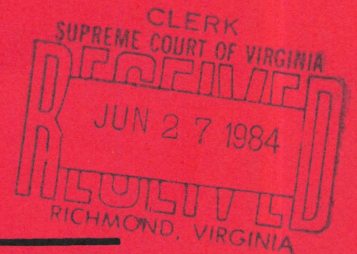


232 Va 189



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

RECORD NO. 830435

APPALACHIAN POWER COMPANY,

Appellant,

v.

EARLINE VIRGINIA SANDERS and PATRICK COUNTY -  
STUART CHAMBER OF COMMERCE, INC.,

Appellees.

RECORD NO. 830436

PATRICK COUNTY - STUART CHAMBER  
OF COMMERCE, INC.,

Appellant,

v.

JAN 5 1987

EARLINE VIRGINIA SANDERS and  
APPALACHIAN POWER COMPANY,

Appellees.

LAW SCHOOL LIBRARY  
W & L UNIVERSITY

JOINT APPENDIX

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Gentry, Locke, Rakes  
& Moore  
800 Colonial Plaza  
Post Office Box 1018  
Roanoke, Virginia 24005

Counsel for Appalachian  
Power Co.

John W. Carter  
Lawrence G. Wilson, Jr.  
Robert H. Whitt, Jr.  
410 Patton Street  
Danville, Virginia 24541

Counsel for Earline Sanders

James L. Hutton  
Robert J. Ingram, Jr.  
Gilmer, Sadler, Ingram,  
Sutherland & Hutton  
201 West Roanoke Street  
Post Office Box 908  
Blacksburg, Virginia 24060

Counsel for Patrick Co. -  
Stuart Chamber of Commerce



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MOTION  
FOR  
JUDGMENT

The plaintiff moves the Court to enter judgment against the defendants in the sum of \$500,000 by virtue of the following facts:

1. That the defendant Appalachian Power Company is owner of a certain lot or tract of land situated in the town of Stuart in Patrick County, Virginia; and,

2. That the defendant Patrick County - Stuart Chamber of Commerce, Incorporated, leased said lot or tract of land from Appalachian Power Company in October of 1978 for the purpose of promoting and holding upon said property a "Harvest Festival," which, in effect, amounted to a craft show to which the general public was invited and which was widely advertised; and,

3. That the defendant Appalachian Power Company was fully aware of the intention of the Patrick County - Stuart Chamber of Commerce, Incorporated's intention to hold such Harvest Festival upon the leased premises and to invite the general public; and,

4. That the plaintiff as an invitee of the Patrick County - Stuart Chamber of Commerce, Incorporated entered upon the premises on October 8, 1978, and while walking around the lot or tract of land designated for the Harvest Festival stepped into a hole in which was contained an open terra cotta pipe, which hole was obscured by grass and vegetation and recently mowed grass which obscured the hole; and,

5. That the defendants owed a duty to the plaintiff to make a reasonable inspection of the premises for latent defects

upon the premises which might bring about injuries to invitees;  
and,

6. That both defendants in this case breached their duty to inspect the premises, or if the premises were inspected, to post a warning sign of the defect existing upon said premises;  
and,

7. That the breach of such duties by the defendants to the plaintiff constituted negligence and as a proximate result thereof, the plaintiff was grievously injured; and,

8. That the plaintiff fractured her right ankle which required extensive orthopedic care and surgery and ultimately the fusion of the right ankle; that as a result the plaintiff has incurred large doctors, hospital, and drug expenses, along with physical therapy and therapeutic devices; and that the plaintiff will continue to incur such medical expenses for the remainder of her life, and that the plaintiff has suffered great pain and suffering as a result of her injuries and will continue to experience such pain and suffering for the remainder of her life; that the plaintiff has lost large sums of income as a result of said injury and will continue to experience such losses of income for the remainder of her life; and,

9. That the plaintiff has been permanently injured as a result of the negligence of the defendants;

WHEREFORE, the plaintiff prays that the Court enter judgment against the defendants in the sum of \$500,000.

EARLINE VIRGINIA SAUNDERS,

By Counsel

CARTER AND WILSON, Counsel for the  
Plaintiff  
410 Patton Street  
Danville, Virginia 24541

By

  
Lawrence G. Wilson, Jr. 2



GROUNDS OF DEFENSE  
ON BEHALF OF  
APPALACHIAN POWER COMPANY

Comes now Appalachian Power Company, by counsel, and files its grounds of defense to the plaintiff's motion for judgment heretofore filed in this action.

1. This defendant denies any indebtedness to the plaintiff for the amount alleged in the motion for judgment or for any other sum whatever.

2. With regard to paragraph 1 of the motion for judgment, this defendant admits that it was and is the owner of a lot or parcel of land on the north side of Blue Ridge Street in the Town of Stuart, Mayo River Magisterial District of Patrick County, Virginia.

3. With regard to paragraph 2 of the motion for judgment, this defendant admits only that it leased the above tract of land to The Patrick County - Stuart Chamber of Commerce on October 4, 1978, for a term extending from October 5, 1978, to midnight, October 8, 1978.

4. This defendant admits the allegations in paragraph 3 of the motion for judgment.

5. With regard to paragraph 4 of the motion for judgment, this defendant admits only that the plaintiff stepped into a hole on the above premises which was a latent defect and previously unknown to this defendant.

6. This defendant does not deem it necessary at this time to respond to paragraph 5 of the motion for judgment as it is a mere statement of legal duties and not an allegation of fact.

7. With regard to paragraph 6 of the motion for judgment, this defendant states that it had inspected the premises prior to

the time they were leased to the co-defendant, Patrick County - Stuart Chamber of Commerce, and that despite all reasonable precautions, the above latent defect was not discovered.

8. This defendant denies that it was guilty of any negligence which proximately caused injury to the plaintiff as alleged in paragraph 7 of the motion for judgment.

9. This defendant denies that the plaintiff was injured and damaged to the extent and with the consequences alleged in paragraph 8 of the motion for judgment and, therefore, calls for strict proof of all such allegations.

10. This defendant is not advised as to the allegations in paragraph 9 of the motion for judgment and calls for strict proof of same.

11. This defendant denies that the Patrick County Harvest Festival which utilized the leased premises was under its control at the time of the accident in question.

12. All allegations in the motion for judgment not expressly admitted herein are denied.

APPALACHIAN POWER COMPANY

By: Richard C. Rakes  
Of Counsel

Richard C. Rakes  
GENTRY, LOCKE, RAKES & MOORE  
800 Colonial Plaza  
P. O. Box 1018  
Roanoke, Virginia 24005

Counsel for defendant,  
Appalachian Power Company

C E R T I F I C A T E

This will certify that on the 8th day of July, 1980, I mailed a true copy of the foregoing grounds of defense to Lawrence G. Wilson, Jr., Esq., Carter and Wilson, 410 Patton Street, Danville, Virginia 24541, counsel of record for the plaintiff.

Richard B. Rakes



CROSS-CLAIM OF  
APPALACHIAN POWER COMPANY

Against

PATRICK COUNTY - STUART CHAMBER  
OF COMMERCE, INCORPORATED

Comes now the defendant, Appalachian Power Company, by counsel, and pursuant to Rule 3:9 of the Rules of the Supreme Court of Virginia, files herewith its cross-claim against the defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, and in support of same represents as follows:

1. At the time of plaintiff's alleged accident, Appalachian Power Company and the Patrick County - Stuart Chamber of Commerce were parties to a lease, copy of which is attached hereto as Exhibit I.

2. That pursuant to the terms of the aforesaid lease, the tenant, The Patrick County - Stuart Chamber of Commerce, agreed to indemnify and save harmless this defendant, Appalachian Power Company, from any and all claims of whatever nature arising out of the use of the premises in question during the 1978 Patrick County Harvest Festival.

Therefore, should it be determined in the principal action that Appalachian Power Company is liable to the plaintiff, then to the extent Appalachian is required to contribute toward the payment of any said judgment obtained by plaintiff, Appalachian Power Company respectfully asks for judgment over against the defendant The Patrick County - Stuart Chamber of Commerce, plus expenses, pursuant to the provisions of the aforesaid lease agreement.

APPALACHIAN POWER COMPANY

By: Richard B. Rakus  
Of Counsel

Richard C. Rakes  
GENTRY, LOCKE, RAKES & MOORE  
800 Colonial Plaza  
P. O. Box 1018  
Roanoke, Virginia 24005

Counsel for defendant,  
Appalachian Power Company

C E R T I F I C A T E

This will certify that on the 8th day of July, 1980, I mailed a true copy of the foregoing cross-claim to Lawrence G. Wilson, Jr., Esq., Carter and Wilson, 410 Patton Street, Danville, Virginia 24541, counsel of record for the plaintiff.

Richard C. Rakes

## ANSWER AND RESPONSIVE

### PLEADING

Comes now your defendant, Patrick County-Stuart Chamber of Commerce, Inc. and for its answer to that Motion for Judgment filed herein against it, sets forth the following:

1) Insofar as your defendant is advised, it admits the allegations contained in Paragraph #1 of the plaintiff's Motion for Judgment.

2) Your defendant admits so much of the allegations contained in Paragraph #2 of the plaintiff's Motion for Judgment that alleges that the defendant, Patrick County-Stuart Chamber of Commerce leased a tract of land from Appalachian Power Company in October 1978 for the purpose of holding upon the said leased premises a Havest Festival.

3) Insofar as your defendant is advised, it admits the allegations contained in Paragraph #3 of the plaintiff's Motion for Judgment..

4) Your defendant denies the allegations contained in Paragraph #4 of the plaintiff's Motion for Judgment.

5) Your defendant denies the allegations contained in Paragraph #5 of the plaintiff's Motion for Judgment.

6) Your defendant denies the allegations contained in Paragraph #6 of the plaintiff's Motion for Judgment.

7) Your defendant denies the allegations contained in Paragraph #7 of the plaintiff's Motion for Judgment and specifically denies that is is guilty of any negligence which caused or was a proximate result of the plaintiff's injuries.

8) This defendant is not advised as to the allegations contained in Paragraph #8 of the plaintiff's Motion for Judgment



and asks for strict proof of each item and element of damage alleged therein.

9) Your defendant is not advised as to the allegations contained in Paragraph #9 of the plaintiff's Motion for Judgment and asks for strict proof of the plaintiff's permanent injury.

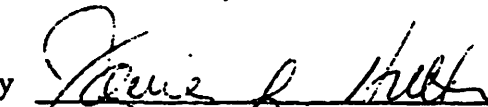
10) Your defendant reserves unto itself the affirmative defense of contributory negligence.

11) Your defendant denies that it was guilty of any negligence which would give rise to any liability on its behalf to the plaintiff and further the defendant denies that it is indebted to the plaintiff for the sum sued for in the plaintiff's Motion for Judgment or for any other sum whatsoever.

WHEREFORE, your defendant prays that the plaintiff's Motion for Judgment be dismissed along with its costs expended.

PATRICK COUNTY-STUART CHAMBER  
OF COMMERCE, INC.

By

  
of Counsel

James L. Hutton  
Gilmer, Sadler, Ingram,  
Sutherland and Hutton  
P.O. Box 908  
Blacksburg, Virginia 24060

Counsel for the Defendant  
Patrick County-Stuart Chamber  
of Commerce

#### C E R T I F I C A T E

I, James L. Hutton, do hereby certify that I have this the 16th day of July, 1980 mailed a true copy of the foregoing Answer and Responsive Pleading to Lawrence G. Wilson, Jr., Carter and Wilson, 410 Patton Street, Danville, Virginia, 24541 and Appalachian Power Company, c/o J. B. Berg, Registered Agent, 40 Franklin Road, Roanoke, Virginia, 24011.

INTERROGATORIES TO PLAINTIFF

JUL 23 1986  
AND FILED  
*Rena Testerman*  
CLERK

Comes now the defendant, Appalachian Power Company, by counsel, and files the following Interrogatories to be answered under oath by the plaintiff.

1. Please list the following information:
  - a. Full name
  - b. Date and place of birth
  - c. Home address
  - d. Business address
  - e. Occupation
2. Are you married, or have you ever been married?
3. If so, please state with particularity:
  - a. Date of marriage or marriages
  - b. Name of present spouse and/or former spouse
  - c. Number of children by present or former marriage and names and addresses of children
4. Have you had any other occupations or jobs in the past five years?
5. If so, for each other occupation or job please state:
  - a. The name and address of your employer
  - b. The dates of employment
  - c. The nature of duties performed
  - d. The reason for termination of employment, if any
6. Please describe in your own words, in full detail, how the accident occurred, including the events leading up to the accident.
7. Please set forth all facts upon which you base your allegation that Appalachian Power Company was negligent.
8. Please state with particularity the injuries received in the accident for which you claim damages in your Motion for Judgment.
9. Have you sought medical attention as a result of

the said injuries? If so, please state with particularity:

- a. The name and address of each doctor who has treated you or with whom you have consulted
- b. The exact date or dates of treatment or consultation
- c. The exact type of treatment given on each indicated date and/or the nature of consultation

10. Have you incurred medical expenses as a result of the accident in question? If so, please list all medical expenses incurred which you allege to be the result of the accident in question and the date such expenses were incurred.

11. Please attach a copy of each medical bill enumerated in the preceding Interrogatory to your answers to these Interrogatories.

12. Have you incurred any expenses as a result of the accident other than medical expenses?

13. If so, please list all such expenses and state the reason for incurring such expenses.

14. Were you employed by any person or firm other than yourself, at the time of the accident which is the basis of this action?

15. If so, for each employment please state:

- a. The name, address, and business of your employer
- b. The date you commenced work for such employer
- c. Each position or title you held and the inclusive dates you held each
- d. A description of your duties as of the date of the accident
- e. The name, address, and position of your immediate supervisor as of the date of the accident
- f. The hours per day and days per week you worked as of the date of the accident
- g. Your basic wage or salary as of the date of the accident and the period of computation, i.e., hour, week, month, year, piecework



16. During any period of employment referred to in the previous question, did you lose time or take time off because of the accident in question?

17. If so, for each occasion please state:

- a. The inclusive dates you were off from work
- b. The reason for each occasion you lost time from work

18. If you were self-employed at the time of the accident which is the basis of this action, please state:

- a. The inclusive days you were off from work
- b. The reason for each occasion you lost time from work

19. Please state the amount of earnings you claim to have lost as a result of this accident and the manner in which the loss of earnings was computed.

20. Were any medical reports, hospital reports, laboratory reports, x-ray reports, or any other reports or records made in connection with any examination, diagnosis, prognosis, or treatment of any injury, complaint, or illness allegedly caused by the accident?

21. If so, for each report or record, please state:

- a. The name and address of the person who made it
- b. The name and address of the person at whose request it was made
- c. The name and address of the person to whom it was made
- d. The date and place it was made
- e. Its contents
- f. The form in which it was made
- g. Whether you, or anyone acting in your behalf, has a copy of it
- h. The name and address of the person who has custody of it

22. Please attach a copy of each medical report listed in the preceding Interrogatory to your answers to these Interrogatories.

23. Please sign and attach to the copy of your answers to these Interrogatories that is sent to defendant's counsel the medical authorization form which is attached hereto, so your physicians can make available to the defendant and defendant's attorneys information relating to your physical condition gained by them in connection with examination or treatment of you, and so as to obviate the necessity of taking discovery depositions of said physicians.

24. Have you undergone any type of medical or physical examination or test in connection with obtaining employment within the past five years?

25. If so, please state the name and address of each physician who conducted such examination or test and the date and place where such test was made.

26. Please state the names, addresses, and telephone numbers of:

- a. All persons known to you, your agents, employees or attorneys who witnessed the accident, or were in the vicinity before, at the time of, or just after its occurrence
- b. All persons, other than those listed above, who have or may have knowledge of any of the matters involved herein

27. With respect to the persons listed in the preceding Interrogatory, state with particularity the position and place of each witness who observed the accident at the time the accident occurred.

28. Please state the names and addresses of all witnesses you will call to testify at the trial of this case.

29. Preceding the accident herein, have you been involved in any accidents involving motor vehicles?

30. If so, as to each, please state:

- a. The date, time, and location of accident
- b. The names and addresses of the people involved
- c. If legal proceedings were commenced
- d. The result of any settlement or legal proceeding
- e. The nature and extent of any injuries you sustained

31. Please answer the preceding Interrogatory with reference to any vehicular accident in which you have been involved since the accident herein.

32. Have you been involved in any accident other than a vehicular accident in which you sustained bodily injury?

33. If so, as to each, please state:

- a. The date, time, and location of accident
- b. The nature of the accident
- c. The nature and extent of any injury you sustained and the treatment rendered therefor

34. List the names and addresses of all physicians whom you have consulted for any reason within a period of five years prior to the accident in question and state the purpose of the visit as well as the diagnosis, if any.

35. List the names and addresses of all hospitals, clinics or other healing institutions in which you were confined during the five year period immediately prior to the accident in question and state the dates of each such confinement.

36. Have you, or anyone on your behalf, including your attorneys, taken any photographs in connection with the accident in question?

37. If so, please state:

- a. The name of the photographer who made any such photographs
- b. The subject matter and nature of any such photographs

- c. The custodian of such photographs
- d. Will you make available the negatives of all such photographs to the defendant's attorneys for purpose of making copies?

38. Did you, or anyone on your behalf, including your attorneys, ever take or receive any statement, either oral or in writing, from any person, including parties, who had any information or knowledge relating to the accident in question?

39. If so, please state as to each such person:

- a. His or her name and address
- b. The date of such statement
- c. The substance of any such statement
- d. If such statement was in writing, please attach a copy thereof to the answers to these Interrogatories

40. Have you ever served in the Armed Forces of the United States?

41. If so, please state:

- a. The branch of service
- b. Your serial number
- c. Your rank when you were discharged
- d. The inclusive dates of service

42. Did you receive a medical discharge from military service?

43. If so, please state:

- a. The date of discharge
- b. The cause for such medical discharge

44. Please state whether you have received or are now receiving any disability compensation as a result of any service connected injury. If so, please state the amount thereof.

45. Have you made or signed any written statement relevant to the accident in question to any insurer or any other person or firm? If so, please state the name and

address of such insurer or other person or firm. Do you have a copy of such statement or statements?

46. Have you ever been convicted of a felony or any other offense involving moral turpitude?

47. If so, please state:

- a. The nature of the felony or offense
- b. The date or dates of conviction
- c. The place or places of conviction

48. Have you applied for any life, hospital, sickness and accident, or disability insurance since the accident forming the basis of this action?

49. If so, please state:

- a. The name and address of each such company
- b. The type of insurance applied for
- c. Whether or not such policy was issued
- d. The date each such application was submitted

50. If you have not previously done so in your answers to these Interrogatories list all inclusive dates of employment since the accident, the name and address of each such employer, the amount of earnings in each such employment, and a brief description of the nature of the work performed.

51. Have you applied for any unemployment compensation benefits since the accident forming the basis of this action?

52. If so, please state:

- a. The address of the office to which such application was made
- b. The date of each such application
- c. The amount of unemployment compensation benefits received, if any, and for what period of time

53. Please attach to your answers to these Interrogatories copies of your federal income tax returns for the last three (3) years.

These Interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorneys obtain further information or decide to call additional witnesses to testify at trial between the time answers to these Interrogatories are filed and the time of trial.

APPALACHIAN POWER COMPANY

By: 

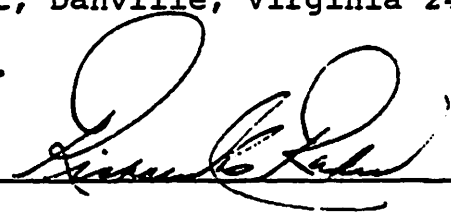
Of Counsel

Richard C. Rakes  
GENTRY, LOCKE, RAKES & MOORE  
800 Colonial Plaza  
P. O. Box 1018  
Roanoke, Virginia 24005

Counsel for Appalachian Power Company

CERTIFICATE

The undersigned hereby certifies that on the 22nd day of July, 1980, he mailed a true and correct copy of the foregoing Interrogatories to Plaintiff to Lawrence G. Wilson, Jr., Esq., Carter and Wilson, 410 Patton Street, Danville, Virginia 24541, counsel of record for the plaintiff.





ANSWER TO CROSS-CLAIM  
OF  
APPALACHIAN POWER COMPANY

Comes now your defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, and for its answer to that cross-claim filed herein against it by the defendant, Appalachian Power Company, sets forth the following:

1) Your defendant admits so much of Paragraph #1 of the defendant's cross-claim that sets forth that the defendant was party to a lease agreement. However, this defendant's copy of the cross-claim did not have a copy of the lease attached and, therefore, your defendant is unable to admit to the authenticity of the lease agreement as set out in "Exhibit A."

2) Your defendant admits that the lease agreement in question does have a "save harmless" paragraph to the Lessor. However, your defendant denies the validity of this agreement insofar as the accident in question is concerned.

3) Your defendant, by way or affirmative allegation, alleges that the accident in question and subsequent injuries and damages to the plaintiff were caused by a hidden defect in the premises which should have been apparent to the defendant, Appalachian Power Company, would have been under a duty to notify or point out this hidden defect or hazard to the defendant, Patrick County-Stuart Chamber of Commerce, Incorporated.

WHEREFORE, your defendant, Patrick County-Chamber of Commerce, Incorporated denies that it would be indebted to the defendant, Appalachian Power Company, for any reason or reasons

as set out in said defendant's cross claim and prays that said cross claim be dismissed.

Respectfully submitted,

PATRICK COUNTY-STUART CHAMBER OF  
COMMERCE, INCORPORATED

By 

of Counsel

James L. Hutton  
Gilmer, Sadler, Ingram,  
Sutherland and Hutton  
P.O. Box 908  
Blacksburg, VA 24060

Counsel for the Defendant  
Patrick County- Stuart  
Chamber of Commerce,  
Incorporated

#### C E R T I F I C A T E

I, James L. Hutton, do hereby certify that I have this the 27th day of August, 1980, mailed a true copy of the foregoing Answer to Cross-Claim to Lawrence G. Wilson, Jr., Carter & Wilson, 410 Patton Street, Danville, Virginia, 24541, Counsel for the Plaintiff, and to Richard C. Rakes, Gentry, Locke, Rakes and Moore, 800 Colonial Plaza, P. O. Box 1018, Roanoke, Virginia, Counsel for the defendant, Appalachian Power Company.

  
James L. Hutton

ANSWERS TO INTERROGATORIES

For answer to certain interrogatories propounded to the plaintiff, EARLINE VIRGINIA SANDERS, by the defendant, APPALACHIAN POWER COMPANY, the plaintiff answers and says:

1. (a) Earline Virginia Martin Sanders.  
(b) May 12, 1936, Halifax, Virginia.  
(c) Route 1, Box 253C, Danville, VA 24541.  
(d) Not applicable  
(e) Housewife

2. Yes.

3. (a) July 21, 1970

(b) Donald Jack Sanders

(c) One. Donna Earline Sanders, Route 1, Box 253C, Danville, VA 24541.

4. No.

5. Not applicable.

6. "I was at Craft Show, looking at quilts and things and my husband and I were walking side by side and I stepped into this hole and just went on down and I thought my day had come. I think I must have went into shock and I was talking out of my head.

7. Appalachian Power Company owned the property and had leased the land to Patrick County - Stuart Chamber of Commerce, Incorporated, and Appalachian Power Company knew, or in the exercise of reasonable care, should have know of the latent defect existing upon the premises.

8. Crushed ankle.

9. (a) Yes. Dr. David G. Dye, Danville Orthopedic Clinic, 171 South Main Street, Danville, VA 24541; Dr. Everett I.

Bugg, Jr., Durham Orthopedic Associates, 1828 Hillandale Road,  
Durham, NC 27705; Dr. Ruperto E. Perez, Jr., 115 South Main Street  
Danville, VA 24541.

(b) See statements attached.

(c) See reports attached.

10. Yes. See attached.

11. See attached.

12. Yes.

13. See attached.

14. No.

15. Not applicable.

16. Not applicable.

17. Not applicable.

18. Not applicable.

19. Not applicable.

20. Yes.

21. See attached.

22. See attached.

23. See attached.

24. No.

25. Not applicable.

26. (a) Donald Jack Sanders, husband of plaintiff,  
Route 1, Box 253C, Danville, VA 24541; Mr. Louis O. Miles, Milton,  
NC 27305.

(b) None.

27. Donald Jack Sanders, husband of plaintiff, was waiting  
beside plaintiff at the time of accident, and Mr. Louis O.  
Miles was a short distance behind plaintiff at the time of the  
accident.

28. Mr. Louis O. Miles, Milton, NC 27305; Donald Jack Sanders, Route 1, Box 253C, Danville, VA 24541; Earline Virginia Sanders, plaintiff, Route 1, Box 253C, Danville, VA 24541; Dr. David G. Dye, Danville Orthopedic Clinic, 171 South Main Street, Danville, VA 24541; Dr. Everett I. Bugg, Jr., Durham Orthopedic Associates, 1828 Hillandale Road, Durham, NC 27705; Dr. Ruperto E. Perez, Jr., 115 South Main Street, Danville, VA 24541.

29. No.

30. Not applicable.

31. Not applicable.

32. No.

33. Not applicable.

34. Dr. Frank G. Turner, 115 South Main Street, Danville, VA 24541, attended plaintiff during her pregnancy starting approximately August, 1974, and Dr. Glenn B. Updike, Jr., 150 West Main Street, Danville, VA 24541, attended plaintiff during the delivery of her child on February 9, 1975.

35. Plaintiff was admitted to Danville Memorial Hospital on February 9, 1975, giving birth to her child, and remained in the hospital until approximately February 16, 1975.

36. Yes.

37. (a) Stavros Calos.

(b) Photos of foot and leg.

(c) Carter and Wilson Attorneys

(d) Plaintiff has no knowledge of the existence of any negatives.

38. Yes. Donald Jack Sanders, husband of plaintiff, talked with Mr. Louis O. Miles by telephone following the accident in about the middle of October, 1978.

39. (a) Mr. Louis O. Miles, Milton, NC 27305.  
(b) October, 1978.  
(c) Mr. Miles indicated that he had seen the plaintiff fall and had heard her scream at the time of the accident.
40. No.
41. (a) Not applicable.  
(b) Not applicable.  
(c) Not applicable.  
(d) Not applicable.
42. Not applicable.
43. (a) Not applicable.  
(b) Not applicable.
44. No.
45. No.
46. No.
47. (a) Not applicable.  
(b) Not applicable.  
(c) Not applicable.
48. No.
49. (a) Not applicable.  
(b) Not applicable.  
(c) Not applicable.  
(d) Not applicable.
50. Not applicable.
51. No.
52. (a) Not applicable.  
(b) Not applicable.  
(c) Not applicable.

53. Not applicable.

Earline Virginia Sanders  
Earline Virginia Sanders

CARTER AND WILSON, Counsel for  
the Plaintiff,  
410 Patton Street  
Danville, VA 24541

By

Lawrence G. Wilson, Jr.  
Lawrence G. Wilson, Jr.

STATE OF VIRGINIA

CITY OF DANVILLE, to-wit:

James L. Clark, a Notary Public in and for  
the City and State aforesaid, do hereby certify that EARLINE  
VIRGINIA SANDERS, whose name is signed to the foregoing Answers to  
Interrogatories, personally appeared before me in my City and State  
aforesaid and after first being duly sworn made oath that the fore-  
going answers are true and correct to the best of her knowledge  
and belief.

Given under my hand this 25<sup>th</sup> day of August, 1980.

My commission expires: Sept. 6, 1980.

James L. Clark  
Notary Public



C E R T I F I C A T E

This is to certify that a true and correct copy of the foregoing Answers to Interrogatories was forwarded to Richard C. Rakes, Esquire, of Gentry, Locke, Rakes & Moore, Counsel for Appalachian Power Company, at his offices at 800 Colonial Plaza, Post Office Box 1018, Roanoke, VA 24005, on this the 5th day of ~~August~~ SEPTEMBER, 1980.

  
Lawrence G. Wilson, Jr.

