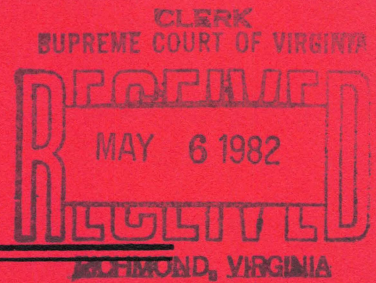


227 VA. 14



IN THE

WASHINGTON & LEE
LAW LIBRARY

Supreme Court of Virginia

AT RICHMOND

MAY 23 1984

RECORD NO. 811433

WANDA SPICER PAGE,

Appellant

v.

GILBERT R. ARNOLD and
JENNIFER ARNOLD RACEY,

Appellees

APPENDIX

James H. Laughlin
2001 Jefferson Davis Hwy
Suite 501
Arlington, Virginia 22202

Thomas V. Monahan
HALL, MONAHAN, ENGLE, MAHAN
& MITCHELL
Post Office Box 848
Winchester, Virginia 22601

Counsel for Appellant

TABLE OF CONTENTS

APPENDIX
PAGES

1. MOTION FOR JUDGMENT FILED MARCH 6, 1980 -----	1
2. ORDER ENTERED MAY 27, 1981 -----	6
3. ASSIGNMENTS OF ERROR -----	10
4. EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE ROBERT K. WOLTZ, JUDGE, ON MARCH 17 and 18, 1981	
a) Testimony of G. W. Hutson -----	11
b) Testimony of Gilbert R. Arnold -----	39
c) Testimony of Jennifer Arnold Racey -----	77
d) Testimony of Andrew Jackson -----	108
e) Testimony of Wanda Spicer Page -----	156
f) Argument -----	157

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
IN CIRCUIT COURT
CLERK'S OFFICE
MAR 6 1980

CLERK, FAIRFAX COUNTY, VA.
WRIT TAX PAID \$25
DEPOSIT 30

WANDA SPICER PAGE

Plaintiff

v.

AT LAW NO. _____

GILBERT R. ARNOLD
THELMA I. ARNOLD
Willow Hill Farms
Route 6, Box 219
Winchester, Virginia 22601

JENNIFER L. ARNOLD
Route 6, Box 219
Winchester, Virginia 22601

ANDREW JACKSON PAGE
4050 Doveville Lane
Fairfax, Virginia 22030

Defendants

MOTION FOR JUDGMENT

Plaintiff moves the Court for judgment against the Defendants jointly and severally in the sum of One Million Five Hundred Thousand Dollars (\$1,500,000.00) for the following wrongs and injuries:

1. Defendants Gilbert R. Arnold and Thelma I. Arnold, his wife, and Jennifer L. Arnold, their daughter, on the 8th day of April, 1978, were in possession of a certain parcel of land, lying and being situate adjacent to Route 50 east of Winchester, Frederick County, Virginia.

2. Situate in the eastern portion of such property was a fenced area which was used to house and restrain certain horses.

3. During or before the evening hours of April 8, 1978, one (1) certain brown horse was placed in said fenced area, for restraining purposes, under the care, custody and control of said Defendants Gilbert R. Arnold, Thelma J. Arnold and Jennifer Arnold.

4. Said brown horse was owned by said Gilbert R. Arnold, Thelma I. Arnold and Jennifer L. Arnold (said Jennifer L. Arnold being the daughter of said Gilbert R. Arnold and Thelma I. Arnold).

5. It was the duty of said three defendants to exercise reasonable care in keeping such brown horse under control and out of the public streets and off the public highways of Frederick County, Virginia.

6. In particular, it was the duty of the said three defendants to reasonably maintain such fenced area described in Paragraph 2 above so as to keep such brown horse confined therein.

7. The defendants, Gilbert R. Arnold, Thelma I. Arnold and Jennifer L. Arnold, negligently allowed said horse to leave such premises during or immediately before the evening hours of April 8, 1978.

8. At approximately 8:00 p.m. on the evening of April 8, 1978, such brown horse, after leaving such fenced area did wander into the eastbound lane of U.S. Route 50 in Frederick County, Virginia

9. A motor vehicle owned and operated by defendant Andrew Jackson Page, husband of aforesaid Wanda Spicer Page, and in which plaintiff Wanda Spicer Page was riding as a passenger, traveling through Virginia and heading East on said U.S. Route 50 did collide with such brown horse.

10. Defendants, and each of them, by their respective acts of negligence proximately caused said accident.

11. As a direct and proximate result of such collision Wanda Spicer Page did suffer severe and permanent personal injury (one of the controlling nerves of right eye damaged, cerebral contusion of right frontal temple area, right jaw cracked, one finger ligament damaged, right thumb dislocated, one tooth broken, bleeding about the mouth); incurred and will incur substantial doctors, hospital and other medical expenses; has suffered and will suffer substantial loss of income; has had her earning capacity destroyed, suffered embarrassment, humiliation and great pain and suffering and loss of consortium.

WHEREFORE, Plaintiff prays that judgment be entered against the defendants jointly and severally, in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00), plus interest thereon from April 8, 1978, until paid, plus costs.

WANDA SPICER PAGE

BY: 

Counsel

OFFICIAL COURT RECEIPT

NO S- 500846

Received of _____

Address _____

Account of 375 Franklin

I hereby certify this to be the Official Receipt Form authorized by law. Receipt in any other form shall not be valid against the Commonwealth of Virginia.



Codes	AMOUNT
037 Tax on Wills and Adms.	
038 Tax on Deeds of Conv.	
039 Tax on Deeds	
048 Tax on Chancery Cause	
049 Tax on Actions at Law	
110 State Fine	
112 Trial Fee-St.	
113 Recovered Costs or Bail Fee	
118 Summons Fee	
119 Comm. Atty. Fee-St.	
120 Ct. Appt. Atty.-St.	
125 Weighing Fee	
126 Liq. Damages	
127 D.M.V. Fee	
130 A.S.A.P. Fee	
131 Driver Ed. Fee	
132 C.I.C.F.	
133 Blood Test Fee	
201 Local Fine	
202 Recovered Costs	
203 Comm. Atty. Fee-Loc.	
205 Deliq. Land Taxes	
206 Sheriff's Fees	
212 Transfer Fees	
213 Tax on Deeds-Cnty.	
218 Trial Fee-City	
219 Library Tax	
250 Spec. Magistrate Fee	
301 Deeds	
302 Wills and Adms.	
303 Chancery Causes	
304 Actions at law	
305 Filing Fees	
309 Notary Commission	
315 Miscellaneous	
317 Financing Statements	
501 Towing	
502 Bonds	
504 Refund	
999 Miscellaneous	
	7005 CHCK
	500846 MDSE
	46556 MDSE
29	25.00 /BOX
045	NTXL 25.00
304	NTXL 30.00
509	NTXL 3.75
206	NTXL 1.25
	TAX 0.00
1315	596 TOT \$60.00
	0001 0081 05-06-80 CHCK
	FAIRFAX COUNTY
	CIRCUIT COURT

Collecting Officer

Title

FORM DC-11

V I R G I N I A :

IN THE CIRCUIT COURT OF FREDERICK COUNTY

WANDA SPICER PAGE,

Plaintiff,

v.

AT LAW NO. 3834

GILBERT R. ARNOLD, et al,

Defendants.

O R D E R

This action came on to be tried on the 17th and 18th days of March, 1981, pursuant to an Order fixing said case for trial.

Pursuant to subpoena duly issued, the following persons appear as a panel of jurors: Helen M. Stewart, Constance S. Heironimus, James R. Cornwell, Alice Welch, Carolyn V. Lofton, Jerry L. Kelican, Larry O. Phillips, Dorothy I. Mills, Susan S. Phillips, David W. Sargent, Robert K. Price, Wilmer R. Jenkins, and Bruce Peterson. Said jurors were duly examined upon their voir dire and found free of exception.

After counsel for each party had taken his preemptory strikes, the following persons were duly sworn and impaneled as jurors to hear this case: Constance S. Heironimus, James R. Cornwell, Alice Welch, Jerry L. Kelican, Larry O. Phillips, Dorothy I. Mills, and Susan S. Phillips.

Counsel for each party made opening statements, after which Plaintiff introduced evidence in her behalf. After Plaintiff rested, counsel for Thelma I. Arnold, Gilbert R. Arnold, and Jennifer Arnold Racey moved to strike the Plaintiff's evi-

dence as to these Defendants on the issue of liability. Counsel for Plaintiff advised the Court that they had no objection to the motion to strike the evidence against Thelma I. Arnold. After hearing argument of counsel pertaining to the issue of liability as it concerned Gilbert R. Arnold and Jennifer Arnold Racey, the Court sustained the motion to strike the evidence as to those Defendants, for the reasons orally stated by the Court and appearing in the record.

Plaintiff duly objected and excepted to the Court's ruling.

Counsel for Andrew Jackson Page moved to strike the Plaintiff's evidence on the issue of liability of Andrew Jackson Page. After hearing argument of counsel, the Court sustained the motion of the Defendant on the issue of speed, and overruled said motion on the issues of lookout and control. Plaintiff's counsel objected and excepted to the Court's ruling on the issue of speed, and Defendant's counsel objected and excepted to the Court's ruling on the issues of lookout and control.

