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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 8726

MARJORIE TAYLOR,
Appellant

v

CITY OF NEWPORT NEWS AND JOHN HUGGINS,
INDIVIDUALLY AND TRADING AS
HUGGINS BAR-B-QUE,
Appellee

JOINT APPENDIX

William Mills Krieger
COGDILL, CORBETT & KRIEGER
730 J. Clyde Morris Blvd.
Newport News, Virginia 23601
Counsel for Appellant

Joseph Smith
2100 Kecoughtan Ave.
Hampton, Virginia
Counsel for Appellee

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VIRGINIA: IN THE CORPORATION COURT FOR THE CITY OF NEWPORT NEWS

MARJORIE TAYLOR, Plaintiff, vs. CITY OF NEWPORT NEWS c/o City Manager 118 Main Street Newport News, Virginia, CITIZENS RAPID TRANSIT COMPANY c/o Sinclair Phillips, Registered Agent 3400 Victoria Boulevard Hampton, Virginia, and JOHN HUGGINS, individually and trading as Huggins Bar-B-Que 526 - 25th Street Newport News, Virginia, Defendants.	MOTION FOR JUDGMENT

TO: The Honorable Douglas M. Smith,
Judge of said Court:

The undersigned, Marjorie Taylor, hereby moves this Honorable Court for judgment against you, City of Newport News, Virginia, Citizens Rapid Transit Company and John Huggins, individually and trading as Huggins Bar-B-Que, and each of you, jointly and severally, in the sum of THIRTY-FIVE THOUSAND DOLLARS ($35,000.00), all of which is justly due the undersigned by you, and each of you, on account of the following:

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ORT NEWS, VA.

1. That on the 21st day of November, 1967, you, Citizens Rapid Transit Company, owned a certain bus line and operated said bus line as a common carrier of passengers, in the City of Newport News, Virginia; that on the 21st day of November, 1967, one of the buses in said bus line was being operated and driven by your agent, servant and employee on its regular route between Fort Eustis, Virginia, and downtown Newport News; that at

the special insistence of the aforesaid employee driver of said bus, plaintiff boarded said bus at Fort Eustis in order that she could be transported to downtown Newport News, for which transportation the plaintiff paid a fare to Citizens Rapid Transit Company.

2. That as a common carrier of passengers for hire, you, Citizens Rapid Transit Company, had a duty to exercise a high degree of care to insure that plaintiff, your passenger, was transported on your bus line in safety and that upon reaching her destination, was discharged from the bus at a reasonable safe place for the discharge of passengers.

3. That plaintiff, upon nearing her desired destination of 25th Street and Jefferson Avenue in Newport News informed your employee operator of said bus of her desire to alight from your bus at the place designated as the "bus stop" located at the southwest corner of 25th Street and Jefferson Avenue.

4. That in utter disregard of the aforesaid duty owed plaintiff, your employee bus driver carelessly, recklessly and negligently discharged the plaintiff at a point not designated as a "bus stop", said point of discharge being west of the area of the bus stop located at the southwest corner of 25th Street and Jefferson Avenue and being an unlit, unsafe area for the discharge of passengers; further that at said point of discharge, the public sidewalk was strewn with garbage and said sidewalk was covered with slippery grease; which said conditions were known, or in the exercise of ordinary care should have been known to you through your agents, servants or employees.

5. That you, John Huggins, or your servant, agent or employee, on the morning of the 21st day of November, 1967, at your business premises known as Huggins Bar-B-Que, located at

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526 - 25th Street in the City of Newport News, Virginia, did carelessly, recklessly and negligently place on the sidewalk in front of said business premises numerous paper bags filled with garbage and quantities of "grease"; further that the subsequent rain during the morning caused said paper bags to rip and tear resulting in garbage and "grease" being strewn and deposited on said sidewalk in front of said business premises; that during the morning you or your servants, agents or employees knew that said garbage and "grease" were so strewn and deposited on said sidewalk and nevertheless did carelessly, recklessly and negligently fail to clean up said garbage and "grease" and allowed the same to remain strewn and deposited on said sidewalk through the morning, afternoon and night of November 21, 1967, although you knew or in the exercise of ordinary care should have known of the dangerous conditions that the garbage and grease created.

6. That the City of Newport News had the duty to keep the aforesaid public sidewalk in a reasonably safe condition for public passage; further that the aforesaid public sidewalk in front of Huggins Bar-B-Que was in an unrepaired, unsafe, defective condition for public passage.

7. That in utter disregard of the aforesaid duty, the City of Newport News, through its agents, servants or employees carelessly, recklessly and negligently, after notice of the aforesaid defective condition of the said sidewalk failed to correct or repair said condition.

8. That the plaintiff, as she alighted from the said bus, was caused to slip and violently fall on the said sidewalk in front of Huggins Bar-B-Que due to the combined presence of slippery grease substance and said unsafe defective condition of said sidewalk.

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9. That as a direct and proximate result of the negligence and failure of the defendant, Citizens Rapid Transit Company, to exercise that high degree of care owed plaintiff and the negligence and failure to exercise ordinary care by the defendants, City of Newport News and John Huggins, the undersigned plaintiff has sustained severe and permanent personal injuries, and has incurred expenses for medical treatment and attention to her injuries and will be required to incur further such medical expenses in the future; further that the plaintiff has suffered pain and anguish in body and in mind and will continue to so suffer said pain and anguish in the future; and further the plaintiff has suffered a loss of earnings from her inability to perform her usual work and labor.

WHEREFORE, plaintiff moves this Court for judgment against the defendantsand each of them, jointly and severally, in the sum of THIRTY-FIVE THOUSAND DOLLARS ($35,000.00), together with costs incident to this proceeding.

MARJORIE TAYLOR

By_____
Counsel

WEST & WILKINSON
Attorneys at Law
2815 Huntington Avenue
Newport News, Virginia
Counsel for Plaintiff

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VIRGINIA: IN THE CORPORATION COURT FOR THE CITY OF NEWPORT NEWS

MARJORIE TAYLOR,	:	
Plaintiff	:	
vs.	:	GROUNDS OF DEFENSE AND PLEA OF CONTRIBUTORY NEGLIGENCE
CITY OF NEWPORT NEWS,	:	
CITIZENS RAPID TRANSIT COMPANY,	:	
and	:	
JOHN HUGGINS, individually and trading as Huggins Bar-B-Que,	:	
Defendants	:	

For its Grounds of Defense to the Motion for Judgment filed against it by the plaintiff, the defendant, Citizens Rapid Transit Company, states as follows:

1. That as to the allegations of fact contained in said Motion for Judgment which are not specifically denied herein, it knows not whether the truth of same exists or existed and will require strict proof thereof.

2. It denies the allegations contained in paragraphs 2 and 3 of said Motion for Judgment.

3. It denies that either it or its agent, servant, or employee was guilty of any negligence whatsoever.

4. Expressly denying any negligence on the part of either it or its agent, servant or employee, it alleges that in the event of such, it was a remote and not a proximate cause of the accident and injuries complained of in said Motion for Judgment.

5. It denies the allegations contained in paragraph 4 of said Motion for Judgment.

6. It denies that the plaintiff was injured in the manner or to the extent alleged in said Motion for Judgment.

7. It denies that the plaintiff has sustained or will in the future sustain the damages, injuries, and expenses all as alleged in said Motion for Judgment.

8. It alleges that the accident and injuries complained of in said Motion for Judgment were caused by the sole negligence of parties other than this defendant.

9. It alleges that, in any event, the plaintiff is barred from recovery in this action by virtue of the legal doctrine of assumption of risk.

10. It will rely upon such further defenses as might become available prior to or during the course of trial.

PLEA OF CONTRIBUTORY NEGLIGENCE

11. Protesting any negligence on its part, it alleges that the plaintiff was guilty of negligence which was a proximate cause of the accident complained of in said Motion for Judgment; which said negligence is legally operative to bar any right on her part to recover herein.

CITIZENS RAPID TRANSIT COMPANY

By W. Reece Hornsby
Of Counsel

Marshall, Blalock, Garner & Millner
119 - 26th Street
Newport News, Virginia

VIRGINIA: IN THE CORPORATION COURT FOR THE CITY OF NEWPORT NEWS.

MARJORIE TAYLOR, Plaintiff v. CITY OF NEWPORT NEWS, CITIZENS RAPID TRANSIT COMPANY, and JOHN HUGGINS, Defendants	:	ANSWER AND GROUNDS OF DEFENSE OF DEFENDANT, CITY OF NEWPORT NEWS.

TO: The Honorable Douglas M. Smith, Judge of said Court:

Now comes the defendant, City of Newport News, by its City Attorney, for its answer to the Motion for Judgment filed herein against it and codefendants, and says that it does not owe the plaintiff anything on account of any allegations in the motion for judgment, and further says:

1. This defendant relies upon any and all defenses provable in this action.

2. This defendant denies that it, or any of its servants, agents or employees, is guilty of any negligence as charged in the motion for judgment or otherwise.

3. This defendant denies each and every allegation of negligence and proximate cause charged in said motion for judgment.

4. This defendant denies that the plaintiff was injured in the manner or to the extent alleged in the motion for judgment.

5. This defendant denies each and every allegation

in the motion for judgment which in anywise alleges or imparts liability on the part of this defendant.

6. This defendant says that if it or its servants, agents or employees were guilty of negligence, which is expressly denied, that such negligence was a remote and not a proximate cause of the alleged injury and damages of which complaint is made by the plaintiff, nor did such negligence efficiently contribute thereto.

7. This defendant says that if it or its agents, servants or employees, were guilty of negligence, which is expressly denied, that such negligence was in the pursuit of a governmental function for which this defendant cannot be held liable.

8. This defendant says that any injuries or damages the plaintiff may have sustained at the time and place alleged in the motion for judgment were directly and proximately caused by the negligence of the said plaintiff and/or by parties other than this defendant.

9. Protesting negligence on its part and on the part of its agents, servants and employees, this defendant will nevertheless rely upon the contributory negligence of the plaintiff.

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10. This defendant says that the injuries and damages, if any, sustained by the plaintiff as alleged in the motion for judgment, were due solely to an unavoidable accident.

Consent decree jury Appeal

11. This defendant denies that the sidewalk, described in paragraphs numbered 4 and 5 of the motion for judgment, was unlit, unsafe or strewn with garbage or

covered with slippery grease.

12. This defendant denies the allegations of paragraphs numbered 6, 7, 8 and 9 of the motion for judgment and calls for strict proof thereof.

13. In addition to the defenses hereinabove set forth, this defendant will rely upon any and all other defenses which may develop in the case and any and all defenses which may be assigned at or before trial or be justified upon the evidence upon trial, and such other defenses as may be available at bar.