INTERROGATORIES

DEC 7 1981  
*Quincy C. Fairlee*

The plaintiff, EARLINE VIRGINIA SANDERS, by counsel, hereby serves the following interrogatories upon the defendant, APPALACHIAN POWER COMPANY, to be answered and signed by the defendant, under oath, within twenty-one (21) days after service, pursuant to Rule 4:8 of the Rules of the Supreme Court of Virginia:

1. Was there any written communication between Appalachian Power Company and Patrick County - Stuart Chamber of Commerce, Incorporated, in regard to the leasing of the lot or parcel of land on the north side of Blue Ridge Street in the Town of Stuart, Mayo River Magisterial District of Patrick County, Virginia, other than the lease agreement dated October 4, 1978, between Appalachian Power Company and the Patrick County - Stuart Chamber of Commerce, Incorporated?

2. If so, are you willing to furnish copies of all correspondence between the two parties to the plaintiff in this matter? If so, please attach copies of all correspondence to your answers to these interrogatories.

3. Did any employee or agent of Appalachian Power Company, inspect the lot or parcel of land in question at any time prior to the commencement of the term of the lease described above? If so, state the names, addresses and titles of all such parties known to have inspected the premises prior to the time the premises were leased to Patrick County - Stuart Chamber of Commerce, Incorporated.

4. To your knowledge, was any defect on said premises discovered by said inspection? Specifically, was the hole in

which the plaintiff fell seen by any of those named who inspected the premises?

5. Did anyone acting on behalf of Appalachian Power Company examine the hole in which the plaintiff fell on the day of her injury or at any time thereafter?

6. If so, give the names, addresses and occupations of those persons so examining the premises.

7. Describe the hole in which the plaintiff fell based on the information obtained by your employees or agents, including the best estimate of the depth, diameter, any material encasing the hole and the apparent function of the hole.

8. What measures, if any, were taken to insure the safety of the premises after the plaintiff fell? Describe any measures taken which altered the site after Mrs. Sanders' fall.

9. Do you know of any agents or employees of the co-defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, who inspected the premises prior to the execution of the lease agreement described above, or at any time prior to the plaintiff's fall? If so, please state their names, addresses and occupations.

10. To your knowledge, what type of preparations were made on the premises leased prior to the opening of the "Harvest Festival" either by employees or agents of APPALACHIAN POWER COMPANY or any other party?

11. Describe the type of equipment and manpower used to prepare the premises for the purpose for which it was leased.

12. Do you know the names of any witnesses to the fall suffered by the plaintiff? If so, please state their names, addresses and occupations, if known.

13. Please state the names, addresses and occupations of any witnesses which you intend to call on your behalf at the trial of this matter and a statement of the evidence which you expect to elicit from each of these witnesses.

14. Did the defendant, APPALACHIAN POWER COMPANY, have any representative on the premises of the Patrick County - Stuart Chamber of Commerce, Incorporated, Harvest Festival, at any time during the period of the lease? If so, please provide their names, addresses and occupations.

15. Was any officer, agent, or employee of Appalachian Power Company present at the time of the fall suffered by the plaintiff? If so, please state the names, addresses, titles and occupations of said person or persons.

16. Was any type of sign or other warning device placed on the premises by any employee or agent of APPALACHIAN POWER COMPANY or any other party known to the defendant? If so, please describe the type of sign or warning device and its location.

EARLINE VIRGINIA SANDERS,

By Counsel

CARTER AND WILSON, Counsel for the  
Plaintiff

410 Patton Street  
Danville, VA 24541

By

  
Lawrence G. Wilson, Jr.

C E R T I F I C A T E

This is to certify that a true and correct copy of the foregoing INTERROGATORIES was forwarded to RICHARD C. RAKES, Esquire, of GENTRY, LOCKE, RAKES & MOORE, Counsel for APPALACHIAN POWER COMPANY, to his offices at 800 Colonial Plaza, Post Office Box 1018, Roanoke, VA 24005, on this the 4th day of December, 1981.

INTERROGATORIES

FILED  
DEC 7 1981  
*John C. Fairley*  
Clerk of Court

The plaintiff, EARLINE VIRGINIA SANDERS, by counsel, hereby serves the following interrogatories upon the defendant, PATRICK COUNTY - STUART CHAMBER OF COMMERCE, INCORPORATED, to be answered and signed by the defendant, under oath, within twenty-one (21) days after service, pursuant to Rule 4:8 of the Rules of the Supreme Court of Virginia:

1. Was there any written communication between Appalachian Power Company and Patrick County - Stuart Chamber of Commerce, Incorporated, in regard to the leasing of the lot or parcel of land on the north side of Blue Ridge Street in the Town of Stuart, Mayo River Magisterial District of Patrick County, Virginia, other than the lease agreement dated October 4, 1978, between Appalachian Power Company and the Patrick County - Stuart Chamber of Commerce, Incorporated?

2. If so, are you willing to furnish copies of all correspondence between the two parties to the plaintiff in this matter? If so, please attach copies of all correspondence to your answers to these interrogatories.

3. Did any employee or agent of Patrick County - Stuart Chamber of Commerce, Incorporated inspect the lot or parcel of land in question at any time prior to the commencement of the term of the lease described above? If so, state the names, addresses and titles of all such parties known to have inspected the premises prior to the time the premises were leased to Patrick County - Stuart Chamber of Commerce, Incorporated.

4. To your knowledge, was any defect on said premises

discovered by said inspection? Specifically, was the hole in which the plaintiff fell seen by any of those named who inspected the premises?

5. Did anyone acting on behalf of Patrick County - Stuart Chamber of Commerce, Incorporated examine the hole in which the plaintiff fell on the day of her injury or at any time thereafter?

6. If so, give the names, addresses and occupations of those persons so examining the premises.

7. Describe the hole in which the plaintiff fell based on the information obtained by your employees or agents, including the best estimate of the depth, diameter, any material encasing the hole and the apparent function of the hole.

8. What measures, if any, were taken to insure the safety of the premises after the plaintiff fell? Describe any measures taken which altered the site after Mrs. Sanders' fall.

9. Do you know of any agents or employees of the co-defendant, Appalachian Power Company, who inspected the premises prior to the execution of the lease agreement described above, or at any time prior to the plaintiff's fall? If so, please state their names, addresses and occupations.

10. To your knowledge, what type of preparations were made on the premises leased prior to the opening of the "Harvest Festival" either by employees or agents of Patrick County - Stuart Chamber of Commerce, Incorporated or any other party?

11. Describe the type of equipment and manpower used to prepare the premises for the purpose for which it was leased.

12. Do you know the names of any witnesses to the fall

suffered by the plaintiff? If so, please state their names, addresses and occupations, if known.

13. Please state the names, addresses and occupations of any witnesses which you intend to call on your behalf at the trial of this matter and a statement of the evidence which you expect to elicit from each of these witnesses.

14. Did the defendant, Patrick County - Stuart Chamber of Commerce, Incorporated have any representative on the premises of the Patrick County - Stuart Chamber of Commerce, Incorporated, Harvest Festival, at any time during the period of the lease? If so, please provide their names, addresses and occupations.

15. Was any officer, agent or employee of Patrick County - Stuart Chamber of Commerce, Incorporated present at the time of the fall suffered by the plaintiff? If so, please state the names, addresses, titles and occupations of said person or persons.

16. Was any type of sign or other warning device placed on the premises by any employee or agent of Patrick County - Stuart Chamber of Commerce, Incorporated or any other party known to the defendant? If so, please describe the type of sign or warning device and its location.

EARLINE VIRGINIA SANDERS,

By Counsel

CARTER AND WILSON, Counsel for the  
Plaintiff,  
410 Patton Street  
Danville, VA 24541

By

  
Lawrence G. Wilson, Jr.



C E R T I F I C A T E

This is to certify that a true and correct copy of the foregoing INTERROGATORIES was forwarded to JAMES L. HUTTON, Esquire, of GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON, Counsel for Patrick County - Stuart Chamber of Commerce, Incorporated, to his offices at P. O. Box 908, Blacksburg, VA 24060, on this the 4th day of December, 1981.

  
Lawrence G. Wilson, Jr.

ANSWERS  
TO  
INTERROGATORIES

Comes now your defendant, Patrick County-Stuart Chamber of Commerce, Incorporated, by Dorris W. Cogar, in person, who after being duly sworn, deposed and answered the Interrogatories filed herein under oath, in accordance with the provisions of Rule 4:8 of the Rules of the Supreme Court of Appeals of Virginia.

The questions are not repeated in this instrument and only the answers to said questions are given as follows:

(1) None.

(2) N/A.

(3) Dorris W. Cogar, Executive Director, Chamber of Commerce, Stuart, Virginia; Lucille Garrett, Co-Chairman of the Harvest Festival 1978, Stuart, Virginia; Louise Tatum, Co-Chairman of the Harvest Festival 1978, Patrick Springs, Virginia; and Amon Sears of Appalachian Power Company, Stuart, Virginia.

(4) The only defect noticed on the premises was that of an abandoned hole which was pointed out to us by the Appalachian representative and it had been filled with old tires and covered with boards.

(5) Yes.

(6) Dorris Cogar was shown the hole by vendors at the close of the days activities. Lucille Garrett and Louise Tatum also visited the site a few days later. Their addresses are above.

(7) I cannot describe the hole from personal observation. At the time I inspected the hole it had long sticks protruding as a warning. I did not measure it or inspect its probable purpose.

(8) The only measure that I know of was taken after the

plaintiff fell was there were larger sticks placed in the hole to show its location.

(9) Mr. Amon Sears of the Appalachian Power Company visited the site with the people above. However, I do not know what type of inspection was made by the Appalachian Power Company.

(10) Appalachian Power Company hired their usual contact to mow or bush-hog the lot and at least one of the vendors' husbands brought his own lawn mower and mowed around the vicinity of her exhibit.

(11) See (10) above.

(12) I do not personally have the names or addresses of any witnesses who witnessed the accident.

(13) Dorris W. Cogar, Stuart, Virginia; Lucille Garrett, Stuart, Virginia; Louise Tatum, Patrick Springs, Virginia; Louis Miles, Cherry Hill Farms, Milton, North Carolina; and Amon Sears of Appalachian Power Company, Stuart, Virginia. Any additional witnesses will be provided to you later by my attorney.

(14) The committee responsible for this activity was: Frances Radford, Ararat, Virginia; Harry Johnson, Stuart, Virginia; Carol Cockram, Stuart, Virginia; Donald Graham, Stuart, Virginia; and Eleanor Weidhass, Stuart, Virginia. However, I am not aware of the dates and times any of these people were on the premises.

(15) To my knowledge, no one was present from the Chamber of Commerce at the time of the accident and the vendors were packing up to leave.

(16) I know of no signs placed on the premises by the Chamber of Commerce. However, I do recall the Appalachian Power Company had placed No-Trespassing signs on the premises in various places.

PATRICK COUNTY - STUART CHAMBER  
OF COMMERCE, INCORPORATED

By

Title

STATE OF VIRGINIA

COUNTY OF Patrick, to-wit:

This 22<sup>nd</sup> day of February, 1982, personally appeared  
Dorris W. Cogar, whose name is signed as Executive  
Director of the Patrick County-Stuart Chamber of Commerce,  
Incorporated, before me, Ammon Sears, a  
Notary Public in and for the County aforesaid in the State of  
Virginia, and after being duly sworn, deposed and stated that the  
answers herein given to the questions propounded in the Inter-  
rogatories filed in a law action styled "Earline Virginia Sanders  
v. Patrick County - Stuart Chamber of Commerce, Incorporated and  
Appalachian Power Company" are true and correct to the best of her  
knowledge and belief.

Taken, subscribed and sworn to before me in the County  
of Patrick, in the State of Virginia, this 22<sup>nd</sup> day of  
February, 1982.

My Commission expires: January 13, 1986

Ammon Sears

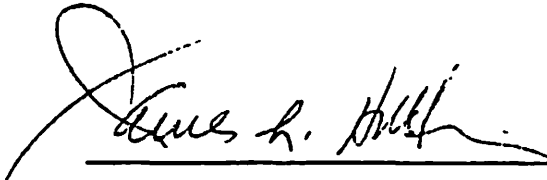
Notary Public

James L. Hutton, Esq.  
Gilmer, Sadler, Ingram,  
Sutherland & Hutton  
Attorneys at Law  
P. O. Box 908  
Blacksburg, VA 24060-0908

Counsel for Patrick County - Stuart  
Chamber of Commerce, Incorporated

C E R T I F I C A T E

I, the undersigned James L. Hutton, do hereby certify that I have on this 23<sup>d</sup> day of February, 1982, mailed a copy of the foregoing Answers to Interrogatories to Lawrence G. Wilson, Jr., Esq., Carter and Wilson, Attorneys at Law, 410 Patton Street, Danville, Virginia 24541, counsel for Earline Virginia Sanders.

  
\_\_\_\_\_

ANSWERS TO INTERROGATORIES

RECEIVED 1982

MAR 16 1982

By *[Signature]*  
Deputy Clerk

Comes now the defendant, Appalachian Power Company, and files the following Answers to Interrogatories.

1. Was there any written communication between Appalachian Power Company and Patrick County - Stuart Chamber of Commerce, Incorporated, in regard to the leasing of the lot or parcel of land on the north side of Blue Ridge Street in the Town of Stuart, Mayo River Magisterial District of Patrick County, Virginia, other than the lease agreement dated October 4, 1978, between Appalachian Power Company and the Patrick County - Stuart Chamber of Commerce, Incorporated?

ANSWER: No.

2. If so, are you willing to furnish copies of all correspondence between the two parties to the plaintiff in this matter? If so, please attach copies of all correspondence to your answers to these interrogatories.

ANSWER: N/A.

3. Did any employee or agent of Patrick County - Stuart Chamber of Commerce, Incorporated inspect the lot or parcel of land in question at any time prior to the commencement of the term of the lease described above? If so, state the names, addresses and titles of all such parties known to have inspected the premises prior to the time the premises were leased to Patrick County - Stuart Chamber of Commerce, Incorporated.

ANSWER: There was no "inspection" as such, but Appalachian's Area Supervisor, Mr. Ammon Sears, did walk over a portion of the premises with Mrs. Dorris W. Cogar, Executive Director of the Patrick County - Stuart Chamber of Commerce, Incorporated prior to the time the written lease was executed.

4. To your knowledge, was any defect on said premises discovered by said inspection? Specifically, was the hole in which the plaintiff fell seen by any of those named who inspected the premises?

ANSWER: Other than the fact that the area was grown up with vegetation and was somewhat rough in places, the only "defect" observed was an abandoned water well which had been filled with old tires and covered with boards. Appalachian's Mr. Sears suggested that this area be roped off so that no one would inadvertently step into it. The hole in which the plaintiff fell was not observed by Mr. Sears or anyone on behalf of Appalachian Power Company prior to the accident.

5. Did anyone acting on behalf of Appalachian Power Company examine the hole in which the plaintiff fell on the day of her injury or at any time thereafter?

ANSWER: No one from Appalachian Power Company examined the hole in which the plaintiff fell on the day of her injury. Attempts were made to locate the hole after the accident, but it was within the past year that Mr. Sears was pointed to a depression and advised that this was the area where the plaintiff fell.

6. If so, give the names, addresses and occupations of those persons so examining the premises.

ANSWER: Russell Smith of Stuart, Virginia, was the person who pointed out the accident scene to Appalachian's Mr. Sears.

7. Describe the hole in which the plaintiff fell based on the information obtained by your employees or agents, including the best estimate of the depth, diameter, any material encasing the hole and the apparent function of the hole.

ANSWER: By the time Appalachian's Mr. Sears had the location of the hole pointed out to him the area in question had been graded down. It was impossible to estimate the depth or diameter at the time of the accident and no material encasing the hole was observed. Appalachian does not know the apparent original function of the hole.

8. What measures, if any, were taken to insure the safety of the premises after the plaintiff fell? Describe any measures taken which altered the site after Mrs. Sanders' fall.

ANSWER: After Appalachian's representatives learned of the accident, Mr. Sears ordered signs placed around the boundary of the lots warning people to keep out.

9. Do you know of any agents or employees of the co-defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, who inspected the premises prior to the execution of the lease agreement described above, or at any time prior to the plaintiff's fall? If so, please state their names, addresses and occupations.

ANSWER: See answer to Interrogatory 3.

10. To your knowledge, what type of preparations were made on the premises leased prior to the opening of the "Harvest Festival" either by employees or agents of Appalachian Power Company or any other party?

ANSWER: Mrs. Dorris Cogar of Stuart - Patrick County Chamber of Commerce had been advised that Appalachian would go over these lots with a bushhog two or three times a year. Mrs. Cogar asked Mr. Sears to delay this until just before the Harvest Festival was to open. Appalachian hired Mr. Ralph Turner to go over the lots with a bushhog, and Appalachian



understands that someone from Stuart - Patrick County Chamber of Commerce thereafter went over the Akers property with a rotary mower. However, Appalachian made no special preparations for the Harvest Festival as it was Appalachian's practice to go over the lots with a bushhog periodically anyway.

11. Describe the type of equipment and manpower used to prepare the premises for the purpose for which it was leased.

ANSWER: See answer to Interrogatory 10 above.

12. Do you know the names of any witnesses to the fall suffered by the plaintiff? If so, please state their names, addresses and occupations, if known.

ANSWER: No.

13. Please state the names, addresses and occupations of any witnesses which you intend to call on your behalf at the trial of this matter and a statement of the evidence which you expect to elicit from each of these witnesses.

ANSWER: Ammon Sears, Stuart, Virginia, Area Supervisor for Appalachian Power Company; Ralph Turner, Stuart, Virginia, Turner Landscaping Service; Russell Smith, Stuart, Virginia, Moody Ambulance Service; Lawrence Burton, Stuart, Virginia, Attorney at Law. There may be other witnesses and, if so, this information will be provided to plaintiff's counsel well in advance of the trial date.

14. Did the defendant, Appalachian Power Company, have any representative on the premises of the Patrick County - Stuart Chamber of Commerce, Incorporated, Harvest Festival, at any time during the period of the lease? If so, please provide their names, addresses and occupations.

ANSWER: No.

15. Was any officer, agent or employee of Appalachian Power Company present at the time of the fall suffered by the plaintiff? If so, please state the names, addresses, titles and occupations of said person or persons.

ANSWER: Not to our knowledge.

16. Was any type of sign or other warning device placed on the premises by any employee or agent of Appalachian Power Company or any other party known to the defendant? If so, please describe the type of sign or warning device and its location.

ANSWER: Not prior to the accident. For action taken following the accident, see answer to Interrogatory 8 above.

APPALACHIAN POWER COMPANY,

By: Ammon Sears

STATE OF VIRGINIA     )  
                              ) To-wit:  
COUNTY OF PATRICK    )

This day personally appeared before me, Ammon  
Sears, representative of Appalachian Power Company, and made oath that these Answers to Interrogatories are true and correct according to the best of his knowledge, information and belief.

Subscribed and sworn to before me this 8th day of March, 1982.

William H. Terry  
Notary Public

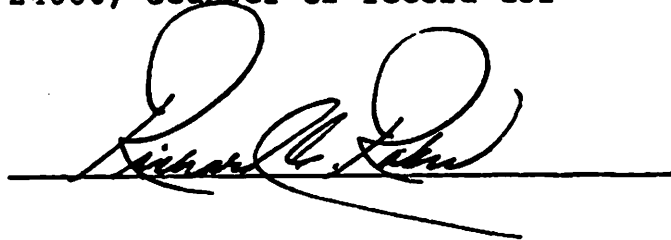
My commission expires: 10-4-82

Richard C. Rakes  
GENTRY, LOCKE, RAKES & MOORE  
800 Colonial Plaza  
P. O. Box 1018  
Roanoke, Virginia 24005

Counsel for Appalachian Power Company.

CERTIFICATE

I hereby certify that on the 15<sup>th</sup> day of March, 1982, I mailed a true and correct copy of the foregoing Answers to Interrogatories to Lawrence G. Wilson, Jr., Esquire, Carter and Wilson, 410 Patton Street, Danville, Virginia 24541, counsel of record for the plaintiff and to James L. Hutton, Esquire, Gilmer, Sadler, Ingram, Sutherland & Hutton, P. O. Box 908, Blacksburg, Virginia 24060, counsel of record for the co-defendant.

A handwritten signature in dark ink, appearing to read "Richard C. Rakes", is written over a horizontal line. The signature is stylized with large loops and a long, sweeping underline.

INSTRUCTION NO. 4

THE COURT INSTRUCTS THE JURY that an invitee is one who visits premises lawfully at the express or implied invitation of the occupant. He is one who visits other than for a social purpose or for his own convenience.

An express invitation is one made directly or indirectly by spoken or written words to come on the premises.

An implied invitation is one made by opening the premises to others for a particular purpose.

*Green*  
*9/28/82*  
*PM*

10

INSTRUCTION NO. 5

THE COURT INSTRUCTS THE JURY that an occupant of premises has the duty to an invitee:

1. To use ordinary care to have the premises in a reasonably safe condition for an invitee's use consistent with the invitation; but an occupant does not guarantee an invitee's safety; and

2. To use ordinary care to warn an invitee of any unsafe condition which the occupant knows, or by the use of ordinary care, should know about; except that an occupant has no duty to warn an invitee of an unsafe condition which is open and obvious to a person using ordinary care for his own safety.

If, then, you believe from a preponderance or greater weight of the evidence that the defendant, Patrick County-Stuart Chamber of Commerce, failed to exercise ordinary care in the performance of either or both of these duties, then said defendant is negligent; and if you further believe from such evidence that any such negligence was the sole proximate cause of the plaintiff's injuries, then your verdict should be in favor of the plaintiff against said defendant.

*Given*  
*9/26/82*  
*qnc*

INSTRUCTION NO. 6

The plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant, Appalachian Power Company, leased the land for the festival to the Patrick County - Stuart Chamber of Commerce when Appalachian Power Company knew, or by the exercise of reasonable care should have known: 1) that the condition of the land involved an unreasonable risk of harm to persons attending the festival, and 2) that the Chamber would admit persons to the festival before putting the land in safe condition. Plaintiff also must prove that Appalachian Power Company failed to use reasonable care to discover or to remedy the condition of the land, or to use other means to protect persons attending the festival from <sup>any</sup> ~~the~~ hazardous condition.

, If you find that the plaintiff has proved these elements by a preponderance of the evidence, then the defendant Appalachian Power Company was negligent; and if you further believe from such evidence that any said negligence was the sole proximate cause of the plaintiff's injuries, then your verdict should be in favor of the plaintiff against said defendant.

*Spencer*  
*9/28/82*  
*gmc*

INSTRUCTION NO. 7

THE COURT INSTRUCTS THE JURY that if two or more persons are negligent, and if the negligence of each proximately causes the plaintiff's injury, then each is liable to the plaintiff for her injury. This is true even if the negligence of one is greater than the other.

Hence, in this case, if you believe by a preponderance or greater weight of the evidence that both defendants were negligent and that the negligence of both proximately caused the plaintiff's injury, you should find for the plaintiff unless you also believe by a preponderance or greater weight of the evidence that the plaintiff was contributorily negligent and that such contributory negligence was a proximate cause of her injury.

*Guinn*  
*9/28/82*  
*y/mc*

INSTRUCTION NO. 8

THE COURT INSTRUCTS THE JURY that an invitee has the right to assume that the premises are reasonably safe for his visit. This assumption does not apply, however, if the invitee knows, or should know, of an unsafe condition or if the invitee uses the premises in a manner that exceeds the scope of the invitation.

9/25/82  
L. H. H.  
J. H. H.



66

INSTRUCTION NO. 12

The Court instructs the jury that you shall find your verdict for the plaintiff and against the Chamber of Commerce if the plaintiff has proved by the greater weight of the evidence that:

- (1) the Chamber of Commerce was negligent; and that
- (2) the Chamber of Commerce's negligence was the sole proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the plaintiff and against Appalachian if the plaintiff has proved by the greater weight of the evidence that:

- (1) Appalachian was negligent; and that
- (2) Appalachian's negligence was the sole proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the plaintiff and against both defendants if the plaintiff has proved by the greater weight of the evidence that:

- (1) both defendants were negligent; and that
- (2) the negligence of both defendants was the sole proximate cause of the plaintiff's accident and damages.

You shall find your verdict for either or both defendants if:

- (1) as to that defendant, the plaintiff has failed to

INSTRUCTION NO. 18

THE COURT INSTRUCTS THE JURY that the opening statements and argument of counsel are not evidence. The statement of any counsel referring to the amount sued for or suggesting the amount of any award that would be fair and adequate is not evidence, but the opinion of counsel only. Such statements, if any are made in argument, are not to be considered by you as evidence, but argument only, in arriving at the amount of your award in the event you find your verdict in favor of the plaintiff.

*Hein*  
*9/29/22*  
*Jme*

## O R D E R

On September 28, 1982, came the plaintiff, in person and by counsel, and came also the defendant, Patrick County -Stuart Chamber of Commerce, Incorporated, represented in person by Doris Cogar, and by counsel, and the defendant, Appalachian Power Company, represented in person by Ammon Sears, and by counsel, and both sides announced that they were ready for trial upon the pleadings heretofore filed.

Whereupon came a jury of thirteen persons and each side having struck three of said jurors, the remaining seven, to-wit: Anna Mae Jones, Nettie Crockett Cox, Daniel Bolden, Beulah Frye Chappell, Earl Wilson Smith, Samuel A. Moore and Donna Tolbert Artrip, were sworn to well and truly try the issue joined and a true verdict render according to the law and evidence.

Whereupon, the plaintiff presented her evidence and thereafter rested her case in chief. Counsel for both defendants, Patrick County - Stuart Chamber of Commerce, Incorporated and Appalachian Power Company, then moved the court to strike the plaintiff's evidence and to enter summary judgment in favor of the defendants on the grounds appearing in the record. Said motions were denied and the objections of the defendants were noted.

Whereupon, the Court adjourned the proceedings until the following day.

On September 29, 1982, the parties appeared again and after the defendant, Appalachian Power Company, introduced its exhibit, both defendants rested. Thereafter, the defendants,

Patrick County - Stuart Chamber of Commerce, Incorporated and Appalachian Power Company, by counsel, renewed their motions to strike the plaintiff's evidence and for the entry of summary judgment in their favor on the grounds that the plaintiff had failed to make out a prima facie case of primary negligence on the part of the defendants and for other grounds appearing in the record. Upon hearing argument of counsel, the Court overruled the defendants' motions, to which action both defendants noted their objections.

Whereupon, the jury, having received the instructions of the Court and heard argument of counsel, retired to consider its verdict. After some time the jury returned with the following verdict:

"We, the jury, on the issues joined, find in favor of the plaintiff, Earline Virginia Sanders, against both defendants, Patrick County - Stuart Chamber of Commerce, Incorporated and Appalachian Power Company, and assess her damages at \$125,000.00.

/s/ Earl W. Smith  
Foreman "

Whereupon, the defendants, Patrick County - Stuart Chamber of Commerce and Appalachian Power Company, by counsel, orally moved the Court to set aside the jury verdict and requested leave to file written motions and legal authorities in support of same. The Court granted leave for the defendants to file their written motions and supporting briefs on or before October 19, 1982, and the plaintiff was granted leave until October 29, 1982 in order to file any desired response.

The Court has taken under advisement the cross-claim of Appalachian Power Company against Patrick County - Stuart Chamber of Commerce, Incorporated and has granted leave for that defendant to file written briefs on or before October 19, 1982.

The Court set November 8, 1982 at 2:00 p.m. as the date and time for oral argument.

And this action is continued on the docket.

*October 12, 1982*

Jack B. Coulter

Judge

A COPY. TESTE: PATSY TESTERMAN CLERK  
By *Dorothy Miller* Deputy Clerk

MOTION OF APPALACHIAN POWER  
COMPANY TO SET ASIDE JURY  
VERDICT AND FOR THE ENTRY  
OF JUDGMENT IN ITS FAVOR

Comes now the defendant, Appalachian Power Company, by counsel, and files this written motion to set aside the jury verdict and for the entry of final judgment in its favor, or in the alternative, to award a new trial. And for its grounds in support of same, this defendant will rely upon the following:

1. The plaintiff failed to make out a prima facie case as to the defendant, Appalachian Power Company.

2. There was no evidence that the defendant Appalachian Power Company had any constructive notice of the latent defect which caused plaintiff's injury.