WHEREUPON, the Court instructed the jury that the Court had sustained the motion of Gilbert R. Arnold, Thelma I. Arnold, and Jennifer Arnold Racey to strike the Plaintiff's evidence as to said Defendants, and that said Defendants had been dismissed as parties Defendant to this action, and that the case would be proceeded against the Defendant Andrew Jackson Page.

Defendant Andrew Jackson Page did not introduce evidence on his behalf. After receiving instructions from the Court, counsel for each party argued the case, and the jury

retired to consider its verdict. The jury returned to the courtroom and rendered the following verdict:

We, the jury, find for the Defendant,
Andrew Jackson Page.

Jerry L. Kelican, Foreman.

After receiving the verdict, the jury was discharged from further service.

Counsel for Plaintiff moved the Court to set aside the verdict of the jury as being contrary to the law and evidence. The Court, upon the argument, denied the said motion to which action of the Court the Plaintiff objected and excepted.

It is, therefore, ADJUDGED and ORDERED that the Plaintiff have and recover nothing from the Defendants in this cause and judgment is herewith entered in favor of each of the said Defendants.


At the request of the Plaintiff, there being no objection by counsel for the Defendants, it is further ADJUDGED and ORDERED, in accordance with the Rules of the Supreme Court of Virginia, that a transcript of the testimony taken in this case, if filed as a part of the record in this cause, shall be and become a part of the record without further authentication.

Enter this 27th day of May, 1981.

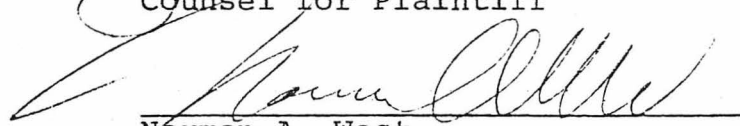


Judge

SEEN:

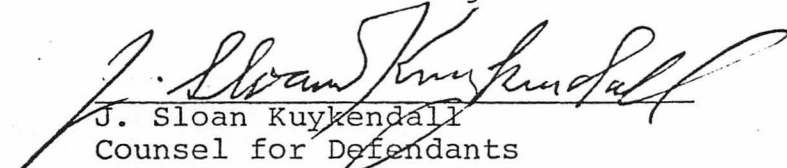


Thomas V. Monahan
Counsel for Plaintiff



Norman A. West
Counsel for Defendant

Andrew Jackson Page



J. Sloan Kuykendall
Counsel for Defendants
Gilbert R. Arnold, Thelma I.
Arnold and Jennifer Arnold
Racey

ASSIGNMENTS OF ERROR

Petitioner, Wanda Spicer Page, assigns the following errors:

1. The trial court erred in holding that the conduct of the Defendants Gilbert R. Arnold and Jennifer Arnold Racey, hereinafter referred to as the Defendants, was not negligent since they were under no duty to foresee that the horse might reasonably be expected to escape from the field under the existing circumstances.

2. The existing circumstances were such that it was a jury question whether the horse escaped the field by jumping over the fence and a jury question whether the fence at certain places was permitted to be of such insufficient height as to constitute negligence when those fences were used to restrain horses. It was error not to permit the jury to decide these issues.

March 17, 1931

EXCERPT OF PROCEEDINGS

(WHEREUPON, the witnesses were excluded from the courtroom and cautioned.)

TROOPER G. W. HUTSON, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

EXAMINATION

BY MR. MONAHAN:

Q. Would you state your name, please, and where you live?

A. Trooper G. W. Hutson, Frederick County, Virginia.

Q. You are a member of the Virginia State Police?

A. Yes, sir.

Q. How long have you been a member of the Virginia State Police?

A. Five years.

Q. How long have you been stationed in the Winchester area?

A. Five years.

Q. I take it that your duties involve the normal duties of a trooper, that is a cruiser, investigating accidents and apprehending law violators?

A. Yes, sir.

Q. Is that what you have done for the five years?

A. Yes, sir.

Q. On the occasion of April 8, 1973, did you investigate an accident at approximately 8 o'clock in the evening, sir, involving Andrew Jackson Page?

A. Yes, sir.

Q. Would you state to the jury at what time you received notification of the accident or at what time you arrived on the scene, whichever notation you make?

A. I was notified at 7:50 p.m. of the accident, and I arrived at 8:03 p.m.

Q. How did you receive notification?

A. I saw a state police dispatcher in Culpeper; by radio.

Q. So I take it the accident had occurred at some time earlier than 7:50 p.m?

A. 7:45.

Q. Where was the accident about which you were notified?

A. On Route U.S. 50, approximately 275 feet west of the Airport Road, across from Perry Engineering.

Q. That's what I was going to ask you. Where is the Airport Road in relation to the entrance to Perry's?

A. Right across from it.

Q. What was the distance in feet?

A. 275 feet.

Q. Would you just advise the jury as to the weather

conditions and road conditions at that scene when you arrived at 8 o'clock?

A. Traffic control device, the traffic lanes were marked, it was a divided highway. The alignment of the road was a grade straight. The weather was clear, the surface was dry, no road defects. It was darkness, the street or highway was not lighted. It occurred in open country. On driver's actions...

Q. Excuse me. Before we get away from the actual scene itself, you said the grade was...it was a straight road running up a grade?

A. A grade.

Q. Which way did the grade run, sir?

A. Uphill; he was traveling up.

Q. In the direction Mr. Page was traveling it was an ascent?

A. Right.

Q. Can you tell this jury approximately how far to the west there was visibility from the scene of the accident? In other words, how far could you see?

MR. WEST Your Honor, I think the question is improper. I think he can testify as to what the lay of the land was, but in the absence of

his having been in Mr. Page's position, I don't think he can tell us how far he could see.

MR. MONAHAN: Perhaps if I rephrase the question.

Q. From the scene of the accident west what, if any, obstructions to sight were there and for what distance was it free of obstruction?

A. You can see several hundred yards. There's a slight curve as you come up the hill.

Q. But for several hundred yards there is nothing to impede your vision?

A. No, sir.

Q. How many lanes are there, in all, on Route 50 East?

A. Two lanes.

Q. Is that...

A. In the eastbound direction there's two lanes.

Q. Two in the westbound direction?

A. Two in the westbound.

Q. At this particular area is there a median?

A. Yes, sir.

Q. Can you describe that at all? Is it narrow or wide or ordinary?

A. I'd say approximately 12 feet wide.

Q. You said there were no artificial lights at that point.

A. No, sir.

Q. With respect to lighting supplied by buildings, are there any lights of that character in the area which have an appreciable effect on visibility?

A. That night I don't recall exactly. Perry Engineering has lighting.

Q. When you arrived at the scene, what did you observe?

A. I found the 1973 Toyota, two-door. It was operated by Andrew Jackson Page of Fairfax, Virginia.

Q. Where was it sitting at the time that you got there, sir?

A. At the point where you turn to Perry Engineering, at the median strip, there's the paved section to get off of the highway. It was sitting in the median strip.

Q. Was there any other object that you discovered at that time material to your investigation?

A. A horse was lying in the road.

Q. Where in the road was the horse lying?

A. In the left lane. Well, about the center of the highway across the lane.

Q. That was 270 some feet from the entrance to Perry?

MR. WEST: Objection, Your Honor,
leading the witness.

MR. MONAHAN: I'm sorry, I
thought he had testified...

Q. Is that what you said?

A. It was approximately 275 feet.

Q. As you conducted your investigation, did you make any
effort to determine if there were skid marks to the
west of that horse?

MR. WEST: Excuse me, Your
Honor. I'm sorry to object, but I think he's leading
the witness. I think the police officer can give us
the benefit of what he found and what he observed
without Mr. Monahan suggesting what he might have
found.

THE COURT: All right.

MR. MONAHAN: I apologize if
that's leading.

Q. What examination, if any, did you make of the road sur-
face immediately west of the horse?

A. I took photographs and measured the distance from the
intersection of the Airport Road. I found no skid
marks. In talking with Mr. Page I have a statement

that he gave me at that time.

Q. I want to ask you, you stated just now that you found no skid marks. I want to ask you, what area did you examine in an effort to find skid marks?

A. West of the accident.

Q. Were you assisted by any artificial light in your possession at the time that you did that?

A. Yes, sir.

Q. What did you carry?

A. A flashlight.

Q. Did you take photographs on that evening, Trooper?

A. Yes, sir.

Q. Are they available at this time?

A. Yes, sir.

Q. Do they accurately portray what you observed to be the situation on that evening as to what you were attempting to photograph?

A. Yes, sir.

MR. MONAHAN: Let's get these marked so you have a point of reference as you talk to the jury.

(WHEREUPON, the photographs referred to were marked Plaintiff's Exhibits #1 through #15 for identification.)

Q. Trooper, I'm going to ask you to step over here, please. I'm going to hand you what have been marked Exhibits #1 through #15 for the Plaintiff for the purpose of identification.

MR. MONAHAN: At this time, Your Honor, I'll move their admission into evidence so that the Trooper may testify with respect to them.

THE COURT: Any objection?

MR. WEST: No objection, Your Honor.

THE COURT: So admitted.

