.
7. A. I believe that's the door. It's been a while since I've
8. been down there delivering, and I couldn't tell you right
9. now.
10. Q. How many attempts did you have to make to get into po-
11. sition?
12. MR. SMITH: That's a leading question.
13. COURT: No, I don't think so.
14. Q. When you were trying to get at the door.
15. A. What do you mean, back in? How many times would it
16. take to . . .
17. Q. Did you have to move it back and forth any to get the
18. back end in where you were trying to get it by that door?
19. A. I don't remember.
20. Q. You don't remember?
21. A. No.
22. MR. HODGE: We have no further questions.
23. MR. SMITH: I have no questions at this time.
24. MR. HODGE: Your Honor, we would like to reserve the

1. right to call him on rebuttal, if necessary.
2. COURT: Very well.
3.
4. WITNESS - JACK L. FARREN
5. Direct Examination by Mr. Hodge:
6. Q. Would you state your name for the record, please.
7. A. My name is Jack L. Farren.
8. Q. Where do you live at the present time, Mr. Farren?
9. A. I live Route 8, Harrisonburg, Virginia.
10. Q. What was your relation to the decedent, Ellen Farren?
11. A. Husband.
12. Q. Where did you live at the time of this accident?
13. A. At the time of the accident I lived on Route 11 twelve
14. miles north of town about a half a mile north of Tenth
15. Legion.
16. Q. How old are you?
17. A. Seventy-three.
18. Q. How old was Ellen Farren?
19. A. Ellen was forty-seven.
20. Q. How long had you and Ellen been married?
21. A. A little over seventeen years. This was not, however,
22. my first marriage. I had been married before that. I
23. was married on the 27th of October, 1927 to a young lady
24. in Page County by the name of Dorothy Aleshire. And we

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1. lived together for thirty-four years. On the anniversary
2. date, thirty-four years, the Lord took her with cancer
3. of the cervix.
4. Q. Did you and Ellen have any children?
5. A. No children.
6. Q. Did you have any children by your first marriage?
7. A. No children by either wife.
8. Q. What blood relatives do you have?
9. A. I have remaining one blood relative, and that's a brother
10. in West, Texas.
11. Q. How long had you and Ellen lived in the Tenth Legion area?
12. A. Approximately six years.
13. Q. And where had you lived prior to that time?
14. A. At New Market.
15. Q. And how long had you lived there?
16. A. One year.
17. Q. Where did you live prior to that?
18. A. We lived three miles east of Elkton on U. S. Route 33,
19. for about eight years.
20. Q. What work did you do?
21. A. I built a motel there in 1964 and did that until 1971.
22. Q. What work did Ellen do?
23. A. She did all the domestic work in the motel, such as
24. making up the beds and cleaning baths and things of that

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1. nature.
2. Q. Since you sold the motel, did she . . .
3. A. In 1971 we sold the motel, yes sir.
4. Q. Since that time had Ellen--what work had she done?
5. A. She had never had any public work since we were married.
6. She did have public work before, but not since we were
7. married.
8. Q. How long had she worked at Liberty House?
9. A. Since the first week in September until the 2nd day of
10. January, her death.
11. Q. How did she come to work at Liberty House?
12. A. Well, she asked me along about a week or two, about a
13. week or somewhere in the neighborhood of a week before
14. she went to work if I would object if she had a job to
15. take up some of her spare time. Because her summer work
16. would have been over, and by her summer work I mean she
17. took care of the flowers, of course, as well as the house
18. and gardening, part of the gardening, she and I did it
19. together; and, of course, we had an exceptionally large
20. mowing area to do. We had a field in front of our house
21. that we liked to keep trim, so we mowed that. Not as
22. often as we did around the house, but about every other
23. week. So, we had pretty much of a continual job of mow-
24. ing; we had a riding mower, of course, and she was ex-

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1. tremely fond of mowing. And this work was over, and the
2. fall of the year had set in, not more than a couple of
3. months until the holidays, and she asked me if I'd mind
4. if she took a job. Well, I was a little slow in answer-
5. ing because we had a very close relationship, we had our
6. regular morning and evening worship, and I was particu-
7. larly fond of this--we were both particularly fond of
8. this, and was both desirous of not having anything enter
9. in that would break up this family worship of ours. So,
10. I told her, I said, "Well, now, honey, it's perfectly
11. all right if you will see that the hours don't conflict
12. with out home life." And she said, "Well, I agree that
13. this I don't want to happen." So, she had put in an
14. application with Mrs. Key, the housekeeper at Liberty
15. House, who Mrs. Moubray also works for. And shortly af-
16. ter she had asked my permission, I had given her permis-
17. sion, and in the next day or two Mrs. Key called and
18. asked her if she would be available, that she was ex-
19. tremely short on help and would like to have her come to
20. work as soon as she could. And so I think the next day,
21. or possibly the next day after that, but certainly just
22. a day or two after that, she went to work. And she grew
23. extremely fond, of course, of the old people in there,
24. and very many of them became very near to her heart. And

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1. she was really attached to her work and liked it very
2. much.
3. Q. What schedule or what hours had she been working then up
4. to the time of the accident?
5. A. Well, from the time she hired, Mrs. Key hired her on a
6. part-time basis, which was approximately three days a
7. week. But inasmuch as this was the rush hour and Mrs.
8. Key said she had two vacations coming up that she hadn't--
9. this was in September and they were later vacations--and
10. Mrs. Key asked her if she would mind, if she could pos-
11. sibly do it to help her out as much as she could from
12. then until the first of the year, to get her couple re-
13. maining vacations over. And so the wife decided that
14. she would do that for her. In other words, her working
15. schedule from the time she worked there, she hired on
16. for part-time, just three days, but after Mrs. Key pre-
17. sented her this problem that she was having with shortage
18. of help, she agreed to work four or five days a week un-
19. til the first of the year. And after the first of the
20. year then Mrs. Key was going to put her back on three
21. days a week.
22. Q. What were her wages there?
23. A. Her net pay, take home pay, was in the neighborhood of
24. a hundred dollars a week. I just don't have the exact

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1. figures, but somewhere right close to a hundred dollars
2. a week.
3. Q. What were her plans to continue to work there?
4. A. Well, she had not planned to continue, only until about
5. the spring of the year when the garden and the flowers
6. and the mowing began, and then she was of course planning
7. on quitting again. Because her summer work would once
8. again begin.
9. Q. Did she have any plans for future work?
10. A. Well, we hadn't discussed the future, but I felt sure
11. in the future that she would have probably gone back
12. to the home in the fall of the year after the work had
13. been over again, if she had lived.
14. Q. What activities did you and Ellen do together?
15. A. Well, we did everything together. I mean, wherever one
16. went, the other went. We had a number of Christian
17. friends in the area, some who lived in Luray, some who
18. lived in Harrisonburg, and of course we spent much of the
19. time, we spent quite a few evenings, visiting our Chris-
20. tian friends and having fellowship that we liked so well.
21. And, of course, we had a Wednesday evening prayer meet-
22. ing that we nearly always attended, and then of course
23. two services on Sunday.
24. Q. What church?

1. A. The Smith Creek Baptist Church in New Market.
2. Q. How would you describe, what kind of marriage did you and
3. Ellen have?
4. A. Well, I don't know whether anybody can fully understand
5. this or not, but to us it was wonderful.
6. Q. What can you tell about the events on the morning, that
7. you recall, of January 2nd, the morning that Ellen was
8. killed.
9. A. Do you want me to go into the detail on that?
10. Q. What had she done?
11. A. I can establish it quite quickly. Customarily since
12. she had been working, and in fact every morning even
13. before she was working, but we always had a devotional
14. period in the morning, reading of scripture and prayer.
15. And at this particular time, on this particular morning,
16. when she went to work, I somehow or other, and I can't
17. understand why it is; but, anyway, I overslept. We did
18. not have a morning devotion that morning, and she went
19. out without me even seeing her. The last time I saw
20. her was on the Sunday evening--on the Monday evening, on
21. New Year's Day, before. On the New Year's Day evening
22. before she went to work the next morning, and I didn't
23. get to see her. But I had an obligation the next morn-
24. ing to meet a lady in front of A & P to collect some

1. rent money that was due me. And I didn't get up until
2. about 7:30, and she always left the house no later than
3. ten or fifteen minutes after six, because she always
4. liked to be--she didn't go to work until seven, but she
5. always like to be in at the nursing home by six thirty
6. or not much later than six thirty anyway. So, as I said,
7. I didn't get to see her that morning. So, I went in to
8. meet this lady at the A & P, and I had a date to meet her
9. there at eight o'clock. Well, I got there about that
10. time and waited just a few minutes for her to come, and
11. then she came and she paid me the little bit of money
12. that she owed me, and then I came on back through this
13. end of town out by the Safeway. And I stopped by the
14. Safeway to get some cranberry juice for Ellen, so she'd
15. have some cranberry juice that evening. And I discover-
16. ed, of course, that the Safeway had not opened yet, be-
17. cause they didn't open until nine. So, I went on back
18. home. And in turning off of U. S. 11 to go back up to
19. my place on the hill, before I turned off of 11 I noticed
20. a car in the driveway up on the hill. It was approxi-
21. mately three blocks from U. S. 11 back up on the hill
22. where I live. And I noticed a car and I thought, well,
23. it's probably somebody looking at the house because about
24. two years before we have had the house for sale, and I

1. just assumed that this was a man who had come in and
2. was looking at the property. And, of course, I wasn't
3. there. And as I drove up there the car that was there,
4. I got out and a gentleman greeted me there, and I noticed
5. particularly that he had a cross, a T-shirt on and a chain
6. around his neck and a cross on it. And I was a little
7. surprised, because the appearance of this man didn't
8. speak to me much that he was really interested in the
9. house; he just didn't appear to me that way, although I
10. had encountered this sort of thing a number of times over
11. the past couple of years we've had our house for sale.
12. And so this man walked up to me, he said, "Are you Mr.
13. Farren?" I said, "Yes sir." And he said--I was a little
14. bit leery of him because on news items, and I read quite
15. a bit, I didn't know just exactly whether this was some-
16. thing fictitious or whether that was maybe somebody try-
17. ing to ensnare me in some kind of a trap. So, I was a
18. little bit cautious and I don't think I received him
19. with perhaps the tone that I should have received him
20. and that I did on his next question. But, when he ap-
21. proached me he asked me if I was Mr. Farren, and I said,
22. "Yes sir." He said, "Well, I've got bad news for you,
23. Mr. Farren." I said, "What's that?" He said, "Your
24. wife has been killed." And I was not too much shocked

1. at this because I said to him, I said, "You must have the
2. wrong man. I don't believe you have the right man." And
3. he said, "Well, are you Mr. J. L. Farren?" And then he
4. said, "Is your wife's name Ellen Farren?" And I said,
5. "Yes sir, that's right." And then I realized that there
6. was a little bit something different about this gentle-
7. man, and I came to find out of course very shortly that
8. he was the Methodist preacher down at Lacey Springs at
9. the Methodist Church, a Mr. Ziegler, who still occupies
10. that position. And then just about the time he affirmed
11. this the second time, I began to kind of wilt. But be-
12. fore I wilted too much, there were two men who were--now,
13. this was back out from my garage, perhaps as far as from
14. here to that wall, from my garage doors. And two men
15. came out from my garage, I had left my garage door open,
16. I always did when I was just going to be gone a little
17. while; I left my garage door open and these two plain-
18. clothesmen, and I couldn't tell you who they were, be-
19. cause I don't know except I know they were law enforce-
20. ment officers. So, as Mr. Ziegler and I, he had impress-
21. ed this upon me and I began to comprehend it, these two
22. men walked up to me and said, one of them said to me,
23. they both walked up, he said, "Mr. Farren, he's telling
24. you the truth." Well, from then on I went into a shock

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1. and wasn't able to--well, they both, the two men grabbed
2. me and was holding me up, and walked in through my garage
3. which went into the back door of the house into the kit-
4. chen, took me into the living room, and I don't know,
5. over a period of time, and this of course is an estima-
6. tion, possibly thirty minutes or twenty-five minutes,
7. I of course just didn't realize because the world had
8. caved in on me. I mean, it was just beyond my control,
9. I couldn't . . . So, finally after a little meditation,
10. Mr. Ziegler was very, very lovely, and of course the two
11. other men were too; from then on I began to get myself
12. together and began to make it known then on the tele-
13. phone. Does that answer your question?
14. Q. What has been your occupation, sir?
15. A. What had been my occupation?
16. Q. Yes.
17. A. Early in my career, when the Lord came into my life,
18. I was a minister of the gospel for about forty years.
19. And I was occupied in evangelistic engagements, in other
20. words, I was not a pastoral preacher, I have held a
21. pastorate, two of them; but my main business was evangel-
22. ism and revival meetings up and down the country. And
23. that's the way I spent most of my early forty years.
24. MR. HODGE: Would you answer Mr. Smith's questions.