3. There was no evidence that a reasonable inspection of the premises by Appalachian Power Company would have likely discovered the latent defect.

4. The Court erred in refusing to strike the plaintiff's evidence and the entry of summary judgment on behalf of Appalachian Power Company, both at the conclusion of plaintiff's evidence and later at the conclusion of all the evidence.

5. The Court erred in granting Instructions 4 and 6, and in refusing to grant Instructions C, D and E.

WHEREFORE, the defendant, Appalachian Power Company, respectfully moves the Court to set aside the jury verdict in favor of the plaintiff and for the entry of final judgment in its behalf. In the alternative, the

defendant, Appalachian Power Company, would move the Court to set aside the jury verdict in favor of the plaintiff and to award a new trial. If however the Court should award the plaintiff final judgment on the jury verdict, Appalachian Power Company, by counsel, respectfully moves for judgment on its Cross-Claim against the co-defendant Patrick County--Stuart Chamber of Commerce, Incorporated for such amount as Appalachian Power Company would be required to contribute toward the payment of the joint judgment against both defendants.

APPALACHIAN POWER COMPANY,

By: \_\_\_\_\_  
Of Counsel

Richard C. Rakes  
GENTRY, LOCKE, RAKES & MOORE  
800 Colonial Plaza  
P. O. Box 1018  
Roanoke, Virginia 24005

Counsel for defendant,  
Appalachian Power Company

CERTIFICATE

This is to certify that on October 19, 1982, I mailed a true copy of the foregoing Motion to Lawrence G. Wilson, Jr., Esquire, Carter and Wilson, 410 Patton Street, Danville, Virginia 24541, counsel of record for the plaintiff, and to James L. Hutton, Esquire, Gilmer, Sadler, Ingram, Sutherland and Hutton, P. O. Box 908, Blacksburg, Virginia 24060, counsel of record for the co-defendant, Patrick County--Stuart Chamber of Commerce, Incorporated.

\_\_\_\_\_  
Of Counsel

O R D E R

On November 8, 1982, oral argument was heard on the motion of defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, to set aside the jury verdict as to it and for the entry of final judgment in its favor. And the Court, having considered the written memoranda and heard argument of counsel, overruled the motion for reasons stated in its opinion letter dated Dec. 14, 1982 and made a part hereof to which action the defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, by counsel, noted its objection. *js*

Whereupon, oral argument was likewise presented on the motion of defendant, Appalachian Power Company, to set aside the jury verdict as to it and for the entry of final judgment in its favor. And the Court, having considered the written memoranda and heard for reasons stated in its opinion letter dated Dec. 14, 1982 and made a part hereof argument of counsel, overruled the motion to which action the defendant, Appalachian Power Company, by counsel, noted its objection. *js*

It is therefore ADJUDGED and ORDERED that the plaintiff, Earline Virginia Sanders, do have and recover of the defendants, Patrick County - Stuart Chamber of Commerce, Incorporated, and Appalachian Power Company, jointly and severally, the sum of \$125,000 with interest from September 29, 1982, and the costs of this action.

It is further ADJUDGED and ORDERED that the defendant, Appalachian Power Company, prevail on its cross-claim against defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, and that the said Appalachian Power Company do have and recover of Patrick County - Stuart Chamber of Commerce, Incorporated, all sums Appalachian Power Company pays on the judgment in favor of the plaintiff, Earline Virginia Sanders, plus attorney's fees and



other costs incurred in the defense of this action, to which action the defendant, Patrick County - Stuart Chamber of Commerce, Incorporated, noted its objection.

It is further ADJUDGED and ORDERED that the transcript be made a part of the record pursuant to Rule 5:9(a) of the Rules of the Supreme Court of Virginia.

And it further appearing unto the Court that the defendants, Patrick County - Stuart Chamber of Commerce, Incorporated, and Appalachian Power Company, have indicated their intention to appeal to the Supreme Court of Virginia, it is further ADJUDGED and ORDERED pursuant to §8.01-676 of the Code of Virginia, 1950, as amended, that execution on this judgment be suspended so long as the petitioners timely prosecute their appeals and thereafter so long as the matter is under consideration by the Supreme Court, provided the petitioners or someone for them shall file an appeal bond in the clerk's office within thirty (30) days of the entry of this order with surety to be approved by the clerk or the Court in the penalty of One Hundred Fifty Thousand (\$150,000) Dollars reciting this judgment and the intention to present a petition for appeal, which bond shall be conditioned to perform and satisfy the judgment in case such judgment be affirmed, or the appeal not be timely prosecuted, or the appeal be denied, and which bond shall also be conditioned to pay all damages, costs and fees which may be awarded against appellants in the Supreme Court and all actual damages incurred in consequence of the suspension.

Enter this 14<sup>th</sup> day of December, 1982.

  
Judge

Seen:

CARTER AND WILSON

By: *Lawrence S. Wilson Jr.*  
Counsel for  
Earline Virginia Sanders

GILMER, SADLER, INGRAM,  
SUTHERLAND AND HUTTON, P.C.

By: *Miss L. Hutton*  
Counsel for  
Patrick County - Stuart Chamber  
of Commerce, Incorporated

GENTRY, LOCKE, RAKES & MOORE

By: *Richard L. Rakes*  
Counsel for  
Appalachian Power Company

*me*

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(... 13)

TWENTY-THIRD JUDICIAL CIRCUIT OF VIRGINIA

December 14, 1982

JACK B. COULTER, JUDGE  
P. O. BOX 211  
ROANOKE, VIRGINIA 24002

CIRCUIT COURT FOR THE COUNTY OF ROANOKE  
CIRCUIT COURT FOR THE CITY OF ROANOKE  
CIRCUIT COURT FOR THE CITY OF SALEM

Richard C. Rakes, Esq.  
Gentry, Locke, Rakes & Moore  
Post Office Box 1018  
Roanoke, Va. 24005

James L. Hutton, Esq.  
Gilmer, Sadler, Ingram, Sutherland  
and Hutton  
P. O. Box 908  
Blacksburg, Va. 24060

Lawrence G. Wilson, Jr., Esq.  
Carter and Wilson  
410 Patton Street  
Danville, Va. 24541

Re: Sanders v. Patrick County-Stuart Chamber  
of Commerce, Inc. and Appalachian Power Co.

Gentlemen:

In overruling the motions of the defendants to set aside the verdict of the jury in this case it might be of some benefit to articulate the major reasons that have influenced the Court in this decision. The novelty of some of the issues involved and the further pursuit being contemplated for their final resolution justify more formal exposition by the trial court of the rationale of its reasoning.

There are basically three significant points of merit advanced by the defendants that warrant serious consideration. As urged by the defendants, they may be summarized as follows:

(1) There was no evidence to justify allowing the case to go to the jury in the first place. Stated differently: the plaintiff failed to make out a prima facie case.

(2) Instruction No. 6 was an incorrect statement of the law. Even so, accepting it as the law of the case, there was no evidence that the landowner (Appalachian) knew or should have known that its tenant (Patrick County-Stuart Chamber of Commerce) would admit persons to its festival before putting the land in safe condition, the second element of the duties imposed upon by a landowner by that instruction.

(3) The plaintiff, by her own testimony, established the "fact" that no "ordinary inspection" would have disclosed the hole into which she stepped and that, therefore, the defendants were not negligent in failing to discover the hole.

Taking these points one by one, was there sufficient evidence to go to the jury? Did the plaintiff make out a prima facie case?

We must bear in mind at the outset the circumstances and surroundings which gave rise to this claim. The plaintiff, along with hundreds of others, had been expressly invited to come upon the subject premises to view and examine, to wander, compare, and bargain for hundreds of articles. It was an arts and crafts festival with scores of booths and tables set up enticing interested spectators to come around. No one under such circumstances could reasonably expect upon visiting premises so arranged and designed that there would be a large and dangerous hole by which the unsuspecting might be trapped with such devastating and crippling injury. This pit, it must be emphasized, was no golfer's divot; it was twelve to eighteen inches in diameter and one to three feet deep. It had probably housed a water meter in the days when these lots, now vacant, served residential homes. This cavity in the ground was literally a land mine -- a bear trap -- and no one, be they owner or four-day tenant, should have undertaken so ambitious a public project as an arts and crafts festival, knowing full well that multitudes of people would be trampling over every square inch of ground, without first satisfying themselves that there were no unreasonable hazards for their walking and unwary guests. They are bound to have realized that the attention of these hundreds of people would be directed and diverted to the arts and crafts they were being specifically invited and encouraged to view.

It is against this setting that the plaintiff must bear her burden of proof, complicated somewhat by the fact that the hole had been removed long before she was physically able to undertake any subsequent investigation of the scene herself. Proof by the greater weight of the evidence is, of course, the standard a plaintiff must meet; but this does not of itself relieve a defendant under certain circumstances from going forward with evidence, particularly when such evidence is peculiarly within its power to produce -- or conceal.

The uncontroverted facts in this case, stated from the viewpoint of the plaintiff, are that a large and dangerous hole, probably the remains of an abandoned water meter opening, was on the subject premises; that an arts and crafts show for the public was being sponsored which would attract hundreds of people; that the plaintiff as one of those so attracted came upon the premises to view and inspect the numerous wares being exhibited; that as the plaintiff was leaving she

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stepped into the subject hole, which was hidden from normal view by a ground covering of undisclosed dimension; and that as a result she fell and sustained almost unbelievable injuries to her leg and ankle resulting in fifteen to twenty fractures to the bones of her ankle and leg, ultimately requiring five operations and leaving her a partial cripple.

From these facts it is the Court's view, as it was the plaintiff's argument, that certain inferences could be legitimately drawn, so long as reasonable and not beyond speculation and conjecture. In addition, the concept of evidence -- at least in civil cases -- embraces any admissions that a party might have made, either express or implied. Express admissions, in other words, such as might have been made in pleadings or opening statements, and admissions by conduct such as silence, are part of the portfolio of evidence by which the threshold of a prima facie case can be crossed.

The fact that there was a ground cavity of such magnitude as the one that trapped Mrs. Sanders gives rise to certain reasonable inferences. The landowner knew of the hole or it did not. If the landowner did not know, it should have. If it knew of the hole, it should have notified its tenant, which it either did or did not do. On the other hand, the tenant knew of the hole or it did not. If it did not, it should have. If it did, it should have taken adequate steps to cover it or warn against it. Such are the inferences, it is submitted, that reasonable minds could draw from the facts adduced -- rebuttable inferences, it is to be emphasized, which additional facts or explanations submitted by the defendants could have tempered or offset.

These are basic elements of the plaintiff's case, but when not established by positive, direct and affirmative evidence, are they not subject to legitimate and reasonable inferences which would transfer to the defendants the burden, not of ultimate persuasion, but of going forward with some evidence of explanation or rebuttal?

In addition to inferences, however, certain facts which the defendants claim the plaintiff did not prove had been admitted either in the defendants' opening statements or in their pleadings. Mr. Rakes, for instance, on behalf of Appalachian, admitted:

1. That Appalachian had owned the subject property since "around 1970" (Tr. #2-15);

2. That Appalachian had been in the habit "of having a Mr. Ralph Turner to go over the property with a bushhogger (Tr. #2-15) -- "two or three times a year" (Tr. #2-16); and

3. That Appalachian officials or employees "knew more about that property than anybody else in the world" (Tr. #2-17) and they did not know the hole was there (Tr. #2-18).

These admissions were consistent with Appalachian's Grounds of Defense in which it was admitted that the hole was "previously unknown to this defendant" (paragraph 5) and that "it had inspected the premises prior to the time they were leased to the codefendant, Patrick County-Stuart Chamber of Commerce, and that despite all reasonable precautions, the above latent defect was not discovered" (paragraph 7).

Mr. Hutton, on behalf of the Chamber of Commerce, promised in his opening statement:

"The evidence will be that Ms. Cogar (the Chamber's representative) and Mr. Sears (Appalachian's official) visited this site. They went around the site.

"The Power Company, I believe, has owned this property since about 1970. Some of the pitfalls and the relationship to some of the hazards on the site were highmarked and, as it were, certain precautions made. The evidence will be from the Power Company, from the Chamber of Commerce, and I do not believe there will be any evidence from the plaintiff that anybody knew that this hole was there." (Tr. #2-10)

Representations made by counsel in their opening statements may not, strictly speaking, constitute formal evidence, but they can become admissions. As observed in 75 Am. Jur. 2d, Trial, §202:

"...The opening statement is not a substitute for the pleadings or for material evidence showing that a cause of action or a defense exists. However, this rule does not mean that an attorney, acting as his client's agent within the scope of his authority, is not able to make admissions favorable to the opposing side...." (emphasis added)

See also, McLhinney v. Landsdell Corp., 254 A.2d 177 (Md. 1969), in which the first headnote summarized:

"Where defendant's counsel, in opening statement, admitted that defendant truck driver was employed by corporate defendant, that truck was involved in accident and that corporate defendant owned truck, verdict should not have been directed for defendants

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on theory that plaintiff failed to establish defendant driver's involvement in accident and corporate defendant's ownership of truck, as counsel had removed such issues from matters in controversy."

In discussing this issue and the scope of opening statements, the Court, quoting from a prior authority, noted at page 180:

"'They (admissions of counsel) may dispense with proof of facts for which witnesses would otherwise be called.... Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof....'"  
(emphasis added)

There would be something intrinsically unfair in a result that would permit a party to make certain positive representations as facts in an opening statement and then attempt to take advantage of his opposition not proving what he had represented to be true or what he had promised his evidence would be.

If Appalachian and the Chamber did not know that a ground cavity of the subject dimension existed on the two relatively small, formerly residential lots -- which they admitted -- then, it is submitted, that the burden of going forward with some explanation shifted to them. A prima facie case had been established. It then became the defendants' responsibility to show, as was affirmatively alleged in Appalachian's Grounds of Defense, that "precautions" to discover the defect had been taken. What were those "reasonable precautions" that Appalachian claimed it had taken?

In addition, the silence of the defendants on this issue is within the concept of an admission by conduct -- the admission by silence. Neither defendant chose to put on any evidence whatever, either to deny, rebut or explain such reasonable inferences as the uncontroverted facts or their own admissions warranted. Instruction No. 2.080 at page 33 of Volume I of the relatively new Virginia Model Jury Instructions -- which was not tendered nor given in this case -- would appear to cover the law on this subject:

"When a party, without explanation, fails to call an available witness who has knowledge of necessary and material facts [fails to testify to necessary and material facts that he knows;

fails to produce necessary and material physical evidence in his control] you may presume that, if called, that witness's [party's] testimony [physical evidence] would have been unfavorable to the party who failed to call him [failed to testify; failed to produce the evidence]."

The inferences reasonably generated by the uncontroverted facts established in this case, when coupled with the express admissions made by the defendants in their opening statements and the implied admissions by silence, were sufficient in the judgment of this Court to have allowed this case to have gone to the jury. The fact that counter-inferences were not available to nor accepted by the jury because of the defendants' decision to stand mute is a risk the defendants assumed.

Instruction No. 6, which is based on the Restatement of Torts 2nd, §359, was initially tendered by Appalachian, but subsequently withdrawn. The Court would have been unaware of this particular statement of the law had its attention not been drawn to it by the conscientious research of the party who now objects to its having been given. Upon hindsight and after the smoke of battle has cleared, this instruction is a clumsy effort at setting forth the duties of a landowner who is leasing his land knowing it is to be used by the public. The instruction as given, however, is more favorable to Appalachian than it should have been, for it overlooks what is required of the landowner vis-a-vis its tenant when it, in fact, does not know of the hazard but, in the exercise of reasonable care, should have known about it. How can a landowner advise its tenant of a hazard it does not know about? And how could the plaintiff prove that Appalachian, the landowner, knew or should have known that its tenant, the Chamber, "would admit persons to the festival before putting the land in safe condition" IF APPALACHIAN DID NOT KNOW OF THE HAZARD? In view of the silence of the landowner, of its refusal to go forward with any explanation, such an inference -- that Appalachian should have known that the Chamber would have admitted persons to the festival without removing the hazard -- is inescapable if it is conceded that Appalachian did not know of the hazard in the first place.

A thorough analysis and study of the Reporter's Notes to §359 of the Restatement demonstrates that no further consideration was given of the landlord's duties when it did not, in fact, know of the hazard. The type of inferences suggested, however, where the landlord knew of the hazard, is worthy of note. At page 247 the Reporter observed:

"The lessor may have a number of different grounds for believing that the lessee will permit persons to enter the land without so changing the conditions exist-  
int at the time of the lease as to make it safe for  
their entry. The land may be leased for so short a



period as to make it unreasonable to expect that the lessee will make any change while using it. It may be leased for a use so immediate that the lessee has no opportunity to make the repairs or alterations necessary to make the land safe for visitors. The known character of the lessee or his lack of financial resources necessary to make the alterations and repairs, may make it clear that the land is to be used as leased...."

Instruction No. 6, in hindsight, could have been more clearly written, but it was more favorable to the defendant, Appalachian, than it was entitled to. Viewing all the instructions as a whole, which included directions to the effect that the defendants were not insurers of the plaintiff's safety and that the mere happening of an accident in itself did not entitle a plaintiff to recover, the clumsiness of Instruction No. 6 does not justify in the judgment of this Court setting aside the jury's verdict.

Finally, the defendants make much ado about the "admission" of the plaintiff herself that the hole was not visible to "ordinary inspection" and hence, if not so visible to an unsuspecting guest, that ergo a landowner and occupant should not be held accountable for failing to discover it. Such might -- and did -- make good argument before a jury, but it is a jury that should interpret and evaluate such evidence. The language, it must be remembered, was that of the attorney, who on cross-examination asked:

"Q. It would not have been visible to ordinary inspection?

"A. No sir"

(Tr. #1-146)

But the "inspection" expected of an invitee and that required of her invitor should be subject to different standards. The "inspection" of one walking over ground which she has been invited to walk over, while talking about Christmas gifts for her little daughter (Tr. #1-12 and 72), should be far less stringent than that of a landowner knowing it is soon to be used for a public event or of a tenant who is preparing to sponsor a highly publicized arts and crafts festival.

Furthermore, "inspection" is a word of different meaning to different people. It may have meant to the attorney asking the question an official and painstaking examination of close and scrutinizing appraisal; while Mrs. Sanders might have understood it to simply suggest mere casual observation -- the product of a trusting glance.

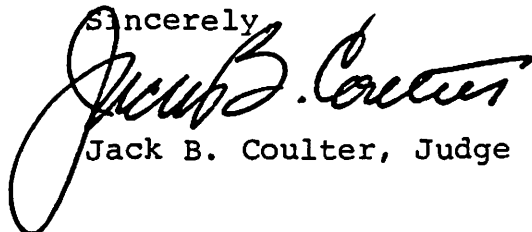
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It should also be noted that shortly after the above exchange, beginning on the very next page (Tr. #1-147), counsel attempted to impeach the plaintiff as to this very evidence, pointing out that she had previously testified at her discovery deposition to the effect that she had not been looking at the ground at the time she stepped into the hole. Although this out-of-court statement was not admissible as substantive evidence, it conceivably could have persuaded the jury to discount the plaintiff's in-court admission that the hole was not visible to ordinary inspection. This was counsel's obvious objective at the time in his effort to establish the contributory negligence of the plaintiff.

The interpretation and evaluation of all of the plaintiff's testimony -- including this somewhat damaging, but nonfatal admission -- was the proper subject for jury resolution.

Other points suggested by the plaintiffs in their very able briefs and oral arguments have been considered, but do not rise to the level of the three dealt with in this opinion and are simply found not persuasive.

Concluding then, to have taken this case away from the jury would have defeated the purpose of jury trials; to set aside its considered and composite judgment on such shallow grounds would be a miscarriage of justice. The defendants have had, if not a perfect trial, at least a fair one. The verdict of the jury should stand. For these reasons, the motions to set it aside are overruled and the final judgment order recently tendered is entered this date.

Sincerely,  
  
Jack B. Coulter, Judge

JBC:d

RECORD NO. 830435

ASSIGNMENTS OF ERROR

- (1) The trial court erred in granting Instruction #6.
- (2) The trial court erred in refusing to strike evidence of Mrs. Sanders and in refusing to set aside the verdict as to APCo and enter final judgment in its favor.

RECORD NO. 830436

ASSIGNMENTS OF ERROR

- (1) The trial court erred in refusing to grant the defendants' Motion to Strike the plaintiff's evidence and enter summary judgment in the defendants' favor.
- (2) The trial court erred in granting Appalachian Power Company's cross-claim against the Patrick County-Stuart Chamber of Commerce, Inc.

The following Opening Statements and Closing Statements were made by Counsel in the Trial of the cause in the foregoing caption specified on September 28, 1982, before The Honorable Jack B. Coulter, Judge of the Circuit Court of the City of Roanoke, and a Jury of seven.

OPENING STATEMENT OF LAWRENCE G. WILSON, JR.

MR. WILSON: Excuse me, sir, may it please the Court, ladies and gentlemen of the Jury, I am going to do one thing. I am going to move around a little bit until I find a place that I a comfortable

This Courtroom is not exactly the way it is at home and, frankly, I am getting a little used to the surroundings.

Judge Coulter has done a pretty good job in describing to you in preparation for this what we are here to decide.

I will go over some of the things very briefly again to give you an idea where we expect to go with our evidence and what we expect the outcome will be, and then we will get on with the important part, and that is listening to the Witnesses and the evidence in the Case.

As Judge Coulter has described, we are

2 representing Earline Sanders, who at the time of this  
3 accident back on October 8, 1980, I believe, was  
4 42 years of age; mother of a young child, which I  
5 think she will get to that in a little while.

6 Her husband and Mrs. Sanders, responding to  
7 some publicity they had heard about this Crafts  
8 Fair, Harvest Festival I believe it was called  
9 in Stuart, decided to leave Danville and go to  
10 Stuart on this Sunday to see the crafts.

11 They will describe to you approximately what  
12 time they got there and what they did for the  
13 short time that they were there, and then she will  
14 describe to you as she was walking across the area  
15 which the Fair was being held, and we believe that  
16 the evidence will show that, in effect, the location  
17 was two lots on which there had previously been  
18 homes and, apparently, these homes had been razed  
19 and, apparently, as well the property attempted to  
20 grow up and in preparation for this Crafts Fair  
21 was probably bushhogged.

22 That seems to be the impression that was  
23 given. In any event, Mrs. Sanders and her husband  
24 were walking across this ground and, as she  
25 progressed, I think they were going back to the car,

as a matter of fact. I think they had seen what they had come to see.

She stepped in a hole. There may be some discrepancy as to the description of the hole, but in any event, we are talking about a hole.

One way to describe it, I think, is as big as a dinner plate. One might be eighteen inches by eight by eighteen or something of that nature, but in any event, a hole large enough to take her foot and leg.

She fell with some force, her leg going, I think, almost to up to her groin into the hole. She will tell you that she, in her words, went into shock.

I am not so sure she can tell you everything that happened immediately after that, and that is the reason we hope we can have some other witnesses here who can pretty well describe the situation.

Her husband is the same way; he can describe some parts of it, but in any event, she can tell you once she was extracted from the hole that she knew that she had a broken leg. She could see it; not the bone protruding from the skin, but the bone sticking into the skin. I guess you could put it

that way.

I will not go into great detail as to what happened after that. She did not have a good recovery from the broken leg. It was a serious fracture. It will be described to you later as having some 15 to 20 bone fragments in it.

I think if any of us can relate to that, we know that that is going to cause difficulty in itself. The description will be that on three different occasions the Doctor tried to manipulate the bone back into place because of the closed reduction and that was a failure.

After having done that three times, he had to resort to surgery and, in effect, he fused her ankle, hoping that would give her the relief that she had not received up to that time.

We believe the evidence will be and fairly apparent from Mrs. Sanders' condition today that that has not been a success, either; that there was some improvement or at least the Doctor says she got a good solid fuse, but in any event, I believe the evidence will show you conclusively that she has had a very unsuccessful recovery from a very serious broken leg.



1  
2 Fortunately, it is simplified to that  
3 standpoint. We are not talking about a lot of  
4 other injuries. We are not talking about broken  
5 legs and ribs and bruises and contusions as you  
6 might get into in an automobile accident, but this  
7 one particular injury, serious injury.

8 In addition, we hope that the Trial can move  
9 fairly fast because of this situation where we are  
10 not dealing with what you would normally get into  
11 with an automobile accident. I believe some of you  
12 answered that you had served on a Jury.

13 We are really talking about a fairly limited  
14 factual situation. We are not talking about whether  
15 one driver was going too fast and the other failed  
16 to stop at a stop sign.

17 We are talking about a lady who was walking  
18 across a rough piece of ground, stepped in a hole  
19 unseen by her and broke her leg.

20 What we are going to have to explore is what  
21 examination of this area had been made by the  
22 Defendants Appalachian Power Company and the  
23 Patrick County - Stuart Chamber of Commerce; what  
24 duty they owe to her to investigate, to look at and  
25 see what was there, what hidden defects might be

there and discover those.

The Court will instruct you at the appropriate time as to what duty they have to her as Invitee on their grounds.

We trust after you have heard all the evidence that you will bring back a verdict for Mrs. Sanders. Thank you.

OPENING STATEMENT OF JAMES L. HUTTON

MR. HUTTON: If it please the Court, ladies and gentlemen of the Jury, I will try to be brief and maybe elaborate a little bit on what Mr. Wilson told you.

This accident happened in Stuart, Virginia, October 8th, 1978, a few days from today four years ago. It might be easier if we were trying this Case in Patrick County and Stuart so that the Jury there would know something about the facilities there where we are talking about.

So, the Lawyers today and the Witnesses are going to have to try to paint a picture for you of this place where Mrs. Sanders fell and what caused her to fall and the situation at the time.

The evidence of Chamber of Commerce will be that it has had this Harvest Festival for

1  
2 some time. This is the first year that they ever  
3 had the crafts phase or the Crafts Festival in  
4 relationship to the Harvest Festival.

5 There is a lot that goes on in Stuart,  
6 I understand. I have never been to one of the  
7 Harvest Festivals.

8 This week I believe they had several events,  
9 and one of them was Tennessee Ernie Ford.

10 This Crafts Festival took place on Saturday,  
11 October 7th and Sunday, October 8th on some  
12 property adjoining the bank in Stuart, and the  
13 property was owned by the Appalachian Power Company.

14 This property, by lease agreement dated  
15 October 4th, some three days prior to the Festival,  
16 leased the property to the Chamber of Commerce for  
17 the purpose, I am sure at no charge, because this  
18 is a civic benefit to the community with the  
19 Hold Harmless Agreement that the Court told you  
20 about.

21 It, in fact, holds them blameless, so to  
22 speak, if something did happen. This hole that  
23 Mrs. Sanders fell in, and there is no dispute that  
24 she did step in the hole and the hole was there and  
25 she did have an injury to her leg, but I am sure

1  
2 the Court will instruct you in the Case today that  
3 just because there has been an accident does not  
4 in itself allow Mrs. Sanders to recover for the  
5 injury, and that is one thing I hope you will keep  
6 in mind today as you hear the evidence.

7 The fact that somebody falls or injures  
8 theirself on somebody's property in itself does not  
9 allow them to recover. They have to show that the  
10 Power Company and the Chamber of Commerce were  
11 negligent in some manner to recover, and I hope that  
12 you will understand this as we go through.

13 The evidence will be that Ms. Cogar and  
14 Mr. Sears visited this site. They went around the  
15 site.

16 The Power Company, I believe, has owned this  
17 property since about 1970. Some of the pitfalls  
18 and the relationship to some of the hazards on the  
19 site were highmarked and, as it were, certain  
20 precautions made. The evidence will be from the  
21 Power Company, from the Chamber of Commerce, and I  
22 do not believe there will be any evidence from the  
23 Plaintiff that anybody knew that this hole was  
24 there.