(WHEREUPON, the photographs marked Plaintiff's Exhibits #1 through #15 were received in evidence.)

Q. Would you just take them each in order. First of all, refer to the back and state each number and then tell the jury what it is. I will take the ones you talked about.

A. This is Exhibit #1.

Q. Show that to the jury, if you will.

A. This is a picture of the roof area of the car which was crushed by the horse.

Q. That is a picture of the Toyota?

A. Yes, sir.

Q. Where was the Toyota when you took that photograph?

A. Sitting in the median strip.

Q. All right.

A. Photograph #2 is a picture of the roof area, again, with the hair of the horse.

Q. Was the Toyota at the same place at that time?

A. Same place.

Q. Did you take all the photographs of the Toyota at the same time and place so I don't have to...

A. Yes, sir.

Q. All right.

A. Photograph #3 is the first point of impact. It would be the right side of the car.

Q. What are the black...

A. Horse hair.

MR. MONAHAN: If any juror can't see, just say so.

A. Number 4 is the same photograph. Number 5 is a picture of the horse.

Q. Where was the horse at the time that you took that?

A. Where I found it at the scene of the accident. That's the center line of the highway.

Q. That white mark represents the center line of the

highway; the center line of the two eastbound lanes?

A. Yes, sir.

Q. Can you estimate approximately how far the horse was from the car itself at that time?

A. At this point it was 275 feet. This was the point that I determined...

Q. 275 feet from the Airport Road?

A. From the Airport Road.

Q. How far was the car either from the Airport Road or from the horse? I would like to get the relationship.

A. To the best, I recall probably 25 feet. I had it pulled up into the median.

Q. The car was 25 feet from which?

A. The horse.

Number 6 is a picture of the car, again, with the horse hair. Number 7 is another picture of the horse. Number 8 is the same picture of the horse. Picture #9 is the rear of the Toyota. In the background is Perry Engineering.

Q. For what purpose did you take that picture?

A. The tag number.

Q. Did you determine to whom the tag belonged?

A. Yes, sir, to Mr. Page.

Number 10 is a side view of the car. Number 11 is the front of his car. Number 12 is another picture of the car from the front. Number 13 is a side view. Number 14 is the horse. Number 15 is the car.

MR. MONAHAN: Your Honor, I assume the jury understands that they will be able to take the pictures to the jury room, but also if any juror wants to see any picture at this time, I will be glad to make it available.

Q. With respect to the 275 feet from the Airport Road to a point west of the Airport Road, to what point do I understand you measured?

A. To the point where I found the horse and debris in the highway to establish a point of impact.

MR. KUYKENDALL: Excuse me a minute. Was that 275 feet west of the Airport Road or east of it?

A. West, back towards town.

Q. At what point in the Airport Road did you measure from?

A. From the intersection.

Q. From the west boundary or the center of the road?

A. West; west boundary.

Q. Were you able to determine if the horse had been carried

any distance by the car?

A. I don't recall. I wouldn't think so. It wouldn't carry much distance. I really wouldn't recall.

Q. You had no affirmative way of establishing that?

A. No, sir.

Q. You really measured from where you found it to the...

A. Where I found it on the road.

Q. Did you talk to Mr. Page that evening?

A. Yes, sir.

Q. Would you state what he said as to how the accident occurred?

A. 'I was traveling on Route 50 when I saw it.' I questioned him as to what...'the horse just standing there. All I could see was its legs.'

Q. With respect to the phrase, 'just standing there,' to what did that refer?

A. To the horse.

Q. Did he tell you on that evening in what lane the horse was standing when he saw it?

A. I don't have it in his statement.

Q. Do you recall him indicating that to you now?

A. I believe he said it was standing in the center, towards the center of the highway.

Q. I know it's not in the statement, was anything said about the direction in which the horse was facing to you?

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

Q. Did you have occasion, Trooper Hutson, to look at any of the fencing on the adjacent property to the south?

A. I checked the fence on the field that evening. I found no breaks in the fence.

Q. Did you return to the fence in the daylight?

A. The next morning. I had come back to work the next morning and I...

Q. Was it daylight then?

A. Yes, sir.

Q. In the course of your two examinations, what part of the fence did you examine?

A. The fence along Airport Road and the fence facing Route 50.

Q. Two sides?

A. Two sides.

Q. Could you tell me how high the fence was?

A. Approximately waist.

Q. Excuse me, your waist?

A. My waist.

Q. Would you stand up and say how tall you are, sir?

A. Six foot one.

Q. Your waist is approximately the middle of your body?

A. Yes, sir.

Q. Did you have any conversation with any of the defendants as to whether it was, in fact...excuse me, I don't want to lead you. Did you have any conversations with any of the defendants in which the identity or ownership of the horse was discussed?

A. In the course of the investigation that night, there was a real estate sign in the field. I contacted...

Q. Trooper, I don't want to get an objection about third parties telling you things so just...as a result of your investigation, did you talk to the defendants and determine whose horse it was?

A. I talked with Mr. Arnold the next day. I went to his house and asked him if he had livestock in the field across from Perry Engineering. He stated he did. The horse was still in the median strip because I couldn't find the owner that night. He went down with me and he identified the horse as being his daughter's horse.

Q. Was there a discussion as to how the horse could have gotten out?

A. To the best I can recall, he stated that it was his daughter's horse and that she had been training him. It was a jumper. In determining there were no breaks in the fence that night and that day, I asked him if it could have jumped the fence.

Q. What did he say when you asked that question?

A. He said she had trained him and it was possible.

Q. That it was a jumper?

A. That it was a jumper and she had been training him.

MR. MONAHAN: Thank you very much. I believe that's all I want to ask.

MR. WEST: Just a question or two, Officer, if I might.

EXAMINATION
BY MR. WEST:

Q. You mentioned in response to Mr. Monahan's question that the road was a grade straight. You're saying uphill?

A. Yes, sir.

Q. Isn't there a bend in the road?

A. A slight curve.

Q. There's a slight curve?

A. To the right.

Q. Isn't this curve sufficient that the lights on the vehicle coming up in the left lane, coming uphill, would not shine on anything on the right side of the road on the pavement?

A. Yes, sir, possible.

Q. It is uphill, as you indicated, as opposed to level?

A. Yes, sir, it's uphill.

Q. There is a bend to the right in this area?

A. Slight, yes, sir.

Q. The area where this is located has no overhead lights, does it?

A. No, sir.

Q. You mentioned Perry Engineering, I believe you said, might have a light or did have a light.

A. I know they have lighting, now. I don't recall back then if they did.

Q. Perry Engineering sits 100 or 200 feet back off from this intersection, doesn't it?

A. Yes, sir.

Q. It's also farther away from where the accident occurred than the intersection, also. In other words, it's in the far direction as opposed to the near direction of where the accident occurred?

- A. Yes, sir.
- Q. Could you describe the color of the horse?
- A. Black, dark brown or black.
- Q. Did the horse have any markings on it of any kind, or any reflective device or anything of that nature?
- A. No, sir, not that I recall.
- Q. When you found it, it was in the highway, in the center of the highway?
- A. Yes, sir.
- Q. In the position shown in the photos?
- A. Yes, sir.
- Q. You found hair from the horse in the right front headlight, did you not?
- A. Yes, sir.
- Q. Did you have occasion to ask Mr. Page if he did anything to avoid collision with the horse?
- A. I don't recall.
- Q. Specifically, did he tell you anything he did to avoid collision with the horse? Would you examine your notes, sir?
- A. Swerved to the left.
- Q. Did he also tell you he applied his brakes?
- A. Yes, sir, applied his brakes.

Q. So he told you that he applied his brakes and swerved to the left?

A. Yes, sir.

Q. There are no lights on the right side of the road approaching it in the direction from whence Mr. Page was coming, are there?

A. No, sir.

Q. In other words, this was an open field, unlighted?

A. Yes, sir.

Q. On this particular day you did not go down the road and look up the road to determine, from eye level, how far Mr. Page could see, did you?

A. No, sir.

Q. In other words, you didn't go down and measure the height that you would be in his seat and look up and see what he could see?

A. No, sir.

Q. Did you find anything on the scene that conflicted with what Mr. Page told you?

A. No, sir.

Q. You did find debris on the scene in the left east-bound lane, is that correct?

A. It would be towards the center in the left. There

was debris on it.

Q. It was spread over an area, would that be fair to say?

A. Yes, sir.

Q. Did you find any other animals in that area?

A. No, sir.

Q. Did you ever have occasion to make an investigation and find out from any other source whether this horse was moving or not?

A. No, sir.

Q. Did you ever learn from any other source how long that horse had been in the road?

A. No, sir.

Q. As I understand you told us, you don't know from your recollection or conversation with Mr. Page whether or not it was facing him on an angle or how?

A. No, sir.

Q. Was Mr. Page a bit upset at this time?

A. Yes, sir.

Q. Can you describe his condition?

A. As far as the accident report, he had no physical defects. He had not been drinking. The rescue squad was on the scene with his wife.

Q. Had they gotten there before you had?

A. Yes, sir.

Q. To your knowledge, he hadn't received any injury?

A. No, sir, she was the only one that received injury.

MR. WEST: Excuse me just a second, Officer.