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1. Cross Examination by Mr. Smith:
2. Q. Mr. Farren, prior to your wife's death how many days had
3. she worked in a row?
4. A. In a row? Well, some of that period there, Mr. Smith,
5. she worked as much as five days in a row. Not every
6. week in there, it fluctuated two or three weeks. Mrs.
7. Key, of course, would have the record; but she worked
8. five days in a row for several weeks, maybe five or six
9. weeks, from the first of September until the accident.
10. Q. And from what you've said I take it you did not particu-
11. larly agree or consent to her working full-time?
12. A. I did not particularly care about her working full-time,
13. because I--and when she, of course, agreed, as I said,
14. to work full-time for Mrs. Key, then I didn't object to
15. it because I felt that she had fallen in love with the
16. job and with the people and with Mrs. Key, and their re-
17. lationship was very well established by then.
18. Q. Did you do much of the cooking around the house?
19. A. The only thing I did, Mr. Smith, was I had cooked break-
20. fast prior to that for about forty years. I nearly al-
21. ways like to get my own breakfast, and still get my own
22. breakfast.
23. Q. Other than this particular job, did she have any other
24. income?

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1. A. No other income, no sir.
2. Q. So, in other words, when she was not working she received
3. all of her support from you?
4. A. Right, that was right, sir.
5. Q. Would you describe her health, please.
6. A. Well, her . . .
7. MR. HODGE: Objection, Your Honor. Beyond the scope
8. of direct examination.
9. COURT: Well, it does go beyond the scope of the direct,
10. and this witness becomes his witness.
11. Q. Could you describe her health, please, prior to her
12. death.
13. A. So far as I know, Mr. Smith, she was under Dr. Deyerle's
14. supervision for two and a half years, for nearly three
15. years up until the time of the accident, for . . .
16. Q. Well, why don't you just state whether or not she was . .
17. A. Excellent health, her health was excellent.
18. Q. Did she have any difficulty with her eyes, seeing, any
19. problems at all?
20. A. No difficulty seeing, Mr. Smith, except she had to have
21. glasses for close reading, and she was an avid reader.
22. She and I both spent much time reading in our evenings
23. particularly. And, as I was talking about, in our even-
24. ing devotions we both very much liked to read.

1. Q. How about hearing, did she have any difficulty hearing?
2. A. No, no difficulty with hearing that I know of.
3. MR. SMITH: I have no further questions.
4.
5. MR. HODGE: The plaintiff has no further evidence.
6. COURT: All right.
7. MR. SMITH: I would like to make a motion.
8. (Motion to Strike the Evidence Out of the
9. Presence of the Jury.)
10.
11.
12. WITNESS - BOBBY EARL GILBERT
13. Direct Examination by Mr. Smith:
14. Q. What is your full name and address?
15. A. Bobby Earl Gilbert, Route 1, Elliston, Virginia.
16. Q. Mr. Gilbert, how old are you?
17. A. Thirty-six.
18. Q. And you are an employee of Roanoke Restaurant Service?
19. A. Yes sir.
20. Q. How long have you worked for them?
21. A. Approximately nine years.
22. Q. What kind of a job do you do with them?
23. A. I just drive a delivery truck for them.
24. Q. Do you do anything else other than drive?

1. A. No sir, that's it.
2. Q. How long have you been driving a truck?
3. A. Since I was fifteen years old.
4. Q. Have you held any other jobs? Other types of jobs.
5. A. I haven't held any other types of jobs, other than maybe
6. a month at a time when I first started out. Most every
7. job I've had has been in the truck line.
8. Q. Had something to do with trucks?
9. A. That's right.
10. Q. What kind of a truck were you driving on January 2nd,
11. 1979, when this accident occurred?
12. A. I was driving a refrigerated 1975 White diesel tandem.
13. Q. Would you describe to the jury, as best you can, the
14. relative size of this truck?
15. A. Well, the truck is basically a tractor with a twenty-two
16. foot bed on it. It's one unit.
17. Q. Now, what portion of the truck is the bed?
18. A. I don't quite understand.
19. Q. Well, perhaps they don't know what a bed is.
20. A. Okay, the bed is the unit on the back, on the chassis where
21. we carry our frozen foods, and we have the partition.
22. We have the frozen unit in front, we have a dry unit in
23. the back; it's where we carry our contents that we de-
24. liver. And the bed itself is twenty-two foot long. The

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1. entire length of the truck is just a little over thirty
2. foot long. And the truck is eight foot wide and twelve
3. and a half foot high.
4. Q. Why is it that you are so familiar with these measure-
5. ments?
6. A. Well, I measured the truck myself and I know what it is.
7. I have to be aware of low bridges, I have to know the
8. height of my truck. When I'm going over back roads, we
9. do a lot of back road traveling, a lot of parkway travel-
10. ing, and we have to be aware of what's ahead of us, an
11. oncoming bridge or we might look at a limb or something
12. hanging over, and we have to know the size.
13. Q. So, it's important to know the height, the size, and also
14. I requested that you take some of the other measurements?
15. A. Yes sir.
16. Q. Is this all one unit? Is the truck and the bed and every-
17. thing that you've described all one unit?
18. A. Yes sir, it's all one unit.
19. Q. Would you describe the type of transmission that you
20. have?
21. A. Well, on that particular truck I have a ten-speed trans-
22. mission.
23. Q. And how many different speeds of reverse do you have on
24. the truck?

1. A. I've got a high and a low.
2. Q. And on this particular day when the accident occurred,
3. which of those two speeds were you using?
4. A. I was in low reverse.
5. Q. Is that the slowest speed that the truck would move,
6. either forward or reverse?
7. A. That's the strongest gear we've got, yes sir.
8. Q. How does the truck react when you have it in low gear?
9. Could you describe to the jury what it's like when you're
10. in the truck when it's in low gear in reverse?
11. A. Well, a diesel runs entirely different than a gas truck.
12. You've got a loping in that engine when you're setting
13. at an idle. It takes a little bit more to accelerate
14. that engine in order to get the lope out of the engine
15. to carry it back. That's really the only basic differ-
16. ence than a gas.
17. Q. How about the noise, is there any noise?
18. A. It's an outside exhaust, and the noise is not even in
19. comparison to a gas job; it's really loud. It has so
20. much vibration from it.
21. Q. Did this unit also contain a refrigeration unit on top?
22. A. Yes sir, it did.
23. Q. Do you recall whether it was working at the time?
24. A. Was it in working order or was it on?

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1. Q. Was it on?
2. A. No sir, it was not on.
3. Q. Okay. Would you describe the lights that were affixed
4. to the truck at the time of the accident. What kind of
5. lights does the truck have?
6. A. Well, you have your regular clearance lights that's re-
7. quired by law which goes around the top of the bed in
8. front, then you've got some along the bed in the back,
9. you've got . . .
10. Q. What color lights are these?
11. A. They are usually red in the rear and yellow on the side
12. or on the front. It can vary, but usually they are red
13. or yellow.
14. Q. Now, how many of those lights would you have?
15. A. On this particular truck, to my memory, there's at least
16. five, I believe, on the back part at the top. It's two
17. or three along each side, and then of course the cab has
18. two or three clearance lights on it, plus I have two on
19. each corner of the top. So, it has eight or ten or
20. twelve lights.
21. Q. And if you're facing the rear of the truck, what lights
22. would you see? What lights did you see affixed to the
23. truck?
24. A. You would see five lights at the top, you'd see two

1. tail lights at the bottom on each side, then your tag
2. light.
3. Q. All right, do you have a back-up light on that particular
4. truck?
5. A. Yes sir.
6. Q. To your knowledge was that back-up light in operation
7. at the time of the accident?
8. A. To my knowledge it was.
9. Q. When does that light come on normally?
10. A. That will come on when you place it in reverse.
11. Q. Had you ever driven this particular route? Had you ever
12. backed a truck into this particular area, the Liberty
13. House Nursing Home, before?
14. A. Yes sir.
15. Q. Before the date of the accident?
16. A. Yes sir.
17. Q. On how many occasions would you have done this?
18. A. I've been doing it for almost five years from when the
19. Liberty House opened. I brought the order in there be-
20. fore they ever opened. And I delivered there twice a
21. week.
22. Q. Now, on this particular morning had you made any other
23. stops prior to coming to Liberty House Nursing Home?
24. A. Yes sir.

1. Q. What time of morning would you have gotten up to take
2. off for your route?
3. A. I usually leave home--I get up to prepare for work around
4. one thirty or quarter till two, and usually leave the
5. plant by two thirty.
6. Q. And what time had you gone to bed the night before?
7. A. I had gone to bed that night somewhere between eight,
8. eight thirty, nine o'clock.
9. Q. Now, that was New Year's Day.
10. A. Yes sir.
11. Q. And then, of course, the morning of the accident was
12. Tuesday, the day after New Year's Day.
13. A. Yes sir.
14. Q. What did you do on New Year's night? New Year's eve,
15. rather.
16. A. We stayed at home, just watched a little television un-
17. til bedtime and went to bed.
18. Q. Okay. At the time of this accident, were you on any
19. type of medication?
20. A. No sir.
21. Q. Had you been drinking any type of alcoholic beverage?
22. A. I don't drink.
23. Q. You don't drink any type of alcohol at all?
24. A. No sir.

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1. Q. What was the stop that you had made immediately prior to
2. coming to Liberty House Nursing Home?
3. A. We were at the Marval Poultry Plant unloading at a Macke
4. vending.
5. Q. And would you describe to the jury what you did from
6. that point on. Just tell us how you got to Liberty House
7. and what you did.
8. A. Well, we had left Marval--I can't say what time it was
9. exactly, but we left and came up 42, I believe the high-
10. way number is. We came down South--turned right off of
11. 42 down South Street, and we came down by Liberty House
12. Nursing Home, which was our next stop. And that was
13. our normal custom to run. We came down the side of the
14. street, and of course I had a view of the parking area
15. when I came down.
16. Q. Incidentally, while you're at this point, did you see
17. any lights on in the parking area?
18. A. Yes sir, I did, before I came into the--came down the
19. street I did notice some lights.
20. Q. All right, was this the usual time that you would come
21. to Liberty House Nursing Home?
22. A. Yes sir, this was my regular time.
23. Q. And was it usual to see lights on in the parking lot?
24. A. Yes sir.