25 The evidence will further be that they were

1  
2 in an area where there was some Kudzu vines that  
3 had been bushhogged or mowed and it was actually  
4 the adjoining property, but out of the immediate  
5 area of the Crafts Festival.

6 If you relish Judge Coulter's instructions,  
7 you will listen carefully to the evidence. Any  
8 of the Attorneys, our arguments sometimes are  
9 biased, but we would like you to pay particular  
10 attention to the evidence of the people sworn on  
11 the Stand, the fact that what took place in  
12 Stuart, Virginia, four years ago and whether or not  
13 Mrs. Sanders is entitled to recover for her  
14 injuries, if in fact these people were negligent  
15 which caused her injuries.

16 You will have to ponder if, in fact, she  
17 was in any way negligent; also, that she assumed  
18 the risk by walking on this property, and there are  
19 certain instances when accidents are unavoidable.  
20 They are nobody's fault.

21 I think possibly, hope, that after you hear  
22 the evidence here today, taking into respect all of  
23 the evidence together, your job that you are sworn  
24 to do justice to all parties, Mrs. Sanders, the  
25 Power Company, the Chamber of Commerce, that you may

1  
2 come to that conclusion. We thank you for your  
3 time and hope you listen carefully. Thank you.

4 OPENING STATEMENT OF RICHARD C. RAKES

5 MR. RAKES: May it please the Court and  
6 ladies and gentlemen of the Jury, I am Richard  
7 Rakes, and I practice Law here in Roanoke. I also  
8 occasionally go down to Danville to the bailiwick of  
9 Plaintiff's Counsel and frequently up in Blacksburg  
10 where Mr. Hutton's Firm is located.

11 You have already been introduced to  
12 Mr. Amhon Sears, the gentleman in the blue suit  
13 who is seated on the bench behind me who is the  
14 Manager of the Appalachian Office in Stuart,  
15 Virginia, which is the County Seat of Patrick County

16 I am not sure that you have been introduced  
17 to the Court Reporter, yet. This young lady, Ms.  
18 Janet Wray, who will take down all of the evidence  
19 on the Stenotype machine and, if necessary, will be  
20 able to reproduce and in typewritten form questions  
21 and answers just as we are saying it.

22 You have met the other Attorneys and their  
23 clients.

24 Now, ladies and gentlemen, whether the  
25 Plaintiff sustained a significant injury as a result

1  
2 of the fall she had on October 8th, 1978, I do not  
3 believe there is anybody in the Courtroom who will  
4 dispute that. She sustained a significant injury,  
5 but the Court will tell you as part of the  
6 Instructions that not everyone who has an accident  
7 and is injured is entitled to recovery.

8 It is not, as Mr. Hutton said, it is not  
9 always the legal liability of somebody else. A lot  
10 of people are injured and hurt.

11 MR. CARTER: If Your Honor please, I  
12 apologize for interrupting Mr. Rakes, and I did not  
13 interrupt Mr. Hutton. They are arguing the Law of  
14 the Case and I think the purpose of the Opening  
15 Statements is to - -

16 THE COURT: Members of the Jury, the  
17 Opening Statement is intended to give you a  
18 broad overview of what the facts in the Case will  
19 develop. You will receive the Law of the Case  
20 when the Court gives you the Instructions.

21 It is very difficult to control Lawyers in  
22 their Opening Statements. They are going to make  
23 references to what they consider the Law to be.

24 I do not feel either side has yet gone  
25 astray, but let us concentrate more on the facts,

1  
2 Mr. Rakes, of the Law. Some of the things that  
3 have been said may ultimately not develop as the  
4 Law in this Case, but that will come when you  
5 receive the Instructions from the Court at the end  
6 of the Case.

7 To repeat, this is an Opening Statement to  
8 give you a broad overview, primarily, of the facts  
9 with some indication of what each side thinks the  
10 Law is.

11 So, I am not going to either sustain or  
12 overrule the objection, Mr. Carter.

13 You may proceed, Mr. Rakes, though, and let  
14 us concentrate more on the factual presentation.

15 MR. RAKES: Thank you, Your Honor. There is  
16 certainly no question but that if either Counsel  
17 for either side stands up here and tells you what  
18 he thinks the Law is and Judge Coulter tells you  
19 something else later on, we will have to live with  
20 that, and as he has pointed out to you, the purpose  
21 of an Opening Statement is to give you a broad  
22 overview or picture as it were.

23 Some of you, not many, but some of you are  
24 as old as I and remember the movies that we used  
25 to go to years ago before the age of television



1  
2 when we used to see the thing called Previews of  
3 Coming Attractions, and that is essentially what  
4 we are doing right here; is to tell you what we  
5 expect the evidence to be from this Witness Stand.

6 First of all, it is the position of  
7 Appalachian that it is just like any other landowner  
8 in this particular case. The fact that it is a  
9 public utility and that it generates and distributes  
10 electrical energy, as you already know from what you  
11 have heard thus far, has nothing whatever to do  
12 with this particular case.

13 Around 1970, Appalachian purchased these two  
14 lots in downtown Stuart, Virginia, with the thought  
15 in mind that someday they might want to put an office  
16 on these lots, but at the time of the accident,  
17 and indeed even as of today, they have not pursued  
18 those plans and the property is just unimproved.

19 Houses had been on them many years before  
20 and at the time of the accident there were no houses  
21 on there, and Appalachian had been in the habit in  
22 order not to let it become unsightly of having a  
23 Mr. Ralph Turner to go over the property with a  
24 bushhogger.

25 Some of you people may know what I mean.

1  
2 When I say a bushhog, it is a type of a tractor  
3 that has a contraption on it that cuts down all of  
4 the heavy stuff and cuts it down to about six inches  
5 tall, and they have been doing that two or three  
6 times a year.

7 So, in September of 1978, Mr. Sears was  
8 approached by Ms. Doris Cogar, the representative  
9 of the Chamber of Commerce, and we will have a big  
10 mouthful to say Patrick County - Stuart Chamber  
11 of Commerce everytime; we will say Chamber of  
12 Commerce, and said, "Look, we would like to use your  
13 property for this Harvest Festival."

14 Mr. Sears talked to his superiors, and they  
15 really did not want to do that. They did not want  
16 to get involved in it.

17 The Chamber of Commerce was persistent.  
18 Appalachian wanted to be a good neighbor. They know  
19 all of these people in the small communities and  
20 they did not want anyone to be upset with them.

21 So, they finally said, "Okay, now, we will  
22 let you have the property. We are not going to  
23 charge you anything for it, but you are going to have  
24 to accept total responsibility for it and you are  
25 going to have to run it and you are going to have to

1  
2 be responsible for it if anything happens; otherwise  
3 having responsibility for them.

4 In other words, Appalachian does not want to  
5 get involved in it. So, they did this written lease  
6 that has already been marked by the Court as  
7 Appalachian Exhibit Number One, and that lease says  
8 in Paragraph Three, "As a part of the consideration,  
9 aforesaid Tenant, being the Chamber, agrees to  
10 save harmless the Landlord," that is Appalachian,  
11 "from any and all Claims of whatever nature arising  
12 out of the use of said parcel for the purposes  
13 aforesaid and will indemnify the Landlord from any  
14 loss of whatever negligence that may occur through  
15 use by the Tenant," and that is the use at the  
16 Harvest Festival.

17 So, with that agreement that was executed  
18 prior to the time of the accident and prior to the  
19 time that the Chamber took over the property,  
20 Appalachian said, "Okay, we will try to help you  
21 out."

22 The evidence will be that in all the years  
23 that Appalachian had Ralph Turner bushhogging this  
24 property, and he and Mr. Sears knew more about that  
25 property than anybody else in the world, and they

1  
2 had been out on the property. They had walked  
3 the property all over.

4 There were two lots; the Akers property and  
5 the Lady Clark property; adjoining properties.

6 They never discovered this hole that the  
7 Plaintiff fell in. They did not know it was there.  
8 It could have happened to them or it could have  
9 happened to anybody else.

10 Now after Appalachian agreed to do this,  
11 Mr. Sears took Ms. Cogar, and the evidence may be  
12 that some other representatives of the Chamber,  
13 out there and pointed out the boundary lines they  
14 had and looked at some obvious problems.

15 There was an old abandoned well over on the  
16 back of the Lady Clark property in that vicinity  
17 and it had some tires over in it, and that was  
18 pointed out to them that they ought to rope that  
19 area off so nobody, children playing around, nobody  
20 could possibly get over there in it.

21 There may be evidence that there was some  
22 pipe coming up out of the Akers property that they  
23 cordoned off in order to make it safe.

24 The evidence will be that the Appalachian  
25 showed them everything they knew about it and

1  
2 that the Chamber then took over and did whatever  
3 they felt was necessary for it to be safe.

4 Now nobody represented that this was smooth  
5 ground and smooth land and it was going to be  
6 evident that it was rough and you are going to see  
7 some photographs that the land was rough, but  
8 everybody knew that.

9 The Exhibitors knew that. We are talking  
10 about Patrick County; not necessarily the City of  
11 Roanoke, you see. The Plaintiff knew it when they  
12 went on the property and, as Mr. Hutton suggested to  
13 you, she was in an area that had not been cut down  
14 further by lawnmower by the Chamber people that  
15 were in the Akers property where most of the  
16 Exhibits were.

17 We submit, ladies and gentlemen of the Jury,  
18 that it was a freak accident, unfortunate, and I have  
19 the greatest sympathy in the world for the lady that  
20 fell and hurt her foot, but it was a freak accident.

21 It was not anybody's legal responsibility  
22 and the Plaintiff, like so many other people who are  
23 injured, simply does not have anybody to attach the  
24 liability to.

25 Now the Court will advise you of the Law in

1  
2 the case at the proper time, and we feel there is  
3 certainly no liability on the part of Appalachian,  
4 and we ask that you look at Appalachian like you  
5 would Joe Doakes, who owns this property down there  
6 because if Joe Doakes owned the property and the  
7 Chamber came and said, "We would like to use your  
8 property for the Harvest Festival," it would have  
9 been exactly the same thing.

10 The fact it is a public utility has nothing  
11 whatever to do with this Case, and we feel under  
12 the oath that you have taken that it will be your  
13 duty at the proper time after hearing the  
14 Instructions of the Court to return a verdict for  
15 Appalachian, and we will not speak with regard to  
16 the other Defendant.

17 I do not know whether the Plaintiff has any  
18 evidence with regard to the Chamber or not. I have  
19 not seen it up to this point. We will just have to  
20 wait and see what they put on.

21 That, then, ladies and gentlemen, is the  
22 position of my client and we trust that we will be  
23 able to move along rapidly with the evidence in the  
24 Case. Thank you.

## CLOSING STATEMENT OF JOHN CARTER

MR. CARTER: If it please the Court, ladies and gentlemen of the Jury; The Court has instructed you as to what the law of this case is.

In Instruction Number Five the Court has set out to you the duty of the occupant and the Court has instructed you that the occupant in this case being the Chamber of Commerce, was under the duty to make a reasonable inspection of the property to be sure that it was safe for invitees or people who were invited there to move about without danger.

The Court in Instruction Number Six has given you the duty that rests upon the owners of the land, or the Appalachian Power Company, and that was to be sure that the land was not unreasonably risky or there was unreasonable risk of harm to the people who were going to be using the premises during the festival.

Now, this was a colorful festival that was held there in the town of Stuart; it was widely advertised and publicized.

Appalachian knew when it leased this land to the Chamber of Commerce the use to which it would

be put.

So we find the situation of Mrs. Saunders, who lives in Danville, watching her television set being apprised of this festival that was coming off in Stuart and that the general public was being invited to come.

The Chamber of Commerce charged the exhibitors a fee to set up their booths and whatnot on the premises.

So on Sunday Mrs. Saunders and her husband started out for Stuart. When they arrived there they found that the festival was on two lots on U.S. Highway Number 58 in the Town of Stuart.

The one to the left as you face the property was neatly manicured and mowed; the one to the right had been growing up in kudzu.

I reckon everybody knows what kudzu is; it was something that some plague brought in in the early part of the century from eastern Europe designed to prevent washing and this sort of thing on the road cuts and fills, and since then has just about driven the farmers of this area crazy.

In any event, the kudzu had not been raked, it had just been cut up with a bush hog, lying there



1  
2 for the future on the surface of the soil.

3 Now, you will recall that this particular  
4 water meter was not anything unusual, that there  
5 were water meters all up and down the frontage of  
6 U.S. 58, apparently put there at a time when the  
7 water mains were brought into being.

8 Now, certainly Appalachian being the owner  
9 of the property, had every reasonable notice or  
10 capability of learning that this very dangerous  
11 and hazardous situation existed, but apparently  
12 did nothing to alleviate or correct it.

13 The Chamber of Commerce was under the duty  
14 to inspect and to determine that these premises  
15 were safe for the invitees who came on the premises.

16 Now, they elected not to put on any evidence,  
17 which I submit to you would indicate that either  
18 there was no inspection or if an inspection was made,  
19 it was an inadequate inspection.

20 So I think we find ourselves pretty much  
21 in a situation of negligence on the part of both of  
22 the defendants in this case for failure to make a  
23 reasonable inspection and to insure themselves that  
24 anyone who was invited there was not going to find  
25 himself booby trapped by a hole such as this.

Of course admittedly, probably the festival overflowed from where it was originally intended to be, because most of it was on a well-manicured area and apparently some of it had flowed over into this lot where the kudzu was growing and where it had been chopped with the bush hog and was lying matted on the surface of the ground so thick, as I remember the testimony, the concrete walkway leading from the concrete steps was completely covered with kudzu.

Now, there was nothing unusual about the way Mrs. Saunders approached the location.

She walked up the steps and started back and she was particularly interested in this one exhibit of Fred T. Hatcher Foundation in Danville.

So she proceeded apparently and probably the least circuitous route to there and she talked to Mr. Miles, whom she knew by face but not by name, and she starts back.

She and her husband were going back to their automobile and then Mr. Miles says all of a sudden he saw her go down and he heard a cry of anguish and she had stepped into this hole.

There is no way on earth she would have of knowing that the hole was there. Probably if the

1  
2 kudzu hadn't been chopped down it might have been  
3 apparent, but this matting of vegetation over top  
4 of the hole made it almost like a land mine.

5 She fell and as a result of it, she has a  
6 very serious, serious fracture, one which is going  
7 to be with her for the remainder of her life.

8 With your permission, I am going to let our  
9 partner, Larry Wilson, go into the details of what  
10 we call special damages and also the injuries that  
11 she sustained.

12  
13 CLOSING STATEMENT OF LARRY G. WILSON, JR.

14  
15 MR. WILSON: May it please the Court, ladies  
16 and gentlemen of the Jury: I am going to try to do  
17 this in possibly two parts, if you will bear with  
18 me.

19 The first I hope I can do very rapidly and  
20 that is to go over the evidence that has been pre-  
21 sented in regard to expenses that have been incurred  
22 by Mrs. Saunders up to date.

23 These first two have been marked as exhibits  
24 and will be available to you to take back and review  
25 in the Juryroom, if you like.

1  
2 But I think it is worthwhile to go over  
3 them and I hope I can relate these to some other  
4 things as we go.

5 But more or less hurriedly, if I may,  
6 Plaintiff's Exhibit Number One is a statement of  
7 charges that have been stipulated beginning with  
8 the Moody Funeral Home, which you will recall was  
9 the funeral home that picked her up and took her  
10 to the Emergency Room and then to the Emergency  
11 Room in Danville, for \$76.

12 The Patrick County Hospital was \$92, which  
13 was for the first Emergency Room visit.

14 Memorial Hospital in Danville - - we talk  
15 about two different hospitalizations, each for  
16 almost a month.

17 The first one was from the date of the  
18 accident on 10-8-78 to November 4, 1978, say four  
19 days short of a month, and that was for \$3653.45.

20 She was hospitalized again in Danville on  
21 March 27, 1979, and was in the hospital until  
22 April 24, 1979, again three or four days short of  
23 a month, and the cost at that time was \$3447.65.

24 During the course of that second visit she  
25 was given anesthesia by the Anesthesia Care Team

Services. We would assume that was during the course of the operation that she had to be given anesthetic.

That shows two times, once on April 19 for \$150, and once on April 23, for \$150.

As you will recall, after the progress of Mrs. Saunders injury was not what the doctor had hoped for and certainly not what she hoped for, it was decided that she would seek a second opinion and she was referred to Doctor Buggs in Durham, North Carolina, who was described by Doctor Dye as a man who had some expertise in this particular kind of injury and had had quite a bit of success.

So she went to Durham on November 13, 1979, initially for consultation with Doctor Buggs and that was for \$50.

On December 19, 1979, he made further charges for admission and examination in the hospital, \$35, hospitalization, \$150, and then one office visit for \$16 or a total to the Durham Orthopedic Associates for \$251.

As I said, she was admitted to the hospital from December 19, 1979, through January 23, 1980, in that case for more than a month, several days

1  
2 more than a month, and the cost of that hospital-  
3 ization was \$1,776.11.

4 At that time there were a number of  
5 anesthesiologists' bills, December 12, 1979 for  
6 \$90; December 13, 1979 for \$90; December 15, 1979,  
7 for \$90, for a total of \$270.

8 I hope you can rely on the math of my  
9 secretary and myself together, but at this point  
10 we have a total medical cost of these items of  
11 \$9,866.21.

12 In addition to that, we saw fit to break  
13 out the statement of charges by the Danville  
14 Orthopedic Clinic and I am not going to try to  
15 belabor these, you will have these before you,  
16 and there are a lot of no charges on there, which  
17 I think is unusual in this day and age.

18 But in any event the care by Doctor Dye and  
19 his associate at the Danville Orthopedic Clinic  
20 totalled \$1,822.

21 I may call your attention to the fact that  
22 this comes up through August 31 of this year, so  
23 she has still been visiting the doctor, as you will  
24 recall she testified to.

25 Just as an example, on the last visit, the

1  
2 office visit was charged at \$18 and an injection  
3 of the joint for \$30, an x-ray of the spine for  
4 \$45.

5 So certainly her relationship with the  
6 Danville Orthopedic Clinic has not ended and we  
7 submit that they will be of some consequence in  
8 the future.

9 In addition, I hope you will rely on me and  
10 my recollection of the testimony, because we don't  
11 have a list of the rest of the damages that  
12 Mrs. Saunders testified to yesterday.

13 It was agreed and stipulated that she had  
14 twenty-one trips to the doctor at various times  
15 and that a fair figure for those trips would be  
16 \$10 in each event.

17 As you will recall the testimony was that  
18 would be \$210 expended by Mrs. Saunders' trips to  
19 the doctor.

20 In addition, she testified that she had to  
21 have babysitters for 42 weeks, the better part of  
22 a year.

23 I don't believe they were all at one period;  
24 I think they were split up, but by virtue of her  
25 being unable to carry on her needs to her child by

virtue of being away at the hospital and by virtue of being unable for 42 weeks, she had to hire a babysitter at \$40 per week. That came to \$1,680.

She also testified in some detail about the haircare at home and in the hospital.

Some might think this is a fairly minor item - - I am not sure the ladies will as much as the men might - - but she testified she had to have 38 shampoos and sets at \$5.00 each and three permanents during this period of time for a total of \$250.

You may recall, not to belittle these things, she was in such a condition at this point that she could not go to the bathroom to have her hair washed where I guess you would do it in a sink or maybe a shower.

If you recall, she had to bring a pan to her sofa or chair in the living room, and we suggest although a minor item, it does display the inconvenience and difficulty that this injury has caused to Mrs. Saunders.

She further testified that she had to have a housekeeper, again to do the chores that she had been unable to do throughout this period of time,



for 34 weeks at \$25 per week or \$510.

The next items are not large in themselves, but they do lend a little bit to what we are going to talk about as a possibility of continuation of this matter.

She testified she has had to change her braces to the tune of \$40. She has had to buy three pairs of special shoes - - as you can see today she has on - - to the tune of \$201.

She has had the heels and soles replaced; I believe the testimony was that they were built-up because of some change in the situation, to the tune of \$48, and again, built-up shoes to the tune of \$16.

So at this point just for the shoes alone we are talking about \$305.

If you will bear with me again - - my math, I think, has been checked and double checked - - those items we have described, the ones she testified to that are not on these papers, total \$3,295.

With the Orthopedic Clinic of \$1,822 and with the other medical expenses, doctors and hospitals, anesthesiologists, of \$9,866.21, we

1  
2 have an actual, provable, and proved list of damages  
3 of \$14,983.21.

4 If I may, I will round that off to \$15,000,  
5 which I think is close enough, since we are talking  
6 about \$17 short of \$15,000.

7 I may also shock you at this point by saying  
8 we would ask you to put that aside for a minute, as  
9 large a sum as that may be, and ask you to consider  
10 that that would be inconsequential compared to the  
11 damage done to Mrs. Saunders as a result of this  
12 accident.

13 I am going to try to describe briefly some  
14 of the things I recall - - I hope you will recall  
15 more from the doctor's testimony - - from  
16 Mrs. Saunders' testimony as to what she has gone  
17 through up to this point and what she undoubtedly  
18 will live with for the rest of her life.

19 The doctor described this broken ankle as  
20 a demolished joint. You know, we have all known  
21 people who have had broken ankles and six or eight  
22 or ten weeks later they have been up and around  
23 and with the exception of a little pain when it  
24 rains, maybe, they are all well.

25 Mrs. Saunders is not that person. You have

seen her and I think her actions speak a lot more loudly than anything I might say.

I cannot describe to you in words the picture that you have seen with her getting around in this Courtroom. I don't believe anybody is going to tell you that Mrs. Saunders is a malingerer.

Mrs. Saunders is limited to such a degree that I don't even want to try to put it in words. You see her getting up and around and so forth, but in addition to that she has borne for a long period of time now pain, pain, pain.

The closed reductions, three times, that is three operations we are talking about; the preparation for those, the anesthesiologist, the recovery.

The arthrodosis, which we chuckled about, the ankle fusion, the pins in the ankle, the removal from the ankle, the nerve block which gave her some temporary relief by Doctor Buggs.

Then to go to the matter of what I am sure that the Defendant will say this lady has a way out, the neurectomy, which Doctor Dye has suggested, which is another surgical procedure that he hoped would relieve her.

He testified though, understandably so, that

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she had declined to have that operation at the time.

Having had five operations or having been in the operating room five times, having had a terrible trauma as a result of the injury itself, as well as the injury to the way of life she had, she chose not to have that operation.

Now, it may be - - and I think she testified to this - - that things have gotten to a point where she probably will have this operation in the future.

We did not expect that to be part of the testimony. Everything that comes in during the trial we don't always know about, but we would ask you to consider, based on what it has cost her before to go to the hospital, what it may cost any of you to go to the hospital for some four or five days and the period of recuperation, to consider what it will cost her if she has the operation that I am sure the Defendant will say she desperately needs so she will be relieved.

Hopefully she will be relieved to some extent, but the doctor said, "I cannot promise or guarantee the results, that this is a last resort."

~~In other words, he has exhausted everything~~

1  
2 else available and has gotten down to the last  
3 resort and this was not going to give her total  
4 relief, but would give her, he hoped, a tolerable  
5 situation of pain.

6 She would still live with pain every day  
7 but he hoped it would be tolerable so it could be  
8 tolerated with medication.

9 That is a sad state of affairs when you have  
10 to get to a point where you know you are 46 years old  
11 and you are going to live the rest of your life, at  
12 best, with a level of pain that can be barely tole-  
13 rated with medication.

14 Again, I think it speaks for itself. The  
15 pain is not being tolerated at this point, ladies  
16 and gentlemen; it is a difficult thing, it is a  
17 debilitating thing for her.

18 She has described trying to do housework,  
19 and we would suggest to you if you have seen her  
20 actions and motions here, what in the world can she  
21 do about doing housework other than try.

22 That is what it amounts to; she is trying to  
23 keep on going and is up and doing it.

24 We would suggest to you, from the experience  
25 she has had in the past, of having someone assist

her in her housekeeping and care of her little girl, this very likely will continue into the future; that she is going to come to a position where she can no longer even get up to try.

We ask you to consider that, as far as the next 30 or 35 years. We don't know her life expectancy.

All of you have had some experience in this, you know what it is; she was 41 when the accident happened and she is 46 years old today.

We ask you to consider what the cost will be on a monthly basis, a yearly basis, for another -- make it a minimum of 20 years, make it 35 years, as a result of this accident.

We recall to you that the doctor has testified by his best estimate that this lady has a 45 percent physical impairment of her foot and ankle, but we don't have any actual statement as to what this would cost.

Forty-five percent, almost half as to one of her legs.

We don't have any testimony here that Mrs. Saunders once was a great tennis player or once was a bowler. We would suggest to you that

1  
2 by virtue of what you have seen from Mrs. Saunders  
3 and her husband, these people lived a very simple  
4 life and her life was wrapped up in her home and  
5 family.

6 Look what has been taken away from her; not  
7 the outside pleasures of being able to go out to  
8 some sporting event or some undertaking such as  
9 that, but the pleasure and responsibility of caring  
10 for her 7-year-old daughter and for her husband and  
11 providing for them.

12 And that is virtually gone, folks, she is  
13 in such a state at this point - - again, hopefully  
14 to improve - - but there is no guarantee of that;  
15 the doctor has not guaranteed that.

16 We would ask you to consider this fully, not  
17 only the pain that she has lived with for the last  
18 four years - - I don't believe anybody can deny that  
19 - - but the possibility of a lifetime of being on  
20 the sidelines sitting in her chair in her living  
21 room with her foot propped up, with the foot cold,  
22 not being able to do the things she expected to do  
23 all of her life and very genuinely wants to do.

24 The doctor throughout his deposition described  
25 that this lady has experienced a great deal of pain.

many times; there were several times in the deposition of a great deal of pain, defined as fairly severe amount of pain.

I would like to reflect on one phrase or series of phrases that might better express the situation in regard to the pain Mrs. Saunders has experienced.

The doctor says at this point she is in constant pain, she is in pain at rest, whether she is sitting, standing, whether the leg is elevated, it makes no difference.

She has constant toothache-like pain in the ankle; it keeps her awake at night.

There are others, but I will try to cut it short at this point.

We would suggest to you, as we have said, that the \$15,000 that has been expended at this point and the several thousand dollars I know you are going to know that will be expended in the future by this lady, are of no material consequence as compared to the months and years that she is going to be required to live with pain and impairment of her physical ability.

There has been some suggestion that we try



1  
2 to say what an hour's worth of pain is worth, what  
3 a day's worth of pain is worth, a week, a month,  
4 a year's worth of pain is worth.

5 I am not going to suggest to you a figure  
6 in that regard; you may want to dwell on that  
7 yourself.

8 But I would suggest to you that we are  
9 talking about not thousands of dollars, but con-  
10 ceivably hundreds of thousands of dollars to com-  
11 pensate this lady, to give her some of the relief,  
12 possibly some pleasures in life that have been  
13 deprived her because of this accident.

14 We realize, and I think it goes without  
15 saying, that money is a poor substitute for the  
16 pain, suffering, humiliation, scarring, all of  
17 these things this lady has undergone, but it is  
18 the only way we have, folks, to measure this; there  
19 is no other measurement.

20 This is the system we live under and we  
21 ask you sincerely to consider a substantial sum,  
22 tens of thousands of dollars, hundreds of thousands  
23 of dollars, to give her some expectation of a future  
24 that she can live with, that she can enjoy.

25 Thank you.

## CLOSING STATEMENT OF JAMES L. HUTTON

MR. HUTTON: May it please the Court, ladies and gentlemen of the Jury: I want to take this opportunity to thank you for taking your time to be with us for the last two days, to come and to render a decision in this case.

This is our system of government and the way these matters are held in this country and these matters are to be decided by people like yourself, from every employment, race and walk of life.

You are to be guided by the evidence you have heard here today and the instructions from the Court.

I might say in the closing argument - - you will probably be glad of this - - this is the only time that I have to speak to you.

The Plaintiff gets to open and end the closing arguments, and I will speak for a short period on behalf of the Chamber of Commerce, then Mr. Rakes will speak for a short period of time on behalf of the Power Company.