Q. Where did you find the horse with reference to the debris?

A. Laying across the center of the highway.

Q. Specifically, the horse wasn't at the point where the debris was. The horse was farther down the road, was it not?

A. The debris was all over the entire area with the horse there.

Q. Did you find anything that indicated that the horse had hit the car and rolled over the top of it, and rolled backwards?

A. Just from the points of impact of the car, the damage, the way it was sustained. It hit the front and then rolled back.

Q. The primary impact was on the right front side of the car?

A. Yes, sir.

MR. WEST: I have no further

questions. Thank you, Officer.

EXAMINATION

BY MR. KUYKENDALL, III:

Q. Trooper Hutson, did you see anything in your investigation which would indicate where the horse left the field?

A. No, sir.

Q. Were there any imprints which would indicate that the horse jumped the fence? Did you look for any imprints around the fence?

A. No, sir.

MR. MCNAHAN: I'm going to object to that tripart-type question. I don't know which question is being answered. Whether he looked, whether he didn't look, whether he observed something or didn't observe something. There were three questions before an answer was permitted.

MR. KUYKENDALL, III: I'll ask the questions over again.

Q. Did you look to see if there were any imprints around the fence which would indicate that the horse jumped the fence?

A. No, sir.

Q. You did not look in your investigation?

A. No.

Q. Trooper Hutson, do you recall discussing this case with me on March 11th of this year at the troopers' barracks?

A. Yes, sir.

Q. At that time you advised me, I believe, that you took no notes about your conversation with Mr. Arnold.

A. No, sir.

Q. So you are not sure what statements Mr. Arnold made to you, is that correct?

A. Not exactly, no, sir. It's the best that I could recall.

Q. You don't recall if he made the statement to you that his daughter was training this colt to be a jumper?

A. His statement was that his daughter had been training the horse.

Q. But he didn't say that she had been training him to be a jumper?

A. No, I asked him a specific question, if he could have jumped the fence.

Q. He responded...

A. It was possible, that he had been training...

Q. That was the extent of your conversation with Mr. Arnold?

A. Yes.

MR. MONAHAN: Let him answer the question. He was still talking. He responded that it was possible that what?

THE COURT: Raise the objection to the Court or let the witness finish his answer.

A. It was possible that it could have jumped. He didn't state that it did. It was possible. He was concerned about his daughter being upset that day.

MR. KUYKENDALL, III: That's all.

REEXAMINATION
BY MR. MONAHAN:

Q. Trooper, in response to a question of Mr. West, you stated there was nothing to conflict with what Mr. Page told you developed during your investigation. I think that's what you said.

A. Yes, his statement...

Q. May I ask you, sir, how would you...

MR. KUYKENDALL: Let him finish the question. You objected, now I'm...

THE COURT: All right, gentlemen,

you'll object to the Court and not between each other.

MR. MONAHAN: Your Honor, I would point out that the Trooper has responded to the question. Anything more would be unresponsive.

THE COURT: Do you have anything more to say to that question?

A. In response to Mr. West's question, did I find anything conflicting with his statement. His statement was that the horse was just standing there and all I could see was his legs.

Q. You're referring, now, to your written notes?

A. Right.

Q. But Mr. West also asked you whether Mr. Page had applied his brakes.

A. I have that in the notes.

Q. May I ask you, sir, how do you characterize the portion of the statement saying he had applied the brakes with the portion of your investigation which determined that there were no skid marks; how do you characterize that?

MR. WEST: Excuse me, Your Honor, I object. I don't think it's proper for the police officer to characterize testimony.

MR. MONAHAN: If it's possible to ask him is there anything conflicting, I can ask him whether those conflict, Your Honor.

A. In the section of the...

MR. WEST: Excuse me, Your Honor, I request that the Court rule on it. I don't think it's appropriate for Mr. Monahan to request this witness to characterize it.

THE COURT: Objection sustained.

MR. MONAHAN: Mr. West opened the door, Your Honor, in that he asked him, did he find any conflict. That certainly is a characterization and I would now ask him whether those two facts are opposite to each other, that he applied the brakes but there are no skid marks.

THE COURT: I think you can ask him whether he told him the two facts.

MR. MONAHAN: In this instance, one fact conflicts with the investigation.

THE COURT: All right, let the jury draw that conclusion, not the witness express his opinion as to whether...

MR. MONAHAN: He has already

expressed his opinion, Your Honor. I contest his opinion.

THE COURT: But there was no objection to that question and the answer.

MR. MONAHAN: I'm entitled to test his opinion.

MR. WEST: Your Honor, I think this is proper argument for the jury at the end of the case and not now for the jury.

THE COURT: Ask him the two facts, and ask him if he said previously there was no conflict...I think you've already said that...and ask him if he wants to change his view on that.

CONTINUATION OF REEXAMINATION
BY MR. MONAHAN:

Q. I'll ask you first of all, did Mr. Page say he applied the brakes?

A. There's a section marked for the accident and it's as he applied his brakes.

Q. Did you find any skid marks?

A. No, sir.

Q. Do you wish to change as to whether there was any conflict between your investigation and the statement?

A. It's possible to apply brakes with no skid marks.

Q. What does that depend upon, then?

A. How hard you hit your brakes.

MR. MONAHAN: Thank you, sir.

That's all I want to ask, Your Honor.

REEXAMINATION

BY MR. WEST:

Q. Officer, it also depends on how long before the impact the brakes are applied, doesn't it?

A. Yes, sir.

Q. Brakes can be applied and not leave skid marks?

A. Yes, sir.

Q. You made this examination at night?

A. Yes, sir.

Q. You did not know exactly where the brakes were applied, did you?

A. No, sir.

Q. In other words, you didn't go down the street with Mr. Page and say, did you apply them here and he said, yes, and then you looked?

A. No, sir.

Q. There are skid marks in that area, are there not, from other vehicles?

A. Yes, sir, it's possible.

MR. WEST: I have no further questions.

REEXAMINATION
BY MR. MONAHAN:

Q. Were there skid marks on the evening of your investigation west of the point where you located the horse?

A. I found no skid marks.

Q. Mr. West has asked you whether you actually went with Mr. Page. How far west did you look for skid marks?

A. I walked several hundred yards down the road.

Q. Did you find any in that entire several hundred yards?

A. No, sir.

Q. From the point of the horse east, even, towards the Airport Road, did you find any skid marks?

A. No, sir.

MR. MONAHAN: That's all.

REEXAMINATION
BY MR. WEST:

Q. You didn't look east of the horse, did you?

A. In that general area there's a...the whole scene, I looked at the whole scene and there was...

(30)

MR. MONAHAN: Mr. Arnold, please.

GILBERT R. ARNOLD, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

EXAMINATION

BY MR. MONAHAN:

Q. Would you tell the jury your name, your address and your age, sir?

A. Gilbert R. Arnold, Route 50, Winchester, Virginia, 74 years old.

Q. Was I correct in referring to that as the Sulphur Spring Road?

A. Sulphur Spring Road, yes, sir.

Q. Mr. Arnold, how long have you lived at your present address, you personally?

A. I came from a career, retired in my career and came home approximately four years ago, or five years ago.

Q. Prior to that time what were you doing?

A. I was with the Army Corps of Engineers.

Q. Did you do engineer work or farm work? I don't know what the Corps of Engineers does.

A. I was a comptroller in civilian capacity, not in uniform, does that help?

Q. Is it comptroller?

A. Yes, sir, a man that handles money.

Q. How long did you handle money, sir, for the Corps of Engineers, or were you in the Corps of Engineers?

A. I was in the Corps of Engineers working as a civilian. My total time was approximately 12 years, out of that another 12 years.

Q. Twenty-four in all?

A. Yes, sir.

Q. I believe you were born on a farm?

A. Yes, sir.

Q. How long did you continue to live on the farm, sir?

A. Until I was 12.

Q. On that farm did you have anything other than work horses?

A. No, sir.

Q. You had two work horses?

A. Two work horses.

Q. After you were 12, did you live in the city or where did you live?

A. In and out of the city. Back and forth on the farm.

Q. For how many actual years after you were 12 did you live on a farm?

A. I don't know how to answer that question.

Q. It must be a bad question, I apologize.

Did you spend any extensive periods of time on the farm after you were 12 until the time that you retired from the Corps of Engineers?

A. I lived on the farm with the exception of bad weather, in which I stayed in the city. Then when I joined the army, then I totally moved away from the farm.

Q. At what age did you join the army?

A. 1933. What age?

Q. Yes, sir, can you do the math for me or tell me how old you were; about 19?

A. Approximately.

Q. So you went in the service when you were about 19, and after that you didn't live on the farm until 1974 or '75?

A. Yes.

Q. When we say between the age of 12 and 19, you would live on the farm except in bad weather. Was that the same farm you had previously lived on?

A. Yes, sir, Glenn Dale, Maryland.

Q. Were the horses on that farm work horses in that period of time?

A. Oh, yes.

Q. Between 1933 and 1974, you acquired, however, your

property on Sulphur Spring Road? In other words, you acquired it, bought it sometime earlier than your actual retirement date, did you?