AFFIRMATIVE DEFENSE

This defendant, City of Newport News, asserts the following, to which a reply is expressly requested, as the basis for an affirmative defense:

1. That the City of Newport News, its agents, servants or employees referred to in the motion for judgment in fact refers to garbage collectors employed by the City and the allegations are based upon the alleged negligence of said garbage collectors who were performing a governmental function.

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2. That the alleged defective unrepaired, and unsafe condition of the sidewalk referred to in the motion for judgment does not refer to an obstruction or defect in the sidewalk, itself, but refers to debris and grease allegedly located thereon.

so what?

3. That the alleged action against the City of

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Newport News is based upon the alleged negligence of garbage collectors for allegedly failing to pick up garbage and/or allegedly spilling garbage all of which amount to the performance of functions which are governmental in nature.

WHEREFORE, having fully answered, this defendant prays that the motion for judgment be dismissed and that it be allowed to recover the costs herein expended.

CITY OF NEWPORT NEWS

By Robert V. Beale

Robert V. Beale
City Attorney

Robert V. Beale
City Attorney
118 Main Street
Newport News, Virginia

CERTIFICATE

I certify that I have mailed a copy of the foregoing Answer and Grounds of Defense of Defendant, City of Newport News, to West & Wilkinson, Attorneys at Law, 2815 Huntington Avenue, Newport News, Virginia, and Joseph Smith, Attorney at Law, 2100 Kecoughtan Road, Hampton, Virginia, counsel of record for plaintiff and Citizens Rapid Transit Company, Sinclair Phillips, Registered Agent, 3400 Victoria Boulevard, Hampton, Virginia, and John Huggins, 526 - 25th Street, Newport News, Virginia, co-defendants, this 27th day of March, 1969.

Robert V. Beale

Robert V. Beale
City Attorney

VIRGINIA: IN THE CORPORATION COURT FOR THE CITY OF NEWPORT NEWS

MARJORIE TAYLOR Plaintiff

VS

CITY OF NEWPORT NEWS, et als Defendants

ANSWER AND GROUNDS OF DEFENSE OF THE DEFENDANT JOHN HUGGINS, INDIVIDUALLY AND TRADING AS HUGGINS BAR-B-QUE

To the Honorable Douglas M. Smith, Judge:

Now comes the defendant John Huggins, Individually and Trading as Huggins Bar-B-Que, by counsel, and for his answer to a Motion for Judgment filed herein, says that he does not owe the plaintiff anything on account of any allegations in the Motion for Judgment and further says that:

1. That he denies each and every allegation of negligence as charged in the Motion for Judgment.

2. That he denies that he or any of his servants, agents or employees is guilty of any negligence as charged in the Motion for Judgment.

3. That he denies that the plaintiff was injured in the manner or to the extent alleged in the Motion for Judgment.

4. That even if he or any of his servants, agents or employees were negligent, that such negligence was a remote and not a proximate cause of the alleged injuries and damages.

5. That any injuries or damages that the plaintiff sustained were caused by the plaintiff or by parties other than this defendant.

6. That the accident was an unavoidable accident. Unavoidable accident

7. That the plaintiff was guilty of contributory negligence.

8. That he denies that the sidewalks were strewn with garbage or grease.

9. That he denies that the plaintiff has sustained or will in the future sustain any such damages, injuries or expenses as alleged in the Motion for Judgement.

10. That the plaintiff is barred from recovery by virtue of the legal doctrine of assumption of risk.

11. And that he will rely upon such other and further defenses as they may develop, or be assigned at or before trial, or such other defenses as may be available at bar.

C. BROOKS

WHEREFORE, the defendant moves that the Motion for Judgment be dismissed and that he be allowed to recover his costs expended.

JOHN HUGGINS, INDIVIDUALLY AND TRADING AS
HUGGINS BAR-B-QUE

BY: Billy C. Brooks
Of Counsel

I certify that a true copy of the above pleading was this 4th day of April, 1969 mailed to each counsel of record in the above case.

Billy C. Brooks
Billy C. Brooks

Billy C. Brooks, p.d.
107 - 28th Street
Newport News, Virginia 23607

VIRGINIA:
IN THE CORPORATION COURT OF THE CITY OF NEWPORT NEWS

MARJORIE TAYLOR, Plaintiff vs. CITY OF NEWPORT NEWS, CITIZENS RAPID TRANSIT COMPANY, and JOHN HUGGINS, Individually and trading as HUGGINS BAR-B-QUE, Defendants	NOTICE OF APPEAL

TO: Mr. Panos Yeapanis, City Attorney,
City of Newport News

Messrs. Marshall, Blalock, Garner & Millner,
Attorneys for the defendant Citizens Rapid Transit Company

Mr. Billy C. Brooks,
Attorney for the defendant John Huggins

PLEASE TAKE NOTICE that on the day of 1972, at_____ o'clock_____ the undersigned will present to the Honorable Douglas M. Smith, Judge of the Corporation Court of the City of Newport News, at the courthouse thereof in said city, a stenographic report of the testimony and all other incidents of the trial of the above-entitled cause (exclusive of medical testimony), transcribed by a reporter, for certification thereof by said judge, in order to make said oral testimony and all other incidents of this trial a part of the record in this case for the purpose of presenting said record to the Supreme Court of Appeals of Virginia, together with the petition for appeal and supersedeas to the final decree of the Trial Court entered in said cause on the _____ day of _____, 1972, and you may examine the original of said transcript or a true copy thereof at the offices of Cogdill, Corbett, Elmore, Friend, Insley & Krieger, 10231 Warwick Boulevard, Newport News,

VIRGINIA:
IN THE CORPORATION COURT OF THE CITY OF NEWPORT NEWS

MARJORIE TAYLOR, Plaintiff vs. CITY OF NEWPORT NEWS, CITIZENS RAPID TRANSIT COMPANY, and JOHN HUGGINS, Individually and trading as HUGGINS BAR-B-QUE, Defendants	]]]]]]]]

TRANSCRIPT OF TESTIMONY

Stenographic transcript of the testimony (exclusive of medical testimony) introduced and proceedings had upon the trial of the above-entitled case, in said court, on the 28th day of March 1972, before the Honorable Douglas M. Smith, Judge of said court, and a jury.

APPEARANCES:

Messrs. Cogdill, Corbett, Elmore, Friend, Insley & Krieger (by Mr. F. Lee Cogdill and Mr. William Mills Krieger), Attorneys for the plaintiff.

Mr. Panos Yeapanis, City Attorney, and
Mr. Frank Morton, Assistant City Attorney,
for the defendant City of Newport News.

Messrs. Marshall, Blalock, Garner & Millner (by Mr. W. Glover Garner, Jr.),
Attorneys for the defendant Citizens Rapid Transit Company.

Mr. Billy C. Brooks,
Attorney for the defendant John Huggins (individually and trading as Huggins Bar-B-Que).

(Dr. M. W. Frazier and Dr. W. F. Peach then gave their medical testimony.)

MARJORIE TAYLOR, the plaintiff, having been first duly sworn, testified as follows:

EXAMINED BY MR. KRIEGER:

Q. Would you state your full name and address, please.

A. Mrs. Marjorie Taylor; 1233 Hampton Avenue, Newport News.

Q. And are you married, Mrs. Taylor, widowed or separated?

A. I am a widow now.

Q. How long have you been a widow?

A. 7 October 1971.

Q. How old are you, Mrs. Taylor?

A. Forty-three.

Q. Do you have any children at home?

A. Yes.

Q. How many at home?

A. Four at home.

Q. How many children do you have, total?

A. Seven.

Q. Do you work at the present time?

A. Right now, no. I haven't worked since my husband died.

Q. Did you work on November 21, 1967, or thereabouts?

A. Yes.

Q. Where did you work?

A. At Fort Eustis Post Exchange.

Q. What kind of work did you do?

A. Cafeteria work.

Q. Did you on November 21, 1967, have an accident?

A. Yes.

Q. Can you describe what happened -

A. Yes.

Q. - that night. What time did this accident occur?

A. About eleven-thirty at night.

Q. Can you describe basically for the jury what happened?

A. Yes. The bus pulled in 25th Street about eleven-thirty at night, and I went to get off the bus. I went to get off it, placed my right foot off first. Then I felt this slippery - this greasy stuff at my foot and I started slipping. And by reaching around trying to hold onto something, anything, I fell, striking my head against the bus. And the next thing I remember, the bus driver was picking me up from the sidewalk.

Q. Were you returning from work when you -

A. Yes, I was.

Q. - when the accident happened. Can you tell us where the accident occurred, what specific spot?

A. Just about in front of the Bar-B-Que.

Q. Is that 25th and Jefferson?

A. 25th.

Q. In Newport News. You say you were getting off the bus and your right foot - did you say your right foot was on the street?

A. Yes. I was stepping down, my right foot on -

Q. Where was your left foot?

A. Still on the step.

Q. When you say you felt something on your foot, was it slippery, sort of slippery?

A. Slippery; slipperyy-like.

Q. Can you tell us: you spun around, fell real fast, or whether it was gradual?

MR. YEAPANIS: I object to those leading questions.

THE COURT: You can't suggest how she might have fallen, Mr. Krieger. You have got to let her do it.

BY MR. KRIEGER:

Q. Can you describe the fall as light?

A. It was fast.

Q. Were you completely unconscious, or what was your condition after you fell?

A. I would say I was in a daze, like.

Q. In a daze?

A. Yes.

Q. And you would say that is different from being unconscious?

A. Well, I think it would be different from being really unconscious.

Q. In other words, you were not blacked out?

A. I was not really totally blacked out but I was dazed.

Q. Before you got off the bus did you look to the ground at all?

MR. YEAPANIS: I object to these leading questions, telling her what she did before she got off. Your Honor has already pointed it out to counsel. It would seem to me that we ought to be a little more careful about the questions. If counsel is going to testify, it is highly improper.

THE COURT: I sustain the objection.

BY MR. KRIEGER:

Q. You tell us in detail as to how you got from the bus onto the ground.

A. How did I get to the bus?

Q. Let me ask you this. -

MR. KRIEGER: Well, Your Honor, you see, this is the problem here. Asking for a yes-or-no answer is not a leading question. If we are going to ask details from the witness, it is essential to the question.

THE COURT: To ask for a yes-or-no answer is not leading? Where did you get that from?

MR. KRIEGER: She can answer yes or no.

THE COURT: That is right. That is what a leading question is, a question that can be answered yes or no.