1. Q. Had you see any automobiles coming in or out of the
2. parking lot before your arrival?
3. A. An automobile had just came in as we were coming down
4. the street.
5. Q. Okay, go ahead, and what did you do then?
6. A. So, as we was coming down South Street there I was aware
7. that there was some traffic in the lot, which is my us-
8. ual routine time. And I made a left-hand turn and came
9. into the parking lot, which I had to come down the side
10. street there, as the pictures indicate. I don't have
11. adequate room to turn that diesel when I go into the
12. lot. The majority of the time as you make that turn
13. back there there can be cars setting in that turn or
14. whatever, and you're not able to negotiate a turn in
15. there in order to turn around and back up to the dock.
16. And, of course, we unload from the rear of the truck.
17. Q. Are you talking about if you came in frontwards?
18. A. If I came in frontwards.
19. Q. Instead of backing, if you came in frontwards.
20. A. Yes sir, so that's the reason we back into that area.
21. Q. Okay.
22. A. And I pulled into the lot, I cut my four-way flashers
23. on, put it in my low reverse and started back. And,
24. of course, the turn is not that difficult, it may be a

1. little bit more difficult than some; but it just deserves
2. extreme caution. I was aware that I had noticed traffic
3. back there, so I was aware of this, I just proceeded on
4. back. This is the procedure that I usually take. No-
5. thing any different.
6. Q. Mr. Gilbert, now you're talking about the turn; which
7. turn are you talking about now?
8. A. This is on the corner of the building, as I first make
9. into the driveway entrance at the back.
10. Q. I think Mr. Hodge described that as a ninety degree turn.
11. A. Well, the building itself might be on a ninety degree
12. turn, I guess, I'm not up on degrees; but it's a wide
13. area there as you come by the corner that you have to
14. swing around.
15. Q. So, in other words, you don't necessarily hug the build-
16. ing?
17. A. Oh, no sir. You don't have to hug the building. You
18. can stay away from the building and make the turn with
19. ease.
20. Q. What would be the speed of your truck, do you have any
21. idea?
22. A. Are you talking about negotiating the turn?
23. Q. Yes.
24. A. Negotiating the turn you'd almost have to come to a stop.

1. Like I say, I've been in there ever since it opened, and
2. I'm aware that there's traffic coming in and out, people
3. going through there changing shifts; so I have at all
4. times that I know that there could be a vehicle maybe
5. coming out of the parking lot, I'm ready and try to stay
6. prepared in case this happens. And at times there, un-
7. til you get that truck straight around that turn and get
8. it back to the loading area, there's almost times that
9. you're almost motionless.
10. Q. Do you normally have a passenger in the truck with you?
11. A. No sir, I don't.
12. Q. How come Mr. Kelly happened to be with you on this par-
13. ticular day?
14. A. Well, Mr. Kelly had been working on the loading crew at
15. nights, he loaded trucks at nights, and they were going
16. to make him a driver, they were going to train him. And
17. at this particular time we had had a holiday, and our
18. business contributes to a lot of schools and activities
19. like this, and when they're out, which they were for this
20. time of the year, our business is rather slow. And a
21. lot of times we'll have an extra driver or an extra help-
22. er that they don't have any use for at the plant and
23. they'll just detail him with a driver to help him out.
24. That's the reason Mr. Kelly was with me.

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1. Q. When you started your backing maneuver, did Mr. Kelly
2. participate at all in helping you back the truck?
3. A. No sir.
4. Q. What did he do?
5. A. He just got back in the seat out of my way where I could
6. have full vision of my mirrors.
7. Q. All right, would you describe to the jury the type of
8. mirrors that you have on the truck? Well, let me ask
9. you this. Do you have mirrors on the truck?
10. A. Oh, yes.
11. Q. All right, describe what they are like.
12. A. Well, it was just standard, what we refer to as West
13. Coast mirrors. They're on all of your tractors. They
14. are just normal big mirrors. I couldn't pinpoint the
15. inches, the height and width of them, but they're good
16. sized mirrors. And usually they'll accommodate them
17. with spot mirrors on the mirror, or a big spot mirror on
18. the left-hand side. This truck particularly had a spot
19. mirror on the left-hand side, which offset the big mirror.
20. It was, I'd say, a good sized mirror. I couldn't say
21. just the quality of it, but the mirrors were adequate for
22. backing; that's what we rely on.
23. Q. In regard to the description of the truck again, would
24. you describe what the under-clearance of the truck is

1. like. Have you looked at it or have any feeling for that
2. at all?
3. A. The clearance from the--in the front of the truck there
4. is--I can't say in inches and feet, but it's got some
5. clearance under it. It's got more clearance under it
6. than the rear tandems have. Now, under your rear tan-
7. dems you have your shackles, you've got your spring sup-
8. ports and all this. You've got variable clearance, you
9. don't have a whole lot of clearance under that rear tan-
10. dem.
11. Q. In other words, if you were to pass over something, how
12. high would it . . .
13. MR. HODGE: Objection.
14. COURT: Leading.
15. MR. SMITH: I was just going to ask . . .
16. COURT: No, you can't do it.
17. Q. Well, how much clearance do you have, do you have any
18. idea?
19. A. The clearance under that tandem part of itself, if you
20. run over anything any size at all, across anything, you
21. would have to be able to--it would have to snag something
22. or do something. I don't think there's clearance under
23. it enough to where I could crawl up under it or anything.
24. Q. Why don't you tell us again what is back there. What

1. makes up the eight feet width of the tractor?
2. A. Well, from outside to outside of your bed is eight foot.
3. Then on the inside of that you've got two dual wheels
4. on each side of the truck, and that's under the eight foot,
5. that's coming back in. Then you've got your frame struc-
6. tures. And then setting inside of your dual wheels you
7. have got your springs, you've got your air bags, you've
8. got your brake mechanisms under there which are big units
9. that hang down from your rear axle. So, you've got--now,
10. this applies to all four sets of wheels.
11. Q. Okay. Mr. Gilbert, let's continue now with the backing
12. of your truck. Just again describe how you maneuvered
13. the truck, what did you use to see, or whatever.
14. A. Well, as I began to back the truck in the area, which I
15. have done on many, many occasions, I started back as I
16. told you there, I had it in reverse, I had my flashers
17. on, and I come on back to the corner. I negotiated my
18. turn and I could see the parking area that I was covering,
19. and I just continued to back on through the loading area
20. where I normally park when we unload.
21. Q. How are you able to see behind the truck?
22. A. The only way I'm able to see behind the truck is with the
23. use of my mirrors.
24. Q. And would you describe how those mirrors are used by you?

1. A. Well, I'm sitting, of course, behind the wheel and I rely
2. on my mirrors for my visibility as far as backing up.
3. And I will look through my mirror or look through the
4. mirror on the right-hand side, and I'll pass from one
5. to the other as I'm proceeding back.
6. Q. Is there any area behind the truck that you're not able
7. to see with those mirrors as you move backwards?
8. MR. HODGE: Ojbection, that's a leading question.
9. COURT: I believe it's a proper question.
10. A. There's not any roadway or anything that I'm not able
11. to see. Before that truck crosses over it, I'm able to
12. visualize it.
13. Q. Is there a blind spot at all directly behind the truck,
14. or not?
15. MR.HODGE: Objection, Your Honor. That's a leading
16. question.
17. COURT: Yes.
18. MR. SMITH: Excuse me, I would like to rephrase the
19. question.
20. COURT: I think you had better rephrase it.
21. Q. What, if any, areas are there behind the truck that can-
22. not be seen by the mirrors?
23. A. It would be right at the very back . . .
24. MR. HODGE: We would object to that. He's already

1. answered that question.
2. COURT: Well, we'll let him answer again. Go ahead.
3. MR. SMITH: Are you saying he can answer the question?
4. COURT: Yes.
5. A. It would be right at the very back end of the truck.
6. Q. And what causes that? Why can you not see that area
7. with your mirrors?
8. A. Well, I really--to see right at the very back of it,
9. that's just a blind spot there, it would be on my right-
10. hand side that I just would not be able to see, because
11. the mirror doesn't pick up that very corner of the back
12. of that truck.
13. Q. All right, continue describing what occurred, if anything,
14. as you moved back.
15. A. Well, as I had continued to make my entrance back, there
16. were several lights on and I had a good visibility of
17. where I was backing to. I could see the cars, as I had
18. made the turn I could see the cars from where they had
19. started all the way back to the back.
20. Q. Which side of the truck are you talking about?
21. A. This is on the right-hand side of the truck.
22. Q. Were there any cars on the left-hand side?
23. A. No sir, there were not.
24. Q. As you came back?

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1. A. No sir, there were not any on the left-hand side as I
2. started back. I noticed the lady earlier, I can't re-
3. call her name, she was back at one of the doors, and I
4. didn't know who it was, I didn't recognize her; but I
5. seen her there trying to get into the door, I seen her
6. open the door as I was backing in and go into the nursing
7. home.
8. Q. Now, are you speaking of Mrs. Moubray?
9. A. Yes.
10. Q. Who testified here before?
11. A. Yes sir.
12. Q. All right, go ahead.
13. A. I seen her. She was unlocking the door and so forth.
14. She made her entrance into that large door that was
15. pointed out in the picture. And just about the time that
16. I had went to make my stop there where I was unloading,
17. I felt just a little roughness that had never occurred in
18. all of my backing back there. I'm familiar with the road-
19. ways and I know where there are traffic bumps, I know
20. where there's not; I had never encountered anything
21. there. But I didn't think anything unusual really, I
22. just continued to set my brake and got out of the truck.
23. And that's when I noticed the lady there, a little ways
24. in front of the truck.