A. Oh, yes.

Q. When did you buy the place?

A. I think it was '62. _

Q. Your wife and daughter lived there?

A. The whole family lived there.

Q. How much is that?

A. My wife, three beautiful daughters and a son.

Q. During that period of time...

A. I was overseas.

Q. What experience with horses did you have between 1933 and 1974, personally?

A. Other than riding them?

Q. That's what I want to know.

A. Just about riding, that's about all I would...

Q. To what extent did you...was that your hobby?

A. Whenever I could ride a horse I would ride one.

Q. That was your hobby, your interest, an avocation with you?

A. Yes, sir.

Q. Were these army horses?

- A. No, they were just bone Johns you could pick up around on the post.
- Q. Were they riding horses or work horses?
- A. No, they were not draft horses, if that's the word. They were not draft horses, they were riding horses or pulling horses, harness horses, something like that.
- Q. How often did you get to ride during that period of time?
- A. Once or twice a month, I'd say. We were very busy.
- Q. Did your riding experience include cross-country?
- A. Oh, no.
- Q. What would you do, ride a ring?
- A. Just ride up one mountain, down the other.
- Q. You got outside the ring? You weren't just in a riding ring, you were out in the open country?
- A. Oh, yes, ride up and down the mountainside.
- Q. Did you do any jumping yourself?
- A. No.
- Q. Did this continue up until the time that you retired, that you would ride on occasion a couple times a month?
- A. I'd say the last several years that did not apply.
- Q. How many would that be, sir?

A. Five or six, maybe.

Q. During the period from '62 on when you acquired the place on Sulphur Spring Road, how many acres did you own?

A. Sixty-two, I beg your pardon, 43.

Q. What was that in, what were you utilizing the land for?

A. Mostly pasture.

Q. What were you pasturing?

A. Cows and horses.

Q. How many horses did you own during the period from '62 to '74?

A. I owned one.

Q. Were there other horses pastured on your place?

A. Yes, sir.

Q. Who did they belong to?

A. My daughter.

Q. How many additional horses did she own?

A. She owned a pony, a brood mare, and this little colt that got killed.

Q. That would only be in the last year or so before 1974?

A. Yes, sir.

Q. Well, the colt wasn't alive in '74. I was asking you, and I maybe didn't make myself clear, sir, I was trying

to determine during the period '63 to '74 when you were overseas and your wife and your three beautiful daughters and your son were living out at Sulphur Spring Road, what horses were on the place, if any?

A. I beg your pardon, I answered you incorrectly. I just don't recall any at that time.

Q. So basically, it was after you returned from overseas that you started acquiring the horses?

A. Yes, sir.

Q. I believe you acquired a male horse first, is that right?

??? A. It was a colt, a weaning, just in the process of being weaned.

Q. That grew up to be Wimpie?

A. That's Wimpie, yes, sir.

Q. Today, how old is Wimpie?

A. Wimpie is six or seven, along in there.

Q. Then after you had owned Wimpie for a time, what, you acquired a pony next?

A. I didn't acquire anything.

Q. You're right, I apologize. Your daughter next acquired a pony, is that right?

A. She acquired a pony.

- Q. What's the name of the pony?
- A. Smokie.
- Q. How old is Smokie?
- A. I couldn't tell you.
- Q. Older or less older...
- A. I couldn't tell you that, sir. He's one of these Chincoteague ponies. You buy them down there and you don't get any history with them at all.
- Q. What year did you buy him, do you know, approximately?
- A. I didn't buy him. A neighbor bought him and we bought him from the neighbor.
- Q. Do you know approximately what year the horse was first acquired, either by your neighbor or by your daughter?
- A. By my daughter, one of my beautiful daughters bought the animal and gave it to Jenny as a present.
- Q. I asked you what year.
- A. I'm trying to resolve that year. I'm afraid I can't recall what year that was.
- Q. Can you give me an approximation of when you got the second horse on the place, or rather in this case, when the pony came to the place making two...
- A. I'm afraid I can't answer that question, I don't

remember.

Q. The next horse was a mare that was added to your establishment?

A. Not to my establishment, to Jenny's herd, yes, sir.

Q. It was added to your land, was it not?

A. Oh, yes, sir.

Q. Do you know what year that was?

A. No, sir.

Q. Was it prior to 1978?

A. I couldn't tell you that, I don't remember.

Q. Do you remember the accident?

A. Yes, sir.

Q. Was it prior to the accident?

A. Prior to the accident.

Q. Do you know approximately how much before the accident you had acquired either the pony or the mare?

A. I hope I'm answering you right. I acquired one animal and you keep telling me the other animals that I did not acquire. My daughter acquired them. What she did with them I don't know.

Q. At what point, can you tell me, in time prior to the accident did the two, the mare and the pony, or either of them, first come to stay on the place at Sulphur

Spring Road?

A. That, sir, I couldn't tell you. You'll have to ask her. I don't remember when it was. She paid for them and I have no idea when that was.

Q. Was the colt born already, the filly, the young one that got killed when you acquired the mare? Excuse me, not when you acquired it, when it was added to your land on Sulphur Spring Road? Do you recall?

A. Where the colt was born, I don't remember where that colt was born, sir.

Q. Do you recall whether it was born at the time that the mare was acquired by your daughter?

A. I don't recall that.

Q. When did you first start to have anything to do with the man on Route 50?

A. In 1975.

Q. How did that man come to your attention?

A. I saw some beautiful Timothy hay growing on the side of the road.

Q. What did you decide when you saw that beautiful Timothy hay?

A. I got hungry and I wanted it, I needed it for my horses and cows, or horses at that time.

- Q. Who did you approach about that?
- A. The owner, or I thought he was a real estate man, but he later turned out to be the owner of the property, Jim Hobbs from Berryville.
- Q. Did you approach him only about the crop then on the property, or did you approach him about the use of the land, in general?
- A. The crops and the use of the land. I'd say both.
- Q. You did not limit your approach to saying, I'd like to cut that Timothy hay and take it home?
- A. No, not limited to that.
- Q. What did you ask him?
- A. If I could keep his fields clean so he could have better sale for them. He said, absolutely.
- Q. You said, if I keep your fields clean so that you'll have a better sale for them, I'll do what, or can I do what?
- A. I'll keep them clean.
- Q. Did you ask him if you could make a crop? I know, only God can make a crop. Did you ask him whether you could grow and cut a crop?
- A. We didn't go through the functions, no, sir. I simply asked him if he wanted me to keep the fields clean so

that the buyers could see a clean field before they purchased the property.

Q. Did you ask him at that time about running cattle or running horses?

A. Not a thing, no, sir.

Q. What did he do?

A. He said, by all means, go to it, or words to that effect.

Q. Did you reduce your understanding to a written lease at that time?

A. At that time, it was all oral.

Q. Did you, in fact, go to it on the basis of that oral agreement and did you, in fact, cut the Timothy hay that you'd seen?

A. Yes, sir.

Q. Did you cut any additional subsequent hay?

A. I cut everything I could see standing, including fescue...do you want me to name them all?

Q. No, sir, I just want to get my question straight, which apparently is not clear to you, sir. I assume that you cut everything you could on the first go around.

A. Yes, sir.

Q. I'm asking you, were there subsequent occasions on which you cut?

A. No, we had a bad season that year. I only got one cutting off of it that year.

Q. How about the next year?

A. One cutting, I think, the following year.

Q. The following year had you put cattle on it?

A. We put cattle in there on two fields.

Q. How many in all were there?

A. Cattle?

Q. No fields, I'm sorry. How many fields were there in all?

A. You're talking about pastures?

Q. You said you put the cattle on three fields. I want to know how many fields there were in all?

A. The front one and the back one, pastures, both fields.

Q. Were there other fields, also?

A. Yes, sir.

Q. How many additional fields were there?

A. There was a corn field and another big hay field which was not fenced at all.

Q. Did you make hay on the hay field?

A. Oh, yes.

Q. The corn field you didn't. Was that yours?

A. Yes, sir, 20 acres. I happen to remember that number.

Q. So you made a corn crop, a hay crop and pastured on two fields?

A. No, I didn't. I planted the corn that came up knee-high and it died on the vine. It was a disaster, so we didn't even harvest it.

Q. That was '70 what?

A. '76.

Q. How many cattle did you run in '76?

A. It fluctuated. We were buying and selling. We'd buy calves all over the place, wherever we could find calves, heifers and cows, and bring them in. Then when the market went up, we'd take the fattest of the crowd and sell that to get more money to buy more cows. So it went up and down like that. I could say this, at any one time the maximum was approximately 200 head. Does that help?

Q. Yes, sir. Did you run any cattle the preceding year which, I take it, was 1975, the first year that you had the land?

A. We started putting cattle in, yes, sir.

Q. How many of the fields did you put the cattle in?

- A. Only the two fenced fields.
- Q. How many years did you continue to have cattle on your place?
- A. About a year-and-a-half, I'd say, two years.
- Q. Then why did you move?
- A. No grass, no pasture, no water.
- Q. When was it that you moved the cattle off?
- A. I just couldn't tell you when they were moved, what month it was, or year. We moved them up to West Virginia where we found better water and better pasture.
- Q. You said you started to move them on in 1975?
- A. Yes, sir.
- Q. They were there approximately a year-and-a-half.
- A. Eighteen months, approximately.
- Q. So then it would have been, would it not, the winter of '76, '77 that you took them off? Doesn't that figure out approximately right?
- A. That's a pretty good estimate, I guess.
- Q. Did the fields sit empty of any livestock for a period of time?
- A. Yes, sir.
- Q. How long?
- A. Until winter of the next year, I'd say November.