BY MR. KRIEGER:

Q. Can you tell us if you ever looked at the ground?

A. Well, it was nighttime, anyway.

Q. Yes, I know that.

A. I put -

Q. When you were getting off the bus.

A. Well, I have a tendency always to looking down. When I put my foot down I didn't see anything.

Q. Right. And so, did you see anything on the ground before you fell?

A. No, I didn't.

Q. So then, what was the first you knew of the presence of anything slippery?

A. When the bus driver helped me up off the ground. Then he was trying to figure out what had happened. So he looks around, and all this - we look around, rather, and all this white, thick stuff, looked like maybe that - we didn't really know what it was then but it was there. Looked like soap at first. Then maybe - he thought maybe it might have been grease.

Q. And this was eleven-thirty at night?

A. Ahum.

Q. Did you later see any of the grease anywhere on your body or your clothes or anything?

MR. MORTON: If Your Honor please, I object to that question. In response to the question before, Mrs. Taylor said that it looked like soap and thought there might have been some grease. Now Mr. Krieger is classifying that answer: in speaking of grease he is making an affirmative statement that it is there. There isn't any evidence that there was any grease there at this point, if Your Honor please.

THE COURT: All right. I sustain the objection.

BY MR. KRIEGER:

Q. Did you notice anything upon your clothing after the accident?

A. Yes. That was a couple of days later, though.

Q. What was the nature of the substance on your clothes?

A. Well, after Mr. Fortner had come by and told me he had found out it was grease, this coat that I had on - it had spots on it. So I went upstairs - well, my daughter helped me to get upstairs and I smelled this stuff and it smelt just like grease.

Q. All right. On the night of the accident did you get medical attention?

A. Yes.

Q. What was the nature of the medical attention? Did you go to a doctor?

A. I went to the Dixie Hospital. The CRT man that drives the truck - the car - he took me to the Dixie Hospital, emergency room.

Q. What did they do for you at the emergency room?

A. They X-rayed me and gave me a couple of pills.to take.

Q. What did you do then? Did you go home or

Q. They put wires on your head?

A. Yes.

Q. When you were in a hospital for two weeks, what hospital were you in?

A. Dixie.

Q. Dixie Hospital. O.K. On the night of the accident what hospital did you go to?

A. Dixie.

MR. KRIEGER: I have no further questions.

THE COURT: All right. Now you may cross-examine.

CROSS-EXAMINATION

BY MR. YEAPANIS:

Q. Mrs. Taylor, I believe you said that you alighted from the bus about eleven-thirty?

A. I think it was about that time.

Q. Is that the usual time you would get home when you were out on the job?

A. That is the usual time the bus get to Jefferson Avenue.

Q. How far were you from your home?

A. Well, I lives on Hampton Avenue. I never really know exactly how far that is. I live in the 1200 block, Hampton Avenue.

Q. How many blocks would you say that is from -

A. Oh, that is quite a ways, because I live down near Oak Avenue, between Oak and Chestnut.

Q. Were you going to take another bus?

A. No. This particular night my husband was supposed to meet me there, which he did. When he got there, I was in the hospital.

Q. He didn't see you fall, did he?

A. No. He hadn't really got there when I got off the bus. He came afterwards, you know, a few minutes after eleven-thirty, looking for me - and I was in the hospital.

Q. Where were you to meet him?

A. I always gets off the bus on 25th Street and he usually be parked across the street.

Q. I believe you said that you had on - let me ask you this. Was it your intention after you met your husband to go to your house, go home?

A. Go home? Yes.

MR. KRIEGER: Your Honor, I don't know the relevance. It is cross-examination but this is getting far afield.

THE COURT: I will allow it.

BY MR. YEAPANIS:

Q. I believe you said you had on a pair of work shoes?

A. Yes.

Q. Can you describe these work shoes that you are talking about to us in detail?

A. Well, it is a nurse-type shoe, crinkle-type shoe with a crepe sole.

Q. It has a crepe sole and heel?

A. No, no. The heel, you know, it would be heel like rubber. And the sole is maybe rubber, too, but it is a crepe, like, you know.

Q. I believe that you said that as you stepped off the bus you stepped off with your right foot, is that correct?

A. That is right.

Q. And you said that you felt something slippery?

A. Under my foot.

Q. When you stepped down, is that right?

A. That is right.

Q. Now, later on when Mr. Krieger asked you a question you said that you did not notice anything slippery?

A. I didn't but I could feel this slippery stuff under my -

Q. You felt, but you didn't see it?

A. I didn't see it.

Q. Is that right? Now, after you fell down,

did you notice anything on the ground where you fell?

A. I didn't notice anything until the bus driver helped me up - because for, you know, a few minutes I was dazed, like.

Q. The substance you saw, do you know what it was?

A. No, at first we didn't know what it was, and the bus driver was trying to decide whether it was soap or grease. That is what he - they didn't know what it was. All they know, it was a white foam, a thick white foam.

Q. Mrs. Taylor, here is a layout, a diagram of that street, and Huggins Bar-B-Que is shown here by this. That is the intersection of Jefferson and 25th. Can you show us on here? You can mark on here approximately where you fell? - if you remember it. This is the entrance to Huggins's. (Counsel indicating)

A. I am not so good at diagrams.

Q. Well, approximately where do you think you fell? Here is the corner up here, right here, and here is the entrance to Huggins's, right here. Do you have any idea in relationship to the entrance, where you fell? If you can, mark it on there and show it to us, approximately.

MR. KRIEGER: Your Honor, couldn't we stand back, have Mr. Yeapanis ask her in reference to the mark, the door or window or something where she

fell, have her mark it? She is nervous.

THE WITNESS: I am not so good at identifying.

BY MR. YEAPANIS:

Q. I will be glad to. This (indicating) is the entrance to Huggins's. Over here (indicating) is one window; and over here (indicating) is another.

A. Well, the door -

Q. The door is right here in this indentation.

A. The bus was near the door.

Q. Right here?

A. Let's see. The first bus - it was somewhere along -

Q. You would say that this is where you fell, approximately here? Remember, that is the door right there, that is the entrance to Huggins's.

A. It was near that door, I know.

Q. Near, but you don't know on which side of the door you fell?

MR. KRIEGER: If you don't know, say you don't know.

A. I don't know.

BY MR. YEAPANIS:

Q. You are not sure of where you fell?

A. Not from this.

Q. In relation to Huggins's.

A. Not from this here. I don't know nothing about diagrams.

Q. All right. Were you in a hurry when you stepped down from the bus?

A. No, not more than usual, no.

Q. Did your right foot - as you put it down, you had your left foot in the bus door, I believe you mentioned.

A. Ahum.

Q. Is that correct?

A. That is correct.

Q. Did your right foot go out from under you?

A. Slipping. I felt this stuff under my foot, stuff was slippery under my shoe, I would say. Then I start slipping, start reaching around, trying to hold onto something. In the meantime I spin around, knocked my head on the side of the bus, twisted myself all the way around.

The next thing I knew, the bus driver was helping me up from -

Q. Who else was helping you up? Was anyone that you knew -

A. Just the bus driver, and Mr. Chester.

Q. Mr. Chester?

A. Yes.

Q. Did you know any of the passengers on the bus?

A. Well, I know the girl; she worked with me, Miss White; and she was walking behind me. I got off ahead of her. But after I come around to myself, the bus driver helped me up off the ground, I didn't see her. Everybody had gone but this one man.

Q. In relationship to the bus's location at the curb, how far was the bus from the curb?

A. What do you mean? The corner of the street?

Q. Where you stepped off the bus, how far was the body of the bus from the curb?

A. Well, just like usual. It was at the curb. You know, you have to always step down on the curb.

Q. You are saying it was right up against the curb?

A. It was in the usual place, yes.

Q. When you terminated your hospital stay, you were released by the doctor. Did you go back to work?

A. I didn't go back right away, no. I came back to the hospital. It was the 16th of December. I didn't go back to work until the 8th or 9th of February.

Q. Did your doctor tell you when he released you that you could go back to work?

A. Out of the hospital you mean?

November 22nd until February 8th?

A. That is right.

Q. 1968. And that is all the time that it says you were out?

A. Well, when you lose one or two days like that, they don't keep that kind of record. They pay you for your sick leave. You take off, it goes on your sick leave.

Q. That is not what that says, is it?

MR. KRIEGER: I object to this. We didn't say anything, put in any amount of money for damages - eleven weeks.

MR. GARNER: That is all you are claiming is the eleven weeks?

MR. KRIEGER: It is perfectly understandable. We are not.

BY MR. GARNER:

Q. Mrs. Taylor, I show you this diagram.

A. Like I said before, I am not very good at diagrams.

Q. You don't know where you fell but you know it was in the area of Huggins's?

A. I cannot really say from this thing here because I don't know about the diagram.

Q. Yes, ma'am. You know it was in front of

Huggins's where you fell?

A. I n that area.

Q. In that area?

A. Right here (indicating), somewhere in there.

Q. Can you say it was in front of Huggins's or not?

A. Yes, I know it was in front of him somewhere in here, because that door, I can remember that door.

Q. The door on Huggins's?

A. Yes.

Q. All right, ma'am. Now -

A. Exactly how far from the door I could not measure from here.

Q. All right. Now, you are not saying that the bus was not stopped in a bus stop when this happened, are you?

A. Well, I wouldn't really know if that is the bus stop or not. A bus in front of the bus: is that a bus stop?

Q. Do you know that there is a bus stop sign down here at this point, down beyond Huggins's?

MR. KRIEGER: Your Honor, I think the witness -

A. That is the bus stop.

MR. KRIEGER: - said she can't read -

THE COURT: There is nothing in the world wrong with the question.

MR. KRIEGER: The fact that he is referring to the plat: she has already said she can't operate with it because she can't draw things to scale.

MR. GARNER: You said in your opening statement that the bus stopped at the bus stop. Are you now saying it didn't stop?

MR. KRIEGER: I mean the bus stop; it stopped. It is not - I don't want to get personalities in this thing. She said she doesn't understand it.

MR. GARNER: Are you claiming the bus didn't stop at the bus stop?

THE COURT: Just ask the question that I am ruling on. I will say what is nitpicking and what isn't. She must answer the question if she can. If she can't, she can say so.

MR. KRIEGER: It calls for a conclusion as to what was the bus stop.

THE COURT: It doesn't call for anything. He is asking her whether the bus stop sign is there in front of Huggins's.

MR. KRIEGER: Oh.

THE COURT: That is all that she has to answer.

MR. GARNER: If Your Honor please, the one I am pointing to is further down from Huggins's, which would include the area which is embraced by the street in front of Huggins's.

THE COURT: All right.