1. Q. Mr. Gilbert, you said you felt something different--I
2. want you to use your words--but how do you mean you felt
3. it? In what, your hands or your . . .
4. A. No, I felt it in my hands in my wheel. Something just
5. didn't feel--I just felt a, just had a, something, I
6. thought maybe I had referred to Bruce, I said, "I can't
7. remember something like a speed bump or something being
8. here in this driveway." I couldn't remember a bump or
9. nothing as many times as I've backed in there.
10. Q. Did you feel anything from the movement of the body of
11. the truck itself?
12. A. No sir.
13. Q. It was just in the steering wheel?
14. A. Just in the steering wheel itself. That's the only time
15. that I felt anything.
16. Q. All right, when was that in relation to when you came to
17. a stop?
18. A. I was setting the brakes. I guess I done stopped the
19. truck before I had mentioned it. Just a second or so,
20. I guess, before I'd actually stopped the truck to get
21. out of it.
22. Q. All right, prior to--well, okay, go ahead. What happened
23. then after you stopped the truck? What did you do next?
24. A. Well, I went up--when I got out of the truck I usually--

1. I don't know why I did that morning, you have to swing
2. off the truck, as you come up on the fuel tank you've got
3. two steps, and it's right high up. I jumped out of the
4. truck, not suspecting anything, just like I usually do,
5. I had my ticket in my pocket and was ready to go back to
6. unload, and for some reason or another I noticed the lady
7. laying--or body, I don't know whether it was a lady or
8. what; but I noticed it laying there. And I went up to
9. the body, and then I turned around immediately and went
10. inside to get help. And then I came back outside.
11. Q. Prior to your coming to a stop, did you ever see Ellen
12. Farren?
13. A. No sir, I did not.
14. Q. Did you see her lying in the lot?
15. A. No sir.
16. Q. Or weren't aware of her presence at all until you saw
17. her lying there.
18. A. Yes sir.
19. Q. Would you describe the lighting in the area? Now, I'm
20. not speaking of the truck necessarily, but state what
21. if any lighting was available in the area.
22. A. Well, the floodlights were on the building. These flood-
23. lights, they--like when you come around the corner, they
24. were adequate for that corner of the building. They

1. don't do anything for the upper part of the parking lot;
2. but after you start back in there, that light that is on
3. back of the building back there, then you have a couple
4. more spotlights, so the lighting wasn't the best in the
5. world, but it was adequate that I could see to get back
6. in there where I was going.
7. Q. After you come around the sharp corner that you testified
8. you backed the truck around, what do you do as far as
9. the position of your truck is concerned? What would the
10. position of your truck be in relation to the building?
11. A. Well, when I made the turn, I aim it straight. I've got
12. a straight shot right straight back to where I'm going.
13. Q. Do you cause the truck to turn from one direction or
14. another during that period of time?
15. A. No sir.
16. Q. Are you saying it's a pretty straight path?
17. A. Yes sir, it's a straight path until I get back to the
18. dock. The only thing I have to do then, when I get
19. right back to where I'm going to back in, once my back
20. end of my truck begins to clear the little offset build-
21. ing there, then I just swing my front end over to the
22. right just a little bit to angle my truck back in to
23. where I can get back to where I unload.
24. Q. Do you recall on this particular day whether or not you

1. had to move the truck around, in other words, jockey it
2. back and forth?
3. A. I did not.
4. Q. It was just a straight movement until you turned.
5. A. I had no complications at all, no sir.
6. Q. When you came around the corner and then straightened
7. out, would you tell the jury what your estimate of your
8. speed would be, the speed of the truck.
9. A. Well, of course, the speedometer doesn't work when you're
10. backing up; but I doubt very seriously even if it would
11. have registered at all, but I'd say the speed of the
12. truck was two or three miles an hour, if that.
13. Q. What was the weather like at the time, Mr. Gilbert?
14. A. It was drizzling rain.
15. Q. By drizzle, what do you mean?
16. A. Well, it wasn't a heavy rain at the time. There had
17. been times that morning that it had been, but at that
18. particular time it had not been. It was raining enough
19. that I had to have the wipers on. But, as far as--you
20. know, it was just a light drizzle.
21. Q. Were you Mr. Kelly's supervisor or boss?
22. A. No sir.
23. Q. Why did you not ask him to get out of the truck and go
24. to the rear of the truck as you were backing in?

1. A. I had no reason to ask Mr. Kelly to get out of the truck
2. for the simple reason that I don't usually carry anybody
3. in the truck. We run single all the time, unless under
4. an unnormal occasion where they've got extra help. If
5. Kelly had not been in the truck, I'd have had to make the
6. turn just exactly like I did it that morning. There was
7. no difference. If I'd have seen need, I'd have asked
8. him; but I didn't see it.
9. Q. Were you on a pretty tight schedule that particular day?
10. A. No sir.
11. Q. Were you in any hurry at all?
12. A. No sir.
13. Q. Do you know today what portion of your truck hit Mrs.
14. Farren?
15. A. No sir, I don't.
16. Q. Are you still driving the truck now?
17. A. Yes sir, I am.
18. Q. Were you having any conversation with Mr. Kelly at the
19. time that you were backing up?
20. A. No sir.
21. Q. Did you have a radio on in the cab of the truck?
22. A. We don't have any radio.
23. Q. Do you have a C.B. radio?
24. A. Well, I usually carried one. I didn't have one that

1. morning, no sir.
2. Q. There were no distractions that you were aware of?
3. A. No sir.
4. Q. Was there anything unusual about this particular backing
5. until the time that you got out of the truck?
6. A. No sir.
7. MR. SMITH: I have no further questions. Answer any
8. questions of Mr. Hodge.
9.
10. Cross Examination by Mr. Hodge:
11. Q. Mr. Gilbert, I understand it's your testimony that you
12. had come from Marval over to Liberty House?
13. A. Yes sir.
14. Q. And that coming down South Avenue you saw parking lights
15. in the back, in the parking area at Liberty House?
16. A. I seen--well, I had seen a car coming into the back. Of
17. course, I seen the lights on that particular car, yes
18. sir.
19. Q. At that time you saw a car moving then? Is that correct?
20. A. I can't remember the car moving. It indicated to me
21. that it was going to back up into a parking area.
22. Q. Were there any other cars parked there that you noticed
23. the parking lights on?
24. A. Not that I--there was other cars, I can't say that I

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1. noticed any lights on them; no sir.
2. Q. But you were aware that there was somebody back in that
3. parking lot at that time.
4. A. Yes sir, I was.
5. Q. Now, when you back to go around that building, the first
6. thing you'd got to do is clear the corner, is that not
7. correct?
8. A. Will you restate that for me, please.
9. Q. I say, when you back to get around to the loading dock,
10. the first thing you have to worry about is clearing the
11. corner at the back of the building. And, if I might
12. use a picture, this is Exhibit #4. Your first concern
13. is clearing the corner, backing around it.
14. A. Yes sir.
15. Q. Now, when you get back to this point and you were start-
16. ing to clear, I understand you to say you've got clear
17. visibility the whole parking lot area back.
18. A. I've got visibility. When I start coming back here, and
19. I've got visibility of this area in here, and then as
20. my truck begins to negotiate around, and of course my
21. mirror swings with the truck, and the ground that I'm
22. about to cover, I have visibility of it.
23. Q. You have visibility of the whole area?
24. A. Yes sir.

1. Q. Now, you've been in there at other times other than
2. early in the morning at this hour, have you not?
3. A. Yes sir.
4. Q. You're aware that sometimes there are cars parked along
5. over by the building in this area right here, are you
6. not?
7. A. Yes sir, I am.
8. Q. And, of course, you're aware of the ones parked on the
9. other side of the lot.
10. A. Yes sir.
11. Q. So, you have to be conscious of both, whether or not
12. there's cars on both sides.
13. A. Yes sir.
14. Q. Now, that morning you were quickly able to tell that
15. there were no cars parked over by the building, is that
16. not correct.
17. A. Once I had made my turn, I could see there were no
18. cars.
19. Q. Now, you said you had taken that truck in there twice a
20. week for five years, you've been in there five hundred
21. times or thereabouts then, haven't you?
22. A. I've been there a long time, yes sir.
23. Q. Now, don't you normally when you're backing have a land-
24. mark or a point that you back to back there?

1. A. Well, I generally back up to--I don't know about no land-
2. mark, but I generally have an area that I back to, and I
3. just back towards that direction.
4. Q. Okay, isn't this utility building, or whatever, on Exhi-
5. bit #3--now, first of all, the door that you're intending
6. to unload in is the one with the mirror on it, isn't that
7. correct?
8. A. Yes sir.
9. Q. Isn't this utility building one of the marks that you
10. have got to keep in mind when you back around there?
11. A. I've got to keep it in mind, yes sir.
12. Q. And don't you normally try to keep the back end of your
13. truck at a certain point on that building?
14. A. I try to keep it away from the building, yes sir.
15. Q. Away from it.
16. A. Yes.
17. Q. But you try to keep it over toward that side too, be-
18. cause that's where you're going to unload.
19. A. Well, I've got to go back and then I realize when I get
20. back there I've got to swing back over to that building
21. so my back end is towards that building. So, I've got
22. to leave room for that to be done.
23. Q. Right. Do you have any particular distance that you try
24. to keep from that building as you are backing back, as a

1. general rule. And you've done this five hundred times.
2. A. Could you ask me that again, please.
3. Q. I say, isn't there a general distance that you've got
4. gauged in your mind to try to keep away from that build-
5. ing as you go back there, if you've done it five hundred
6. times.
7. A. Well, yeah, I couldn't say in inches or feet, but I try
8. to keep a distance from it; yes sir.
9. Q. Now, do you remember when we took your deposition on
10. June 13, 1979?
11. A. Yes sir.
12. Q. Do you remember at that time stating to me that you gen-
13. erally tried to stay within one and a half to two feet
14. from this corner of this little offset or little utility
15. building?
16. A. I don't remember saying it, but I probably did, if you've
17. got the deposition.
18. Q. Would that be an accurate statement though?
19. A. I would say yes.
20. Q. Now, as I understood your testimony, once you got
21. straightened up and backing there's really nothing block-
22. ing or keeping you from having a view of this whole area
23. that you were backing into. Is that correct?
24. A. No sir, I can see the area I'm backing into.

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1. Q. You can see that area back there?
2. A. Yes.
3. Q. Now, you're familiar of course with the area in which
4. Ellen Farren was found, you're the one who found her.
5. A. Yes sir.
6. Q. Now, the area where she was found is a little ways in
7. front of that utility building, is it not?
8. A. Yes sir, it is.
9. Q. Okay, and that area in which she was found is the area
10. that you had no trouble viewing as you backed around that
11. corner, is that correct?
12. A. I'd say that's correct.
13. Q. Now, you had a helper there, Mr. Kelly. Isn't it really
14. a fact that he would be required to do whatever you told
15. him to do since you were the driver of that truck in
16. terms of working that load?
17. A. Well, I've never regarded it as that, no sir, because
18. I've never took supervision.
19. Q. If you had told him to get out of that truck to check
20. to see what was behind you, he would have done so, wouldn't
21. he?
22. A. If I had asked him, yes sir.
23. Q. Now, you were aware, of course--we've already establish-
24. ed you were aware that there was a vehicle back there.

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1. A. Yes sir, I was.
2. Q. But you saw no need for Mr. Kelly to get out to assure
3. you that you could back back there.
4. A. No sir, I did not.
5. Q. Was there anything Mr. Kelly was doing that was neces-
6. sary to have him in the truck?
7. A. No sir, there was no need, other than just being where
8. he was at.
9. Q. Had you not on previous occasions, not necessarily at
10. Liberty House, but on previous occasions when you thought
11. that there was somebody behind you when you were backing,
12. and you had a helper or somebody to get out there and
13. make sure that you could back safely.
14. A. There has been occasions that I've got out and checked.
15. Q. You've done it yourself?
16. A. Yes sir.
17. Q. Now, you testified that you felt, I believe you said a
18. slight roughness, or you felt a disturbance right before
19. you stopped, brought this truck to a stop. Is that cor-
20. rect?
21. A. Yes sir.
22. Q. And about a second or so before you brought the truck
23. to a stop you felt that roughness.
24. A. Well, I felt it right before I brought it to a stop. I

1. don't know whether it was a second, two seconds, three
2. seconds; but it was right before I brought it to a stop.
3. Q. Do you recall telling Mr. Kelly it felt like a thump?
4. A. I recall telling Mr. Kelly that I felt something that I
5. normally hadn't felt.
6. Q. What is the maximum speed you can get out of the truck
7. in low reverse?
8. A. I would be--I don't know whether I've ever tried to get
9. maximum, so I couldn't say.
10. Q. It could run faster than you wanted to back then, is that
11. correct?
12. A. Well, it would get up a little faster than what I had it,
13. yes sir.
14. Q. Now, in Exhibit #7, that shows where Mrs. Farren was
15. found, is that correct?
16. A. Yes sir.
17. Q. Which side of the truck was she on? Was she on your
18. side or the other side?
19. A. She was on my side.
20. Q. She was also lying to the right approximately where the
21. parking area is, is that not correct? The parking mark.
22. A. Yes sir.
23. Q. And that's the parking along by these buildings.
24. A. Yes sir.