Q. November of 1977?

A. I would say '77, yes, sir.

Q. At that time what did you put on the field in terms of livestock?

A. Nothing.

Q. In November of 1977, did you move any livestock on? Any livestock, I'm including not just cattle, I'm talking about livestock?

A. I didn't.

Q. Where was Wimpie?

A. Wimpie was over on Sulphur Spring Road.

Q. When did Wimpie go over to the other field?

A. I think Jenny took him over there...it was in cold weather because she had to take an axe and break the ice. I'm going to say approximately February.

Q. Of 1978?

A. Yes, sir.

Q. Had she taken other horses over earlier than that?

A. No.

Q. So the first horses, ponies were moved on in February of '78, about that time?

A. One horse, all the rest were ponies.

Q. Wimpie was a horse?

A. He was the only one.

Q. What was the mare?

A. She was a pony, too.

Q. Define pony for me.

A. Under 14 hands, sir. He's 15 hands.

Q. The foal or the colt, the filly that was subsequently killed was moved over, also, about February of 1978?

A. He wouldn't leave his mother. He was always under his mother.

Q. So that was about 1978?

A. Yes.

Q. That filly at that time, do you know how old it was?

A. I don't know.

Q. Subsequent to the oral agreement of 1975, did you enter into a written agreement as to the lease of the property?

A. Yes, sir. I came home and...because I didn't want to get mixed up because he had all that stuff subdivided and he told me they were going to sell it. As the new buyers bought it I'd have to do business with them.

Q. When did you enter into that written agreement?

A. '75.

Q. How long after the initial oral agreement?

A. I couldn't say, I don't remember.

Q. Do you have that agreement with you, sir? Here it is.

A. I believe...

(WHEREUPON, the document referred to was marked Plaintiff's Exhibit #16 for identification.)

Q. I'll hand you what I'll refer to for identification purposes as Plaintiff's Exhibit #16 and ask you if that's the agreement.

A. Yes, sir.

Q. Do you recognize any of the signatures?

A. This is mine, this is Hobbs'.

Q. Was the Hobbs signature signed in your presence?

A. Oh, yes.

MR. MONAHAN: I'll offer this
as Plaintiff's Exhibit #16.

MR. WEST: No objection.

THE COURT: So admitted.

(WHEREUPON, the document marked Plaintiff's Exhibit #16 for identification was received in evidence.)

Q. The agreement, Plaintiff's Exhibit #16, purports to be made with Jim Hobbs, President, Spectrum Properties, sir?

A. At that time he was.

Q. Did Mr. Hobbs or Spectrum Properties participate at all in your farming operation?

A. Not at all, sir.

Q. They were strictly real estate people who own the land?

A. That's right, sir. My job was to keep it clean, that's all.

Q. Mr. Arnold, I would appreciate it if you would come to the blackboard and draw for the jury a picture of the farm.

MR. KUYKENDALL: If you're able to do it. That's up to you. I don't know whether he's an artist or not.

A. I can do my best.

Q. If you draw the same picture you previously drew, Mr. Arnold, we won't have any problem.

A. It sure won't be the scale on that.

Q. Come on up. I don't expect you to put 97 acres on the blackboard.

(WHEREUPON, the witness drew a diagram of the farm.)

Q. Sir, would you label where Route 50 is, please?

A. (The witness complied.)

Q. Would you label where the Airport Road is?

A. (The witness complied.)

Q. Would you identify with the initial G any gates which are on the property, sir?

A. (The witness complied.)

Q. You stated that there were four fields, two of which were pastures. Would you identify the pasture fields by the letter P1 and P2, please?

A. (The witness complied.)

Q. You stated that one field was used to make hay. Can you identify that as H, please? Was that field used exclusively for hay, or did you at times put livestock in there?

A. We had cows in there. Both, we made hay and had cows in there.

Q. Would you just point out and tell the jury where there was fencing on the exterior boundaries of the property?

A. There was fencing here (indicating).

Q. You're telling me then, there was fencing on each side of the property along the Airport Road, on the north side of 50 along P1?

A. I made an error. There is no fence here (indicating.)

Q. Along P1, there is fencing there?

A. Yes, sir.

MR. KUYKENDALL: Excuse me a minute, fencing at what part? I don't know where you're talking about.

A. He said exterior.

MR. MONAHAN: Yes, sir, I said exterior along 50 adjacent to P1, pasture number one.

Q. How about to the west of the pond along pasture number one, is there fencing?

A. Yes, sir.

Q. Would you want to mark that with the same x?

A. (The witness complied.)

Q. With respect to H, the hay field that you had marked with an H?

A. Yes, sir.

Q. What about the fencing along the western edge of that?

A. Over here, no, sir.

Q. What is along the western edge of H between the two gates that you have marked here and here (indicating)?

A. Access road.

Q. Is there any fencing along the east or west side of that access road?

A. The east is American wire fence, and this is barbed

wire fence.

Q. So then, there is fence along here?

A. Yes.

Q. What is the situation in this corner?

A. The situation is two gates.

Q. Is this a field? There seems to be a box, there.

What does that box represent?

A. That's a box to get into the corner of the field you want to get into you. The box is developed so you can get gates in an open and close.

Q. So it's a fenced box?

A. Okay, fenced box.

Q. All right. Now referring you to the gate at the corner of the Airport Road and Route 50, was that closed at one time?

A. Yes.

Q. How?

A. A chain lock.

Q. Chain and lock. Who had the key?

A. I did.

Q. Anyone else in your family have the key?

A. No.

Q. Referring you to the gate in the lane at this point,

that is a gate?

A. Yes.

Q. How is that fenced?

A. Same way.

Q. Is it chain and lock?

A. I have a key to that, too.

Q. A different key?

A. Yes.

Q. Anyone else have the key?

A. No, sir.

Q. Would you talk about the gates down in the area of the field, the A field and pasture number two. There are two gates in this boxed area. How were they fenced?

A. This one here, about the same way, we had a lock on this. But this was a full type of a chain on top of a wire, wire fence.

Q. There's a gate in P1, near the pond?

A. Close to the barn.

Q. That's fixed by wire in its own wing, is that what you said?

A. No, I said you lock it with a wire. You pull it shut and wire it until it hooks.

Q. No lock, though?

A. No.

Q. No combination key?

A. No. That's the access in and out of the whole place.

Q. Now, I want you to look at it carefully...marked actually five gates. Are there any other gates that we neglected?

A. It depends.

MR. MONAHAN: All right, sir, if you would resume your seat.

Q. Mr. Arnold, when did you first learn there had been an accident?

A. My wife told me about it Sunday morning.

Q. That would be April 9, 1978?

A. Yes, sir.

Q. The day following the night on which it occurred?

A. Yes, sir.

Q. You were then at your Sulphur Springs home?

A. Yes, sir.

Q. When you learned that there had been an accident, what, if anything, did you do concerning the accident?

A. I got my clothes on. I don't know how, but the wife got me dressed, and we went over there.

Q. When you went over, what time of day was it?

A. It was in the morning, before lunch.

Q. What was the weather at that time?

A. Beautiful.

Q. Was the filly still there?

A. Still where?

Q. At the scene. The horse that was hit, was it still at the scene?

A. Yes, I think he was, yes sir, or she.

Q. Do you know where you first saw her following that?

A. Some kind-hearted soul had dragged her out of the road for me, and dragged her right up on the turn-around.

Q. It was in the median area?

A. It was in the median area, except for its head. I think its head was over in the concrete turn.

Q. About what time did you say? This was just before lunch is the only way you can fix the time?

A. Nine-ish, ten o'clock in the morning.

Q. At that time, sir, did you go and check the four gates, five gates?

A. At that time, I waited for my daughter to come to drag the horse off the road, like the police told us to do.

Q. Did she eventually come?

A. Oh, yes.

Q. At that time or on that morning, did you check the gate?

A. Oh, yes.

Q. Did you check all the gates?

A. Oh, you bet.

Q. What was the condition of the gate at the corner of Airport Road and 50?

A. Intact.

Q. What was the condition so far as being locked or unlocked?

A. Locked. Just exactly that - locked. It always has been locked.

Q. Was it identical to the way you had left it?

A. Yes, sir.

Q. Chained and locked in place?

A. Yes, sir.

Q. Unbent?

A. Yes, sir.

Q. And wrapped as you had wrapped it?

A. Yes, sir.

Q. With respect to the gate here, which is halfway down your access lane between the hay field and this open

field....I'll refer to it as open because it has no wire...what was the condition of that gate?