BY MR. GARNER:

Q. There is a bus stop sign right there?

A. Right here, yes.

Q. There is one there and you know that, do you not?

A. I see that right here.

Q. But you know that there is one out there right here, is that not correct?

A. They always get off by that jewelry store.

Q. Then there is another bus stop sign right up here at the corner?

A. This one be the jewelry store right here, that is right.

Q. So, now, the bus stopped right here in front of Huggins's on the night you got off, did it not?

A. It was a bus, one bus already in the zone.

Q. Yes, ma'am; but your bus stopped in front of Huggins's?

A. Right here, somewhere along here but I can't remember.

Q. So your bus stopped between the two bus stop signs that are located there on 25th Street, is that not correct?

A. That is what it seems, yes.

Q. So it stopped within the bus stop, is that not correct?

A. I guess you would call this the bus stop.

Q. And you had -

MR. KRIEGER: I ask that that last answer be stricken because the question was unfair. It calls for the conclusion as to what is and is not a bus stop; and Mrs. Taylor is not an expert in this.

THE COURT: All right. Well, I will instruct the jury that she said it stopped within the bus stop signs.

BY MR. GARNER:

Q. Mrs. Taylor, how often had you ridden this bus?

A. I ride the bus every night but maybe two nights a week. Sometimes my husband picked me up from work.

Q. How long had you been riding on the bus?

A. Oh, ever since I had been working Fort Eustis

I had been riding the bus.

Q. How often did you get off at this particular stop?

A. Just like I say: every night but maybe two nights a week catch a ride.

Q. Pardon?

A. Had poor chances of catching rides. Didn't have no choice; ride the bus.

MR. KRIEGER: I object and request that that answer be stricken because he said "when you got off at this bus stop," and the meaning of a bus stop is crucial to this particular case. My witness is not the witness that is to testify for the bus company as to what is and what is not a bus stop. And I think she was led into it and unfairly so by Mr. Garner.

THE COURT: I overrule your objection.

MR. KRIEGER: I take exception, Your Honor.

BY MR. BROOKS:

Q. Had you ever had occasion to slip before, in these crepe-sole shoes?

A. No, I never had.

Q. Not on rainy surfaces? Did you ever have arthritis?

A. No indeed.

Q. What?

A. No, not yet; no arthritis.

Q. Was Huggins Bar-B-Que closed every night when you got off there?

A. I really didn't pay much attention when I got off the bus to those things, whether they were closed or not.

Q. Do you know whether or not they were closed that particular right?

A. I don't know. I really don't know.

Q. You were dazed, I believe you said?

A. Yes, after I fell I really didn't notice. Because when I get off the bus I go about my business, you know, going home.

Q. Did you notice any cans such as garbage cans or refuse cans in the area?

A. Oh, no.

Q. Did you see any, notice any marks where any cans had been removed? - like round marks on the sidewalk.

A. No, I can't say.

Q. Did you talk to anybody from Huggins's or its employees about the accident?

A. No. I don't know nobody over Mr. Huggins's.

Q. When was the next time you went to that particular area after the accident?

(There was no objection.)

THE COURT: Plaintiff's Exhibits 5, 6 and 7, as introduced.

(The bills were marked Plaintiff's Exhibits 5, 6 and 7.)

THE COURT: All right, sir. Next witness.

MR. KRIEGER: I call Mabel Huggins as on cross-examination.

THE COURT: You call her as an adverse witness?

MR. KRIEGER: Yes, sir.

MABEL HUGGINS, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. KRIEGER:

Q. State your name if you will, please.

A. Mabel Huggins.

Q. Mrs. Huggins, were you the owner and manager of the Huggins Bar-B-Que on 25th Street on November 22, 1967?

A. Yes.

Q. Is that close to the corner of Jefferson Avenue and 25th Street?

A. Yes.

Q. And do you still own that establishment?

A. (The witness nodded.)

Q. O.K.

BY THE COURT:

Q. What was your answer?

A. Yes.

MR. KRIEGER: She shook her head yes, Your Honor.

BY MR. KRIEGER:

Q. On November 21, 1967, do you remember putting a can of grease onto the sidewalk in front of your establishment?

A. Yes, I remember it being put there.

Q. Can you describe the size of the can or the weight, what kind of can it was?

A. It was a tin can - about 25-pound can.

Q. About a 25-pound can. What would that be in size? Can you approximate that?

A. What was what?

Q. What would that can be in size, in height and width? Can you approximate that?

A. (Witness indicating) About this tall.

Q. It would be about from your waist to your chin?

A. Yes, I guess so.

Q. O.K. How wide would it be?

A. How wide?

Q. You know; what would be the - I forget the old geometry term, not the diameter - yes. What would be the diameter of the can?

A. I don't know.

Q. How far across the top?

A. I don't know.

Q. Would it be about as wide as from shoulder to shoulder, do you think?

A. It is round. It is not wide, it is round.

Q. Well, all right. In other words, it is as wide as a stovepipe, is that right?

A. Say what?

A. It is not as thin as a stovepipe?

BY THE COURT:

Q. Can you show him with your arms about how big it was?

A. About this wide (witness indicating).

BY MR. KRIEGER:

Q. Thank you. And can you tell us how full that can was with grease?

A. It wasn't quite full.

Q. It wasn't quite full. All right. Now, why did you put it out on the sidewalk? Was there a reason for

putting it on the sidewalk?

A. Well, we always stowed the garbage there for the garbage man, beside the building. Not on the sidewalk: beside the building.

Q. But does the sidewalk run up to the building?

A. Yes.

Q. All right. And was the grease in a liquid form or a solid form?

A. Well, not exactly liquid, not exactly solid.

Q. It was pourable?

A. I guess you could say that.

Q. All right. What was the weather like on that date that you put this out? Do you remember? On the day that Mrs. Taylor fell, do you remember what the weather was like when you put the grease out?

A. It was a fair day.

Q. By "fair" do you mean - was it raining?

A. No.

Q. Not raining. Was it dry but overcast when you put the grease out?

A. I don't know.

Q. You don't. About what time did you put the grease out? Do you remember?

A. It was about seven that morning.

Q. About seven o'clock in the morning?

A. Ahum.

Q. And did the garbage men pick up the can?

A. Yes.

Q. And did you see them spill any of the grease?

A. Yes.

MR. YEAPANIS: Your Honor, I object to the leading question.

MR. KRIEGER: This is on cross-examination.

THE COURT: He has called her as an adverse witness. Nobody objected.

BY MR. KRIEGER:

Q. And did you? Oh, you say you did see the garbage man spill the grease, is that right?

A. (The witness nodded.)

Q. Did the garbage man that spilled the grease attempt to clean the grease up, clean it?

A. (The witness nodded.)

Q. How did he attempt to clean it?

A. We cleaned it, too. We also cleaned it with Clorox.

Q. You helped clean it, but did the garbage man try to clean it up?

A. Yes.

Q. All right. Now, how much grease did he

spill? Do you know?

A. It wasn't that much.

BY THE COURT:

Q. Beg your pardon?

A. It wasn't much.

Q. It wasn't much?

A. No.

BY MR. KRIEGER:

Q. When you say that you tried to help clean it up, did you or did one of your help, help clean it up?

A. Well, I said "we," I didn't say "me"; I said "we."

Q. Mrs. Huggins, I am not trying to trick you or anything.

A. I understand that but I still say "we," so -

Q. O.K. You mean you and the garbage man, or you and one of -

A. My help.

Q. And you were involved in cleaning up? You personally helped clean it up?

A. I certainly did.

Q. O.K. How did the garbage man try to clean up?

A. They had things on the truck that they used.

Q. What? A broom or a mop or what did they use?

A. I don't remember just what it was they used.

Q. What time was the grease spilled? Do you remember that? - about.

A. About eight.

Q. About eight o'clock. O.K. And do you remember - well, did you know that Mrs. Taylor had her accident on the same night that the grease was spilled?

A. No. Not until I heard it - um - I think it was the next day, or the day after that it was.

Q. When you heard it?

A. Yes.

Q. Right.

A. I heard it when - I didn't hear it, really. Someone - somebody came around asking questions and I heard it that way. After that I didn't hear any more about it.

Q. When the grease was spilled, was it spilled onto the City sidewalk? Was it spilled onto the City sidewalk?

A. It was spilled on the street, the sidewalk.

Q. Pardon?

A. Yes, the sidewalk.

Q. And the sidewalk close to the street?

A. No; it was spilled on the sidewalk, what they call the sidewalk.

Q. Well, was it spilled close to the curb, or -

A. No, it wasn't.

Q. It wasn't spilled close to the curb?

A. Nowhere near the curb.

Q. But you said, then, it was spilled on the street,earlier?

A. Well, I said the street, the sidewalk, whatever you call it. The can is here like this (witness indicating). This is the window, and here's the can. Well, when he picked the can up, the grease was spilt. In other words, he kind of did like this (witness demonstrating) to balance himself like that, and just a little bit spilt.

Q. Right. It wasn't, you know, then that - it wasn't spilled when he tried to put it in the truck? Is that what you are saying?

A. Do what?

Q. Do you know that it was not spilled when he tried to put it into the truck, tried to lift the can into the truck?

A. No, he didn't spill it then.

Q. Did you see him spill it?

A. Yes. I was sitting at the door.

Q. Oh, you were standing at the door when it was actually spilt?

A. Yes; I saw it.

Q. And did it rain that day?

A. Not that day.

Q. Did it rain later that evening?

A. That night, yes. I don't remember what time it started but it was raining the next morning.

Q. Do you know if any of the grease floated, like an oil slick on that grease?

A. No, I would say not, because it was the Clorox that I took out there - that is the reason why I said "we," because I am the one that took the gallon of Clorox out there myself; and I don't think that the grease could have floated after pouring Clorox on the grease.

Q. You have no personal knowledge one way or the other? That is just an opinion you are expressing, is that right?

A. About what?

Q. About whether or not the grease floated.

A. No, it didn't. I know the grease couldn't have floated.

Q. You know that as a fact?

A. As a fact.

Q. You looked at it?

A. It couldn't have floated.

Q. Did the City come out the day after the accident and clean the sidewalk?

MR. YEAPANIS: Your Honor, what they did after the accident -

THE COURT: Sustained.

MR. KRIEGER: Your Honor, I am not offering this as proof of any negligence. I am offering it for the purpose of showing the presence of the grease during this period.

THE COURT: Sustained.

MR. KRIEGER: I object and make an exception, Your Honor.

Your Honor, I further make an exception to that ruling on the basis that even if it was offered to show its condition at that time, it is what could have been done in lieu of what was done. It is proper to go into evidence then. I don't want it to show it as the condition at that time but I want to show what could have been done to prevent the grease from being slippery.

THE COURT: No, sir. That is the very reason it is inadmissible. What anybody did afterwards, Mr. Krieger, doesn't have anything to do with this case at all.