I would like to say as we told you in the

opening statement, nobody would deny to you that Mrs. Saunders was not injured on October 8, 1978, in Stuart, Virginia, and that she did not have a significant injury; she did.

Now I am not going to say much about this injury, other than the fact that when she came back, if you will recall from the testimony as the Court has instructed you to do, after visiting Doctor Buggs in North Carolina, she had marked improvement.

At that time she would go from two, and I believe Doctor Dye said up to maybe four months at a time when he did not see her.

I may be mistaken; you can recall that. There was no marked swelling, but she continued to have pain, and right after that time he recommended to her that she have this operation on the nerves, the neurectomy, that he would not guarantee - - I don't know of any doctor that guarantees anything, or any lawyer today who can guarantee to you how this case would come out or how you would decide it - - but in his opinion it would correct her difficulty and that he recommend she have it.

1  
2 She told you that, and he told you that by  
3 his deposition, and that would relieve her pain  
4 and that has been her chief complaint for more  
5 than two years, is pain.

6 Mr. Carter and Mr. Wilson are very eloquent,  
7 but the Court puts a little bit more duty before  
8 you can award this woman some damages for her leg,  
9 that you have to find certain things that we talked  
10 to you about in the opening statement.

11 The first one is there is no verdict to be  
12 based on sympathy for anyone. Now, certainly we  
13 all have sympathy for Mrs. Saunders. I am sure you  
14 do, and if I were sitting in your place, I would,  
15 too.

16 She was injured, but the Court says it goes  
17 further than that and it puts this burden on the  
18 Plaintiff, not the Defendant.

19 It tells you in Instruction Number Nine that  
20 the fact that there was an accident, that the  
21 Plaintiff was injured, does not of itself entitle  
22 the Plaintiff to recover.

23 The Plaintiff has the burden of proving by  
24 the greater weight of the evidence that the  
25 Defendants, or either one of them, were negligent

1  
2 and such negligence was the proximate cause of the  
3 Plaintiff's injury.

4 Not that she stepped in a hole, as she did,  
5 and not that she was injured, as she was, but the  
6 fact that someone's negligence caused this and she,  
7 herself, is free from any negligence on her own  
8 part.

9 Now, Mr. Carter in his eloquence, said the  
10 reason we didn't put on any evidence was the fact  
11 that we did not do any inspection, or if we did,  
12 it was inadequate.

13 The reason we did not put on any evidence was  
14 because it is not our burden of proof; it is their  
15 burden of proof, as the Court told you, to prove  
16 that we were negligent, that we knew these premises  
17 were not safe, that we didn't make an ordinary  
18 inspection to determine they were safe so that we  
19 could warn this lady.

20 Now, where was that evidence? As to the  
21 Chamber of Commerce, in Number Five, it says, "To  
22 use ordinary care to have the premises in a reason-  
23 able safe condition for invitees use."

24 Well now, there are several avenues open to  
25 the Plaintiff. He has the discovery process which

1  
2 he used; he took discovery of both Mr. Sears and  
3 Mrs. Cogar, the Chamber of Commerce people, as to  
4 what took place and what inspection was made and  
5 what was done to make this place ready.

6 He had the opportunity to call them as adverse  
7 witnesses and put them on the stand to tell him what  
8 took place and let you make that determination,  
9 but he decided not to do that.

10 It was his burden to put them on the stand  
11 to prove by a preponderance of the evidence that  
12 the Chamber of Commerce, and for that matter, the  
13 Power Company, was negligent.

14 It says an occupant does not guarantee the  
15 safety of an invitee, and it goes on to say, "Use  
16 ordinary care to warn an invitee of any unsafe  
17 condition which the occupant, the Chamber of  
18 Commerce, knows."

19 There has been absolutely no evidence from  
20 this stand or from anyone else that the Chamber of  
21 Commerce or the Appalachian Power Company, either  
22 one, for that matter, knew that this hole was  
23 located on this property.

24 It is the burden of proof of the Plaintiff  
25 to show that either we knew or that we should have

1  
2 known.

3 Now how does he do that? He goes to Stuart,  
4 Virginia, and talks to different people.

5 He tried to prove by Mr. Smith and  
6 Mr. Howell that it might have been a water meter  
7 hole. But, you know, it might have been a water  
8 meter hole.

9 I don't know what it was; these people don't  
10 know what it was. They didn't even know it was  
11 there until this lady stepped in it.

12 What he did prove by Mr. Smith was that the  
13 house was torn down more than 20 years ago, before  
14 Mr. Smith came to Stuart.

15 There has been no other evidence and he  
16 didn't have any evidence here from the town that  
17 it was a water meter and we took it out.

18 I am sure if there had been such evidence,  
19 he would have had it here.

20 That is his burden of proof, not the burden  
21 of the Chamber of Commerce and Power Company to  
22 come here and say this is what we did and it was  
23 reasonable.

24 It is up to him to show what we did was not  
25 reasonable. That is the reason no evidence was

put on.

"In the use of ordinary care should have known." Did you hear any statement here from this stand that said this should have taken place and it wasn't done?

Mr. Miles was one of their witnesses. He was an exhibitor there and he said the place was rough; not as Mr. Carter says, nice one way and rough over where she fell.

Mrs. Saunders said it was rough all over, that she couldn't see any difference in it.

Neither one of them offered you any evidence whatsoever that would have said that with a reasonable inspection or if this place had not been rough, this accident would not have happened.

Why? Because it was rough because there were vines and it had been mowed but that wouldn't have discovered the hole.

The hole was the problem, not the rough. She didn't trip on the vines or the weeds; it was the hole.

That hole has been described by everybody as being below the level and not discoverable.

Now, the Court has told you in Instruction



1  
2 Number One what ordinary care and negligence is.  
3 Negligence is the failure to use ordinary care.

4 Ordinary care is the care a reasonable  
5 person would have used under the circumstances  
6 of this case.

7 Who is a reasonable person? Am I reason-  
8 able? Are you reasonable? Is Mrs. Cogar or  
9 Mr. Sears reasonable? What does a reasonable  
10 person do?

11 This was a charitable event; some land was  
12 leased for nothing from the Power Company to put  
13 on an event by a civic organization to promote  
14 the Stuart area.

15 Now what in a reasonable effort would have  
16 been done? The fact that it was mowed, would that  
17 be reasonable?

18 Would it be reasonable to get down on your  
19 hands and knees and take a screen and crawl over  
20 every space to find this hole?

21 I am not sure that would have discovered  
22 this hole the way it was hidden. Mr. Miles told  
23 you that this was Sunday afternoon and that he  
24 had been there for two days and a lot of people  
25 were in and out and nobody fell and nobody called

it to anybody's attention.

Mr. Smith from the funeral home told you he had been on the property and that his son mowed next to it. He took her out of the hole; he didn't know the hole was there.

They tried to elicit from him that there were water meters up the street and that should have been a water meter, but that is not the way the evidence came out.

He didn't know what it was; he couldn't say it was a water meter hole. He didn't know it was there.

Mr. Howell said he had been on the premises, he had lived there for several years. He had been to the fair and he didn't know the hole was there.

Neither did all of these exhibitors in the big field shown to you on the pictures, who had been over the area, know that the hole was there.

This was a unique situation and that is the reason I told you in the opening statement that it is technical and hard to understand, because everybody has sympathy for this lady.

She was injured, but the Court tells you in order for you to pay her for her injuries you have

1  
2 to be shown that one or both of these Defendants  
3 over here were negligent, and if you find that,  
4 she has to be free from contributory negligence.

5 Let me suggest a point back in her testimony  
6 and call your attention to it.

7 She testified herself that the area was  
8 rough; she testified that she was looking where  
9 she was going.

10 I said, "Every step?" She said, "Every step."  
11 I said, "Right before you put your foot down, did  
12 you see a hole?" She said, "No."

13 Mr. Rakes asked her on cross examination  
14 would that hole have been visible or discernible  
15 on an ordinary inspection and she said no.

16 An ordinary and reasonable inspection is  
17 what it has to be for her to recover, in order  
18 for these people to be negligent.

19 If it is that way, then you have no choice.  
20 If it is the other way, if it was discernible and  
21 we should have found it - - and she testified  
22 earlier in the deposition, two years ago or a  
23 year and a-half ago, that she wasn't watching  
24 where she was going, that she was talking to her  
25 husband and wasn't paying any attention and just

stepped in a hole.

I don't know what happened and I am not sure she remembers, but one of those is true, one of them probably happened.

But I suggest to you that the reason she is not to recover is because there has been no negligence. These things happen; people get in their mind if somebody comes on your property and falls, right away you have to pay them, but that is not the case and that is not what the Court has told you.

They talk about inadequate inspections; there has been no evidence of any inspection at all. That is their job.

They have attempted to tell you this was a water hole, but they don't know; they don't know what it is anymore than we do.

It may have been a water main or water meter hole; nobody knows. Nobody knew it was there that we know of that is alive today; or what it was or why it was there, if there was something in it, when it was removed or what it was.

They don't know and we don't know. Does that allow her to recover? Under the law I think

1  
2 not.

3 Again, I thank you for your attention and  
4 I won't belabor the point any further.

5 I hope that you will go back and that you  
6 will recall the evidence, look at the Exhibits and  
7 read your Instructions.

8 I would remind you again that the Chamber  
9 of Commerce took possession of this property by  
10 this lease on the fourth day of October, 1978.

11 They had the Harvest Festival there and  
12 the Craft Festival and other things going on and  
13 they did what any reasonable person would have  
14 done under the circumstances to learn of any  
15 defects and to protect the public from them.

16 There were, I assume, thousands of people  
17 there over the weekend. There were no accidents  
18 of anybody falling from rough terrain. This one  
19 lady, Mrs. Saunders unfortunately stepped in this  
20 hole that nobody knew was there and under any  
21 reasonable inspection would not have found that  
22 it was there.

23 It is unfortunate, but I don't believe she  
24 is entitled to recovery for it and I don't think  
25 you will either.

Thank you very much.

CLOSING STATEMENT OF RICHARD C. RAKES

MR. RAKES: May it please the Court, ladies and gentlemen of the Jury; We are now reaching the part of the case in which it is downhill from this point on in the sense of the time from the beginning to the end and we are rapidly approaching the end of the case and the time it will be in your hands.

The purpose of the closing statement, I will say just briefly because I am sure you probably understand this already, is for the lawyers to summarize both the evidence and the law of the case that you have just seen on the overhead viewer of the instructions of the Court.

Judge Coulter spent some time early yesterday morning emphasizing to you about the law of the case and getting the commitment from you under your oath that you would apply the law of the case at the time it came for you to take the issue and to make a decision and to render a verdict.

Now, as Mr. Hutton has told you, neither of

us will appear before you or have the privilege of standing before you again, because we have reached that point in the trial where we call it closing argument.

The reason we don't have the right to stand again is because we do not have the burden of proof.

The burden of proving the case, all aspects of the case, is upon the Plaintiff and her Counsel, and not upon the Defendants.

That is why she has the right, through her attorneys, to rebut anything that Mr. Hutton and I say during our part of the closing argument, and that is what their part of the rebuttal will be limited to, anything we say at this point.

Now, it is good that we stop, because you have to stop somewhere; if you didn't do it that way, we would just keep going back and forth and never would get through.

So we only get one shot at it at this particular point to do what we find to be our duty under the law as lawyers for our respective clients, and that goes for Plaintiff Counsel as well, to attempt to carry the burden of persuasion

on you.

Now the instruction tells you about the credibility of witnesses, using your own judgment, using your own common sense, and neither Mr. Hutton nor I, and I am sure Plaintiff's Counsel, would be so presumptuous as to think we could possibly stand up here and convince you of something that you knew in your own good common sense wasn't so.

I hope and pray I don't have the temerity to try it, and I assure you I certainly am not going to.

What do we have here? We have a case in which a party came upon some property and stepped into a hole and turned her leg.

I told you yesterday morning that I am not minimizing that, I am not discounting that at all.

The lady sustained a significant injury, we all know, you have heard the evidence, and we have never attempted to try to persuade you otherwise, but the Court has told you that not every accident or injury is compensable; that somebody else does not owe for every time one sustains an injury.

We see this happening all the time on our



own property, on other peoples' property, in our own homes, we see it out in the field, we see it everywhere throughout life.

There are many injuries that occur that are not the liability of somebody else. Some we have to accept our own responsibility for.

This could have been less injurious; it could have been worse. Thank the Lord it wasn't worse.

I am sorry for her sake that it was as bad as it was, but let's look at the law that you have sworn upon your oath to follow.

In Instruction Number Two which refers to the burden of proof, it says, "Prove by a preponderance of the evidence."

Now ladies and gentlemen of the Jury, I like to tell this illustration of preponderance of the evidence.

Most of us are familiar with the statue of the lady of justice with the scales of justice hanging out on her arms.

Each one has a weight down below or has the place to place the weight on it.

The Plaintiff has the burden of tipping

those scales on liability in her favor.

There are two aspects to every one of these types of cases; one is liability and one is damages.

Now, you don't get to the damage aspect unless you first decide one or both of the Defendants is liable to the Plaintiff under the law, under the instructions that you have received.

All right, we look at Instruction Number Six for example, which is the only instruction that tells you anything at all about Appalachian Power Company as the owner of the property.

Now, there are other instructions that talk about negligence, but they don't talk about the specifics of it.

You have one general definition of negligence in Instruction Number One and it is the failure to use ordinary care that one would ordinarily use.

That is the general definition of negligence, but Instruction Number Six tells you that the Plaintiff has the burden with respect to Appalachian to prove by a preponderance of the evidence, the greater weight of the evidence, if you will, that Appalachian knew - - we will take it both ways - - that the condition of the land involved an unreasonable

1  
2 risk of harm to persons attending the festival.

3 Now I submit to you that they will concede,  
4 and I challenge them when they stand up here to  
5 concede that they have not proven that Appalachian,  
6 the Chamber or anybody else knew of the existence  
7 of this hole, and none of the witnesses that they  
8 put on testified that they knew of the existence  
9 of the hole.

10 So what is the second part of it? "That by  
11 the exercise of reasonable care should have known,"  
12 and what we are talking about here is inspection.

13 Mr. Hutton has alluded to this, but in the  
14 pre-trial aspect of this case we have what is  
15 called discovery, so that nobody will be surprized  
16 at the time of trial.

17 We will know, each one of us, if we have  
18 done our job the way we should, what the evidence  
19 of the other party is with respect to the critical  
20 issues in the case.

21 They have exercised their right through  
22 Interrogatories in this case earlier, that were  
23 signed by both Mr. Armon Sears on behalf of the  
24 Power Company and Mrs. Doris Cogar on behalf of  
25 the Chamber, in which they asked questions

2 extensively about inspections that were made of  
3 the property out there.

4 They had the right in a civil case - - you  
5 can't do it in a criminal case, but in a civil case  
6 they have the right to call the Defendants as an  
7 adverse party or adverse witnesses and question  
8 them about any aspect that is relevant to the  
9 issues of that case.

10 They have the right to do that and I frankly  
11 was shocked and amazed when they didn't call either  
12 one of these people to describe what inspections  
13 and what was done out there prior to the time this  
14 Harvest Festival was started, because they had  
15 access to that information.

16 I can only conclude, ladies and gentlemen  
17 of the Jury, that they didn't want to run the risk  
18 of having you understand what had been done and  
19 that that was a reasonable inspection, and what had  
20 been done in preparation of getting that property  
21 ready for the Harvest Festival, and they have the  
22 burden of proof, not the Defendant.

23 The Plaintiff's Counsel could stand up here  
24 all they want to and say, "If they had inspected  
25 they would have come up here and told you about it,"

1  
2 but that is not the law and we have to follow the  
3 law.

4 The one who says somebody else owes me has  
5 the burden of proving why under the law they owe  
6 me.

7 "That it involved an unreasonable risk of  
8 harm to persons attending the festival," and the  
9 second part of all this, that Appalachian Power  
10 Company knew or in the exercise of reasonable care  
11 should have known that the Chamber would admit  
12 persons to the festival before putting the land  
13 in fair condition.

14 I could say it was the Chamber's fault, but  
15 I am not going to do it, because I don't think it  
16 was.

17 I don't think it is anybody's fault out  
18 there that this happened. It is one of the kinds  
19 of things that happens sometimes in spite of no  
20 fault on either party, and we are talking about  
21 legal fault now.

22 Yes, I suppose it is possible if one were  
23 to have taken a long, big pole and gone out there  
24 over every every inch of that property that it  
25 might have been possible to have discovered the

1  
2 existence of that particular hole.

3 But you saw the photographs and you heard  
4 them talk about thirty or forty exhibits out there.  
5 You know that they had 300 to 500 people out there  
6 at one time or another.

7 You know that it was a large area and that  
8 simply is not reasonable that they would be  
9 required to do that. We have got to look at  
10 this thing from the standpoint of reasonability.

11 Look at Appalachian's standpoint. Appalachian  
12 owned a couple of vacant lots. The property, the  
13 very property, if you will, that the accident  
14 happened on, that they had bought 20 years or more  
15 ago, had no house on it at that time.

16 They thought maybe someday they might con-  
17 struct an office building on it.

18 We know that sometime before this festival  
19 was to open that the Chamber came to Mr. Sears and  
20 Appalachian and said, "We would like to use this  
21 property."

22 They agreed to it and you have seen the  
23 agreement that the Chamber signed, and Appalachian  
24 said, "Okay, you see what it is and if you want to  
25 use it, okay."

1  
2 "Go ahead and take it and use it, but, you  
3 know, there is some burden on you to get it right,  
4 because of the fact that we are going to ask you  
5 to absolutely hold us harmless from any claim as  
6 a result of that."

7 So the Chamber then went on and put on the  
8 Harvest Festival and you know that the festival  
9 only lasted two days.

10 I am not sure there has been any evidence  
11 as to how long they had to get it ready, but you  
12 know the date of the instrument that they signed,  
13 what was just a few days before the Harvest Festival  
14 was to open.

15 Now, the same instruction says that the  
16 Plaintiff must also prove - - that is in addition  
17 to all the things I have just covered - - that  
18 Appalachian failed to use reasonable care to  
19 discover or to remedy the condition of the land.

20 Well, I submit to you ladies and gentlemen  
21 of the Jury, that you can't remedy what you can't  
22 discover, and what did their own evidence say  
23 about that?

24 As Mr. Hutton pointed out, this lady said,  
25 contrary to what she did in her depositions, but

1  
2 nevertheless she testified at the trial of this  
3 case and that is what you are to base it on, her  
4 testimony - - and she can't rise any higher than  
5 her own testimony - - that she was looking down  
6 exactly where she was placing her right foot just  
7 before she did it and that it was impossible to  
8 see that there was anything under it.

9 Now, if that is true, what possible way  
10 could Appalachian, could the Chamber or anybody  
11 else have seen this particular condition themselves  
12 by going and eyeballing every solid inch of that  
13 ground.

14 Now, all of us have the utmost sympathy for  
15 Mrs. Saunders. Anybody who is not functioning  
16 100 percent is deserving of all of our sympathy.

17 But ladies and gentlemen of the Jury,  
18 Instruction Number 19 tells you the law of the  
19 case, and I can have sympathy and Mr. Hutton and  
20 the Chamber and the owner of the land and her  
21 attorneys and her husband and everybody and she,  
22 herself.

23 But as far as the outcome of this case is  
24 concerned you are not permitted to have sympathy,  
25 because Instruction 19 says you must not base your



1  
2 verdict in any way upon sympathy, bias, guesswork  
3 or speculation.

4 Ladies and gentlemen, for you to speculate  
5 that either Defendant failed to exercise ordinary  
6 care to discover this latent defect when there has  
7 been not a scintilla of evidence put on by the  
8 Plaintiff, would be to engage in the utmost  
9 speculation and guesswork.

10 That is what you are told in Instruction  
11 Number 19 that you must not do.

12 So I am not going to talk about damages  
13 either, because this is simply a case in which the  
14 Defendant, Appalachian Power Company, is not  
15 liable.

16 It was the owner of the property, just like  
17 you or I, or John Doe or anybody else would be.

18 The fact that it was a public utility has  
19 nothing whatsoever to do with the case.

20 The Court hasn't mentioned that in the  
21 instructions, the fact it is a public utility,  
22 but it is like any other landowner, and it could  
23 happen to any of us who tries to be a good citizen  
24 and tries to do what is right, to get along with  
25 the people of our community and then end up being

1  
2 subjected to a lawsuit.

3 Now anybody can bring a lawsuit, all you  
4 have to do is have the filing fee on that.

5 But that is why we have juries, because not  
6 every suit that is brought is compensable, and we  
7 feel, ladies and gentlemen of the Jury, that the  
8 Plaintiff has utterly and wholly failed to make  
9 out a case of liability against the Power Company,  
10 and frankly, I cannot see that they have made out  
11 a case against the Harvest Festival as well.

12 It is in your hands, and when you come out,  
13 obviously you will have to look everybody in the  
14 eye and you have to render a verdict, and your  
15 foreman will hand that verdict to the Court.

16 But you could come out of that Juryroom and  
17 say, "The law in this case which I promised  
18 Judge Coulter to follow when I undertook to be  
19 on the Jury says that I simply cannot speculate  
20 and the Plaintiff has simply not proven her case.

21 "She has proven that she fell into a hole  
22 on the property owned by Appalachian and leased to  
23 the Chamber, and that is the extent of her proof."

24 Thank you very much.  
25

## CLOSING STATEMENT OF JOHN CARTER

MR. CARTER: If it please the Court, ladies and gentlemen: We now come to the final argument which Mr. Hutton and Mr. Rakes seem to be so apprehensive about.

They have stood here and argued to you that it was the duty of Mrs. Saunders to prove to you how that hole got there and why the other side had not found it.

The Court has instructed you as far as the Chamber of Commerce was concerned it was under a duty to make a reasonable inspection and to satisfy itself or to satisfy the standards of a reasonable person that the premises were safe for the invitees who came there.

Appalachian would argue that it was up to us to show that Appalachian had not made an inspection.

I submit to you when the facts of a situation are peculiarly within the knowledge of the Defendants it is incumbent on them to show if they did in fact make a reasonable inspection.

MR. HUTTON: I hate to interrupt anybody in

1  
2 their final argument, but I don't believe he is  
3 quoting the law.

4 MR. RAKES: It is not the law.

5 THE COURT: I don't understand the basis of  
6 the objection.

7 MR. HUTTON: The objection is, I believe the  
8 argument was this is a peculiar situation where  
9 the facts are within the knowledge of the Defendant,  
10 and he was arguing that, and I don't believe it is  
11 the law.

12 MR. RAKES: He said it was incumbent on us  
13 to put on evidence.

14 THE COURT: I think it is legitimate argu-  
15 ment; objection overruled.

16 MR. RAKES: Exception.

17 MR. HUTTON: I except to that.

18  
19 MR. CARTER: And they stood here and  
20 represented to you that we had full knowledge of  
21 everything that had been done prior to this  
22 particular festival.

23 They have talked about what we call in the  
24 law discovery, or interrogatories, questions which  
25 are propounded by either side to the party on the

other to elicit information.

I must tell you that a lawyer is very artful in giving you as little information as he possibly can, and we did, in fact, propound these interrogatories.

But the information they gave us was so scanty it was virtually impossible to tell what had taken place.

I am frank to say, I was surprised when they did not put their own witnesses on the stand whom they had brought there.

Again, I say to you that I can only surmise under those circumstances that either there was no inspection made or if there was, it was entirely inadequate.

Now, the problem here, I think, is simply this: That the anticipation was that only the left-hand lot would be used for the craft fair, but it was more successful and attracted more people and more exhibitors than had been anticipated, and so it spilled over into the lot where the kudzu had been or where it had been bush hogged.

Well, they failed to anticipate that there should be an inspection of the other lot and

1 particularly where there was kudzu there, they  
2 failed to go over it with a rake which would have  
3 disclosed not only this hole, but any other  
4 dangerous instrumentalities or objects that were  
5 there.  
6

7 They neglected to go over it with a fine  
8 mowing machine of some type other than a bush hog.

9 Any of these things would have insured  
10 against the injury of Mrs. Saunders or any other  
11 person invited there.

12 We feel that the Court's instruction to you  
13 that they should use reasonable care in providing  
14 for the safety of the invitees, the fact that the  
15 Court has instructed you that Mrs. Saunders had a  
16 right to expect the premises to be in a safe  
17 condition having been invited there, and then we  
18 get to this argument about Mrs. Saunders having  
19 said that an ordinary inspection of the premises  
20 would not have disclosed this hole.

21 Now, to begin with, I think Mrs. Saunders  
22 interpreted the question which was propounded to  
23 her, could you or someone walking across this  
24 field have discerned by just ordinarily looking  
25 at it that there was a hole there.

1  
2 I think there is an entirely different  
3 duty upon you as an invitee who has the right to  
4 expect the premises to be safe, and the duty  
5 which rests upon the host or invitor to inspect  
6 and be sure that the property is safe.

7 I submit to you in this particular case  
8 who would expect something of this sort, and  
9 particularly after the place had been bush hogged  
10 and the evidences of the hole having been filled  
11 up, I submit to you that there is negligence on  
12 the part of both of these Defendants here and  
13 that Mrs. Saunders is entitled to recover for  
14 this terrible injury which she has received.

15 I want to tell you this, that I am very  
16 appreciative of the sympathy that both Mr. Hutton  
17 and Mr. Rakes have exhibited here for Mrs. Saunders,  
18 but sympathy isn't going to do much for her situ-  
19 ation.

20 She has to have something more concrete if  
21 she is to enjoy any kind of normal life in the  
22 future.

23 Thank you ladies and gentlemen.  
24

25 \* \* \* \* \*

The following cause came on to be heard on this the 28th day of September, 1982, before The Honorable Jack B. Coulter, Judge of the Circuit Court of the City of Roanoke, and a Jury of seven, when the following Proceedings were had:

(The Court Reporter Ms. Janet M. Wray, was duly sworn. The Witnesses were called and excluded under the Rule. Counsel made Opening Statements to the Court and Jury, after which the following Proceedings were had in the presence of the Jury.)

THE COURT: All right, Mr. Wilson, if you will call your first Witness.

MR. CARTER: Yes, Your Honor. We call Mr. Sanders, please.

DONALD JACK SANDERS

was called as a Witness, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:



DIRECT EXAMINATION

BY MR. CARTER:

Q State your name for us, please.

A Donald Jack Sanders.

Q And you live where?

A Danville, Route 1, Box 256.

Q Is this your wife?

A Yes.

Q What do you do for a living?

A I work at Goodyear Tire and Rubber Company.

Q There in Danville?

A Yes, sir.

Q Back in October of 1978, did you and  
Mrs. Sanders have occasion to go to Stuart?

A Yes, sir.

Q How did you happen to go there?

A We saw this Craft Show advertised on TV  
and decided to go.

Q It was advertised on TV?

A Yes, sir.

Q So, you all decided to go?

A Yes, sir.

Q About what time of day did you arrive there?

A I imagine somewhere around lunchtime or somewhere along in there.

Q Did just the two of you go up?

A Yes, sir.

MR. CARTER: Your Honor, may I have the Witness come down to the rail of the Jurybox?

THE COURT: Yes, certainly. Are you going to show pictures?

MR. CARTER: Yes.

THE COURT: Let the Record reflect that the pictures you are holding in your hand, and by stipulation, have been admitted into evidence as Chamber of Commerce Exhibits, and if you will repeat the numbers. - -

MR. CARTER: One, two, three.

THE COURT: - - so that we have it in the Record.

(Thereupon, Chamber of Commerce Exhibit Number One, a photograph, was entered in evidence.)

(Thereupon, Chamber of Commerce Exhibit Number Two, a photograph, was entered in evidence.)

(Thereupon, Chamber of Commerce

Exhibit Number Three, a photograph,  
was entered in evidence.)

THE COURT: Please step down in front of  
them.

BY MR. CARTER:

Q I am showing you Chamber of Commerce  
Number One. Can you tell us what that represents or depicts?

A Well, all I can see - -

THE COURT: As you look at it and  
familiarize yourself with it, then turn it around  
as if you were a teacher and show it or whatever  
Mr. Carter is asking you about so that the Jury  
can see.