A. Same as the other, chained and locked. Nobody tampered with that, either.

Q. Which is the condition you had left it in?

A. Yes, sir.

Q. Same wrap, wrapped in the same fashion that you had left it in?

A. Yes, sir.

Q. I believe there is also something about a gate leading into pasture number two with a chain and lock gate?

A. That was when we had stock in there, otherwise it was open.

Q. Did you look at it on that occasion?

A. I didn't go back there because we had nothing in there.

Q. There was no access from P1 and H to P2 other than through the gates, anything you had, not had anything in there?

A. That's right.

Q. All right. How about this gate over here to H? Did you examine that?

A. It wasn't necessary to examine that because that wasn't used either.

Q. The horses had not been in either P2 or in this HB?

A. Or any of the H's. The horses had only been in P1.

Q. Then I should of asked you about this gate right here, shouldn't I, sir?

A. I don't know what you shouldn't ask me, sir.

Q. I apologize. May I ask you about that gate?

A. Please do.

Q. Tell me what its condition was on the morning of April 9, 1978?

A. It was closed.

Q. Did you examine it?

A. Yes, sir.

Q. It was closed?

A. It was wired tight, like always.

Q. Had you wired it previously?

A. I had not. My daughter had.

Q. So, all that you really know is that it was closed and wired tight?

A. Yes, sir.

Q. You don't know whether it was in the same condition that it had been on the previous evening?

A. Yes, sir.

Q. When you last saw the horses, when was that, prior to

the morning of April 9?

A. That was the following night, up in the corner, eating on a patch of clover up there.

Q. You said the following? You meant the previous night?

A. The previous night, I'm sorry.

Q. About what time did you see them on the previous evening?

A. Just before headlight time. It was daylight.

Q. Do you know what that was?

A. No, sir.

Q. What were you doing on the farm just before headlight time?

A. Grubbing.

Q. What field were you grubbing?

A. In the back. The two edges that you see there (indicating).

Q. Did you see the horses as you were grubbing?

A. No.

Q. As you were leaving?

A. As I was leaving. It was too far to see them from back there.

Q. When you saw them, in what part of the field were you?

A. May I get up?

Q. Yes, indeed.

A. That patch of clover was up in this corner (indicating).

Q. Do you want to make that CL?

A. If...will we put that in there...?

Q. If it's important.

A. Is it?

Q. I don't know. I didn't ask the question, so I assumed you wouldn't mind. When you saw the horses in the area of the clover, what horses did you see?

A. All of them.

Q. Can you name the ones that you saw?

A. Wimpie, Smokie, Abbie and her baby.

Q. Her baby is the filly with which we are concerned today?

A. Yes, sir.

Q. In what direction were you headed at that time?

A. I was making a left-hand turn to come home.

Q. Did you check the gates before you came home?

A. No, sir.

Q. When had you last checked the gate at the time?

A. About nine.

Q. When had you last checked the gate at the corner of Airport Road and Route 50? That morning, is that

your answer?

A. No.

Q. On that morning, did you check the gate at the barn which would be the one on the western edge of the pasture?

A. I checked all of the gates. It was my habit to walk around the fence and gates, every gate.

Q. On that day, did you do that?

A. Yes, sir.

Q. Mr. Arnold, how often did you get over to the barn on 50?

A. How often? I was over there always. I spent more time there than I did at home.

Q. Would you mind telling me how often you got there, sir, in terms of every day or every other day?

A. Every day.

Q. You were at the farm every day?

A. (Witness responding in the affirmative.)

Q. Did you ever have any trouble with people tampering with the fences or lock?

A. No, sir.

Q. Had you ever, prior to April 8, 1978, observed any indication that people had gone on the property in

your absence?

A. No, sir.

Q. Had you ever had any difficulty with your neighbors?

A. No, sir.

Q. Were you ever threatened in any fashion with people going to take action against your property?

A. No, sir.

Q. Did you ever have any sign or indication that people were going through your yard to the horses, in your absence?

A. No, sir.

Q. So, to the best of your knowledge and belief, nobody ever bothered those horses?

A. That's right.

Q. Nobody ever bothered your property?

A. No, sir. It wasn't my property.

Q. Well, that's a matter for the jury to decide.

A. Oh, I see.

Q. Now, these leases you are holding in your hand which is Plaintiff's Exhibit #16 was still in effect at the time of the accident of April 8, 1973, was it not?

A. It was, sir.

- Q. And that was made out to you? You are the lessee under that lease, are you not?
- A. Well, it's the final agreement, he and I both signed it.
- Q. And, in turn, your daughter put the horses on the property with your agreement?
- A. All that's true, sir.
- Q. Were the fences that were on the property at the time of the incident of April 8, 1978, the same fences that were on the property when you took it over. sir?
- A. Yes, sir.
- Q. Had you altered them in any way?
- A. No. sir.
- Q. That's true for the entirety of the lease, that you had not altered them during the entirety of the lease period?
- A. What lease?
- Q. The one in your hand.
- A. I didn't know this was the lease. Excuse me, this is a foreign agreement to me. If it's a lease...
- Q. Is it true, sir, that during the entire period, from the time that you executed Plaintiff's Exhibit

#16 to the date of the accident of April 8, 1978, that you didn't alter the fences?

A. I did not alter the fences. It was a brand new fence.

Q. The answer was you didn't alter them?

A. I did not.

MR. MONAHAN: Your Honor, that's all the questions we have at this time.

MR. WEST: I have no questions, Your Honor.

EXAMINATION

BY MR. KUYKENDALL:

Q. Mr. Arnold, have you, since the date of that accident, measured the height of the fences?

A. Yes, sir.

MR. MONAHAN: Your Honor, I'm going to object to testimony of this fashion unless Mr. Kuykendall wishes to make him his own witness for this purpose.

MR. KUYKENDALL: I'm willing to do that.

JUDGE WOLTZ: All right.

MR. MONAHAN: I just don't want to be bound.

.(65)

MR. KUYKENDALL: I'm going to object to that, because I don't think I have to be, and he asked him about the fences, and I have the right to ask him about the height.

MR. MONAHAN: Your Honor, I strictly have avoided any description.

THE COURT: Objection overruled.

MR. KUYKENDALL: Excuse me, sir, I didn't hear that.

THE COURT: Objection overruled.

MR. MONAHAN: Note my exception on that, Your Honor.

Q. All right, look here, Mr. Arnold. What kind of a fence was it that enclosed P1, on the Route 50 side?

A. American wire on the bottom and barbed wire on the top.

Q. You measured that thing?

A. Yes, sir.

Q. What was the height of it from the ground?

A. The American wire was 48 inches, 3 inches up above that was one strand of barbed wire. We had a

total of 56 inches from the ground.

Q. Did you measure the fence on the western side?

A. Yes, sir.

Q. What kind of fence was that?

A. Same fence all the way around, sir.

Q. Was there board fencing?

A. I beg your pardon? This was the wire fence up at the barn. All the rest of it is American wire, just like this (indicating).

Q. How high are the fences all the way around?

A. Same as the front; 56 inches total from the ground.

Q. How about the wire on top?

MR. MONAHAN: Excuse me, Your Honor, 56 includes the barbed wire.

Q. Tell them how high the American wire fence was and how high was the barbed wire, a total of what?

MR. MONAHAN: He has responded to that question.

A. 56 inches.

Q. That was the height of the fence enclosing that area?

A. Yes, sir.

Q. What kind of a gate was there that the point designated here has from the western end, next to the box?

A. A good gate, sir.

Q. How high was that gate?

A. Up to. Probably was up to my shoulders.

Q. How tall are you, do you know?

A. No, sir.

Q. Could you estimate that height?

A. I'd say 48, 49 inches.

Q. How about the gate up here on the eastern end of P1?

A. That was a steel gate, and that is 48 inches. I know that because that's stock height, 48 inches.

Q. I believe there was a barn. Where was the barn hook gate?

A. This is the barn (indicating).

Q. The fences adjoin that barn?

A. Yes, sir.

MR. KUYKENDALL: That's all.

THE COURT: Do you have any questions?

MR. WEST: Excuse me, may I ask one question? I'll be as brief as possible.

EXAMINATION
BY MR. WEST

Q. Can you tell me how far this fence runs along the

side of the road here? What is the distance from here to here?

A. I did not measure it, sir. I'm going to say 15 acres, if that will help you.

Q. But, you don't know what the distance is here?

A. I didn't measure it.

MR. WEST: Thank you, sir.

THE COURT: Any further questions? That's all.

(WHEREUPON, the witness was excused.)

ROBERT G. KENDALL, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

EXAMINATION

BY MR. MO-AHAN:

Q. Would you please state for the record your name and your place of residence?

A. My name is Robert Kendall, and I live at 332 Ridge Avenue, Winchester, Virginia.

Q. What is your profession, Doctor?

A. I am a doctor, a neurosurgeon.

Q. Where do you practice, Doctor?

A. In this city, Winchester.

Q. May I ask you, sir, to define the area of specialty identified as neurosurgery?

(69)

MR. MONAHAN: I would ask that we, perhaps, recess at this time, Your Honor.

THE COURT: All right. Members of the jury, we will recess, it seems to be a convenient time to do so, for lunch, and we will recess for approximately an hour. And I'll ask if you'll be back at quarter of two, and remember the instructions concerning any discussion on the case. We will now recess and resume at 1:45.

(WHEREUPON, a brief recess was taken.)

JENNIFER ARNOLD RACEY, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

EXAMINATION

BY MR. MONAHAN:

Q. Would you please state your name and where you presently live, for the jury?

A. My name is Jennifer Arnold Racey, and I live in Fisher's Hill.

Q. You are now married to whom?

A. Lloyd Racey.

Q. In April of 1978, were you married?

A. No, sir. I was not.

Q. Where were you living then?

A. I was living, basically, in two places. I was maintain-

ing an apartment in Strasburg, but my mailing address and everything was still at home with my parents.