BY MR. KRIEGER:

Q. When you saw the spill, did you notice whether or not the can fell?

A. Yes.

Q. Did it fall?

A. No.

Q. It didn't fall?

A. (The witness shook her head.)

Q. What happened?

A. Just as I told you.

Q. It splashed out over the top?

A. It didn't splash. He just grabbed it up and just a little bit came out, like I told you. It wasn't a splash, it was a spill.

Q. Didn't the garbage men attempt to clean the grease at that time?

A. MR. YEAPANIS: That question has already been asked.

MR. KRIEGER: That is repetitious. I am sorry.

THE COURT: It has been asked.

BY MR. KRIEGER:

Q. Is the corner on which your barbecue is located a busy corner in Newport News? Is there a lot of pedestrian traffic?

A. We are not on the corner.

Q. Well, I mean that vicinity.

A. Well, I guess you could call it busy - at

times.

Q. How many feet would you say you are, approximately, from the corner?

A. I wouldn't know; don't know too much about feet.

Q. O.K. Would you say one door or two doors from the corner?

A. When you say "door," what do you mean?

Q. Well -

THE COURT: Here is a plat that is in evidence. It speaks for itself. If you want to ask her about it, that is all right.

BY MR. KRIEGER:

Q. (Taking up the exhibit) Is this (indicating) the front door of your establishment right here, pointing to the graph in evidence? Is this the front door of your establishment right there on this graph that says "Huggins"? This is 25th Street (indicating).

A. (Witness examining)

BY THE COURT:

Q. Just to speed it up: Aren't you behind the jewelry store that sits on the corner and faces Jefferson Avenue?

A. Yes.

Q. You are the first door facing 25th Street from

the corner, facing 25th Street? Is that right?

A. Yes, first door leaving the jewelry store. The jewelry store has got a door.

THE COURT: The jewelry store does have a side door there, that is right.

BY MR. KRIEGER:

Q. This is 122 feet from this point to this point. Would you say you are about one-half from the corner to a point somewhere further down past you on 25th Street? On this map, there is 122 feet. Would I be accurate in saying that you are about halfway towards - away from Jefferson Avenue from that corner this 122 feet? Would you be about sixty feet from the corner right here?

A. I would be about two buslengths from the corner; the length of two buses from the corner.

Q. The length of two buses from the corner?

A. (The witness nodded.)

Q. You mean from the back of one bus to the back of the next bus?

A. (The witness nodded.) Almost. I have watched that very often. As far as the feet, as I say, I don't know much about it.

Q. Do you know how long a bus is?

A. Beg your pardon?

Q. How long is a bus? Can you approximate that?

A. No, I can't. That is why I say I didn't know about feet, but I do know about the length of the buses because I so often watch them.

Q. Well, if I show you this scale - do you agree that when you are talking about the buses you are talking about the front of the bus being right here at the corner?

A. I guess so.

Q. Well, there is the bus stop sign, would that be right?

A. As I say, I mean I don't know anything about - the two lengths of the two buses: because at the end of the bus, it is a little bit by our door, the second bus.

Q. O.K. Now, you are saying, then, that from here to here (indicating) is two complete bus lengths? Right?

A. Ahum.

Q. Two complete buses?

A. Almost.

Q. Right from here?

A. No, not exactly two buses, now. Almost. Because the bus's little back door -

Q. From here way over to here (indicating) is 122 feet; from the front of the first bus back here to where they have the second bus stop noted is 122 feet. Where is

the middle of your front door, let's say, in reference to that 122 feet on this thing? It is not quite - it is not even halfway, is it? Back towards the second bus sign, is it?

A. What is not halfway?

Q. Your front door is not halfway on this. You see this line here, Mrs. Huggins; you see where it goes from here to here (indicating)?

A. Yes.

Q. O.K. Your front door is where on that line? It is not quite halfway between that line, is it? It is closer to Jefferson Avenue than the halfway point on that line, isn't it? You see the front door there?

A. Ahum.

Q. O.K. Now, that is closer to Jefferson Avenue, that line, isn't it?

A. No, because - let's see. It is three buses - it is almost - it is, as I say, it is the length of the two buses, almost.

Q. I don't know how long the buses are, and you don't know how long the buses are.

A. And I don't know what you are talking about there, either.

Q. I am trying to get the number of feet from this point here, approximately the number of feet.

A. Well, that is what I was trying to explain to

you, what I know. This I don't know.

THE COURT: She can't tell you in feet. She can tell you in buslengths and that is the best she can do.

MR. KRIEGER: Your Honor, the map graphically shows 122 feet; and she can see where her -

THE WITNESS: If I don't understand the map, I don't understand it.

THE COURT: She didn't understand the map.

THE WITNESS: I am trying to tell you what I understand.

MR. KRIEGER: Your Honor, I would like to show this to the jury - it is in evidence - and point out what I am trying to demonstrate with Mrs. Huggins. I think that would be entirely proper.

MR. YEAPANIS: Your Honor -

THE COURT: I will let you argue that. I am not going to let you show it to the jury.

MR. KRIEGER: It is an exhibit, Your Honor.

THE COURT: I understand that, but you are going to point out 122 feet on it, and then half of it - this, that and the other.

MR. KRIEGER: Ah, no. It is self-evident. The Huggins restaurant is marked right there,

and there is 122 feet.

THE COURT: Sure. The jury can see the plat, absolutely.

(Mr. Krieger handed it to the jury.)

THE COURT: I am sorry. I didn't understand what you meant.

MR. KRIEGER: Yes; I just wanted them to be able to - .

BY MR. KRIEGER:

Q. But you do remember that it did rain on the day that Mrs. Taylor fell; isn't that right?

A. It didn't rain that day. When I woke up the next morning, it was raining then. But that day it did not rain, that day; and when we closed that night it wasn't raining. Sometime during the night it started.

Q. Do you remember making a statement to Mr. J. B. Fortner on November 27, 1967?

A. Saying what?

Q. Talking about this accident; Mr. Fortner, who is a representative of the bus company.

A. Just as I told you in the beginning, I talked with - that is when I knew about the lady had fallen; I talked with someone when he came to ask me about it.

Q. Yes. And that was six days after the accident, six days after the grease spilled; right?

A. I don't remember just - I mean, what day it was.

Q. Well, November 27, 19- -

A. Well, I really don't remember.

Q. Do you remember telling Mr. Fortner that the area that the grease covered was about two feet square?

A. I don't remember talking about no feet.

MR. MORTON: I object with reference to a statement made in a case such as this.

THE COURT: An ex parte statement is not proper.

MR. MORTON: Yes, sir.

MR. KRIEGER: A prior inconsistent statement, Your Honor, on cross-examination, that is all.

THE COURT: I think there is a statute covering that.

MR. KRIEGER: All right. sir. It refers to certain types of statements in certain kinds of situations. This is a defendant.

THE COURT: I think this is one of them, unless you show me something to the contrary.

MR. KRIEGER: All right, Your Honor. I withdraw the question. I have no further questions.

THE COURT: MR. YEAPANIS?

MR. YEAPANIS: We don't have any questions to ask her now.

DIRECT EXAMINATION

BY MR. BROOKS:

Q. Mrs. Huggins, what time did you knock off that day? What time did you close up?

A. I would say about nine.

Q. Nine p.m., nine o'clock that night?

A. Yes.

Q. Of your own knowledge do you know whether anybody slipped in front of your place that day?

A. No.

Q. Did you walk over the area where that grease was spilled and cleaned up?

A. Yes.

Q. Did you slip?

A. No.

MR. BROOKS: I have no more questions.

BY THE COURT:

Q. I have one. Would you tell me what John Huggins has to do with the Huggins Bar-B-Que.

A. What did he have to do with it?

Q. What does he have to do with it. Does he own it?

A. He did before he turned it over to me.

Q. All right. Let's talk about November 21, 1967, when this accident happened. Who owned it?

A. (Witness pausing) I don't remember.

Q. You don't remember. All right. Thank you.

(The witness was excluded and not excused.)

MR. KRIEDER: I would like to call Herbert Williams.

MR. COGDILL: We would like to call him as an adverse witness. He was with the City at the time the accident happened.

MR. YEAPANIS: If Your Honor please, we object to his being called as an adverse witness. It hasn't been established that he is adverse. Because he worked for the City doesn't make him an adverse witness.

THE COURT: Well, he having been an employee of the City at the time of the accident, I will let him be called as an adverse witness.

MR. YEAPANIS: Note my exception to the Court's ruling.

MR. KRIEGER: Thank you.

HERBERT H. WILLIAMS, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. KRIEGER:

Q. Would you state your name, please.

A. Herbert H. Williams.

Q. Mr. Williams, where do you live? What is your address?

A. 824-A Rutherford.

Q. How about going over that.

A. 824-A Rutherford.

Q. Rutherford Street?

A. Right.

Q. Where are you employed?

A. City of Newport News.

Q. Were you so employed on November 21, 1967?

A. Yes, I was.

Q. And where were you employed for the City, what department?

A. Sanitation Department.

Q. What was your job with the Sanitation Department?

A. Collecting garbage.

Q. Were you the driver or the helper?

A. I was helper.

Q. You were the helper?

Q. Right.

Q. On that day do you remember picking up some grease down at the Huggins Bar-B-Que at 25th and Jefferson?

A. Yes, I do.

Q. Tell us where you picked this garbage up or grease.

A. Well, I picked it up at Huggins Bar-B-Que - at the Huggins Bar-B-Que.

Q. O.K. Go ahead.

A. It was right on the corner, they had grease at the - I mean where they had all the trash right there at the right-hand side of the door.

Q. Was that right on the sidewalk?

A. No; they had it up beside.

Q. The other side of the building?

A. Yes, they had it the other side of the building. And so we moved all the bags and all. So then, well, just got the stand, the stand that had the grease in it.

Q. What you are talking about is a can or a stand?

A. Twenty-five-pound lard stand is what it was.

Q. You call it a "stand," but it was actually a twenty-five-pound lard can?

A. Right. That is what it was.

Q. How full was that can, Mr. Williams?

A. The can was sitting up beside the building.

Q. How close was the top? Was the grease -

A. I don't like to say because I mean when I picked the stand up, throw it in the truck - I picked it up to throw it in the truck, a little bit spilled on the street.

Q. A little bit spilled on the street?

A. Right.

Q. Did it have a top on it?

A. It had a top on it but it wasn't fastened down tight.

Q. Had a top on it but it wasn't fastened down tight?

A. That is right.

Q. How much did you spill on the street?

A. Well, didn't very much spill, tell you the truth.

Q. Wasn't very much spilled?

A. That is right.

Q. O.K. Now, how did you start to pick up this can?

A. Well, I just took it by both handles and went to pick it up.

Q. Took it by both handles?

A. Right. It had two handles, handle on each

side, that is right.