We cannot see a thing that you are looking  
at.

BY MR. CARTER:

Q Hold it this way after you examine it so  
that the Jury can see what you are talking about. Now  
what does that represent? Is that the Crafts Fair?

A Yes, sir; in Stuart.

Q In Stuart, Virginia?

2 A Yes, sir.

3 Q This is a picture of the place that you  
4 and Mrs. Sanders went or were invited to by television  
5 advertising?

6 A Yes, sir.

7 Q Let me ask you on this particular photograph,  
8 can you identify approximately where Mrs. Sanders fell?

9 A All I can say, we left where they had  
10 these - -

11 Q Turn it around so that the Jury can see.  
12 Turn it around here. The Jury and His Honor have got to know  
13 what we are doing.

14 You started to explain to me.

15 A We had just left the Hatcher.

16 Q The Hatcher?

17 A The Hatcher Center; people that make the  
18 toy - - not the toy people; people that make things.

19 Q Fred Hatcher in Danville, they had an  
20 exhibit there?

21 A Yes, sir.

22 Q Where was the Hatcher Exhibit?

23 A Somewhere back up here in the back.

24 Q Back of that sign here?

25 A Yes, sir; back of in there.

Q When you all left from the Hatcher Exhibit, which direction did you go?

A I left and started back toward the street.

Q Back toward the street?

A Yes, sir.

Q I will come to the rest of that in a moment, if I may.

MR. CARTER: May I exhibit this photograph to the Jury?

THE COURT: Are you talking about Exhibit One?

MR. CARTER: Exhibit Number One, Chamber of Commerce Exhibit Number One.

BY MR. CARTER:

Q This is Chamber of Commerce Exhibit Number Two, Mr. Sanders. Sir, do you recognize that general area?

A Yes, sir.

Q Is that the Crafts Fair that you attended?

A After four years, it is hard.

Q I understand that. Well, I mean we have all admitted that this was it. I mean all of the Attorneys have agreed that these were pictures taken by the local newspaper photographer of this particular Craft Fair that you went to in Stuart.

2 Does that look like the Craft Fair?

3 A Yes, sir.

4 Q Does it show the Fred Hatcher Exhibit in  
5 there, or can you tell?

6 A I can't tell, sir.

7 Q I show you Chamber of Commerce Exhibit  
8 Number Three. Is that the Craft Fair that you all attended?

9 A Yes.

10 Q One of the photographs taken by the  
11 newspaper photographer, I think. Does that show the Fred  
12 Hatcher Exhibit there, or can you tell?

13 A I can't tell.

14 Q Sir, if you will take the Stand there.

15 MR. CARTER: If Your Honor please, I am  
16 going to pass Chamber of Commerce Exhibit Number  
17 Three upon the Jurors.

18 THE COURT: Let the Exhibits be passed among  
19 the Jury.

20 You may resume your seat.

21  
22 BY MR. CARTER:

23 Q All right, Mr. Sanders. After you left the  
24 Hatcher Exhibit there, what happened?

25 A We just walked and talked about what we were

going to buy our little girl for Christmas, and all of a sudden she just fell down in there.

Q Where did she fall?

A In a hole.

Q Was it in the general vicinity of where this Fair was being held?

A Yes.

MR. RAKES: Your Honor, I am going to have to object to the leading nature of the questions and ask him to just tell where it happened.

THE COURT: Let's not lead the Witness.

BY MR. CARTER:

Q Describe what Mrs. Sanders fell in.

A She fell in a hole; that's all.

Q Where was the hole in relationship to the Craft Fair?

A I guess it was just left of the Hatcher Center. We started back.

Q Can you describe what type of hole it was?

A All I can remember is some kind of a pipe or something it looked like to me.

Q In the ground?

A Yes, sir.

Q Below the surface?

A Yes, sir.

Q What happened after Mrs. Sanders fell?

A I froze; I couldn't move, and she scrambled out of the hole.

Q Pardon?

A I imagine she climbed out of the hole. I just froze.

Q Who got her out of the hole?

A I don't know.

Q Someone other than you?

A No. I imagine she got herself out.

Q Well, describe to us the surface of the ground there and the proximity of the hole.

A It was fairly rough; rough walking.

Q What do you mean by "rough"?

A It wasn't no level terrain.

Q Was there any vegetation on the surface?

A Yes, sir; some kind of weed or something, vine or something there because - -

Q Had it been mowed?

A It appeared to be maybe bushhogged and left.

Q What do you mean by that?

A Well, just you couldn't see as you walked;



like vegetation or something. I mean you could see, but you didn't know what was there.

Q You're telling us the vegetation was not raked up; it was just lying there where it had been cut?

A I wouldn't think it was raked up, no, sir.

Q After Mrs. Sanders was extracted from this hole, what happened then?

A Ambulance, somebody got an ambulance to pick her up and I helped carry her.

Q Was it a local ambulance in Stuart?

A Yes.

Q Where was she carried?

A To the hospital outside of Stuart there.

Q Over on the East side of Stuart?

A Yes, sir.

Q And she was treated there?

A The Doctor, yes, sir. The Doctor looked at her and asked her where she wanted to go, asked her which hospital she wanted to go to.

Q Well, what hospital did she elect to go to?

A She elected to go to Danville where she could be close to - -

Q Memorial Hospital in Danville?

A Yes, sir.

2 Q That is where she was treated?

3 A Yes, sir.

4 MR. CARTER: All right, thank you,  
5 Mr. Sanders.

6 Gentlemen, you may examine Mr. Sanders.

7 THE COURT: Mr. Hutton?

8  
9 CROSS EXAMINATION

10  
11 BY MR. HUTTON:

12 Q You say you went down on October the 8th.  
13 What day of the week was that on?

14 A It was a Sunday.

15 Q So, you got there around Noon?

16 A Roughly, yes, sir.

17 Q How long had you been on the ground when  
18 the accident happened?

19 A I couldn't say definitely. I was looking  
20 around.

21 Q If you will, Mr. Sanders, come here and just  
22 point out on this picture about where you left the Fred  
23 Hatcher Booth. If you will just point out to the Jury where  
24 the Fred Hatcher Booth was.

25 THE COURT: Identify what photograph you are

1 talking about.

2 MR. HUTTON: I am sorry.

3 BY MR. HUTTON:

4 Q We are talking about Chamber of Commerce  
5 Exhibit Number One.

6 A This one. Hatcher was sitting back up in  
7 here somewhere.

8 THE COURT: Your hand and arm is obstructing  
9 the view of most of the Jurors.

10 THE WITNESS: In the back.

11 BY MR. HUTTON:

12 Q Was it behind these exhibits?

13 A Yes, sir.

14 Q Was it out there by itself?

15 A I can't exactly remember. I don't think so.

16 Q Mrs. Sanders did not fall anywhere here on  
17 this picture, then. Is that what you are telling us or what?

18 THE COURT: I am sorry, but these people  
19 over here cannot see. The Witness is in the way  
20 of the picture.

21 MR. HUTTON: I am sorry.

2 BY MR. HUTTON:

3 Q Indicate there, if you will, about where  
4 Mrs. Sanders fell.

5 A Somewhere through here, and the Hatcher  
6 Booth was here.

7 Q Between there and the steps. Do you see the  
8 steps there?

9 A Yes; below the steps. It was back in there.  
10 I can't say exactly. The Hatcher Booth started back toward  
11 the street.

12 Q Where were you parked?

13 A Just parked on the street. That is all  
14 I can remember.

15 Q How many sets of steps were there?

16 A I can't say that, either. One set of steps  
17 is all I ever saw there.

18 Q You don't know exactly where on this picture,  
19 then, she did fall?

20 A It was right somewhere above the steps. I  
21 can't say exactly; somewhere back of the Hatcher Exhibit  
22 because we had just left the Hatcher Exhibit going back  
23 toward the street.

24 Q Do you mean somewhere in here or - -

25 A No, sir, back where the Hatcher Center was

and the street there.

Q So, you don't know exactly where she did fall. I am not trying to confuse you. I am trying to, if we could for the Jury, find out if you do know exactly what location she did fall.

A Somewhere between the Hatcher Center and the street; back here behind this.

Q Back in behind those trees?

A I wouldn't say behind the trees. It was in front of the trees because the Hatcher Center was up here at the street where the exhibit is at.

Q Can you see the Hatcher Center from this picture here or is it behind the tree?

A Back; somewhere back in here.

Q It was facing back this way, the same way the other groups were?

A Yes, sir.

MR. HUTTON: All right, fine.

THE COURT: You may resume the Witness Stand.

THE WITNESS: Yes, sir.

BY MR. HUTTON:

Q You say this hole that you observed was below the surface?

A Yes, sir. I know it was.

Q And you say what made it rough was the  
hilly - -

A I said rough terrain, yes, sir.

MR. HUTTON: I do not have any further  
questions.

MR. RAKES: No questions, Your Honor.

THE COURT: Is there any Redirect?

MR. CARTER: No, Your Honor.

Mr. Sanders, come down and if you will go  
back out.

(Witness excused.)

MR. CARTER: Mr. Miles, please.

LOUIS MILES

was called as a Witness, and after having first been duly  
sworn to tell the truth, the whole truth, and nothing but  
the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Would you tell us your name, please?

2 A I am Louis Miles.

3 Q Mr. Miles, if I could direct your attention  
4 back to October 8th of 1978, what sort of work were you  
5 doing then?

6 A I was working for Fred T. Hatcher and Son  
7 in Danville, Virginia, and I was selling crafts for them,  
8 traveling around to Craft Shows.

9 Q Give us a little idea of what the Fred T.  
10 Hatcher Center is?

11 A It is a workshop for mentally retarded  
12 adults. It gives them a chance to do something useful and  
13 make a little bit of money.

14 Q You are saying you traveled?

15 A I was a Sales Manager.

16 Q Was that on the October 8th that I have talked  
17 to you about? Where were you that day?

18 A I was in Stuart, Virginia.

19 Q What was the purpose of being up there?

20 A They were having a Craft Show.

21 Q Over what period of time did the Craft Show  
22 extend?

23 A It started, I got there, about the break of  
24 day that morning and I stayed until about dark that night,  
25 and I don't remember the exact hours. It must have started

around lunchtime or so.

Q How about the day before? Did you go two days or one day?

A I think I went just that one day.

Q If you can just make it without me interrupting you, just describe it. You said you got there early that morning, break of day, and what did you do?

A I set up my exhibit.

Q Can you describe, just take your time and describe fully the location where you set up your exhibit?

A It was right beside the bank there in Stuart. One part of the grounds was more or less like your yard, you know. It was grass; not any trees at all, and right next to it, that lot, was a field that had some large trees in it and it had running Kudzu all over the ground.

THE COURT: Running what?

THE WITNESS: Kudzu.

THE COURT: Ask him what that is.

BY MR. WILSON:

Q Do you know what Kudzu is?

A Yes. You have seen it when you go down the road and these vines that grow all up in the trees and they will eventually pull a tree down. They cover the ground and



2 you can't even see the ground. They have big leaves on them.

3 Q All right, sir, you have described some  
4 portion of it was close-cut and some portion of it was a  
5 little - -

6 A Yes, one lot was, like along right next to it.

7 Q In relationship to those two things you  
8 described, the neater part and the rougher part of it, were  
9 there exhibits in both of those parts?

10 A Yes.

11 MR. RAKES: If Your Honor please, he has  
12 already answered and, obviously, it is gone, but I  
13 would like to make a continuing objection to the  
14 leading of the Witness.

15 THE COURT: Let us not lead the Witness.

16  
17 BY MR. WILSON:

18 Q All right, sir, describe a little more  
19 fully to the group, if you would.

20 A Okay, where I was set up, I was set up in  
21 the Kudzu area and there were several other exhibits there  
22 and there were large trees, and I would say I was maybe a  
23 hundred feet or so, give or take, from the highway facing  
24 the highway.

25 Q Your exhibit was facing the highway?

2 A My exhibit was facing the highway. I don't  
3 think there were any more exhibits between me and the  
4 highway.

5 The others were either beside me or  
6 behind me.

7 Q Can you describe how your exhibit was set  
8 up?

9 A Yes, I had, well, I sold - - I had a lot  
10 of quilts with me and I had two racks, maybe, ten feet long  
11 and eight feet high, one over here and one over here, and  
12 I had tables about the size of this table with placemats  
13 and tablecloths and things like that, and I had like a  
14 playhouse set.

15 It was a doll bed and a little chest of  
16 drawers, and I had hobbyhorses, and I just had spread out  
17 maybe the length of this room.

18 Q We are trying to get a picture of what was  
19 there. So if I could ask you, was there any kind of  
20 buildings or coverings or anything of that nature in your  
21 exhibit?

22 A No.

23 Q Tell us a little bit about the Harvest  
24 Festival for the Craft Fair itself. What transpired during  
25 the day?

A It was a threatening day and it looked like it was going to rain at any time, I remember, and business was slow until after lunch, and then it picked up some, and I really don't - - all I remember is a lot of people being there.

The main thing I remember about the day is this lady over here.

Q Let me go back and clear up. You said it was threatening all day. Did it rain any?

A I think it might have drizzled some. I remember it was real cloudy and I was afraid that my stuff was going to get wet.

Q Tell us how many people, approximately, may have visited the thing on Sunday?

A Maybe 500, maybe 600. I know at one time 300 people were there, I would say, from what I remember at one time.

Q Can you tell me when that was in relationship to the time that Mrs. Sanders finally had her accident?

A I would say probably during that time and a couple of hours prior to that. A lot of people were stopping on their way to the mountains.

Q If you would, just bring us on down and focus on when you said that the thing you remember most is

1 this lady. Tell us what you remember about that.

2  
3 A She came up to me and she introduced herself  
4 and she said that she had been to a workshop there in  
5 Danville and she had had some things custom-made and she  
6 was telling me, you know, how much she liked them and how  
7 pretty she thought they were and what good work our kids did,  
8 and I don't remember the whole conversation.

9 We must have stood there and talked for  
10 ten minutes or so, and she said she had to go and she started  
11 walking back toward the highway, and I looked away.

12 Somebody asked me a question about some of  
13 the merchandise, and I answered them, and I turned back  
14 around and I saw her walking toward the highway and, all of  
15 a sudden, she fell down.

16 I remember she fell to her left and, you  
17 know, for a second or two I just looked. I looked for her  
18 to get up and I heard her cry out.

19 I don't know that she screamed, but she cried  
20 out now. "Oh," or something like that. So, I started to  
21 walk closer and, as I did, she cried out again.

22 I could tell she was in pain, and so I kind  
23 of speeded up to try to get to her, and somebody got to her  
24 before I did. I don't know who or remember who.

25 He pulled her. She stepped in a - - it was

a red corrugated pipe, I think is what you call it, and the pipe was maybe that long, but it was planted down in the ground, and I remember it had some kind of valve, water valve or some kind of meter or something in the bottom of it, and it was in the area where the Kudzu was and, obviously, she couldn't see the hole and she was - -

MR. RAKES: If Your Honor please, I am going to have to object to his statement as to what the other party might have been able to do.

THE COURT: Objection sustained. You do not know what she knew. Describe from your own personal knowledge.

THE WITNESS: At any rate, this hole was there and we pulled her out and I don't - - I looked at her ankle, and I don't think any bones were sticking out from the flesh, but you could look at it and tell it was really messed up.

I mean she was crying and screaming and, in my opinion, it was a pretty - -

MR. RAKES: I object. Just have him describe what he saw.

BY MR. WILSON:

Q If you can, just describe what you saw.

2 A I saw this man pull her out of a hole that  
3 was covered up in Kudzu - -

4 THE COURT: Go ahead; finish your statement.

5 THE WITNESS: - - and she laid there for  
6 a few minutes until the ambulance came and they took  
7 her away.

8  
9 BY MR. WILSON:

10 Q You stood up a minute ago and, during the  
11 course of what you were talking about, described a hole.  
12 Can you tell us, make a statement as to maybe the diameter  
13 of the hole and the depth of the hole?

14 A I would say it may have been two to three  
15 feet deep and maybe twelve inches wide, I guess.

16 Q Of course, I have already tried to get you  
17 to describe the lay of the land, but how about let us focus  
18 right on that point.

19 Can you describe more fully where that  
20 particular point was in relationship to your setup, your  
21 display, and maybe the street?

22 A Well, I am saying the highway was a hundred  
23 feet from my display and I am saying maybe she was two-thirds  
24 of the way to the highway, maybe, and I guess she was  
25 walking back to her car.

As you got to the highway, it was steps down there. It was like an embankment. In one place, it was some steps you go down.

Q In which direction was she walking when you saw her?

A She was walking toward the highway.

Q You have told us you saw her fall and you saw her lying there. Did you see anything after that? In other words, did you stay there or go back?

A I stayed there for a few minutes and I made sure that somebody was going to call the ambulance and look after her, and then I went on back to my display.

Q If I could, please, let me show you this photograph and ask if you can identify anything in that photograph.

THE COURT: What photograph are you handing him?

MR. WILSON: That is Chamber of Commerce Exhibit One.

THE WITNESS: That looks like it.

BY MR. WILSON:

Q Could you come up here in front of the Jury and point out some of the things you described, where you

2 remember them located?

3 A Okay, I was located - - can you see those  
4 quilts hanging? My display was on the other side of these  
5 trees, and the area that I am talking about where I saw her  
6 fall is on the other side.

7 THE COURT: Do that again for these Jurors  
8 over here.

9 THE WITNESS: My display was set up on the  
10 other side of these trees. If you look right in  
11 there, I think that is my quilt rack in the area  
12 that I just described where she fell between there  
13 and the highway back over here.  
14

15 BY MR. WILSON:

16 Q Can you see the area in that picture?

17 A No, it is blocked.

18 Q While you are here, I will show you  
19 Chamber of Commerce Exhibit Number Two and see if that adds  
20 anything to what you told us about the first one.

21 A Well, again, I was over here. This was the  
22 first plot of land that I described that might look like your  
23 yard.

24 THE COURT: Turn it all the way around.  
25



2 BY MR. WILSON:

3 Q Hold it back here. Which way were you  
4 pointing to?

5 A I am saying that this was the first plot of  
6 land in Number Two. The other one was over here, the  
7 Kudzu area.

8 THE COURT: Are you saying over here to the  
9 left of the picture?

10 THE WITNESS: If the highway is back this way,  
11 it is to the left.

12  
13 BY MR. WILSON:

14 Q Does this picture show what the type of  
15 vegetation was on the ground that you are talking about?

16 A No, no.

17 Q Let me show you one other picture which is  
18 Chamber of Commerce Exhibit Three and see if that shows the  
19 location or the type of vegetation.

20 A No.

21 Q Is that your Fair, do you recall?

22 A Yes.

23 Q Can you tell us where that was in  
24 relationship - -

25 A That was next to the bank. The bank is

2 back over here.

3 THE COURT: Please forgive me for  
4 interrupting, but you have got to speak to a  
5 Record. When you say over here and up here, that  
6 does not mean anything.

7 What you just described, are you pointing  
8 to the right of - -

9 THE WITNESS: The bank was over here, over  
10 to the right of this display, and if you were to  
11 walk in the opposite direction, you would be  
12 walking toward the highway, but this is still not  
13 where I was set up; in the area that I was set up.

14  
15 BY MR. WILSON:

16 Q You may have a seat back up here. I think  
17 you may have answered it, but let me ask you again. Were  
18 there other Exhibitors set up in the area where you were?

19 A Yes, yes.

20 Q How many would you estimate?

21 A I guess maybe five or six. I know that they  
22 were making apple butter there and there was another lady,  
23 she had some of the same kind of crafts that I did; several  
24 others.

25 Q Do you have an estimate of how many exhibits

2 there were in all in the whole Fair?

3 A Gosh, it must have been 30, 40; something  
4 like that.

5 MR. WILSON: We have no further questions;  
6 thank you.

7  
8 CROSS EXAMINATION

9  
10 BY MR. HUTTON:

11 Q Mr. Miles, what is your address now?

12 A Cherry Hill Farms, Milton, North Carolina.

13 Q Are you employed?

14 A I am Director of Cherry Hill Jams,  
15 Incorporated.

16 Q Jams that you eat?

17 A No. I promote rock-and-roll shows,  
18 bluegrass. It is an entertainment-type thing.

19 Q You are no longer employed with the Fred  
20 Hatcher Center?

21 A No, sir.

22 Q How long has it been since you have been  
23 employed with them?

24 A It has been two-and-a-half years.

25 Q The accident happened about four years ago,

I believe.

A Yes.

Q Tell me this: Have you been up to Stuart to look at this thing recently?

A No, sir.

Q Have you been back since they had the Fair?

A No, sir.

Q I believe you spoke of steps and, of course, the steps are evidently in the picture. What refreshed your mind that there were steps; the fact that you looked at the picture?

A No. That afternoon, my boss, which was my mother at the time, she came up and we were telling her about it and we went back down and looked at it, and my father was there.

We discussed it, you know.

Q The afternoon it happened?

A Yes.

Q What time of day did it happen?

A I think it was around three o'clock or 3:30; thereabouts.

Q Do you recall giving a Deposition in this matter back in April of 1981?

A Yes, sir.

Q I am referring to Page Forty-One, Line Eight, and your answer to the question, "It wasn't a mountain, but as I remember, it was like a steep embankment."

You are talking about coming up the street.

A Yes.

Q My question is, do you recall where the steps were coming up from the sidewalk? You said, "No, I don't think it was. It might have been a sidewalk on the side of the street, but I am not sure. It was even on the side of the street."

Something refreshed your memory since April that there was a sidewalk and steps.

A I don't know. Today, I remember there being steps there.

Q How many sets of steps were there?

A How many steps or how many sets of steps?

Q How many?

A Just one that I remember.

Q If you will come here a minute, please.

A I am saying one that I was in.

Q Well, let me ask you a question: I am not trying to confuse you. We are just trying to get the information out so that these people understand.

THE COURT: What photo are you looking at?

MR. HUTTON: I am looking now, Your Honor,  
at Chamber of Commerce Number One.

BY MR. HUTTON:

Q This is an Exhibit that I believe you  
identified of the Crafts Fair or part of the Crafts Fair.

A Yes, sir.

Q I show you here a set of steps. This is  
not the set of steps you are talking about?

A No. As I remember, it was one further down.

Q So, there are two sets of steps?

MR. RAKES: Excuse me; over to the left of  
the photograph as you go so that we can get some  
direction.

THE WITNESS: It would be two steps included  
in that area.

BY MR. HUTTON:

Q Is this where most of the exhibits were?

A The biggest part of them were.

Q Have a seat. You said a minute ago on  
Direct Examination that you were only there on Sunday.

A I think. If it was a two-day event, I was  
probably there both days. I don't remember if it was

two days.

Q I believe it has been stated here on several occasions that it was a two-day event, Saturday and Sunday. You don't recall when you got there?

A Well, most of the time I will stay the duration of a whole show. Some shows I might be the first day or second day. It was depending on how my schedule ran because I was doing a couple or three Craft Shows a month or more.

Q Well, would your recollection in April of 1981 be more correct than it is today?

A Well, I guess.

Q Referring to Page 40 of Mr. Miles' Deposition, the question is, "When did you get up and set up your booth?"

Your answer, "Early Saturday morning, I believe it was." Question, "Was it a two-day Festival, Saturday and Sunday?"

"I think so; Saturday and Sunday, I think." Question, "Do you know what time it got started on Sunday?" Your answer, "Somewhere in the neighborhood of nine or ten o'clock. I got there about the break of day."

Question, "Would that be Saturday morning?" Your answer, "Yes."

Now what size tent or exhibit did you have?

A Well, I took about the length of this room. That is how much space I had.

Q They did not have room for you in the regular area where you see most of the booths are; did they?

A No.

Q They told you that you could set up in this area over here if you would like?

A Yes.

Q And you complained about it being rough, but you went over there anyway?

A Right, I guess. It was rough. I remember that.

Q Well, you remember also that they told you that this was the place set up, but they did not have room for you and if you would like to set up over there, you could.

A Right.

Q Now this hole that Mrs. Sanders fell in because she didn't fall, she stepped into it, actually; is that correct?

A Yes.

Q You say it was below the surface of the ground?

A Yes; the top of the pipe was, you know,



about level with the ground.

Q Had you been in this area before yourself?

A I think I had walked across it once or twice. I am not sure; I think I had.

Q You had never noticed the pipe there?

A No.

Q If this happened say around 3:00 or 3:30 on Sunday afternoon and you had been there since early Saturday morning, had there been a lot of traffic over the two days of the Show?

A Yes.

Q Had there been a lot of people around?

A A fair amount.

Q People in this area?

A Yes.

Q To your knowledge, no one had ever called attention to any of the Exhibitors or the Chamber of Commerce that there was a hole there?

A No.

Q To your knowledge, do you know of anyone that knew the hole was there?

A No.

Q Prior to the time Mrs. Sanders stepped in it?

A No, I don't know.

Q You are saying that in addition to yourself and the Apple Butter Exhibit, there were other exhibits over where you were behind the trees?

A Yes, sir.

Q This is approximately, you say, probably a hundred feet from the road?

A I am not saying exact. A good, you know, two minutes. I don't think; I don't know; maybe not a minute-and-a-half walk.

Q Well, the terrain, as you described it, there is a sidewalk and then you come up an embankment and then it sort of levels off.

A Yes.

Q On both lots.

A I remember it being more so on the side I was on. It was kind of the further you went down the road, the higher the bank got. That is the way I remember it.

Q But you were not on the bank?

A (Shaking head.)

Q You were at least a hundred feet from the bank?

A Yes.

THE COURT: When you are shaking your head, please also say yes or no, depending upon which

way you are saying it for the purposes of the  
Record.

THE WITNESS: It was close to a hundred  
feet.

BY MR. HUTTON:

Q Was there anyone, were there any booths  
between your booth and where Mrs. Sanders fell?

A There were some like toward the side of me,  
you know. I don't think there were any directly between me  
and her, I don't think, because I could see it.

Q The booth to the side of you would be as  
you are facing the road to your left and back of where most  
of the booths were. There were no booths to your right;  
were there?

A I believe it was.

Q What do you mean you believe it was? Who  
was it?

A I don't remember. I know right behind me  
a man was making apple butter and I think over here there  
was somebody with some woodwork; a lady with some dolls and  
stuff.

Q What was her name; do you know?

A No.

Q Do you know where she was from?

A No, I don't have any idea.

Q How often did you go to Craft Fairs?

A Quite often.

Q Didn't you see the same people at the same Fairs most of the time?

A No.

Q The apple butter was behind you?

A (Nodding head.)

THE COURT: Please answer yes or no.

THE WITNESS: As I recall, it was behind me.

BY MR. HUTTON:

Q But nothing between your booth and the street; in other words, for a hundred feet you had a clear view of the street?

A Yes.

Q There were no booths in front of you. Now the booths over to your left in the main area we are talking about shown in the picture, they were almost down to the street or close to the street; weren't they?

A Yes.

Q And sort of sitting in a semicircle?

A I don't know that they were in a semicircle.

I know they went down to the street; I know that.

Q Well, let me ask you this: We will go over these pictures again, and I don't mean to be arguing with you. I am just trying to get some relationship as to what took place, and I explained to the Jury in the Opening Statement that - -

THE COURT: He did not hear the Opening Statements. Just ask him the question.

BY MR. HUTTON:

Q If you will come back so that we can talk about this picture, now this is Chamber of Commerce Exhibit Number One, and you have said that your exhibit was back over here behind these trees.

A Yes.

Q Here is a row of trees here; is that correct?

A Yes.

Q This would be the steps coming back across this way?

A Yes.

Q Is that correct?

A Yes.

Q Did the exhibits then go back and around this way and back down the side of the bank in what I would say

would be a semicircle?

A I don't remember. I was over there.

Q Well, let me show you Chamber of Commerce Exhibit Number Three. Are those some exhibits for the Crafts Fair?

A Yes, it looks like it.

Q Is that the bank?

A Yes, it looks like it.

Q Well, then, the bank in this picture, in Exhibit Number One, would be over to the right; would it not?

A Right.

Q I show you Chamber of Commerce Exhibit Number Two. It shows, looks like, a Moody Funeral Home tent in the back. Do you remember where it was located?