1. MR. HODGE: We have no further questions.
2.
3. Re-Direct Examination by Mr. Smith:
4. Q. Mr. Gilbert, I think you've said that it was not neces-
5. sary on this particular day in your opinion to get out
6. of the truck or have him get out of the truck, is that
7. correct?
8. A. Yes sir.
9. MR. SMITH: I have no further questions.
10. COURT: Thank you.
11.
12. MR. SMITH: I would like to call Charlotte Ritchie.
13. MR. HODGE: We would like to be heard outside of the
14. presence of the jury on this.
15. COURT: Members of the Jury, would you retire to your
16. room for a few moments.
17. (Jury Leaves the Courtroom)
18.
19. COURT: This is the next witness, do you have any ob-
20. jection to her being in here?
21. MR. HODGE: We are going to be objecting to her testi-
22. mony.
23. COURT: Oh, is that what it is?
24. MR. HODGE: And we would request Mr. Smith to proffer

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1. feel that . . .
2. COURT: Yes, save your point. All right, call your
3. first witness.
4. (Jury Returns to Courtroom)
5.
6. WITNESS - CHARLOTTE L. RITCHIE
7. Direct Examination by Mr. Smith:
8. Q. What is your full name?
9. A. Charlotte Louise Ritchie.
10. Q. And what is your address, Mrs. Ritchie?
11. A. I live at Spotswood Mobile Homes.
12. Q. Are you an employee of Liberty House Nursing Home?
13. A. Yes sir.
14. Q. Were you acquainted with Ellen Farren?
15. A. Yes, I was.
16. Q. Prior to her death.
17. A. Yes.
18. Q. Did you have occasion to work with Ellen Farren at
19. Liberty House Nursing Home?
20. A. Yes, I did.
21. Q. Over what period of time did you work with her?
22. A. Off and on, whenever she was there and we would both
23. be on on the same day we would see each other. She
24. only worked part-time, so it wasn't that often.

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1. Q. Mrs. Farren died on January 2, 1979. Did you have oc-
2. casion to work with her during the week prior to that?
3. A. Yes, I did. I worked with her Sunday before Christmas.
4. Q. How about after that?
5. A. I think I did, but I don't remember. Yeah, I know I
6. did, I worked one day with her that I know of.
7. Q. Did you have occasion to see her during the week before
8. New Year's, before January 2nd, from time to time?
9. A. Do you mean to talk to her?
10. Q. Would you see her at work, observe her at work?
11. A. Yes, I seen her at work, I seen her on the Sunday be-
12. fore Christmas, we ran into each other in the bathroom.
13. Q. Okay, what, if anything, do you know about her health
14. during this period of time?
15. A. On that particular Sunday I found her in the restroom
16. and I asked her--she was standing at the sink.
17. MR. HODGE: Your Honor, I would renew objection to this.
18. As I understood, this witness was going to testify to
19. something the day prior to the accident.
20. COURT: In the near proximity of this accident.
21. MR. HODGE: Well, Your Honor, I would submit that the
22. Sunday before Christmas is not the near proximity of
23. January 2nd.
24. COURT: Your objection is not well taken, and you

1. can save your point. Go ahead.
2. Q. Go ahead, Mrs. Ritchie.
3. A. I went into the restroom and she was standing at the
4. sink. And Ellen was the type that I didn't find in there
5. that often, and I asked her if she was all right. And
6. she said, "No, I don't feel well." I said, "Do you want
7. to go home?" She says, "No, I'll go on back to work."
8. She went out the door, she went down to B Wing and I
9. went back to the laundry room. I did not see her again
10. until we left at--well, I left at 2:30 and she left at
11. 3:30.
12. Q. Was there anything unusual about her appearance?
13. A. She, to me, was not acting right and she was pale.
14. Q. Did you have occasion again to see her during the follow-
15. ing week?
16. A. Yes, I did, and she did not act like she normally did.
17. She was not as lively.
18. Q. And this was the week before January 2nd?
19. A. Yes sir.
20. Q. Did she indicate to you in the restroom what it was that
21. was bothering her?
22. MR. HODGE: Objection, leading question.
23. A. In the restroom the only thing she said, . . .
24. COURT: Rephrase the question.

1. Q. What, if anything, did Mrs. Farren say concerning the
2. particulars of her feelings?
3. A. She said she felt sick on her stomach. And I didn't
4. know whether she'd already been sick or what, and I said,
5. "Do you want to go home." And she said, "No, I don't
6. feel good, but I'm not going home." Going out the door
7. we told each other that. She told me twice she was not
8. going home, because I would have had to call somebody in.
9. Q. Are you acquainted with Mr. Gilbert?
10. A. Yes.
11. Q. Do you know who he is?
12. A. Yes, I do.
13. Q. And how did you become acquainted with him?
14. A. By him delivering at the nursing home.
15. Q. Are you familiar with the truck that he normally drives
16. when he comes to the nursing home?
17. A. I see it, yes.
18. Q. Have you ever observed or heard the truck being backed
19. into the nursing home?
20. A. Oh, yes, you can hear it coming in quite loudly.
21. Q. Can you hear it from inside the building?
22. A. Yes, you can.
23. MR. SMITH: I have no further questions of this witness.
24. MR. HODGE: We have no questions.

1. WITNESS - VIRGINIA WHISLER

2. Direct Examination by Mr. Smith:

3. Q. What is your full name?

4. A. Virginia Whisler.

5. Q. What is your address, Mrs. Whisler?

6. A. 532 East Rock Street, Harrisonburg.

7. Q. Are you an employee of Liberty House Nursing Home?

8. A. Yes, I am.

9. Q. How long have you been an employee?

10. A. A little over five years.

11. Q. Were you acquainted with Ellen Farren?

12. A. Yes.

13. Q. All right, did you from time to time work with Mrs.

14. Farren?

15. A. At times, yes.

16. Q. Did you have occasion to see or talk or be with Mrs.

17. Farren on January 1st, I believe, of 1979?

18. A. Yes sir, I did.

19. Q. Was this the day before her death?

20. A. Yes sir.

21. Q. Did you have any discussion with her or did she make

22. any comments to you having to do with her health?

23. A. Yes.

24. Q. Would you please tell the jury what, if anything, she

1. said.
2. A. I was already there before Mrs. Farren came in, and when
3. she came in I hadn't seen her for a couple of days, and
4. I said, "Hello, Ellen, how are you, how was your week-
5. end?" She said, "Well, I didn't feel good all weekend."
6. And I said, "What was wrong?" She said, "I don't know,
7. I just can't tell you what was wrong."
8. Q. All right, was there anything unusual about her appear-
9. ance?
10. A. Well, she looked tired.
11. Q. Did she look different than what she had looked prior?
12. A. Yes, she looked real pale and tired.
13. Q. Incidentally, when was this during that particular day?
14. Was it in the morning or afternoon . . .
15. A. That was before seven o'clock, before we went to work.
16. Q. Did you have occasion to see her on other occasions dur-
17. ing the same day?
18. A. Yes, lunch time and another break time during the after-
19. noon.
20. Q. And do you recall any observations that you may have
21. had concerning how she looked?
22. A. Well, she didn't look any better than she did earlier
23. in the morning. She still looked tired and pale-like.
24. MR. SMITH: I have no further questions.

1. MR. HODGE: We have no questions.
2. COURT: Thank you. Call your next witness.
3. MR. SMITH: That's our evidence, Your Honor.
4. COURT: All right. Any rebuttal?
5. MR. HODGE: No, Your Honor.
6. COURT: All right, the entire evidence is complete.
7. There's a mutual motion by both parties for the jury
8. to view the scene of this accident, and the Court will
9. not accompany you, but I will caution you not to let
10. anybody outside of your party discuss the case with you
11. or ask you questions or make any suggestions. And the
12. two attorneys who are going, if you wish to have certain
13. areas pointed out to the jury, use the detective, Mr.
14. Myers. Or, if any member of the jury has any question
15. to ask, I think it would be proper, if you gentlemen
16. think it's proper, while you're out there.
17. MR. SMITH: I personally feel if they have any ques-
18. tions that perhaps it would be best to wait until they
19. return to the Courtroom.
20. COURT: Then I could rule on the propriety of it.
21. MR. SMITH: We've pretty much agreed there are three
22. things which we will have pointed out to them, and that's
23. basically it, other than the general view.
24. (Jury and Counsel View the Scene)

1. So, it appears to me, the interest runs from then too.
2. COURT: I believe you're right on that, come to
3. think of it. Your cause of action arises on the date of the
4. death, and your damages are ascertained as of the date of
5. death.
6. MR. SMITH: I have no objection to that.
7. COURT: I think that's right, you're right. But
8. in that A & P case, I don't know, in that case . . .
9. MR. HODGES: Was that injury or was that . . .
10. COURT: No, it was property damage. It was a big
11. suit up in Winchester with the A & P stores, a suit between
12. the landlord and the lessee, and it was a right large suit.
13. It took a long time to try the case. I sat up there by de-
14. signation.
15. MR. HODGES: Has that been within the last few
16. years?
17. COURT: Oh, no, it's been about ten years ago.
18. I suppose I should mark these refused.
19. Now, where are yours?
20. MR. SMITH: I think there are just three that are
21. objected to.
22. COURT: E, G, and J.
23. MR. SMITH: That's the unavoidable accident instruc-
24. tion which I think there is sufficient evidence to at least

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1. put it in. I think it's up to the jury. Again, it's a
2. strange happening and if they find that really it was due to
3. no one's fault, you know, it's just one of those things that
4. happened, . . .
5. MR. HODGE: Are you going to withdraw your contri-
6. butory negligence instruction then?
7. MR. SMITH: No. I think it's going to have to be
8. left to them. I mean, who knows what happened. And I think
9. that they can come up with a variety of things.
10. COURT: That's the unfortunate thing about this case.
11. In giving instructions you always look through the record to
12. find some evidence to support the giving of instructions; and
13. in this case, again I repeat in the record, that I don't know
14. how this poor woman was killed.
15. MR. HODGE: Your Honor, of course our objection to
16. it is, one, the cases state that such an instruction should
17. be given with great rarity; few automobile accidents occur
18. without fault.
19. COURT: Well, the mere happening of an accident
20. doesn't establish negligence, we all know that.
21. MR. HODGE: I think in that situation there is an
22. instruction to that fact. And with the argument that there
23. is contributory negligence by the decedent, then that certain-
24. ly cuts against that it was not an unavoidable accident. You

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1. can't have it both ways.

2. COURT: You mean a party can't have different theor-
3. ies in defense of a case?

4. MR. SMITH: The jury could find either way.

5. MR. HODGE: Well, the point would be, that if there
6. is evidence to support the theory that there is contributory
7. negligence, then there is no evidence to show that it's an
8. unavoidable accident.