Q. And when you grabbed it to pick it up, is that when the grease came out the top?

A. Well, when I picked it up, as I got ready to throw it in the truck, that is when a little splashed out.

Q. A little splashed out?

A. That is right.

Q. Was the "little" close to the building line, or out here close to the curbline?

A. Well, it was right off from the curb, I believe.

Q. Right off the curb. You remember, don't you? You know where it was spilled, don't you, Mr. Williams?

A. Well, tell you the truth, not definitely I don't, because I mean - but I think it was right off - but it was right off on the curb, I know. I mean because when I picked it up to throw it in the truck, the truck was parked in the curb.

Q. Right. As you started to throw it into the truck, that is when you spilled it?

A. That is right.

Q. Now, when you spilled it, did you throw the rest of it in the back of the truck?

A. Yes, I throwed the can, throwed it in the truck, that is right.

Q. Is this the usual way that you pick up this grease? Is this the way they usually left it, out by the side?

A. Well, I wouldn't know about that because I mean -

Q. You had picked it up before, hadn't you?

A. No, I haven't.

Q. You had never picked it up before?

A. No. I worked a different route.

Q. You had been working a different route. All right.

Now, who was working with you that day?

A. I was working with Mr. Faison. I don't know who the other fellow was, tell you the truth.

Q. You don't know who the other man was that you had been working with that day?

A. No, I don't.

Q. Had you ever seen him before?

A. Well, new men come and go. I don't know exactly who it was, tell you the truth.

Q. Which side was Faison working on?

A. Faison working up the left-hand side of 25th and I were working the right.

Q. And the other guy was doing what?

A. Well, he was working the other side with

him, helping on this other end, too.

Q. Which side was he working?

A. He was working on the side with me.

Q. He was working on the side with you?

A. That is right.

Q. After you spilled this grease, what did you do then?

A. Well, we always carried brooms on the truck. I took the broom, cleaned it up the best I could.

Q. Cleaned it up the best you could?

A. That is right.

Q. Who helped you clean it up the best you could?

A. I cleaned it up myself, took the broom, cleaned it up myself.

Q. Oh, you cleaned it up yourself?

A. That is right - the best I could.

Q. Did the other boy help you any?

A. No, he didn't.

Q. Now, did you see anybody come out that had an establishment along there after you spilt this grease? Did you see Mrs. Huggins?

A. No, I didn't.

Q. You didn't see Mrs. Huggins. O.K.

Now, I want you to show us about how big a

spot this grease spilled in. Just take your hands.

A. Well, I mean when it - just a little spot about something like that; little, small spot. (Indicating)

Q. These boys are having a hard time seeing you over here.

THE COURT: Hold your hands up in the air.

BY MR. KRIEGER:

Q. Stand up, why don't you?

A. Just a little small spot like that (indicating).

Q. Don't be ashamed of your hands.

Was this grease solid or liquid?

A. It was liquid.

Q. It was liquid?

A. That is right.

Q. When you took your broom, did you try to sweep this grease up?

A. Well, no. I took my broom and I had a dustpan, and I just swept out what I could sweep in with my truck.

Q. The broom you are talking about was one of the big, long-handled ones that has got stiff brushes?

A. That is right.

Q. Did you have one of those dustpans that you used to sweep it in?

A. That is right. We always kept them on the truck.

Q. O.K. You kept them on the truck.

Now, so what did you do? Put your dustpan down at the curb where the curb runs into the street and you swept it down that way?

A. No. I put it down - where the grease was, I put it down there, and swept it right in the pan. Then I put it in the truck.

Q. Did you put any sand on top of the grease after you finished sweeping it up?

A. Well, no, I didn't because had I did that - the janitor at the BAR-B-Que say - I reckon it was the janitor - Mr. Huggins - somebody, I don't know who he was. Anyway, he said he would take care of it.

Q. Said he would take care of it?

A. That is what he said.

Q. On your trucks that you drive, Mr. Williams, what do they put on there for you to take grease and stuff up with that you spill on the street? Anything except a dustpan and the broom?

A. Well, not as I knows of.

Q. You were working the truck, you know better than anybody. Was anything else on there that you could use?

A. Wasn't anything else on there at the time; not as I knows of.

Q. Any sand on there or anything?

A. No.

Q. O.K. But you talked to this guy and you thought it was -

A. - Mr. Huggins or somebody that worked with him.

Q. And after you did as well as you could with what you had, then they said they would go ahead and clean it up?

A. That is right.

Q. Finish cleaning it up. O.K.

How far from the front door of Huggins's is it to the side of their building, Mr. Williams? Do you remember?

A. How far?

Q. Yes.

A. What? From -

Q. From the door that comes out on the sidewalk to the side of their building.

A. Well, I wouldn't have the slightest idea. I couldn't very well say.

Q. Have you been down there lately?

A. I have been down there but I never measured

it.

Q. Have you been down there in the last couple of days or the last week?

A. Well, no, I haven't, tell you the truth.

Q. You haven't?

A. I sure haven't.

Q. Have you been back down there since the accident happened, to look?

A. Well, no, because I mean I changed departments. I am in the street gang now, picking up leaves, all like that, so ain't no reason.

Q. Did Mr. Faison, who was working with you that day, know about your spilling this grease?

A. No, he didn't.

Q. He didn't know?

A. No, he didn't.

Q. How about the other boy on the truck with you?

A. Well, I - yes, I am pretty sure he know about it.

Q. In fact, he saw you spill it?

A. I mean he saw me when I was cleaning it up, also.

Q. And either Mr. Huggins or the guy that worked for him knew about it because he told you he would

take care of it, too?

A. That is what he said.

MR. KRIEGER: I think that is all the questions I have.

THE COURT: All right, Mr. Yeapanis.

MR. YEAPANIS: I don't have any questions of Mr. Williams at this time, Your Honor.

MR. GARNER: We don't have any questions, Your Honor.

BY MR. BROOKS:

Q. Do you know Mr. Huggins?

A. Beg pardon?

Q. Do you know Mr. Huggins?

A. Do I know him?

Q. Yes.

A. No, not personally I don't.

Q. Well, do you see him in the courtroom?

A. (Witness looking)

MR. MORTON: If Your Honor please, he said he didn't know him: how could he possibly recognize him in the court room?

A. Over there; over there (indicating).

THE COURT: A person might not know someone personally but could know what he looked like, who he was. I don't know Mr. Nixon personally but

I think I could recognize him if I saw him.

BY THE COURT:

Q. All right. Do you see him?

A. What I mean, I don't know if that is him. That is the brother of a friend of mine.

BY MR. BROOKS:

Q. Is that the man you are talking about who said something about cleaning it up?

A. He said he would take care of it.

Q. Is that the man?

A. That is right.

MR. BROOKS: That is Mr. Huggins.

THE COURT: Is that all, Mr. Brooks?

MR. BROOKS: Yes, sir. Excuse me, Your Honor.

THE COURT: Do you want him back outside, Mr. Yeapanis?

MR. YEAPANIS: Yes, Your Honor.

THE COURT: I will ask you to go back to the witness room, please.

(The witness was excluded, but not excused.)

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MR. COGDILL: I want to call Mr. Faison.

MR. KRIEGER: May it please the Court, for the sake of time I am going to lead the witness very fast on preliminary. Is that all right?

(The witness entered the courtroom, and took the stand.)

MR. KRIEGER: Is your name James Faison?

THE WITNESS: That is right.

MR. YEAPANIS: We object again to calling him as an adverse witness, Your Honor.

MR. KRIEGER: I am calling him as an adverse -

MR. YEAPANIS: You are not?

MR. KRIEGER: I am.

MR. YEAPANIS: We object to that.

THE COURT: Overruled.

MR. YEAPANIS: Note my exception.

THE COURT: Yes, sir.

JAMES FAISON, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. KRIEGER:

Q. Is your name James Faison?

A. That is right.

Q. Have you been with the City on garbage trucks since 1942?

A. That is right.

Q. On the morning of November 21, 1967, were you working on the garbage truck that went in front of Huggins's

and picked up the garbage on that route?

A. That is right.

Q. Was Mr. Herbert Williams with you?

A. Yes, he was.

Q. And did Mr. Herbert Williams spill some grease, to your knowledge?

A. No, I do not know. At that time I didn't know when it was spilt. I think about - sometime later -

MR. MORTON: We object. He has answered the question.

MR. KRIEGER: Your Honor, he is answering the question.

THE COURT: All right. Go ahead.

A. I didn't know it at the time that he had spilled it. I knew it a few days later.

BY MR. KRIEGER:

Q. And had you worked on that route before?

A. I had worked on that route about six years.

Q. Did you ever spill grease yourself when you were collecting garbage?

MR. MORTON: We object to that. It has nothing to do with the case.

THE COURT: Sustained.

BY MR. KRIEGER:

Q. Well, did Mr. Williams work on that route

with you?

A. Yes, he did.

Q. Did he ever see you spill grease?

A. Yes.

MR. MORTON: We object to that, for the same reason, if Your Honor please. Whether or not Mr. Williams ever saw Mr. Faison spill any grease certainly is inadmissible, has nothing to do with this case.

THE COURT: Sustained.

MR. KRIEGER: Your Honor, may I have a conference, please, on this, and an offer of proof of what I expect to prove here?

THE COURT: All right.

MR. COGDILL: How about taking the jury out, so we don't get into something and have a problem with the jury?

THE COURT: All Right. Gentlemen, I will let you go to the jury room while we take up the matter.

(The jury retired to the jury room.)

MR. KRIEGER: I discussed this case with Mr. Faison the other night. He told me that on numerous occasions prior to this he had spilled grease and that his procedure as Mr. Williams's manager

on the truck - he was sort of a foreman - was to go into Huggins's and get scalding hot water and bleach and clean it up himself. All I want is to show that and when he says that Mr. Williams knew how to do this and had seen him do it on many occasions.

Now, Mr. Williams says this was the first he had ever worked the route. Right off we have a prior inconsistent statement.

Number Two, I want to show also that he knew the routine for properly cleaning the street.

Plus, I further asked Mr. Faison what the purpose was for cleaning up the grease - and this is an issue in this case - what the purpose was for cleaning the grease when he was doing it: in order to rid the City of garbage; or to eliminate a hazard such as a slippery sidewalk. And he said that it was to eliminate a hazard. He didn't say it in those words; that is essentially what his testimony is going to be if I can pursue that line of questioning. I want to get it in as fast as possible.

THE COURT: All right.