A No, I don't.

Q It is not in either one of the other two pictures; is it? Do you want to look at them and see?

A No. At these Craft Festivals, I have several of these tents.

Q It wasn't in the area where yours was; was it?

A No, I don't think so, no.

THE COURT: You may resume the Witness Stand.

2 MR. RAKES: No questions, Your Honor.

3 THE COURT: Any Redirect?

4 MR. WILSON: We have no further questions,  
5 Your Honor, please.

6 THE COURT: You referred several times to  
7 the length of your exhibit being the length of this  
8 room. Would you approximate that for the Record  
9 as best you can?

10 If you want someone to step it off for you,  
11 we will do it.

12 THE WITNESS: I would say 40 feet, 35 or  
13 40 feet.

14 THE COURT: Between 20 and 35 feet?

15 THE WITNESS: I would say 35 feet would be  
16 close.

17 THE COURT: Were you making charges; were  
18 your craft items for sale?

19 THE WITNESS: Yes, sir.

20 THE COURT: And were the other Exhibitors  
21 offering their wares for sale?

22 THE WITNESS: Yes, sir.

23 THE COURT: And sales were made?

24 THE WITNESS: Yes, sir.

25 THE COURT: You may step down unless my

questions provoked anything further from either side.

MR. WILSON: I don't believe so, Judge. Mr. Miles has come up here from Danville and I wonder if it might be permissible for him to be excused.

MR. RAKES: I have no objection.

MR. HUTTON: I have no objection.

THE COURT: You may step down and you may be excused.

MR. WILSON: Judge, we do have one other question.

REDIRECT EXAMINATION

BY MR. WILSON:

Q Did you pay any sort of fee for your right to set up your exhibit at the Crafts Fair?

A I am sure I did.

Q To whom did you pay that?

A I think it was through the Chamber of Commerce, I think.

~~MR. WILSON: I have nothing further.~~

~~THE COURT: Is there any Recross?~~



1  
2 before the Court and Jury:)

3  
4 MR. RAKES: If Your Honor please,  
5 Ms. Warner went back to my office to see if she  
6 could get the rest of those instructions and she  
7 will be coming along shortly, but I see no reason  
8 why we need to hold things up if the Court has no  
9 objection.

10 THE COURT: Do you prefer to wait, Mr. Rakes?

11 MR. RAKES: No, sir. I would not want to  
12 hold the Jury up.

13 THE COURT: All right, if you are ready,  
14 Mr. Wilson, you may call your next Witness.

15 MR. WHITT: Russell Smith.  
16

17 RUSSELL SMITH

18 was called as a Witness, and after having first been duly  
19 sworn to tell the truth, the whole truth, and nothing but  
20 the truth, was examined and testified as follows:  
21

22 DIRECT EXAMINATION

23  
24 BY MR. WHITT:

25 Q I believe you are Russell Smith; is that

2 correct?

3 A Yes.

4 Q Where do you work?

5 A Moody Funeral Home, Stuart, Virginia.

6 Q How long have you been a resident of  
7 Stuart, Mr. Smith?

8 A Twenty years.

9 Q How long have you been working at Moody  
10 Funeral Home?

11 A Twenty years.

12 Q I want to direct your attention to  
13 October 8th, 1978. During this time, there was a Crafts  
14 Fair going on in the vicinity of Moody Funeral Home; is that  
15 correct?

16 A Right.

17 Q If you would, please, tell the Court how you  
18 happened to come on the scene of it when Mrs. Sanders fell?

19 A As you know, we run an ambulance service  
20 and I was on call that day, and I answered the phone and they  
21 said they needed an ambulance in front of the Arts and Crafts,  
22 and so - -

23 Q Where in relation is this piece of property  
24 to the Funeral Home?

25 A It is East on 58 about, I would say, a

couple of hundred yards from the Funeral Home.

Q All right.

A And so I went up to get an ambulance to go out to the scene, and when I got up to the intersection, our ambulance was already there, and so I just stopped the car and got out and helped them load Mrs. Sanders in the ambulance.

Q When you got there, was Mrs. Sanders still in the hole or was she laying beside the hole?

A I believe she was laying right beside of the hole.

Q All right, can you describe what her leg looked like?

A It was a compound fracture on her, I believe it was, her right leg with the bone protruding through.

MR. HUTTON: I am sorry; I did not hear that.

THE COURT: Please repeat your answer.

THE WITNESS: The bone was protruding through the skin on her right, I believe it was, her right leg.

BY MR. WHITT:

Q I believe the lot where the Crafts Fair was being held was a vacant lot; is that correct?

2 A Yes.

3 Q Could you describe the lot itself?

4 A Well, the lot right off of the sidewalk,  
5 it was steps that you go up to where this house used to be,  
6 and there is a walkway, but you could not tell where the  
7 walkway or anything was at.

8 You could see the steps and it was Kudzu vine  
9 all over the ground. It had been mowed down, but it  
10 still - - it was covering the hole, and you could hardly see  
11 the hole.

12 I do not think you could even recognize it  
13 if you knew it was there.

14 MR. RAKES: I am sorry; excuse me. If you  
15 could look right at the Judge; it is natural for  
16 you to look at the person who is asking the question,  
17 but when you answer, if you could look at Judge  
18 Coulter, I think maybe we could all hear.

19 THE COURT: Suppose you try that.  
20

21 BY MR. WHITT:

22 Q Could you describe the hole?

23 A The hole was a round water meter. It was a  
24 round water meter and it was about, I would say, 12 to 18  
25 inches deep.

Q Approximately what was the diameter of the hole?

A I would say maybe 12, 14 inches.

Q Was it round or square?

A It was round.

Q In front of your Funeral Home, is there a water meter similar to this?

A Yes, it is similar, but now the one we have, the newer model, is oblong.

Q Do you know from your experience in living in Stuart whether all the property or most of the lots along Route 58 have these similar types of water meters?

MR. RAKES: If Your Honor please, he is testifying it is not similar to the one he had at his place.

THE COURT: Could you repeat the question?

BY MR. WHITT:

Q Mr. Smith, from your experience by living in Stuart, do the lots fronting Route 58 have water meters?

A Yes, they do.

Q Near the property?

A Yes, they do.

Q Were they similar to the one on the property

2 where the accident happened?

3 A Yes, they are similar.

4 MR. WHITT: All right, that is all I have.

5 THE COURT: Cross Examination.

6

7 CROSS EXAMINATION

8

9 BY MR. HUTTON:

10 Q Mr. Smith, had you been on this property  
11 before?

12 A Yes.

13 Q When?

14 A Well, my children used to mow the yard  
15 next door. So part of their lawn mower is over there. It  
16 is a little turnaround.

17 Q Do you know where the nearest booth was to  
18 where Mrs. Sanders stepped in this hole?

19 A To the best of my recollection on it, it was  
20 sort of to the back of the lot.

21 Q Most of the activity was on the adjoining lot  
22 next to the back; is that correct?

23 A Well, yes; up and down the street there,  
24 but - -

25

MR. HUTTON: I do not have any further questions.

2

## CROSS EXAMINATION CONTINUED

3

4

BY MR. RAKES:

5

Q Mr. Smith, where do you live with reference

6

to where this accident happened?

7

A I live down on Buena Vista Street right down

8

in front of the Funeral Home.

9

Q But it does not front on Route U. S. 58;

10

does it?

11

A No.

12

Q Did you ever know any of the people who had

13

residences there on the property where houses had been

14

razed?

15

A No. Well, I knew Mrs. Akers; Doctor Akers'

16

wife. She lived there since I have been in Stuart.

17

Q How long ago was that before the accident?

18

A I would say five or ten years.

19

Q How long had the house been down; to your

20

knowledge; had the house been taken off the lot before the

21

accident happened?

22

A I am going to say maybe three or four years,

23

I guess, before the accident happened.

24

Q Did you ever visit her at that house?

25

A No; we went out with the ambulance and hauled

her out of the house. That is the Akers' property that I am talking about.

Q I understand. How about the Clark property? The Clark property is where this happened; isn't it?

A Right.

Q Did you ever have any occasion to visit anyone in the home on the Clark property?

A No, I did not. The house was torn down and everything before I came to Stuart.

Q You said it was on the Clark property that the Plaintiff fell?

A Yes; it was where the meter was at.

Q Had you been on the Clark property before this accident; to your knowledge?

A Yes; I mean I walked on it. I mean as far as like I said, I went with my kids up there to mow the yard next door to it.

We would go up there and make a turnaround. It was in the back part; it was never on the edge of it.

Q Well, in the block that the Akers and the Clark property was located, you were not personally familiar with any water meters that went back 15 or 20 years; were you?

A No.

Q Well, where on 58 are you talking about then



other than the one at the Funeral Home?

A Well, next door to the Funeral Home there they have the water meter that is - -

Q You do not know how far that goes back; do you?

A No.

Q You do not know when it was installed; do you?

A No, I don't.

Q This hole you looked at appeared to be a water meter; is that correct?

A Yes.

Q Could it have been something else?

A Probably so.

Q Certainly, you had never seen that hole before on the Clark property; had you?

A No.

MR. RAKES: I have no further questions.

THE COURT: Redirect?

MR. WHITT: Yes.

REDIRECT EXAMINATION

BY MR. WHITT:

Q Mr. Smith, where in relation to the stairs leading up to the Clark property was this hole?

A Going up the steps?

Q Yes, sir.

A All right, it is on the right-hand side of the walk.

Q Is the walkway still there now?

A Yes, sir. It is under the Kudzu vine.

Q How close to the old walkway was it?

A I would say maybe two feet or three feet away from the walkway.

Q Through to the right of the walkway?

A To the walkway facing up toward the old home there.

Q Going back to the other meters along Route 58, to your knowledge, do these meters generally have covers on top of them of some sort?

A Yes, as far as I know, unless they have been taken off or left off by the Meter Reader or something.

MR. WHITT: Thank you. That is all.

THE COURT: Recross.

RECROSS EXAMINATION

BY MR. HUTTON:

Q The meter you are familiar with is the one on Route 58; this is the one next door?

A Yes, that is correct.

Q Did you know the Clark property and the Akers property had a well between them?

A No, I did not.

Q You did not know there was a well there?

A No.

Q In other words, the Clark house where this accident took place, you say the house was razed or torn down long before you came to Stuart?

A Yes.

Q You have been in Stuart 20 years?

A Right.

Q So, you do not know whether they used Town water or water from the well or what they used; do you?

A No, I don't.

Q When he talks about the walkway, you are talking about the sidewalk up on the property. The steps are not still there; are they?

A No, no, the steps were there whenever she fell.

Q The steps are not there now? They have  
since been - -

A The bank has been sloped down.

MR. HUTTON: I have no further questions.

THE COURT: Mr. Rakes?

MR. RAKES: I have no other questions.

THE COURT: You may step down.

(Witness excluded.)

THE COURT: Call your next witness.

MR. WHITT: James Howell.

JAMES HOWELL

was called as a Witness, and after having first been duly  
sworn to tell the truth, the whole truth, and nothing but  
the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHITT:

Q Your name is James Howell; is that correct?

A Yes, sir.

Q Where do you work, Mr. Howell?

A I work for the Moody Funeral Home in Stuart,

and we have an ambulance service.

Q How long have you been working for Moody Funeral Home?

A Since 1957.

Q How long have you lived in Stuart?

A All of my life.

Q How old are you now?

A I am 45.

Q Mr. Howell, I want to direct your attention back to October 8, 1978, when there was a Crafts Fair going on in Stuart at that time, and it was the day when I believe you received a call or was summoned on the ambulance to go to a property close to the Funeral Home where the Craft Fair was being held?

A Yes, sir. Really, I was already on one run and I was coming home, to the home place, and a Policeman, why, he flagged me down.

Q What did you proceed to do then?

A I went on up, you know, after someone had hurt her ankle, you know, her foot or leg or something.

Q What did you observe when you arrived at the scene?

A I saw this woman, about three to four foot, a hole, that looked like about 18 inches.

2 Q What injuries did she receive that you could  
3 tell? What did it look like?

4 A It was her ankle; it was a compound fracture.

5 Q Could you describe it, please?

6 A Well, it just come through, you know, where  
7 the skin - -

8 Q Could you see the bone?

9 A Yes, sir.

10 Q Did you put Mrs. Sanders in the ambulance?

11 A Yes.

12 Q Would you please describe the property  
13 where you picked Mrs. Sanders up; the terrain?

14 A Well, it was a little entrance up there. I  
15 believe it was, I would say, climb up the steps.

16 Q Cement steps?

17 A Yes, sir.

18 Q How about the ground itself?

19 A It had all of these, you know, old Kudzu  
20 weeds on it, I call it.

21 Q Could you describe the hole? Did you see  
22 the hole?

23 A Yes, sir, I did.

24 Q Could you please describe it, as best you can?

25 A Well, it was, you know, just like I said,

2 about so-so, and looked like - -

3 THE COURT: So-so does not read too well  
4 in the Record.

5 THE WITNESS: I would say 18 inches across.  
6

7 BY MR. WHITT:

8 Q Was it round or - -

9 A Round.

10 Q It was round, and what type of hole did it  
11 appear to be to you?

12 A A meter hole.

13 Q A meter hole?

14 A Meter hole, right.

15 Q Does the Funeral Home have a meter hole  
16 similar to that one?

17 A Well, I can't say because it is, you know,  
18 so far back.

19 Q Well, let me ask you this: Does the  
20 Funeral Home have a meter fronting close to Route 58 on the  
21 property?

22 A Yes, we do.

23 Q How about the house adjacent to the Funeral  
24 Home?

25 A I don't know about that one.

2 Q How about any of the rest of the property  
3 along Route 58? Do you have any idea whether they do or not?

4 A I have no idea.

5 MR. WHITT: That is all I have.

6

7 CROSS EXAMINATION

8

9 BY MR. HUTTON:

10 Q Mr. Howell, how long have you lived in  
11 Stuart?

12 A I have been there all my life.

13 Q This accident took place on what is more  
14 familiarly known as the Clark property?

15 A Yes, sir.

16 Q Do you know when the Clark house was torn  
17 down?

18 A Not really; it has been a long time.

19 Q More than 20 years?

20 A I am sorry; I cannot remember.

21 Q You don't remember the last people who lived  
22 in the house?

23 A No, I do not.

24 Q Had you been on the property before?

25 A Oh, yes.



2 Q In what capacity?

3 A Just business.

4 Q On the Clark property?

5 A Yes.

6 Q With the people that lived in the house?

7 A No, sir. I was hired earlier for this  
8 Art Show what they was having out there.

9 Q Had you been there earlier and been on the  
10 property before that time?

11 A Yes.

12 Q I see what you mean. You had not noticed  
13 the hole being there.

14 A No, I had not.

15 Q Had you walked in this particular area?

16 A No, I did not.

17 Q Most of the activity was on the adjoining  
18 property over at the Akers property; is that correct?

19 A Yes.

20 Q Was most of the activity on the Clark property  
21 out on the back on the lot around the apple butter kettle?

22 A I can't recall.

23 Q There wasn't any booth right close to where  
24 you picked Mrs. Sanders up; was there?

25 A There was not.

MR. HUTTON: All right, fine. Thank you.

CROSS EXAMINATION CONTINUED

BY MR. RAKES:

Q Mr. Howell, you testified that this appeared to be a water meter hole, but it could have been something else; couldn't it? You are not positive that it was a water meter; are you?

A Yes, I am. I am sure it was a water meter.

Q You have never seen it before, though; you had never seen it before?

A Not really; not that one.

Q Where had you seen one before?

A Others in Stuart.

Q I understand, but not in the vicinity of that one other than at the Funeral Home, and that was a fairly recent one; wasn't it; 20 years?

A It was built in close.

Q So you had not seen any other water meters anywhere in the vicinity of the hole that you saw on the Clark property; had you? You had not seen any close by there; had you, sir?

A No, sir.

2 MR. RAKES: No further questions.

3 MR. WHITT: I have one more question,  
4 Your Honor.

5  
6 REDIRECT EXAMINATION

7  
8 BY MR. WHITT:

9 Q Mr. Howell, we talked earlier about the  
10 cement stairs leading up to the property.

11 A Yes, sir.

12 Q Those stairs are no longer there; is that  
13 correct?

14 A That is correct.

15 Q Are there still the remnants of a sidewalk  
16 on this property?

17 A I don't recall.

18 Q Do you remember whether or not there was a  
19 remnant of a sidewalk the day Mrs. Sanders fell?

20 A Yes, there was.

21 Q Where in relation to this sidewalk was the  
22 hole?

23 A Excuse me; I did not understand.

24 Q How close to the sidewalk was the hole?

25 A Off to your right about four or five feet.

2 MR. WHITT: That is all I have.

3

4 RECROSS EXAMINATION

5

6 BY MR. HUTTON:

7 Q Mrs. Sanders had not been walking on the  
8 sidewalk, then, when she fell?

9 A I don't know where she was walking.

10 MR. HUTTON: Thank you.

11 THE COURT: Mr. Rakes?

12 MR. RAKES: No.

13 THE COURT: You may step down.

14 (Witness excused.)

15

16 MR. WHITT: Your Honor, I would ask that  
17 Mr. Smith and Mr. Howell both be excused.

18 THE COURT: Is there any objection?

19 MR. RAKES: No, Your Honor.

20 MR. HUTTON: I have no objection.

21 THE COURT: You both may be excused,

22 Mr. Howell and Mr. Smith. You may leave if you want  
23 to.

24 MR. WILSON: We call Earline Sanders.

25

EARLINE VIRGINIA SANDERS

was called as a Witness, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Would you tell us your name, please?

A Earline Virginia Sanders.

Q Where do you live, Mrs. Sanders?

A Danville.

Q If you don't mind my asking, how old are you? You do mind?

A I am 46.

Q How old were you at the time of this accident?

A Forty-two.

Q Are you married?

A Yes, sir.

Q What is your husband's name?

A Donald Jack Sanders.

Q Do you have any children?

A One little girl.

2 Q What is her name?

3 A Donna Earline.

4 Q How old is she?

5 A She is seven.

6 Q At the time this accident happened, do  
7 you recall how old she was?

8 A Three.

9 Q Three years old.

10 A Yes.

11 Q Could you just in your own words start off  
12 the day that this accident happened and tell us what you all  
13 did?

14 A Well, I had heard on the TV and things all  
15 that week and I wanted to go so bad. So, my husband and I  
16 carried my little girl down to Granny's and we headed out,  
17 and then we went on up, and I like quilts and things like  
18 that.

19 Q You are doing fine except when you say  
20 "went on up." Could you continue that? You went on up  
21 to where?

22 A Went on up to Stuart.

23 Q Do you know at all what time it was when  
24 you got there?

25 A I thought it was around Noon. It might have

been later than that; I don't know.

Q In other words, you and your husband drove up to Stuart?

A Yes, sir.

Q Do you remember where you parked?

A On the side of the road is all I know. On the other side, I think.

Q Can you tell us how you got onto the property where this accident happened?

A We went across, I think, across the street and went up some steps.

Q You have been hearing reference to these steps and everything. Is that the Akers steps you are talking about? I don't think you have seen the pictures.

Describe the steps, if you would.

A It looked like to me it was five or six steps up a hill now; I don't know. That is the way it looked like to me.

Q Leading from where to where?

A Leading from the street.

Q From the street?

A Yes.

Q Onto the property?

A Onto the property.

2 Q You went up those steps?

3 A Yes.

4 Q Did your husband go with you?

5 A Yes, sir.

6 Q Describe to us what you did after you got  
7 up on the property.

8 A I went and started looking at quilts and  
9 pricing the quilts and talking to some ladies that had the  
10 quilts, you know, went around. They had different things  
11 there, and then we went on, you know, kind of on the back  
12 of the lots and was at Miles', where I had bought things from  
13 before, and I talked to him for awhile.

14 Q You knew him?

15 A Well, I had seen him down there at the thing,  
16 but I didn't know, you know, didn't know who he was. Really,  
17 I had - -

18 Q Did you know his name?

19 A No.

20 Q But you did recognize him?

21 A Yes.

22 Q And you went to his booth and started talking  
23 with him?

24 A I talked to some more, now, maybe made my  
25 rounds before I got around to his. I visited them all.



Q After you talked to him, would you tell us what you did then?

A Well, my husband and I were walking side-by-side and we were talking about what we were going to get my little girl for Christmas, and I don't know.

All of a sudden, I went down. When I went down, I hollered, "Oh, Lord." I thought that was it.

Q You don't know that it is important, but you said you were talking about getting something?

A Some wooden toys and things, little dollhouses or something for my little girl.

Q So, you were talking about something at the Fair, possibly getting?

A I told him I would put an order in if I did not get it there. I told my husband we would put an order in.

Q Where were you going at the time you fell?

A We were headed to the car.

Q You described your husband walking beside you, and did you see the hole before you stepped in it?

A No, I sure didn't.

Q As best you can, describe how you fell.

A Well, I don't know. Like I said, we were side-by-side and well, I didn't see the hole when I went down.

2 Q Can you describe the area around the hole?

3 A It was rough.

4 Q Well, keep on, try to describe it a little  
5 more fully, if you can.

6 A Well, it looked like to me it was that stuff,  
7 whatever grows, and it might have been cut or bushhogged,  
8 whatever you call it, but it was thick.

9 It was bad walking.

10 Q Keep on; after you fell, describe what  
11 happened then.

12 A Well, I think I scuffled some way or another  
13 and got out of the hole myself, but when I seen the bone,  
14 I don't know what I did. I just fell back.

15 Q Which leg of yours went into the hole?

16 A The right one.

17 Q Is that the one that was broken?

18 A Yes, sir.

19 Q And you got yourself out of the hole, you think?

20 A I think I did.

21 Q Then, what? Just keep on describing what  
22 happened, if you would.

23 A I don't know. I was hollering and  
24 screaming and telling them to get some help.

25 ~~Q How did you feel?~~

to go back to Danville.

Q Did you go back to Danville?

A Yes, I went back to Danville.

Q How?

A On the ambulance.

Q The same ambulance that took you to the  
Emergency Room?

A I don't know.

Q Then, maybe I can go back and do this some  
other way. Let me change my method a little bit.

Before we leave this, go back and describe,  
as best you can, the whole Crafts Fair. Give me as much  
description as you can remember.

A Well, I don't know. The quilts and things  
when I first started out, I started looking at them and it  
was a whole lot of different, like I said, different things.

Then, we went up, looked like to me, up an  
aisle this way, and then we cut across and come down another  
aisle, and then went down another one.

That is all I remember.

Q Was there any difference in one part of the  
property and the other as far as the degree of roughness,  
you call it?

A I don't think so.

and different places.

Q Away from home?

A Away from home, yes, sir.

Q Over what period of time would you say that you have had to take some meals out?

A Well, I would say at least a year because I wasn't able to do anything. My husband worked all the time.

Q Did that cost you more to eat that way than it would have had you been making all your meals at home and buying your groceries once a week and that sort of thing?

A I don't think so.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. HUTTON:

Q Mrs. Sanders, while we are with that, these meals, you are talking about taken away from home. In other words, you went out to eat?

A My husband would, yes, sir. My husband would bring my meals home.

Q Well, then, you did not go out to eat. You ate at home. He just went out and bought them.

A Bought them and brought them back.

2 Q Now on October 8th, I believe this was a  
3 Sunday; is that correct?

4 A Yes, sir.

5 Q You and your husband went up to the Crafts  
6 Fair because you had been interested in crafts?

7 A Yes, sir.

8 Q Mainly, in quilts, I believe?

9 A Yes, sir.

10 Q Did you visit all the booths at the Fair?

11 A I hope I did.

12 Q So, you had been at the Fair quite a time  
13 before the accident happened?

14 A Yes, sir. I looked around.

15 Q I don't know how we are going to do this.  
16 This is Chamber of Commerce Exhibit Number One which shows  
17 a portion of the Crafts Fair. Do you recognize that as being  
18 a portion of the Crafts Fair?

19 A Yes, sir. This is the way we went up, went  
20 around this way.

21 Q You went up these steps here?

22 A Yes, sir.

23 Q If you will, then, just show the Jury.

24 A We went up these steps here and came around  
25 this way and went on around back through this way, through

the woods, and right over here.

Q Where is it in relationship to that picture where you fell?

A Looks like to me it was over in here.

Q It was over to the - - were there two sets of steps?

A I don't remember seeing but one.

Q Have you seen these pictures before?

A I think I have seen them down at Mr. Wilson's office.

Q And these also, these other pictures, Chamber of Commerce Exhibits Two and Three?

A I haven't seen those, I don't think.

Q Does this appear part of the Crafts Fair the day that you were there?

A Yes, sir.

Q What was over in the woods is not visible in this picture. If you will, just show it up where it - -

A I don't see anything.

Q You said you came over and then came back through the woods and came back down this way?

A Yes, sir, and came, it looked like to me, through this way.

Q Where was Mr. Miles's Exhibit?

A Looks like to me it was kind of over in the woods. After I got around this way, it was over this way.

Q Back in here somewhere?

A Yes, sir; over this way.

Q Do you remember seeing the Apple Butter Exhibit?

A No, sir.

Q You say you had known Mr. Miles before?

A Well, I had seen him down at the place, but I didn't know him at the time. I had gone from some of the people down there at the Fred Hatcher Center.

Q You had been down to the Fred Hatcher Center?

A Yes, I had put an order in.

Q Did you know his mother?

A No, sir.

Q You were on your way back to your vehicle?

A Yes, sir.

Q And where were you parked?

A As far as my knowledge, I think I was across the road.

Q Across the road. Out in front of the exhibit or do you know?

A Right across from the exhibit.

Q Did you go up the steps to get into the exhibit?

A Yes, sir.

Q Was that these steps that I just showed you in Exhibit One?

A Yes, sir. That is what it looked like to me.

Q When you were leaving, were you heading for the same set of steps, or do you know?

A I said I was headed toward the same set of steps, as far as I know.

Q I believe you were talking to Mr. Sanders and you all were talking about buying your daughter something for Christmas there at the exhibit or ordering something you said; is that correct?

A We were talking about buying her something for Christmas, yes, sir.

Q You were walking along. Were you watching where you were walking?

A Yes, sir.

Q Do you remember if you were talking about an exhibit as you were walking?

A I was always watching where I put my foot.

Q So, right before you stepped in the hole, you were looking where you put your foot?



2 A Yes, sir.

3 Q And you did not see the hole?

4 A No, sir.

5 Q In other words, it wasn't visible?

6 A No, sir.

7 Q I believe you said you were married in 1970?

8 A Yes, sir.

9 Q At that time, you were working?

10 A Yes, sir.

11 Q When you got married, you quit?

12 A I stayed home for a while, and then I tried  
13 it after a few more months and he was on one shift and I  
14 was on the other. I figured it wouldn't work.

15 Q In other words, I believe when you got  
16 married, your husband did not want you to work; isn't that  
17 what you told us earlier in your Deposition?

18 A He figured he thought it was the place for  
19 me at home.

20 Q So when you got married, you quit working?

21 A Yes, sir; I had to because he lived in  
22 Danville and I lived in Halifax.

23 Q You didn't live in Danville when you were  
24 first married?

25 A No, sir.

~~only more than than it did now~~

CROSS EXAMINATION [CONTINUED]

BY MR. RAKES:

Q Mrs. Sanders, just a few questions, ma'am.

I know you have been up here on the Stand a long time.

When you answered Mr. Hutton's questions, I understood you to say that you were watching where you were going and looking where you were stepping your foot down and that the hole was not visible at the very time you fell; is that correct?

A No, sir. I didn't see the hole.

Q Ma'am, I didn't mean that. I understood that, but what I am saying, let me take it one step at a time. Number One, you stated that you were watching where you were stepping your feet; is that correct?

A Yes, sir.

Q Just before you fell, you were watching where you were stepping?

A Yes, sir.

Q And that you were looking where each step was going?

A Yes, sir.

Q And that despite that, your right foot went in this hole?

A Yes, sir.

Q It would not have been visible to ordinary inspection?

A No, sir.

Q You have already testified that this was sort of a rough area where you fell?

A Yes, sir.