9. COURT: I tried a murder case not too long ago
10. where the defense plead self-defense and also accidental
11. killing. They were exactly in conflict with each other.

12. MR. SMITH: Well, we just feel that it would not
13. be error to give that instruction. I think this is a rare
14. case.

15. COURT: Well, how could it be unavoidable?

16. MR. SMITH: Again, if for instance she had fallen
17. under the wheel, if she for some reason because of illness
18. fell under the truck, through no fault of anyone, it just
19. happened. I think it's just as easy to say that happened as
20. anything else, because we don't know.

21. COURT: What about G?

22. MR. SMITH: Well, that's assumption of the risk,
23. and the only reason I put that in is because of the testimony
24. of Mrs. Moubray about the lights and the noise and, you know,

1. I don't think anyone could argue that certainly she should
2. have known that a truck making a lot of noise and lighted up
3. was coming into that parking area. And I just feel that if
4. she undertook to--again, who knows. If she undertook, be-
5. cause it was raining, to dart in behind the truck or dart
6. around the front of the truck, or whatever, she assumed the
7. risk. And I don't know how much evidence there is, because
8. I can't prove what she did. I admit that. But I think there
9. are a lot of inferences and a lot of circumstantial evidence
10. that . . .
11. MR. HODGE: The same inferences and circumstantial
12. evidence, we say put her across the parking lot and on all
13. these other instructions that were rejected are what you are
14. now relying on for this instruction right here. And there
15. is no evidence to support it.
16. MR. HODGES: Judge, I always have understood the
17. distinction between contributory negligence and assumption
18. of risk is that in contributory negligence it's the careless-
19. ness, and in the assumption of risk it's the venturesomeness.
20. COURT: That's right.
21. MR. HODGES: Now, if I understand that correctly,
22. and I concede . . .
23. COURT: Plus a knowledge of the danger.
24. MR. HODGES: Yes sir.

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1. COURT: A person is not, cannot be found guilty or--
2. not guilty, but it cannot be found that he or she assumed the
3. risk of a thing unless she appreciates the danger that she's
4. in.
5. MR. HODGE: Now, I can see his contributory negli-
6. gence . . .
7. COURT: That's where you get your venturesome.
8. MR. HODGE: Yes sir, and there's no evidence of
9. that venturesomeness, or the knowledge for assumption of risk
10. to apply in this case.
11. MR. SMITH: The problem is, you don't know which
12. she did. That's the whole problem.
13. MR. HODGES: With all due respect, if your client
14. hadn't run over her, she would be here to tell us about it.
15. MR. SMITH: Yeah, and we probably wouldn't be here.
16. COURT: If you all had settled the case, we wouldn't
17. be here.
18. MR. SMITH: I don't see what great harm it would
19. cause to allow the jury to have that.
20. MR. HODGE: I had that same argument a while ago.
21. MR. SMITH: Well, I don't know which one you're
22. referring to . . .
23. MR. HODGE: I think all of them.
24. MR. SMITH: I don't think all of them would cause

1. great harm; but there's one of them I thought would.
2. COURT: Isn't your E and your J the same instruc-
3. tion?
4. MR. SMITH: No sir.
5. COURT: The mere happening of an accident and that
6. accident may occur without negligence.
7. MR. SMITH: Well, it is not specifically the un-
8. avoidable accident type situation. I think the important
9. thing about E is that it puts the burden on the plaintiff,
10. and specifically it puts the burden on the plaintiff to pro-
11. vide more than a probability and to show how and why this
12. particular accident occurred. J is, I think, you know, known
13. as an unavoidable accident instruction. I think E goes much
14. further.
15. MR. HODGE: Your Honor, E is covered by Instruction
16. D which we have agreed to being given, as to no presumption
17. of negligence from the happening of an accident. We would
18. submit that the language in E has never been approved as a
19. language in an instruction by the Virginia Supreme Court;
20. where the language in D, or certainly close variations, have.
21. The particular language that the plaintiff must show how and
22. why the accident happened, while conceding to Mr. Smith that
23. there are cases that cite that particular proposition, that
24. nearly uniformly these are cases where the question is whether

1. there was even evidence to get to the jury or cases where the
2. evidence was struck, and not questions of whether a theory
3. or evidence supporting a theory is sufficient to establish
4. how an accident happened. We just submit that that is not
5. the law in terms of instruction, and that Instruction D,
6. which we agreed should be given or can be given without our
7. objection, covers the basic thrust of the instruction, that
8. being that negligence cannot be presumed from the mere happen-
9. ing of the accident.
10. MR. SMITH: My whole case is, I think, based on
11. this how and why, and I think it's been repeated in cases
12. that where the lower court did not grant the motion to strike
13. and it went up to the Supreme Court that this is what they
14. said.
15. COURT: Well, simply stating the law isn't it that
16. the burden in all civil cases is on the plaintiff to prove
17. by a preponderance of the evidence that she or he has a re-
18. coverable claim because of the negligence of the defendant.
19. MR. SMITH: If I could add that one sentence to
20. Instruction D, then this would be fine. In other words, if
21. I could add the additional thing to Instruction D, that the
22. plaintiff must show why and how the accident happened, then
23. I would have no objection to not using E. But that is right
24. out of the cases, and there are so many of them where that

1. same language is used over and over again.
2. MR. HODGE: You cannot show one case where that . . .
3. MR. SMITH: Not as an instruction, no.
4. MR. HODGE: You can show lots of cases where the
5. language in D has been approved.
6. MR. SMITH: Well, but it's the law of Virginia and
7. I don't see why--if the cases cite that that is the law,
8. then why shouldn't the jury be instructed as such? Maybe
9. had it been instructed, maybe those cases wouldn't have had
10. to go up to the Supreme Court and been reversed.
11. MR. HODGE: Those cases were always where they had
12. been struck.
13. COURT: Here you have in D that before the plaintiff
14. can recover in this case he must prove by a preponderance of
15. the evidence not only that defendant, Gilbert, was negligent,
16. but that the negligence was the approximate cause of the
17. plaintiff--of the death of the plaintiff. If after hearing
18. all of the evidence you believe it is just as probable that
19. the accident happened in some other manner and from other
20. causes than that charged by the plaintiff, your verdict must
21. be for the defendant.
22. MR. SMITH: I know, but I'm saying that there's
23. something missing there.
24. COURT: Well, what's missing?

1. MR. SMITH: In addition the plaintiff must also
2. show how and why the accident occurred; that it can't be left
3. to conjecture and surmise. You know, it's not a guessing
4. thing.
5. COURT: Well, how in the world would they do that
6. in this case?
7. MR. SMITH: That's a very good question. That's
8. a good question. And that's exactly the argument that's
9. come up in all these other cases.
10. COURT: You certainly could argue that.
11. MR. SMITH: But I'm afraid if it's not in the in-
12. structions and I argue that, that my opposing counsel is
13. going to argue it isn't the law, it didn't say that here,
14. we don't have to prove how and why. And that's why I want
15. it in there, so that I can argue that point.
16. COURT: Well, . . .
17. MR. SMITH: They can argue that that's not the case
18. or, you know, they've got an instruction in there it doesn't
19. have to be proved with mathematical--well, that's damages;
20. but . . .
21. MR. HODGES: Bill, don't you agree that that's
22. really the test that the trial court applies in ruling on
23. the motion to strike?
24. MR. SMITH: The cases that I have gone through, and

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1. I went through I think most of them, they were cases--I may
2. be wrong--but they were cases where the motion to strike had
3. been granted, and the court reversed that, and in most in-
4. stances they affirmed it--I don't recall the numbers on that,
5. but there were also cases where the motion to strike was not
6. granted and the case went on and then went up and they re-
7. versed it. And they said that there was no evidence--you
8. know, the plaintiff has to show how and why. There was a
9. case where the woman stepped into the side of a cab, and
10. there was a dent or something in the side of the cab. And
11. the Court held, you know, the guy was driving, he was looking
12. out for it--I think I even have a photocopy of that case--and
13. he held that they had to show how and why that woman got
14. into the side of that cab in . . .
15. MR. HODGES: In order to get to the jury. That's
16. not what the jury is instructed.
17. MR. SMITH: But they reversed it and said that it
18. appeared that most of the evidence was presented to the Court
19. and, you know, judgment was entered for the defendant.
20. COURT: Bill, I don't ever remember giving that in-
21. struction as to the responsibility of showing why and how
22. the accident occurred. I think you have the right to argue
23. that.
24. MR. HODGES: I agree.

1. COURT: Sure, I think you have the right to argue
2. that; because that would be part of the plaintiff's responsi-
3. bility. (Court reads opinion in the case.)
4. MR. SMITH: And that's just merely a repeat of
5. what they say in a whole bunch of other cases. I've made
6. notes on a slew of them.
7. MR. HODGE: All of them came up on whether the
8. question was sufficient to get to the jury.
9. MR. SMITH: Well, I'm not going to argue that. I
10. mean, that may be so, Glenn, but that's what we're . . .
11. I mean, if that's what they say the law is, why wouldn't it
12. be a proper instruction?
13. MR. HODGES: That's just like you don't instruct
14. the jury on the burden of proof shifting.
15. MR. SMITH: Because it never shifts.
16. COURT: Yes, it does. You drive your automobile
17. on the wrong side of the highway, the burden shifts then to
18. explain why you're over there.
19. MR. SMITH: The burden of going forward with the
20. evidence changes, . . .
21. MR. HODGES: And you don't instruct the jury on that
22. either. That's a matter of law for the Court, just like how
23. and why.
24. COURT: This certainly would permit Mr. Smith to

1. argue that the burden includes her responsibility to show
2. how and why the accident happened.
3. MR. HODGES: To argue it.
4. COURT: To argue it, that's what I mean.
5. MR. HODGES: Yes sir. I cannot quarrel with the
6. Court on that.
7. MR. SMITH: Can I argue that it's incumbent on the
8. plaintiff to show how and why?
9. COURT: Yes.
10. MR. SMITH: Are they prohibited from arguing that
11. the law is to the contrary? That the plaintiff does not
12. have to show how and why.
13. COURT: This is the law stated here, but it's not
14. in the form of an instruction.
15. MR. SMITH: All right, but suppose they get up and
16. argue that the plaintiff does not have to show how and why
17. the accident occurred. Is that permissible? The case says
18. you have to show it . . .
19. MR. HODGES: In order to get it to the jury.
20. MR. SMITH: Are you saying that the Judge has al-
21. ready held that you have proved how and why the accident
22. occurred?
23. COURT: No, . . .
24. MR. SMITH: Because the judge has said he doesn't

1. know how and why.

2. MR. HODGE: We have proved that there is sufficient
3. evidence from which the jury can infer how the accident oc-
4. curred. And that is the province of the jury to determine
5. that.

6. COURT: I ruled that it was sufficient evidence to
7. be a factual issue to be submitted to the jury. They are
8. the triers of the facts, not the Court.

9. MR. HODGE: Our burden is to show the negligence.

10. MR. HODGES: If you grant how and why and an in-
11. struction on it, Bill, I think you've taken that away from
12. the jury.

13. MR. SMITH: Well, there it is. I have one case . .

14. COURT: Do you have one, Bill, where the jury was
15. instructed on that?

16. MR. SMITH: Your Honor, no, I don't. I don't have
17. one where it was approved as a . . . this is a 163 Virginia
18. case, which is really pretty similar to the case we have
19. here. And they use exactly the same language.