MR. MORTON: If Your Honor please, what Mr. Faison has done in the past just has nothing to do with this case. He asked Mr. Williams whether

or not there was anything on the truck and he said no, that there wasn't. He didn't ask him whether he went in and got any hot water or anything such as that. If Mr. Faison has spilled grease in the past, I submit that certainly has nothing to do with what Mr. Williams did on the morning of November 21st.

THE COURT: Oh, I don't know about that. I think if one City employee working a sanitation truck does one procedure for getting up spilled grease, then I think the jury is entitled to know it.

As I understand your question, you said this man would testify that Williams has done this in the past?

MR. KRIEGER: Well, Williams had been with him when he did it. He knew the procedure. And Mr. Faison was the foreman of this crew. And automatically we have prior inconsistent statements, because Mr. Williams said this is the first time he ever picked up garbage on this street.

MR. MORTON: He didn't say that, if Your Honor please. He said he hadn't worked that route.

THE COURT: He said he hadn't worked that route. All right; let's bring the jury back.

MR. MORTON: Note our exception.

(The jury returned to the box.)

BY MR. KRIEGER:

Q. Had you worked on this route with Mr. Williams before the date in question?

A. Yes, I have.

Q. Thank you. And had you dropped grease on the route before?

A. Yes, I have.

Q. In that location?

A. Yes.

Q. And were you the foreman of this group, so to speak?

A. That is right.

Q. What would you do when you would drop grease? Would you tell the jury.

A. Whenever I worked on that side of the street, when I get those cans of grease if I spill any I always get a broom and hot water and get it up before I leave.

Q. Where do you usually get the hot water?

A. From the inside of Huggins Bar-B-Que.

Q. All right. And Mr. Williams had seen this and he knew the procedure, is that right?

A. Yes, we have. We both had done it on different occasions.

Q. When you cleaned the grease, what was the purpose of cleaning the grease?

A. Cleaning the grease was the purpose of someone may come by and slip up on it, hurt themselves.

Q. Right. Are you saying that it was a danger?

A. Danger.

MR. KRIEGER: I have no further questions.

MR. YEAPANIS: We don't have any questions.

MR. BROOKS: No questions.

(The witness was excluded but not excused.)

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MR. COGDILL: I would like to call Mrs. Smith, if I may.

MARION SMITH, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

EXAMINED BY MR. COGDILL:

Q. Would you state your name, please.

A. Marion Smith.

Q. Mrs. Smith, where are you employed?

A. By Attorney Joseph Smith.

Q. And were you so employed on December 4, 1967?

A. Yes, sir.

Q. Mrs. Smith, I ask you to look at that and tell me what it is, please.

MR. GARNER: If Your Honor please, we have some witnesses. I don't know what -

THE COURT: Let's just wait until everything is over with and then we will see about who wants whom as witnesses. Who wants to be next?

MR. BROOKS: I will be next, Your Honor.

I move to strike the evidence in regard to Huggins Bar-B-Que. There has been no negligence shown on the part of Huggins.

MR. COGDILL: In rebuttal, the only thing we would like to say is, it is unrebutted now. You have to take the evidence in the light most favorable to the plaintiff, and the evidence on behalf of the plaintiff is that this man sitting in the courtroom advised Mr. Williams that he would clean this up and take care of this matter after Mr. Williams left. Certainly if you say you are going to do something and you don't do it, you are as much at fault by your absence as you are if you had undertaken the task and failed to do it in a proper manner.

We feel that at this time, with the evidence before the Court, this evidence is enough to hold Huggins in, because this was one of their duties.

MR. KRIEGER: We would like to have him called a joint tort feasor. I believe they are in a situation

where the two of them had the duty to clean the site, and Huggins had the duty to clean, volunteered to take over that duty. Of course, I don't think the City can delegate it but they are in as joint tort feasors as far as we are concerned.

MR. COGDILL: Yes.

THE COURT: I overrule your motion.

MR. BROOKS: Note my exception.

MR. YEAPANIS: Your Honor, the City of Newport News moves to strike the plaintiff's evidence, based on two criteria. First, that the evidence has failed to show that there was any negligence on the part of the City. It can only show that some grease was spilt and that the garbage collector cleaned it up as best he possibly could. This doesn't establish any negligence.

Second, the main thrust of the motion to strike is that in the performance of the governmental function - which garbage collection is deemed to be in the state of Virginia - the City is immune from tort liability regardless of whether or not there is any negligence on the part of the City. (Citing Ashbury vs. The City of Norfolk, 147 SE 223, cases cited therein, and Fenon vs. The City of Norfolk, 203 Virginia 551.)

If you look at the evidence in this case, it is

quite obvious what was happening. In the plaintiff's own testimony, the only evidence says that a garbage collector picked up a can of grease, picked it up and put it in the truck. Some of it spilled. Regardless of where it spilled, he was performing the work of collection of garbage, which is a governmental function.

These two cases have been the ruling law in Virginia. They clearly indicate that what was happening was the cleaning of the street, picking up of garbage. Now, it is true that Williams got down and wiped it off, but we say that is part and parcel of the same thing - collecting the garbage. That is part of the whole process. And this law is very clear in Virginia that that is a governmental function.

Regardless of whether there was any negligence on the part of the City, the City should be stricken as a party defendant in this matter. I don't see how the Court can hold otherwise based on the evidence before the Court and based on these cases which have been presented to Your Honor at this time.

THE COURT: You did plead that, too, didn't you?

MR. YEAPANIS: Yes, Your Honor, we did.

MR. KRIEGER: Your Honor, I have a case here which, although I have Shepardized it, has been affirmed on numerous occasions in more modern times. This is a 1942

case but because it states the law in the area with which we are concerned here so well, I think I will probably, for the sake of argument, rely on this case as to the City. The name of the case is Tyler vs. City of Richmond and it is 168 Virginia 308.

I would also ask the Court to consider the changing public policies as to sovereign immunity at this time, considering these particular cases. But, as I say, the Tyler case is exactly on point with this particular problem. (Mr. Krieger summarized the Tyler case.)

Of course, the City (in the Tyler case) said, "Well, there is governmental immunity." And they also said that there was no negligence in maintaining the streets as far as the street department's duty to remove the chain from the sidewalk; there was no negligence because they had no notice of the existence of the hazard - not defective condition as such, but no notice of the hazard placed there by the City.

Well, our theory of the case is based on Tyler in this regard. We are not saying that the City is necessarily liable because the garbage man spilled the grease. We are saying that he spilled the grease and at that point the City had notice that there was a dangerous condition and had a duty as far as safety and

welfare and keeping up sidewalks and streets, which they are liable for. Governmental immunity doesn't extend to them. They had a duty to then go ahead and remove the grease in a proper fashion.

Now, this grease was there for at least fourteen hours, fourteen to sixteen hours according to the testimony of the witnesses. The question then becomes that in this fourteen- to sixteen-hour period did they have notice that the grease was there?

Well, the Tyler case clearly answers that. They say when the City puts it there, we don't care whether it is a governmental function or not, we may not hold them for the negligence in putting it there but we will hold them for the negligence in not cleaning it up after they have put it there, because at that point it becomes the duty of the City. They have the notice. We don't have to prove the notice, although I think really fourteen to sixteen hours is a reasonable length of time in that kind of occurrence. But we don't even have to prove the notice to the City. Although the Supreme Court says the appropriate rule of law controlling cases of this kind is that ordinarily a municipality is not liable for injuries to travellers upon a public highway caused by obstructions of which it had no notice either actual or constructive, they

make an interesting observation: "... where the obstruction in the street or highway which caused the injuries to the traveller was placed there by the servants or agents of the municipality, it is liable to the traveller for such injuries whether it had notice or not." This goes to the notice problem.

I think what they are really saying is that they have notice when they place it there. Because the agents of the City had knowledge, their knowledge goes back to their master, the City.

So the primary theory of our case is that once they dropped the grease, if somebody had come along immediately, before they had an opportunity to clean it up, and had slipped and fallen, we would have a poor case. We couldn't win - because the accident occurred before they could warn anybody that it was there or even put up barricades. Its being there was negligence in the performance of a governmental function.

Now, that is the difference between that and the tree case. (203 Virginia 551) The tree wasn't there as a part of the governmental function. The tree just fell over. In the Hurricane Donna case, by the way, that decision turned on the basis that this was like a snowstorm where you have snow in the streets and

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people sue the City for slipping on snow. That is a case where the task of cleaning up is so enormous that you have to give the City a reasonable length of time with which to clean it up. That is what that case turned on. It had nothing really to do with this kind of incident here where you have a small defect.

Now, however, the City left this alone for fourteen hours. They didn't clean it. They had notice and they didn't get down there in fourteen hours and clean it. They did get there the next morning and clean it, but they didn't do it within that fourteen-hour period - and that is our primary case of negligence, based on Tyler versus Richmond. And the Shepardized cases, Your Honor, 196 Virginia 514 and 204 Virginia 742, say the same thing.

Now, the second theory, so to speak our "backstop" theory, is this. Now, there is no case on the point. O.K. But it is the secondary theory. I asked Mr. Faison, "Why do you clean the streets" Is it to remove garbage or is it for safety?" What did he say? "It is for safety and keeping the sidewalks safe."

While the City might, in their various departments, say categorically and generally what an employee's duty is, here was a foreman for the City since 1942 and he knows what his duty is when he is cleaning up that

d debris and what the purpose of his cleaning is. It is to make the sidewalks safe. And I don't think that there has been any evidence to refute that as far as his duty is concerned in cleaning up that grease: it is a safety duty, keeping the sidewalks and streets clear. It has nothing to do with and they weren't interested in getting up a little bit of grease in the garbage off the street so that flies wouldn't gather and make people sick. He was interested that nobody would slip and fall. He was quite candid and I am sure quite honest and realistic about it. I think ordinary commonsense tells us that this was the reason he was cleaning it up, to keep the streets clear.

That is our second theory. The primary thing is that the City and its agents had themselves, whether or not initially immune, put the hazard there, failed to clean the hazard up on the spot. The hazard continued for fourteen to sixteen hours, on a busy street corner. And the plaintiff's feet went out from under her and she was injured. I think we clearly have a case against the City on one or both of the theories.

(Mr. Yeapanis rose to speak.)

MR. COGDILL: Let me say this, if I may, just to conclude, and then he can rebut.

This governmental function or municipal function

is something that if you don't have anything to do with causing the injury or the danger, then you are all right. But in this case, just like the case of Rosenthal versus The City of Staunton, which is 160 Virginia, a person has a right to believe that the sidewalks are clear and safe, and you can walk with faith, as that case said, "until you either become aware of the situation as an ordinary reasonably prudent person should" - in this case either see it or should have seen it.

But in this case it is not the garbage collection that caused the problem, the problem is the sidewalk, the liability for the sidewalk. The City has a responsibility and in this case they put the instrumentality there, the danger. And we say that it is not a governmental function and that the City should be held in.