Q You have heard some testimony that the main part of the exhibit area was mowed down much closer to the ground and was like a lawn, but that the area where you fell looked like it had been bushhogged.

Is that the way you remember it?

A Well, the only thing I can say, to be frank with you, I think all of it was rough.

Q So, you knew before when you walked up to the top of the steps there from the sidewalk, from the street, that it was a rough area you were going into?

A No, sir. Well, I didn't realize until I got there; when I got up the steps.

Q Yes, ma'am, when you got to the top of the steps and looked, you could then see how rough it was?

A Yes, sir.

Q But yet you continued to go throughout all of this?

A Yes, sir.

Q Had you had any trouble walking around on the rough ground before you fell in the hole?

A I don't think so.

Q Do you remember giving your testimony in Discovery Deposition in an Attorney's office in Danville on April 7, 1981?

A Yes, sir.

Q Both Mr. Hutton and I were there and we asked you various questions?

A Yes, sir.

Q I am on Page 23, Line 25. Do you remember this question and these answers that you gave at that time, Mrs. Sanders?

Question, "Do you know where you were looking at the very time that you stepped into the hole?"

Answer, "No, sir."

Question, "Do you know whether you were looking at the ground?"

Answer, "No, sir."

Question, "You just don't know one way or the other?"

Answer, "No, sir."

Do you remember those questions and those answers?

A No, sir, I don't.

Q But they are not like the answer you have just testified to today; are they?

A No, sir.

Q Were you testifying to the truth at the time you gave these answers at that time?

A I am hoping as far as I know it was the truth.

MR. RAKES: Do you stipulate that these questions and these answers were made at this time? This Deposition has been filed. You have a copy.

MR. WILSON: I do not think it has been filed. I do not have a copy, for what it is worth.

MR. RAKES: Let me show it to you.

MR. WILSON: I will so stipulate to it.

MR. RAKES: All right. Thank you.

THE COURT: At this time, however, the Court instructs the Jury that what this Witness may have said in a pre-Trial Discovery Deposition is not evidence in this Trial.

It is only offered for purposes of impeachment.

2 What this Witness testified today is the only  
3 evidence before you. What she testified at some  
4 other Hearing is admissible only for the purposes  
5 of impeachment.

6  
7 BY MR. RAKES:

8 Q What time of day did you have your fall?

9 A As far as I know, I believe it was around  
10 lunchtime, to me.

11 Q It was actually in the morning; wasn't it?  
12 It was just close to noontime; wasn't it?

13 A I thought it was around lunchtime.

14 Q You did not have any bones that were actually  
15 protruding through the skin; did you?

16 A Well, I seen the bone, but I didn't see it  
17 come through the skin.

18 Q No, ma'am. I mean you did not have any  
19 bone that came through the skin?

20 A Looked like to me my foot was like a  
21 chicken wing; like that.

22 Q What I am getting at, there was no bone  
23 through the skin?

24 A I didn't see it.

25 Q Bleeding and all of that?

Is that a fair statement?"

A "In essence it is. I think there's a likelihood we can greatly lessen the amount of her pain. I have reservations about her ever being pain free. All I'd like to do is lessen, you know, decrease her pain to a tolerable level so she can function."

Q "At least to the level with pain medication she would be relatively comfortable?"

A "That's correct."

Q "And what would that procedure involve? Would it require hospitalization?"

A "Hospitalization."

Q "How long?"

A "Probably three or four days."

Q "All right. And after that you would hope that whatever pain level she might have would be within tolerable means that could be adequately treated through medication?"

A "Yes."

MR. RAKES: "Thank you."

THE COURT: That concludes the Deposition.

MR. WILSON: If Your Honor please, that is our Case.

(Plaintiff rests.)

yourself for the Record by name?

MR. RADFORD: Francis Radford.

MR. TURNER: Ralph Turner.

MR. JOHNSON: Harry Johnson.

THE COURT: Will the three of you then hold up your right hands and be recognized to come back tomorrow at 9:30?

(Thereupon, the Witnesses were sworn and recognized to return to Court at 9:30 a.m., September 29, 1982.)

THE COURT: That means the Summons that you had to appear today is still binding on you. We are not going to get to you today and you are excused and you may leave now if you so desire. You do not have to. You may wait outside, but I expect you have had enough of that for today.

This Motion would normally be in Chambers and we are in Closed Session and, in case you don't know, Mr. Olinger is an Attorney from Blacksburg. So, we don't close it to other Attorneys.

All right, Mr. Hutton.

MR. HUTTON: If it please the Court, at this time, the Defendant Chamber of Commerce would move



1  
2 to strike the evidence of the Plaintiff and enter  
3 judgment for both the Defendants on the basis that  
4 the Plaintiffs have failed in their burden of proof  
5 of persuasion.

6 (Mr. Hutton, Counsel for Defendant  
7 Patrick County - Stuart Chamber of Commerce,  
8 Incorporated, argued his Motion to the Court.)  
9

10 THE COURT: Mr. Rakes?

11 MR. RAKES: May it please the Court,  
12 Counsel for the Defendant Appalachian Power Company  
13 which occupies the status of Lessor or Landlord  
14 or owner in this case would respectfully move that  
15 the Court strike the evidence of the Plaintiff and  
16 enter Summary Judgment in favor of Appalachian on  
17 the Plaintiff's Claim against it on the grounds  
18 that the Law of Virginia, as set forth in  
19 Oliver against Cashin, 192 Virginia 540, Southeast  
20 2nd 571, provides that upon the surrender of the  
21 premises by the Lessor to the Lessee that absent  
22 any warranty that there are no defects on the premises  
23 and any evidence that there are defects known to the  
24 Lessor upon the surrender of the property to the  
25 Lessee that the Lessor has no further duty and, in

1  
2 this case, there has certainly been not a scintilla  
3 of evidence that the defect was known to the Lessor.

4 (Mr. Rakes, Counsel for Defendant Appalachian  
5 Power Company, argued his Motion to the Court.)  
6

7 THE COURT: Mr. Carter?

8 (Mr. Carter, opposing Counsel, argued the  
9 Motions to the Court.)  
10

11 THE COURT: How do you respond to Mr. Hutton's  
12 observation that the testimony of the Plaintiff  
13 herself, and I always understood that the Plaintiff  
14 can rise no higher than her own evidence, when she  
15 said clearly that it was not visible to reasonable  
16 inspection?

17 (Mr. Carter, opposing Counsel, further argued  
18 the Motions to the Court.)  
19

20 THE COURT: In any event, I think this is  
21 a Jury Case, Jury question. I think that the  
22 concern is not limited to whether the Defendant or  
23 Defendants knew, but whether or not in the exercise  
24 of reasonable, ordinary care they should have done.

25 Consequently, your Motions are overruled.

1  
2 MR. RAKES: Counsel for Appalachian Power  
3 Company respectfully excepts.

4 MR. HUTTON: Counsel for Chamber of Commerce  
5 respectfully excepts.

6 THE COURT: Let the Record clearly and  
7 eloquently show the Ruling of the Court has been  
8 excepted to.

9 Anything further?

10 MR. RAKES: If Your Honor please, I apologize  
11 for my earlier remarks, but I would like to also  
12 include in the Grounds for the Motion the fact that  
13 the Plaintiff is guilty of the assumption of risk  
14 as a matter of Law.

15 She testified that she saw how rough the  
16 ground was when she went up to the top of the steps,  
17 and yet she continued to go on it and she testified  
18 that she could not see what was underneath the  
19 Kudzu and vines and so forth obscuring the hole,  
20 and she knew before she took the first step onto  
21 this rough area that she has testified in detail  
22 about that you could not see underneath the vines  
23 and the Kudzu, and I think she assumes the risk of  
24 a latent defect.

25 THE COURT: You may well have a Case for

1  
2 contributory negligence. It would be your burden,  
3 of course, to show, but I don't think this is an  
4 assumption of risk case.

5 I think Mr. Carter's objection and your  
6 objection in the Opening Statements when you referred  
7 to the assumption of risk nearly triggered something  
8 from the Court that this is not an assumption of  
9 risk case.

10 Though, in my judgment, contributory  
11 negligence, once again, is a Jury question.

12 MR. RAKES: Is the Court prepared to rule on  
13 the Motion with respect to the Cross Claim at this  
14 point?

15 THE COURT: Isn't that something that will  
16 come after a Jury verdict?

17 MR. RAKES: Judge, I don't know.

18 THE COURT: All right, Mr. Hutton.

19 MR. HUTTON: Your Honor, I would think - -

20 THE COURT: This is my reaction without  
21 hearing evidence, and Mr. Hutton's argument, I  
22 think that is a pretty safe hold harmless agreement.  
23 It might prove to be reliable. The Jury  
24 might find for the Defendant.

25 Until the amount is fixed, this verdict of

1  
2 THE COURT: You all see if you can stipulate  
3 the evidence.

4 The Court will be in recess.

5 (Thereupon, a recess was taken. Following  
6 the recess, the parties returned to the open Court-  
7 room and the following proceedings were had in the  
8 presence of the Court and the Jury.)  
9

10 THE COURT: The Plaintiff having rested, now  
11 the Defendant, Chamber of Commerce, may proceed,  
12 Mr. Hutton.

13 MR. HUTTON: Your Honor, the Chamber of  
14 Commerce rests its case; it does not desire to put  
15 on any evidence.

16 THE COURT: Appalachian Power Company.

17 MR. RAKES: If Your Honor please, Appalachian  
18 would like to formally introduce Appalachian Exhibit  
19 Number One, which has been stipulated and marked as  
20 its Exhibit.

21 THE COURT: It will be admitted into evidence  
22 as Defendant's APCO Exhibit Number One.

23 (The document previously  
24 identified as Defendant's APCO Exhibit Number  
25 One was received into evidence.)

1  
2 MR. RAKES: With that, the Defendant,  
3 Appalachian Power Company rests its case.

4 THE COURT: Members of the Jury, we will now  
5 with this quick conclusion of the evidence, retire  
6 and the Court will get with the Attorneys to work  
7 on instructions.

8 It is hard to anticipate how long this will  
9 be, but I would guess it would be at least an hour.

10 Accordingly, it would be my thought just to  
11 excuse you until 11:15. I don't see any reason to  
12 keep you locked up in the room.

13 You may stay there if you wish, but what I  
14 am suggesting, unless there is any objection from  
15 Counsel, is that I just excuse the Jury until 11:15.

16 So if you have any shopping to do downtown,  
17 or anything else, you might accomplish that and come  
18 back at 11:15, or you may stay.

19 There is a coffee shop downstairs or you may  
20 stay in the Juryroom, if you wish, but the Court is  
21 going to excuse you until 11:15, and hopefully we  
22 will be substantially close to being ready by then.

23 You are instructed once again not to allow  
24 anybody to talk to you about the case nor put your  
25 self in such a position that you might overhear any

1  
2 give anybody the opportunity to object.

3 MR. RAKES: If Your Honor please, Counsel  
4 for the Defendants do have some motions to make at  
5 this time.

6 THE COURT: You may make them.

7 MR. HUTTON: If it please the Court, Counsel  
8 for the Chamber of Commerce respectfully moves at  
9 the end of all the evidence to strike the evidence  
10 and enter a summary judgment for the Defendant, the  
11 Chamber of Commerce.

12 (Mr. Hutton argued the motion.)  
13

14 MR. RAKES: May it please the Court, Counsel  
15 for the Defendant, Appalachian Power Company, now  
16 that all the evidence is in and both sides have  
17 rested, would respectfully renew its motion to  
18 strike the Plaintiff's evidence as to Appalachian  
19 and to enter a summary judgment in Appalachian's  
20 favor.

21 (Opposing Counsel argued the motion.)  
22

23 THE COURT: Anything further, Mr. Hutton?

24 MR. HUTTON: Nothing further, Your Honor.

25 THE COURT: Mr. Rakes?

1  
2 MR. FAKES: No, Your Honor.

3 THE COURT: I think we are in the same  
4 posture in principle, philosophically, as we were  
5 yesterday and there has been no change in the  
6 evidence. The Court is still of the opinion that  
7 this is now a Jury case.

8 I think that the issue, of course, has been  
9 eliminated as to whether either of the Defendants  
10 knew; I don't think there is any evidence to  
11 establish that they knew there was the hole.

12 The issue is whether they should have known,  
13 and I think that the Plaintiff was an invitee to  
14 this festival and craft show, and the fact that  
15 the hole ultimately turned out to be of such a  
16 dimension, and apparently it was, justifies inference  
17 from those facts from which a Jury could infer  
18 negligence.

19 The Plaintiff ultimately had the burden of  
20 establishing its case by a preponderance of the  
21 evidence.

22 As far as the burden of going forward, I  
23 think that is a risk that you both are toying with,  
24 at least the Defendant is, you are relying, I presume,  
25 on the fact that the Plaintiff has some burden of



going forward.

They certainly have the ultimate burden of persuasion, but with the inferences that could reasonably be inferred from the facts as established, whether or not an inspection was made or not made, whether or not whatever inspection might have been made is reasonable or not reasonable, is a void which we hope the Jury will be able to solve fairly, but your motions are overruled.

Exceptions are duly noted and we now will try to do the best we can within our limited quarters.

(Thereupon, a recess was taken. Following the recess, the parties returned to the Courtroom and the proceedings were had in the presence of the Court and the Jury.)

THE COURT: Ladies and gentlemen, we have been working right hard on getting 19 instructions, and we are about ready to present them to you; consequently, I thought as far as you are concerned, we would excuse you for lunch.

We will stay another 15 minutes and wrap up the instructions, so when you come back after lunch, we will be ready to go with the instructions and the

1  
2 MR. HUTTON: Yes, sir, Your Honor, the  
3 Defendant, Chamber of Commerce, by Counsel, respect-  
4 fully objects to Instruction Number Five in its  
5 present form.

6 I think Paragraph Number One is a correct  
7 statement of the law; Paragraph Two is a correct  
8 statement of the law, but it goes so far as to  
9 talk about unsafe condition which is open and  
10 obvious.

11 I don't believe there has been any evidence  
12 in this case at all about unsafe, open and obvious.

13 I think, as a converse, the Jury could believe  
14 that since it wasn't open and obvious that the  
15 Chamber of Commerce or the other Defendant did not  
16 use ordinary care.

17 Since there is no evidence of it, I don't  
18 think that part of open and obvious of Paragraph  
19 Number Two should be used.

20 THE COURT: Defendant, Appalachian? It doesn't  
21 concern you too much.

22 MR. RAKES: We will join with Defendant,  
23 Chamber, on those same objections.

24 THE COURT: Instruction Number Six is addressed  
25 to Appalachian's responsibilities and it is based in

large part on the Restatement of Tort, Second Edition,  
Section 359.

Any objection from the Plaintiff?

MR. WHITT: No, Your Honor.

THE COURT: Defendant, Chamber of Commerce?

MR. HUTTON: No objection, Your Honor.

THE COURT: Defendant, Appalachian?

MR. RAKES: Yes; if Your Honor please, Counsel  
for Appalachian will respectfully object to the giving  
of Instruction Number Six on the grounds that this is  
not the Law of Virginia with respect to the lease of  
property by a landowner to a tenant or leasee.

The Law of Virginia in the Lease of Land to  
a tenant or leasee is that the invitees of the tenant  
or leasee stand in the same shoes of the tenant and/or  
leasee; that the law is expressed in the case of  
Oliver against Cashin, the citation of which has been  
previously given to the Court.

THE COURT: 192 Va. 540, 65 S.E. 2d 571 (1951).

MR. RAKES: Yes, sir; thank you.

The duty of Appalachian in this instance would  
have been the duties of any other owner of the premises,  
and the fact that it is a public utility has nothing  
whatever to do with the standard of care that it had;

1  
2 that it had a duty to notify or to tell the lease<sup>s</sup>  
3 about any known defects.

4 The evidence from the lease agreement clearly  
5 shows that it did not warrant that the land was free  
6 of defects at the time.

7 This particular instruction talks about if  
8 Appalachian knew that the condition of the land  
9 involved an unreasonable risk of persons attending  
10 the festival.

11 Certainly there is no evidence to support this  
12 in this case, nor is there any evidence to support,  
13 by the exercise of reasonable care should have known.

14 First, we don't think this is the Law of  
15 Virginia as it applies to the facts of the case, but  
16 even if it were, there is certainly no evidence in  
17 the record to show that reasonable care or any type  
18 of reasonable inspection could or would have discovered  
19 the latent defect which existed and which caused the  
20 Plaintiff's injury.

21 So for those reasons we would respectfully  
22 object to the giving of this instruction.

23 THE COURT: Very well; Instruction Number  
24 Seven is your concurring negligence instruction.

25 Is there any objection from the Plaintiff?

1  
2 motions before we recess until the Jury gives its  
3 verdict, from the Plaintiff?

4 MR. CARTER: Not as far as the Plaintiff,  
5 Your Honor.

6 THE COURT: Mr. Hutton?

7 MR. HUTTON: Nothing further, Your Honor.

8 THE COURT: Mr. Rakes?

9 MR. RAKES: No, Your Honor.

10 THE COURT: We will stand in recess until we  
11 hear from the Jury.

12  
13 (At 4:42 P.M. the Jury returned to the Court-  
14 room whereupon the following took place before the  
15 Court and Jury.)

16  
17 THE COURT: Have the Jury come in, please.

18 THE CLERK: Members of the Jury, have you  
19 reached a verdict?

20 MR. SMITH: We have.

21 THE CLERK: We, the Jury, on the issues joined,  
22 find in favor of the Plaintiff, Earline Virginia  
23 Saunders, against both Defendants, Patrick County -  
24 Stuart Chamber of Commerce and Appalachian Power  
25 Company, and assess her damages at \$125,000.

Earl W. Smith, Foreman.

Members of the Jury, is this your verdict and so say you one and all?

THE COURT: Do you wish to poll the Jury, Mr. Wilson?

MR. WILSON: No, sir.

THE COURT: Mr. Hutton?

MR. HUTTON: Please, sir.

(Whereupon, the Jury was polled.)

THE COURT: Members of the Jury, we thank you on behalf of the community for hearing and resolving the issues in this case.

(Thereupon, the Jury was excused from the Courtroom and the following took place before the Court.)

THE COURT: Any motions by the Plaintiff?

MR. WILSON: No, sir.

THE COURT: Mr. Hutton?

MR. HUTTON: Yes, sir; if it please the Court, Your Honor, on behalf of the Chamber of Commerce, I move the Court to set aside the Jury's verdict as

1  
2 being contrary to the law and the evidence and  
3 further for other exceptions to the trial, including  
4 the failure of the Court to strike the Plaintiff's  
5 evidence when the Plaintiff rested, failure to strike  
6 the Plaintiff's evidence and enter a judgment for the  
7 Defendant at the end of all the evidence, for the  
8 errors cited and exceptions made in refusing certain  
9 instructions offered and in granting such instructions  
10 objected to.

11 THE COURT: Mr. Rakes?

12 MR. RAKES: May it please the Court, on behalf  
13 of Appalachian Power Company, we respectfully move  
14 the Court to set aside the Jury verdict as contrary  
15 to law and the evidence, without evidence to support  
16 it, and in that regard, if Your Honor please, we would  
17 like the opportunity to file a written motion after  
18 the transcript of the Record has been prepared and  
19 a memorandum of law in support of the motion to set  
20 aside the verdict.

21 If the Court would permit that and fix some  
22 time limits after the transcript, I assume we could  
23 start work on it immediately and get it filed right  
24 away.

25 Then if you would give us some reasonable



LEASE

THIS LEASE AGREEMENT entered into on this the 4th day of October, 1978, by and between Appalachian Power Company, hereinafter referred to as "LANDLORD", party of the first part, and The Patrick County - Stuart Chamber of Commerce, hereinafter referred to as "TENANT", party of the second part;

WITNESSETH:

That for and in consideration of the sum of ONE DOLLAR, receipt of which is hereby acknowledged, Landlord leases to Tenant and Tenant rents from Landlord that certain lot or parcel of land, formerly W. C. Akers and Lady L. Clark residences, on the North side of Blue Ridge Street in the Town of Stuart, Mayo River Magisterial District of Patrick County, Virginia, under the express terms and conditions following:

1. The term of this lease shall extend from 12:01 a. m. October 5, 1978 to midnight October 8, 1978.
2. Tenant agrees to use said parcel of land for the express purpose, only, of exhibiting arts and crafts during the 1978 Patrick County Harvest Festival.
3. As part of the consideration aforesaid, Tenant agrees to save harmless the Landlord from any and all claims of whatever nature arising out of the use of said parcel for the purposes aforesaid, and will indemnify the Landlord from



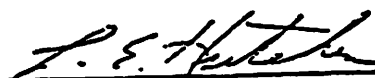
any loss, of whatever nature, that may occur through said use  
by the Tenant.

WITNESS the following signatures and seals:

APPALACHIAN POWER COMPANY

By  (SEAL)  
Manager, Patrick County Office

PATRICK COUNTY - STUART CHAMBER OF COMMERCE

By  (SEAL)  
President

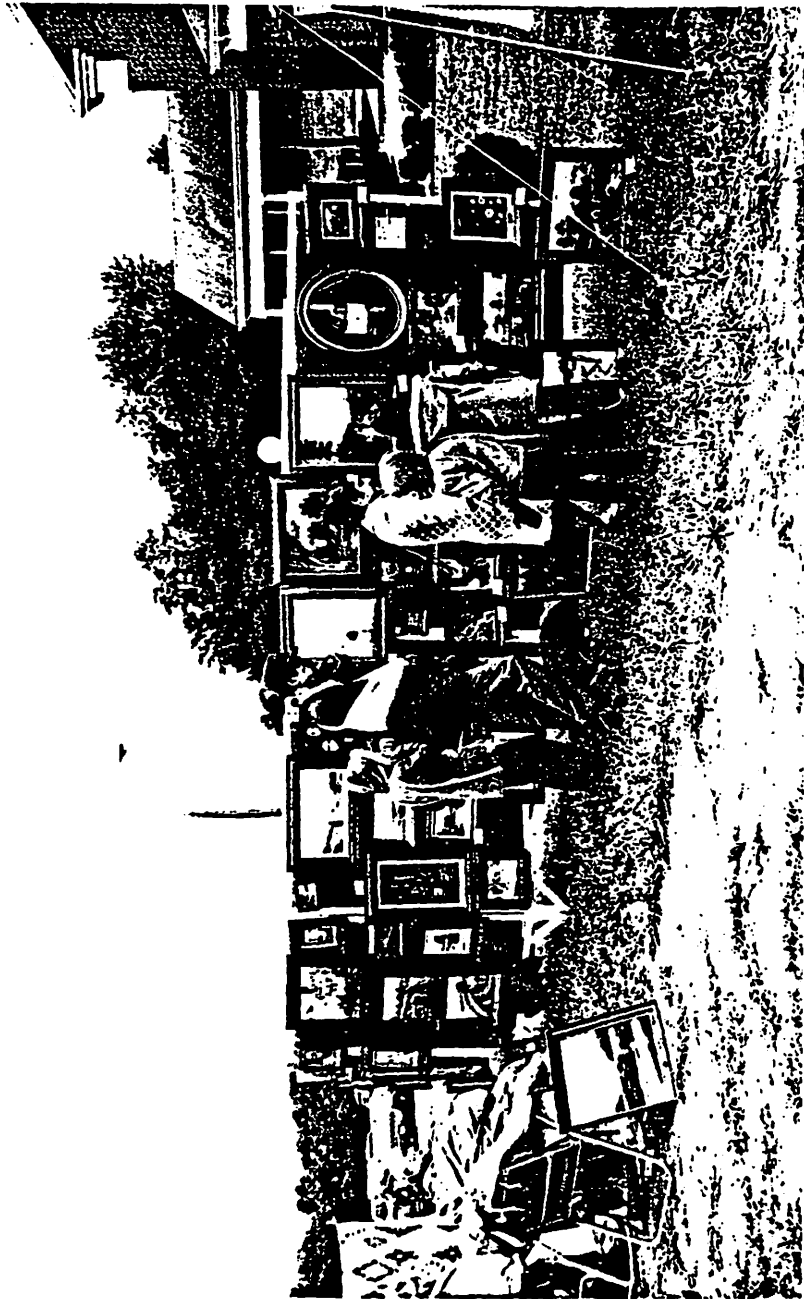
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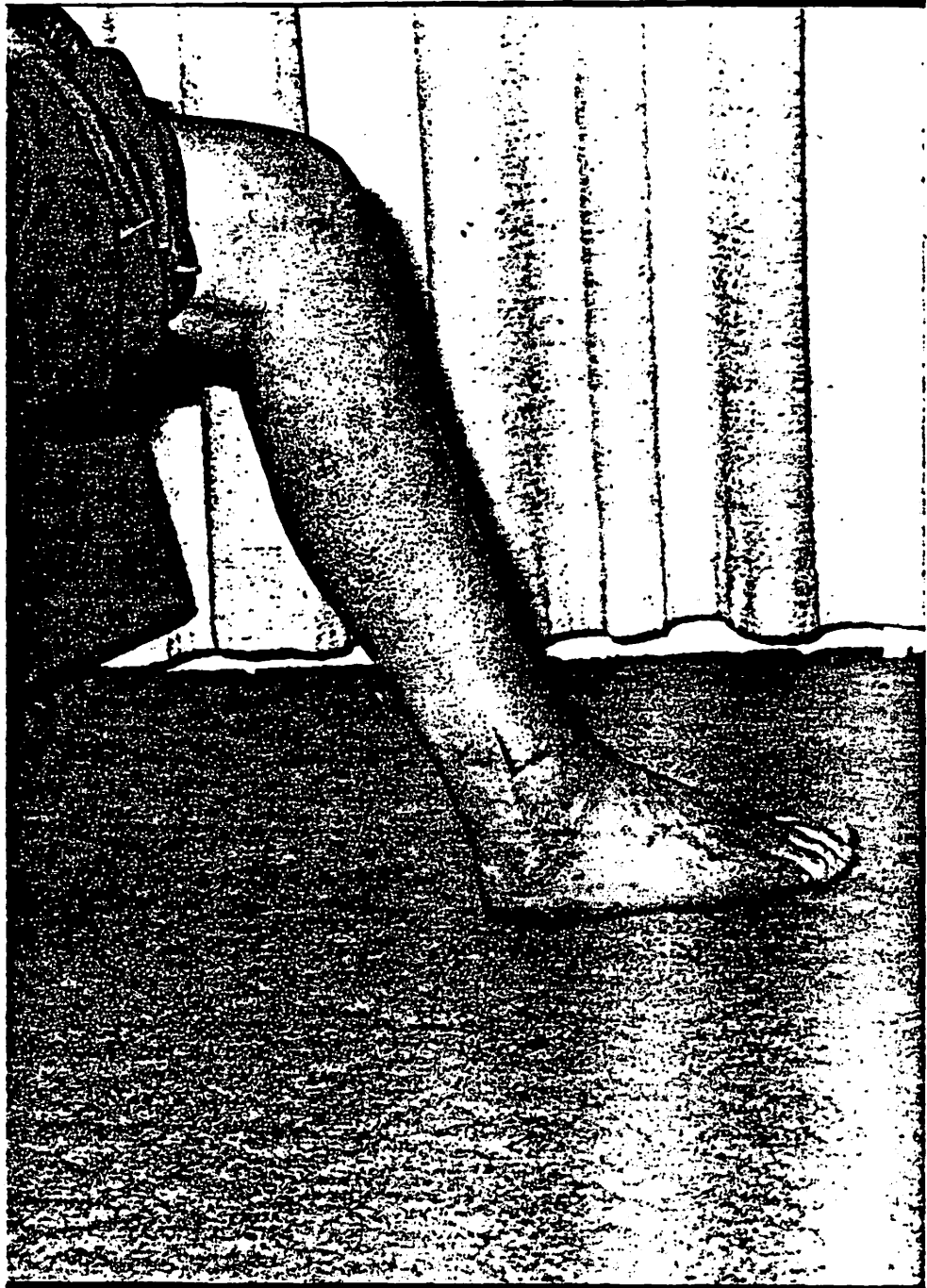


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#5

#6