20. MR. HODGES: In the opinion, not in the instruction,
21. right?

22. MR. SMITH: No, I told you, I haven't found any
23. specific instructions; but this is a . . .

24. MR. HODGE: Bill, that goes back to a 204 Virginia

1. case where the language was first quoted.
2. COURT: Has there been an instruction on this about
3. the burden of proof?
4. MR. HODGE: Yes sir, the stock instruction I believe
5. is in here.
6. MR. HODGES: Yes sir, I think we typed that up.
7. It's 12.02 in there, I believe.
8. MR. HODGE: Which is really very similar to his
9. Instruction D.
10. MR. SMITH: I'll eliminate that whole Instruction
11. D just to get that one sentence.
12. COURT: Where did this instruction come from?
13. MR. HODGES: It's 12.02, Judge.
14. COURT: I know, but it's not identified.
15. MR. HODGES: Oh, we just typed it up in anticipa-
16. tion. It's really one that Mr. Smith, we feel, should have
17. submitted on this point.
18. COURT: Have you seen it?
19. MR. SMITH: (Examines Instruction)
20. MR. HODGE: That is the stock instruction and has
21. certainly been approved.
22. MR. SMITH: Well, that, Your Honor, I think is very
23. close to what I have in that D. I think the Court needs to
24. do what it wants to do, but I feel it's in the cases, it's

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1. the law of Virginia, and since it's the law of Virginia then
2. why not instruct the jury on that. They can argue that they
3. have proved how and why.
4. COURT: I wish there had been some instruction in
5. which the point was made.
6. MR. SMITH: There's always got to be a first.
7. I mean, there it is. I don't think anyone denies that it's
8. not the law. Here's one, a 163 case, it went to the jury and
9. they held that as a matter of law the jury couldn't have
10. found the defendant liable, again because the plaintiff did
11. not prove how and why the accident occurred. Now, obviously
12. there probably was a motion to strike, but here they went
13. through the whole thing, they just merely said the evidence
14. would not support the verdict.
15. COURT: Well, if I were to give this instruction,
16. Bill, wouldn't I really suggest to you that you renew your
17. motion to strike?
18. MR. SMITH: Well, I'm going to do that anyway.
19. I'm also going to move for summary judgment.
20. COURT: Before we go to the jury?
21. MR. SMITH: Yes sir.
22. MR. HODGE: We have a motion too.
23. MR. SMITH: They can argue that they have proven
24. how and why. Now, I mean, it's either the law of Virginia

1. or it isn't. And if it is, I don't see anything wrong with
2. the jury knowing that. And if that's the case, they can ar-
3. gue that they have shown how and why. They've got an in-
4. struction in there about--I've forgotten what it said--but
5. about not having to prove . . .
6. MR. HODGE: That instruction though would certainly
7. tend to confuse the jury as to the specifics of what has to
8. be proven in terms of how an accident occurred and why an
9. accident occurred. It's in the province of the jury for
10. them to determine how and if there is a reasonable basis
11. for an accident to occur. And if you put this instruction,
12. you are narrowing the province of the jury to such an extent
13. that we feel it would just be error.
14. MR. HODGES: It's the same thing as granting the
15. motion for summary judgment; that's all it is if he takes
16. it in front of the jury.
17. MR. SMITH: You're saying you've got evidence to
18. show how it happened. It's not cut and dry as far as you
19. all are concerned.
20. MR. HODGES: I would submit that your other instruc-
21. tion covers to the jury what our burden is.
22. COURT: E certainly would be a bit confusing. If
23. I were the ordinary juryman of average intelligence, which
24. they all have, laymen; if I were to be instructed by the

1. Court that the person who brought the suit, known to me as
2. the plaintiff in the case, had the burden of telling me and
3. showing me to my satisfaction how did this accident happen
4. and why did it happen, I wouldn't know what to do. I would
5. be so confused, I wouldn't know what to do. But, on the
6. other hand, if I were told, now it's your responsibility to
7. judge from the preponderance of the evidence whether or not
8. this defendant was negligent and that his negligence was the
9. proximate cause of the accident, then I'd know what to do.
10. But I don't think there is any thing to prohibit Mr. Smith
11. from arguing to the jury that among the many responsibilities
12. the plaintiff has, is to show how and why this happened.
13. Plus other things.
14. MR. SMITH: And they'll come back and say, we're
15. not . . .
16. COURT: Well, they'll come back and say, now, wait
17. a minute, how about these lights that reflected this person
18. on the lot, the fact that the person was at the truck, the
19. fact that it's agreed that the truck struck this woman, the
20. fact that--I'd better not argue the case because there are
21. some points in that evidence that I thought--well, I won't
22. say anything right now. I can't give this instruction as it
23. is.
24. MR. SMITH: Well, as you said, I can argue that;

1. but my point is they can also argue that that's not their
2. requirement, they are not--and then you get into a legal mat-
3. ter.
4. COURT: Well, that's all right. They can argue
5. that there are additional duties.
6. MR. SMITH: Well, I just have a feeling that they
7. are going to argue that the law doesn't say that, they don't
8. have to show how and why, there's no instruction to this
9. effect. So, I'm on the one hand saying this is the way it
10. is, and they're going to be on the other hand saying it isn't.
11. It's a matter of law whether it is or isn't. What I was go-
12. ing to say is, if the Court will not grant it, I will object
13. to that; but then I would like to propose, as an alternative,
14. that the sentence "The plaintiff must show how and why the
15. accident happened," be omitted from E and it be given other-
16. wise.
17. COURT: Would you have any objection to that?
18. MR. HODGES: Then how much of E is still duplicitous
19. of D? (Instruction D read)
20. MR. SMITH: The Court needs to do what it thinks
21. is proper.
22. COURT: I'm going to refuse E, gentlemen. I'm going
23. to give D and J. I'll refuse E.
24. MR. SMITH: I object.

1. MR. HODGES: We would, of course, note our objec-
2. tions.
3. COURT: You all can save your points.
4. (End of Argument on Instructions)
5.
6. (In Open Court)
7. MR. SMITH: (Renewed Motion to Strike and Motion
8. for Summary Judgment)
9. COURT: (Motions overruled and exceptions noted)
10. MR. HODGE: We would have a motion that the Court
11. strike any evidence of the defendant in terms of showing
12. no negligence on the part of the defendant and instruct the
13. jury that the defendant was, in fact, negligent as a matter
14. of law. And our motion is based primarily on the testimony
15. of the defendant, Bobby Earl Gilbert, when he stated there
16. was not any of the roadway or anything that he was not able
17. to see where the truck crosses over it, he was able to vis-
18. ualize it. Also his testimony that he did not require his
19. assistant, Mr. Kelly, to get out, even though he was aware
20. that there was somebody back there in the parking lot. And
21. we would submit that this, as a matter of law, shows negli-
22. gence on the part of the defendant; and that the only issue
23. that should be submitted to the jury is the question of con-
24. tributory negligence.

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1. And I would tender transcripts of Mr. Gilbert's
2. testimony, Your Honor, if I may. (Transcripts handed to the
3. Court)
4. MR. SMITH: Your Honor, in response to that, I
5. think that what the counsel for plaintiff failed to tell the
6. Court is that they failed to offer any evidence that would
7. place Mrs. Farren in the particular spot that she was found
8. after her death. And there is no evidence whatsoever to
9. show that that person or body was where it was during the
10. entire period of time that Mr. Gilbert was backing his ve-
11. hicle into that parking lot.
12. In regard to the helper not getting out of the cab,
13. I think Mr. Gilbert indicated that he did not think it was
14. necessary, because he was moving in a safe manner and he was
15. able to see what was behind him. And I do not think the law
16. requires that a truck driver have a helper get out and ob-
17. serve anything.
18. COURT: The part of the evidence that impressed
19. me was the evidence of Mrs. Moubray, who was offered as a
20. witness for the plaintiff in the case, when she said that
21. you could hear the truck coming at a long way off and, "I
22. knew the truck was coming in, I saw its lights. I've been
23. there on other occasions and heard his truck." And at the
24. conclusion of her testimony, she said, "The truck came back

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1. in the normal manner that it always has." There's evidence
2. in the case that Mr. Gilbert had been driving this route
3. for the last five years on the average of twice a week, and
4. that he did nothing which he normally did not do on other
5. occasions.
6. I, again, gentlemen, as to your motion, I don't
7. feel that it's well taken. I believe that the evidence
8. creates a factual issue for the jury to determine. This
9. Court, as you know, is not the trier of the facts and the
10. jury in this case is the proper trier of the facts, and I'm
11. going to submit the case to the jury after argument by you
12. gentlemen and after the Court has instructed the jury.
13. MR. HODGE: Note our objection for the record.
14. COURT: All right, sir.
15.
16. (Instructions read to the jury, Closing arguments of Counsel, Return of Jury Verdict)
17. COURT: All right, Mr. Hodge.
18. MR. HODGE: Your Honor, we would move to set aside
19. the jury verdict as being contrary to the law and to the evi-
20. dence, and also on the basis of our objections to the instruc-
21. tions and evidenciary rulings that the record will reveal.
22. COURT: Would you like an opportunity to submit
23. argument, written argument, briefs in support of your argu-
24. ment?

1. MR. HODGE: I don't believe we do at the present
2. time.
3. COURT: Well, my present thought is I observed the
4. defense and I felt that there were sufficient factual issues
5. supported by competent evidence which justified the case be-
6. ing submitted on those factual issues to the jury, and at
7. this time without any further argument, I cannot disturb the
8. verdict of the jury. So, gentlemen, you have of course twenty-
9. one days, as you well know, in which to take such steps as
10. you deem advisable. Again I want to thank you all for your
11. cooperation. It was a pleasure presiding. And, again, you
12. don't know how a jury will vote or how a jury will react in
13. a case. I've ceased to guess. But I don't see anything that
14. would justify this Court at this time in disturbing the
15. verdict. Thank you very much.
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17. (End of Trial)
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Court Reporting Service
32 Graham Street
Harrisonburg, Virginia 22801

1. (Out of the Presence of the Jury)

2. COURT: All right, Mr. Smith.

3. MR. SMITH: Your Honor, at this time I would like
4. to make a motion to strike the plaintiff's evidence on the
5. ground that I do not feel that the plaintiff has carried the
6. burden, that there has been any evidence whatsoever of any
7. negligence on the part of Mr. Gilbert, the driver of the
8. truck, who was involved. There has been no evidence whatso-
9. ever as to how Mrs. Farren's body arrived at the point that
10. it was at at the time the accident occurred. No one has
11. testified as to how she arrived there, where she came from,
12. except that she was last seen behind the wheel of her car.
13. I believe that there are numerous cases in Virginia that are
14. very similar to this particular situation. And over and
15. over again the Supreme Court of Virginia has held that the
16. plaintiff must show how and why an accident has occurred.
17. I have many citations. There was a very recent case, in
18. fact it's in the advance sheets, in 219 Va. 15, Snead v.
19. Snead, where this same principle was reiterated by the
20. Supreme Court of Virginia. Basically the Court says it
21. cannot be left to speculation, guesswork, things of this
22. sort, but the plaintiff has to prove how and why the acci-
23. dent occurred.