MR. YEAPANIS: Mr. Cogdill is mistaken on that. The law as to sidewalks isn't that people walk in faith in the City. It is the City keeping the streets and sidewalks in reasonably safe condition. People aren't entitled to walk with blind faith on the streets. The City is not responsible. They have cracks and defects in the sidewalks. So that it is improper to say that that is the law in Virginia on defective sidewalks.

Of course, we are saying that this isn't a defective sidewalk case. That Tyler case, which was decided in 1937, had to do with a chain sticking out of the street on a sidewalk, and it caused an obstruction on that sidewalk.

In this case that we have here today, it doesn't make any difference what Mr. Faison said he was doing, because the question whether it is a governmental function is a question of law, and Mr. Faison can't answer that question because he says it was to keep the streets safe. The question of whether that was a garbage collection function - and the whole incident occurred during the collection of garbage - is a question of law for this Court to decide.

Based on the Ashbury case and the Fenon case, it is pretty clear to me that that was a collection of garbage. What was happening out there on that street at Huggins Bar-B-Que, you are sweeping a street of garbage and it is all part of one thing, all of it. Now, the State of Virginia hasn't abrogated that theory yet. And those two cases are clearly on point. They deal with the collection of garbage.

I can't see anything more clear than what we have here, that Herbert Williams was picking up garbage and spilled it. He was still cleaning up garbage. The

fact that it was on a sidewalk didn't take it out of the garbage collection function. It didn't remove the governmental immunity. And it doesn't make any difference whether the City created it or not, the governmental immunity doctrine still applies.

That case of Tyler versus Richmond was concerned with constructive notice to the City, whether the City had notice that there was a defect in the sidewalk.

It didn't even talk about governmental immunity or garbage collection. It didn't have a garbage collection question there. So that case is not on point.

The Ashbury case and the Fenon case are the two cases on the point in Virginia, and we ask the Court to rule in our favor.

MR. MORTON: If Your Honor please, I have one thing also to say about Tyler. Tyler limited itself to the word "obstruction," and in that case, as I recall it, it was a chain that came off a sprinkler system. And although the facts are very hazy and the judge himself admits that they are susceptible to any number of interpretations, the final conclusion of the court is that the chain blocked over three-quarters of that sidewalk. In other words, that it was an actual obstruction in it. And the court limited itself, it didn't go into the word "defects" or anything else. It

limited it to obstructions of which the municipality had notice. As Mr. Yeapanis said, contrary to what Mr. Krieger said, there was not one mention of the words "governmental immunity" in that case. That case had nothing whatsoever to do with governmental immunity.

THE COURT: It doesn't bother me that this is governmental immunity. That part is all right. When they were picking up the garbage if somebody slipped and fell right then, that wouldn't present any problem. It does concern me a little bit that it stayed out there fourteen hours.

All right. I will think about that while you are deciding on which of Mr. Garner's witnesses can be let go.

MR. KRIEGER: Your Honor, would you like the Tyler case? I have a copy of it.

THE COURT: Yes.

(The following occurred after a brief recess, and still in the absence of the jury.)

THE COURT: Gentlemen, the Court is going to sustain the motion of the City to strike the plaintiff's evidence, on the ground that it was performing a governmental function. There doesn't seem to be any law that the Court can go by that places any barrier of

time. The plaintiff is not alleging that the sidewalk or the street itself was defective, as it was in the City of Norfolk case, but they are contending that the grease on the sidewalk was what caused her to fall, and this is a result of garbage collection - and garbage collection has been held in Virginia to be a governmental function. So I don't think the Court can differentiate because of the time. I am going to have to strike the evidence as far as the City is concerned, on its immunity as a governmental agency.

MR. COGDILL: Your Honor, there is one thing, if you will, look at Number Six in the motion. That says "to keep the public streets in a reasonably safe condition." In the motion for judgment that is one of the allegations.

THE COURT: Yes, sir, but all of your evidence has been that she fell on the grease spot that came from the collection of the garbage, and that is what you are bound by.

MR. COGDILL: Well, but it was on the sidewalk.

THE COURT: That is true.

MR. COGDILL: This is what our theory was, that it was an unsafe sidewalk.

THE COURT: Yes, sir. But the Court feels that it is because of the collection of garbage and the spillage

of grease. I just don't see the courts having discussed any time limitations or anything of the kind. They say if it is a governmental function the City is immune. So that leaves us with Mr. Huggins only.

I will tell you the truth, I am not sure whether we have got the right party in the case, because I don't know how we can get a judgment against Mr. Huggins if he wasn't the owner. But Mr. Brooks in his opening statement said that John Huggins owned it. Then on interrogatory I am not sure what was answered on that. It seems to me that you are not contending that there is an improper party defendant, Mr. Brooks.

MR. BROOKS: It is my understanding, Your Honor, that as of the date of the accident the license was technically in the name of John Huggins. The manager was Mrs. Huggins. And when it came time to apply for license, she applied for the license the following year.

THE COURT: Well, he was the owner -

MR. BROOKS: - of record.

THE COURT: - as far as license is concerned, at the time. All right.

MR. COGDILL: May we have just one minute?

THE COURT: Yes, sir.

MR. MORTON: If Your Honor please, we also have

some witnesses.

(Counsel conferred.)

MR. COGDILL: Your Honor, may we go ahead? I have talked to Mr. Brooks, who has the only party that is left. We would like for you to discharge the jury and let the Court decide the case at this time.

THE COURT: Is that all right with you?

MR. BROOKS: Yes, sir.

THE COURT: All right. Let's bring in the jury.

(The following occurred in the presence of the jury.)

THE COURT: Gentlemen, we have not been idle while you have been out. The Citizens Rapid Transit Company has made a motion to strike the evidence of the plaintiff as far as the Citizens Rapid Transit Company is concerned, on the ground that no negligence had been shown against them, and the Court has sustained that motion. Consequently, the Citizens Rapid Transit Company will no longer be a defendant.

The City of Newport News then made a motion to strike the evidence, on the ground that they are immune to liability in this type of case because the garbage collection under the law is considered a governmental function of the City under which they are immune even though they might be negligent.

The Court feels that this is the prevailing law in the State of Virginia at this time and that the City in its garbage collection is exercising a governmental function and consequently they are immune. So I have sustained their motion to strike the evidence.

This left the defendant Mr. Huggins, trading as Huggins Bar-B-Que. Upon the Court sustaining the two motions to strike, the attorneys have now agreed to waive the jury and allow the Court to decide the remaining part of the case. This is a procedure that is allowed in this state when the parties agree to it. So they have agreed and therefore I will not need for you to pass on any questions involved, and the Court will now handle the matter from here on out.

(The Court thanked the jury for their services.)

THE COURT: Unless anyone wants me to technically break the panel, I will just excuse them.

MR. COGDILL: We would like for you to go ahead and excuse them, if Your Honor please.

(The jury was excused.)

THE COURT: Now, what witnesses, Mr. Brooks, do you want to keep?

MR. COGDILL: Let me put something in the record before you do. I want to save my point. We want to

note our exceptions to the Court's ruling on the governmental immunity, for the reasons stated before.

THE COURT: All right.

MR. BROOKS: Mr. Huggins is the only witness I am going to put on, Your Honor.

THE COURT: All right. We don't need to keep anyone else?

MR. BROOKS: No.

THE COURT: I would suggest, ask Mrs. Huggins; she might want to step in the courtroom.

JOHN HUGGINS, the defendant, having been first duly sworn, testified as follows:

EXAMINED BY MR. BROOKS:

Q. Will you state your name, please.

A. John Huggins.

Q. When this accident happened, was the license in your name?

A. Yes, sir.

Q. And later on what happened to the license?

A. Later on they were transferred to her.

Q. That is your wife, Mabel Huggins?

A. Yes, sir.

Q. Mr. Huggins, you heard Herbert Williams identify you from the witness stand and say that you told him to move on, that you would take care of cleaning up this

grease?

A. Yes, sir, I did.

Q. Did you tell Mr. Herbert Williams that?

A. No, sir; I wasn't even there.

Q. Where were you that day?

A. Out on 44th Street. I had a place at that time on 44th Street.

Q. And when did you first become aware that there had been an accident?

A. The next morning when one of the CRT representatives came out to see me about it.

MR. BROOKS: I have no further questions.

MR. COGDILL: We have no questions, Your Honor.

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MR. COGDILL: On behalf of the plaintiff, we are going to submit the case with no argument.

MR. BROOKS: That is the defendant's case, Your Honor. We submit that there is no negligence shown on behalf of Huggins. Williams identified the wrong man. There has been no evidence that anybody told them to move on or to assume the burden of cleaning it up or any such thing. The evidence, as I recall it, is that the can was put out on the sidewalk in a closed container, not even

filled to the top. And I don't see how that is negligence on the part of Huggins or his employees.

THE COURT: All right. I find for the defendant Huggins.

MR. COGDILL: We just note our exception.

THE COURT: All right. The court stands adjourned.

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JUDGE'S CERTIFICATE

I, Douglas M. Smith, Judge of the Corporation Court of the City of Newport News, Virginia, do hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings in the case of Marjorie Taylor vs. City of Newport News, Citizens Rapid Transit Company and John Huggins, Individually and trading as Huggins Bar-B-Que, tried in said court on the 28th day of March 1972, and includes all the testimony offered, the motions and objections of the parties, the rulings of the Court and the exceptions of the parties, and all other proceedings of said trial, exclusive of medical testimony.

I further certify that the exhibits offered in evidence, as described by the foregoing record, and designated as Plaintiff's Exhibit B (refused) and Plaintiff's Exhibits 1 to 8 inclusive (received in evidence), are all of the exhibits offered upon said trial, and the originals thereof have been initialed by me for the purpose of identification.

I further certify that said transcript was presented to me for certification and signed within sixty days after the final order in said cause, and that the attorneys for the defendants had reasonable notice in writing of the time and place at which the same would be tendered for certification.

Given under my hand this ___ day of_____ 1972.

_____

JUDGE

CLERK'S CERTIFICATE

VIRGINIA:

In the Corporation Court of the City of Newport News,

on the _____ day of _____ 1972.

I, _____, Clerk of the Corporation Court of the City of Newport News, Virginia, do certify that the foregoing report of the testimony and other evidence and incidents of the trial in the case of Marjorie Taylor vs. City of Newport News, Citizens Rapid Transit Company and John Huggins, Individually and trading as Huggins Bar-B-Que, was lodged and filed with me as the Clerk of said court on the _____ day of _____ in the year 1972.

CLERK OF THE CORPORATION COURT OF
THE CITY OF NEWPORT NEWS

_____
Clerk