24. COURT: The law always has been that the mere

1. happening of an accident doesn't establish negligence.
2. MR. SMITH: Yes sir. Now, some of these cases
3. move around, some of them involve a defendant, a deceased
4. defendant. And they've held that without any evidence as
5. to what the defendant did wrong so to speak, that that was not
6. sufficient, the fact that the accident occurred. Some of
7. them also have been a deceased plaintiff, you know, similar
8. to our situation. Bailey v. Fare, 163 Va. 611, was a deceas-
9. ed plaintiff where a vehicle was driven down a road, it was
10. a highway near an intersection, and the plaintiff stepped
11. off of the curb, or they assumed the plaintiff stepped off
12. the curb, and walked into the side of the particular motor
13. vehicle. And the Court held there that the plaintiff did
14. not sustain the burden, that again, the mere happening of
15. the accident was not sufficient, and that the plaintiff had
16. to show how and why the accident occurred. In fact, in
17. that case they sort of presumed from all the facts that one
18. way or the other the plaintiff had to be contributorily
19. negligent in order for the accident to have occurred. Now,
20. I have copies and I have citations, I don't know what the
21. Judge wants at this particular time. I just strongly feel
22. that the plaintiff has not met the burden and the jury has
23. no way whatsoever to know when Mrs. Farren arrived at the
24. particular point where apparently she was killed, whether

1. she had been lying there as the truck came back, or whether
2. she came after the truck had passed in front of her, whether
3. she went around the front of the truck, whether she was to
4. the rear of the truck, we don't know whether she slipped and
5. fell. We have no idea of how Mrs. Farren got from behind
6. her wheel to where she ultimately came to rest. It was an
7. unfortunate accident, but I think the law would say that it
8. ought to stop right now, Your Honor.
9. COURT: All right, Mr. Hodge.
10. MR. HODGE: If it please the Court. Your Honor,
11. we believe that we have submitted abundant evidence to
12. support negligence on the part of the defendant. The
13. situation is, first of all, that by order of agreement the
14. cause of the death is not in dispute. Mrs. Farren was run
15. over by . . .
16. COURT: You need not argue that at all. In other
17. words, just argue whether or not you feel that the evidence
18. presented creates a factual issue to be submitted to the
19. jury.
20. MR. HODGE: The question of factual issue is a
21. lookout question. There is evidence by Mr. Kelly that there
22. was no obstruction, nothing to block the view. That's the
23. same testimony that was by Officer Myers, that there was
24. nothing in that lot to block the view. We have the situa-

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1. tion where the decedent was last seen in her automobile on
2. one side of the parking area. Her body was found twenty
3. feet, twenty-one feet away from her automobile on the other
4. side of the parking lot. And the evidence is it had not
5. moved from the place that she was run over at. Now, we
6. would submit that there is a presumption, certainly the
7. presumption that the decedent absent any evidence to the
8. contrary looked out for her safety. We would submit that
9. there is evidence . . .
10. COURT: Wait a minute. You say a presumption that
11. she did that?
12. MR. HODGE: I believe that there is a presumption
13. that the decedent--absent any showing, absent any showing to
14. the contrary, that there is a presumption that she took
15. reasonable care.
16. COURT: I never heard that before.
17. MR. HODGE: I cite you the case of N.& W.v. Green-
18. field, 213 Va. 44.
19. COURT: Where a person is presumed not to have
20. been contributorily negligent under a certain state of
21. facts.
22. MR. HODGE: Yes sir.
23. COURT: Is that what you're saying?
24. MR. HODGE: I'm saying that absent the showing

1. that there was contributory negligence that the presumption
2. is that she is not. Now, the position I think we should
3. point out to the Court is the parking pictures will show
4. that the decedent was traveling to the east side of the
5. lot along a parking area. That the driver had twenty-one
6. feet of paved area between that in which to run his automo-
7. bile, and yet he was running over there. And that's the
8. place that she reasonably could expect that she was out of
9. the way. And the evidence shows that he did not keep a look-
10. out, the evidence shows that there was knowledge that there
11. was someone in the parking lot, they had seen a car with
12. parking lights on it. There was no attempt to put the
13. helper--he had a helper right there with him, to put the
14. helper back there to ensure that he could back up without
15. running over anybody. We would submit there is abundant
16. evidence for a jury to find that the driver was in fact
17. negligent.
18. MR. SMITH: Your Honor, I'd like to just comment
19. by way of quick rebuttal.
20. COURT: Quickly.
21. MR. SMITH: Mr. Hodge talks about there was nothing
22. to block the view. The whole point is, block the view of
23. what? There has been no evidence whatsoever that Mr. Gilbert
24. was not maintaining a proper lookout. The whole point is,

1. it is our contention that he has not established when Mrs.
2. Farren arrived at that particular point. It is perfectly
3. consistent that the defendant backed his truck up and had
4. a perfect view of the whole area and saw absolutely nothing
5. because instead of her passing to the rear of the truck she
6. could have come around to the front of the truck to go to
7. the door that she was going to. I mean, the point is, he
8. argues that the defendant should have had a clear view,
9. apparently he argues, of Mrs. Farren. I don't know whether
10. he's saying that she was lying in the pavement or just what
11. she was doing at the time. But my point is, he has not
12. proven what he should have had a clear view of because he
13. has not placed her in any particular position at any particu-
14. lar time in relation to where the truck was when the truck
15. was moving back. In fact, I would say the whole logical
16. conclusion from the facts that have been presented is that
17. regardless of the actions of either party, that probably
18. it happened because of something out of the control of either
19. one of them. I would submit that it's more than likely
20. that she came around the front of the truck and perhaps
21. slipped. And if that were the case, there's no way that he
22. could have seen her unless it was pure luck.
23. COURT: Well, it's a concession in the case that
24. Mrs. Farren lost her life as a result of the truck striking

1. her. That's the concession in the case.
2. MR. SMITH: That's correct.
3. COURT: Then there's evidence that if the driver
4. had been keeping a proper lookout, a reasonable lookout for
5. what might be behind him when he was backing, that he could
6. have or by the exercise or ordinary reasonable care should
7. have seen this lady or any other object when he was backing.
8. MR. SMITH: If she were behind him.
9. COURT: Well, now, there's photographs indicating
10. that her body is lying to the rear of the truck. Isn't that
11. right?
12. MR. SMITH: No, it's just the opposite.
13. COURT: Well, her body is lying there . . .
14. MR. HODGE: It's on #6 and #7, both, Your Honor.
15. MR. SMITH: It shows exactly where the truck had
16. come to a stop.
17. COURT: Yes. She's off to the side of the truck.
18. The thing that concerns me--I think there's a factual issue
19. on the negligence of the defendant at this stage of the
20. proceeding which would be fairly admissible to be left to
21. the discretionary judgment of a jury. The thing that con-
22. cerns me more than anything is the matter of contributory
23. negligence on the part of this lady. Mrs. Moubray, who was
24. called as a witness for the plaintiff, testified that she

1. heard this car coming. She said she could hear this truck
2. a long way off, "I knew the truck was coming, I saw its
3. lights. I've been there on other occasions and heard this
4. truck. This truck came back in the normal manner as it
5. always has." Now, from where this lady's car was parked,
6. it would appear to me that she would have been in the pathway
7. of this truck in its backing. I think, of course, that of
8. course creates a factual issue for the jury. I don't feel
9. at this stage of the proceeding, Mr. Smith, your motion is
10. well taken and I'm going to deny your motion to strike at
11. this time.
12. MR. SMITH: We except to your ruling, Your Honor.
13. COURT: All right, sir, you can save your point.
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Harrisonburg, Virginia 22801

1. (In Open Court)

2. COURT: All right, Mr. Smith, I believe you have
3. a motion to make at this time.

4. MR. SMITH: Your Honor, first of all, I would like
5. to renew my motion to strike the plaintiff's evidence on the
6. grounds that I have set forth at the conclusion of the
7. plaintiff's evidence. First of all, that there was no
8. evidence as to how or why this particular accident had
9. occurred. And there are numerous cases that have held that
10. this is a requisite if the plaintiff is to recover, one of
11. them being Snead v. Snead, 219 Va. 15. Also one I thought
12. was very close to the case in point, 163 Va. 611, Bailey v.
13. Fare. I also would like to in support of that motion, also
14. the fact that I think as a matter of law the evidence showed
15. that the plaintiff had to be contributorily negligent for
16. this accident to occur.

17. Secondly, I would like to at this time make a
18. motion for summary judgment. And basically I'm using the
19. same grounds. I think after the defendant's evidence I
20. still feel that the plaintiff has not carried the required
21. burden. I think the plaintiff's own evidence shows that
22. the truck was lighted while--I don't think any reasonable
23. person could differ that that truck, or someone should have
24. known that that truck was moving into this parking area.

1. And I think as a matter of law the Court should grant both
2. of these motions.
3. I further would like to renew my objection to the
4. Court not granting my motion for a continuance so that I
5. would be allowed to be able to go out and track down some
6. additional evidence that I was not aware of until the morn-
7. ing of this trial. And I think I've already stated for the
8. record what the basis of that request was. And I would like
9. to make sure that that objection is still in the record.
10. COURT: First, Mr. Smith, let me interrupt right
11. here.
12. MR. SMITH: Yes sir.
13. COURT: The two witnesses that you called yester-
14. day, wasn't that the information that you had received?
15. MR. SMITH: Not particularly, sir. Now, I was
16. able . . .
17. COURT: Wasn't that included . . .
18. MR. SMITH: Because I was not granted a continu-
19. ance I tried to contact as many of these alleged persons as
20. I possibly could and I was able to come up with some, but it
21. was not done in the manner in which I would like to have
22. done it, in that I would like to have searched out all the
23. people out there who in any way had come in connection with
24. this woman. There were statements made to me on the tele-

1. phone that these particular witnesses did not offer which
2. led me to believe that there may be some more specific infor-
3. mation that I was not able to obtain. That's why I wanted
4. to renew this because I didn't want the Court to think that
5. because I had two witnesses in here, that it cured the prob-
6. lem because I'm saying it did not cure the problem.
7. COURT: My recollection of your motion that was
8. taken just prefacing the trial of the case, your motion for
9. a continuance, that you had been called yesterday morning,
10. the day of the trial, by an anonymous person who refused to
11. identify herself . . .
12. MR. SMITH: That's correct.
13. COURT: And that she said there were other inform-
14. ants, whose names she also refused to reveal, that would have
15. some helpful information concerning the health condition of
16. the decedent.
17. MR. SMITH: That's correct.
18. COURT: I openly expressed my opinion that this
19. would truly create a hardship on the defendant in offering
20. their full defense to the claim of the plaintiff, that if
21. counsel for the plaintiff would join in the motion I would
22. grant it, but I also remarked that I didn't feel there was
23. sufficient merit for the Court on its own to continue the
24. case. That at that late hour and this information coming

1. from an unidentified person I didn't feel that the Court
2. was justified in granting the continuance.
3. MR. SMITH: I understand that and I respect the
4. Court's decision. I also would like to add that counsel
5. for the plaintiff did not join in the request and they
6. objected, they opposed any such motion for a continuance.
7. COURT: Right. Unless you gentlemen want to be
8. heard I'm prepared to rule on the motion. On the motion to
9. strike and motion for summary judgment, Mr. Smith, I feel
10. that your motions are not well taken and I must overrule
11. them at this time. I have given this case my very careful
12. consideration and I feel that there is sufficient evidence
13. to create factual issues to be properly submitted to the
14. jury.
15. Now, I understand the plaintiff has a motion.
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