Q. Were you working or at school?

A. I was working.

Q. When had you set up the apartment in Strasburg?

A. It was about February of that year.

Q. You, I believe, owned the filly involved in the accident of April 8, 1978?

A. I did.

Q. When had you pastured her first over on Route 50?

A. Prior to that particular accident.

Q. When did you first put her over there?

A. Well, I move them back and forth from my father's farm to this pasture so they could have grass to eat, good food. And I believe I had had them there during the summer of 1977, and then I moved them home to my father's farm so they could eat, and then moved them back again.

Q. When did you move them back again?

A. To the best of my recollection, it was about November of 1977.

Q. They spent, basically, the winter and up until April on 50?

A. Yes, sir.

- Q. How long have you been interested in horses?
- A. All my life.
- Q. By all your life, you started at what age?
- A. I'd say five or six, from the time I could understand what a horse was.
- Q. Did you have horses at that age?
- A. No, sir.
- Q. When did you start riding horses?
- A. When I was about fifteen.
- Q. When did you first own your own horse?
- A. There was a pony given to me for my sixteenth birthday.
- Q. To get oriented, how old were you in April of 1978?
- A. Twenty.
- Q. When you say you were interested in horses from five to fifteen, what form did that interest take?
- A. Basically, I'd like to watch westerns. I'd read any kind of horse books I could get my hands on, read horse magazines, things like that.
- Q. You were not then on a farm, I believe?
- A. Yes, sir. I was living on my father's property.
- Q. When you were five, he didn't own that property, did he?
- A. We moved there when I was four.
- Q. Did you have horses on the place before you were fif-

teen?

A. Occasionally, briefly. Like for short amounts of time.

Q. Those were the other people's horses, then?

A. Yes.

Q. I suppose the other people were charged with the responsibility for the horses, then, not yourself?

A. Yes, sir.

Q. Did you, in fact, care for, feed and water the horses earlier?

A. No, sir, not those.

Q. When you acquired the first...would you say horse or pony?

A. He was a pony.

Q. How do you define pony?

A. Well, technically, a pony is anything below fourteen-one hands. It's a term in height.

Q. Fourteen hands one inch, is that what you are saying?

A. Yes.

Q. What is a hand?

A. Four inches. A measurement of four inches. I believe that would be fifty-five inches.

Q. Anything under fifty-five inches would be a pony?

A. Yes.

Q. The first horse that you took care of?

A. Totally, would have been my pony.

Q. Where did you acquire that?

A. My sister bought him as a birthday gift for me.

Q. Was he full-grown when you got him?

A. Yes, sir.

Q. Where did you keep him?

A. At my father's farm.

Q. On Sulphur Spring Road?

A. Yes.

Q. Did your father have any ponies or horses at that time?

A. Not at that moment, no.

Q. When was the next acquisition of a horse bought by your father himself?

A. My father bought the horse, Wimpie, the following January, which would have been 1974.

Q. Did you keep it on the same Sulphur Spring farm?

A. Yes, sir.

Q. Then there came a time when you got a mare?

A. Yes, sir.

Q. When was that?

A. 1976, August of 1976.

Q. Was that a horse or a pony?

- A. She's a pony.
- Q. How tall is she?
- A. Fourteen hands, which would be fifty-four inches.
- Q. She was one inch short of being a horse?
- A. Yes.
- Q. Was she full-grown when you acquired her?
- A. Yes, sir.
- Q. How tall was Wimpie, by the way?
- A. He's fifteen hands.
- Q. That would make him three inches taller than a pony?
- A. Yes, sir.
- Q. When you acquired the mare, was she in foal or had the filly already been born?
- A. She had had the filly.
- Q. How old was the filly when you acquired the mare?
- A. Well, I can only go by what the owner of the filly said at the time, so I assume about five months to six months of age.
- Q. In April of 1978, how old was the filly?
- A. She would of been just about two years old.
- Q. Her birthday was just about that time?
- A. Yes, sir.
- Q. It's been said that she was not weaned at the time?

- A. No, sir, she wasn't. She was not weaned.
- Q. She was beyond the age of being weaned, wasn't she?
- A. Yes, sir.
- Q. Actually, the only reason that you say she wasn't weaned because you didn't have a separate field to cut her out in?
- A. Yes, sir.
- Q. When, normally, would you have weaned her, do you know?
- A. Probably about a year of age.
- Q. Had the mare pretty much dried up?
- A. I don't know. The filly still nursed off her, so she may have been getting something. The mare would stand and allow the filly to nurse.
- Q. She didn't look as heavy as she had previously, did she?
- A. No, sir.
- Q. You said the filly went over in November. Did all the horses go over in November?
- A. Yes, sir.
- Q. During the winter did you supplement their diet?
- A. Yes, sir, I did.
- Q. How did you do that?
- A. With hay that my father cut and with horse feed grain.
- Q. Were you continuing to do that into April?

- A. Yes, sir.
- Q. Had you diminished the ration?
- A. No, sir.
- Q. Had you increased it?
- A. No, sir.
- Q. What horse or horses among the four had you trained?
- A. I had trained, personally, the pony, Smokie, and my father's horse, Wimpie.
- Q. The mare was previously trained?
- A. Yes, sir.
- Q. What training did you give the horse, Wimpie?
- A. Obedience training, I guess you would call it. I taught him to stand quietly while he was being handled; different things of riding, like how to turn.
- Q. Was he a saddle horse?
- A. Yes, sir.
- Q. Who rode him?
- A. I did.
- Q. Anyone else?
- A. No.
- Q. How about your dad, after he came home?
- A. He did occasionally.
- Q. So, basically, you principally and your father occasion-

ally?

A. Yes, sir.

Q. And, you did also train the pony, Smokie?

A. Yes, sir.

Q. Was that a saddle pony?

A. Yes, sir.

Q. Who rode it?

A. I did.

Q. How long did it take you to train the horse, or was it still in training?

A. Well, they're almost always in training as far as keeping their minds from forgetting. I'd say about a year.

Q. You started about a year before on this initial training of the horse, Wimpie?

A. A year before what? It takes about a year to train a horse.

Q. You completed the initial phase of training in a period of about a year and then kept his mind on his business after that?

A. Yes, sir.

Q. What year did you train the horse?

A. I started in 1975, I believe.

Q. So that would have been '75, '76 you'd been giving him

an intensive course?

A. Yes, sir.

Q. And the pony, what year did you give the pony its intensive course?

A. I started training him in 1973.

Q. You trained him first?

A. Yes, sir.

Q. You had been training the filly about how long?

A. She really hadn't been into a schedule yet. It was wintertime, and I don't usually handle them that often in the winter.

Q. To what extent were you training her, then?

A. I don't know. Singled out, I might spend about, spend some time with her, a couple of hours, like once a week.

Q. Did you sort of have her on a lead line or what...?

A. Strictly a halter and a lead line.

Q. You were just teaching her to follow the leader?

A. Yes, sir.

Q. How long had you been doing that, not in terms of how many hours a week, but over what period of months?

A. I'd say about three or four months.

Q. How tall was the filly at the time of this accident?

A. She would have been about thirteen hands.

Q. Thirteen hands, even?

A. Yes.

Q. I believe you have some photographs of her, a photograph of her?

A. Yes, sir.

(WHEREUPON, the photograph referred to was marked Plaintiff's Exhibit #17 for identification.)

Q. I'll show you what I refer to then as Exhibit #17 for the plaintiff and ask you if you'd identify both horses in the picture.

A. Yes, this is the filly and her mother.

Q. Which was which?

A. The filly is in the foreground and the mother is behind her.

Q. The filly is brown?

A. Yes, sir.

Q. Can you tell me when that photo was taken?

A. To the best of my knowledge, it's about a year before her death.

Q. In the spring of '77?

A. Yes.

MR. MONAHAN: May I offer that as Exhibit #17, Your Honor?

THE COURT: No objection.

MR. KUYKENDALL: I have no objection.

(WHEREUPON, the photograph marked Plaintiff's Exhibit #17 was received in evidence.)

Q. Did the filly have any distinctive markings, Mrs. Racey?

A. She had a white sock on her right rear leg and a small star and a snick, white markings on the face.

Q. Was there any differentiation between the color of her tail and mane and the brown of her body?

A. Yes, sir. They were both black. The mane and tail were black and her body was reddish-brown.

Q. Can you tell me, from your experience, whether the filly had stopped growing at the time of her death?

A. To the best of my knowledge, she had.

Q. She was at least full height?

A. Yes, sir.

Q. Do you know how much, it's got to be an approximation, but how much, before the accident, she had achieved full height?

A. It wouldn't of been long, I wouldn't think.

Q. By that, what do you mean, that winter?

A. Yes.

Q. How did the horses come through the winter of '77 and '78?

A. Very well.

Q. They were in good condition, good shape?

A. Oh, yes, yes, sir.

Q. As I understand it, the filly got actually double rations of the sort. You put out feed and she was also on milk?

A. Yes, sir.

Q. She was eating the feed?

A. Yes, sir.

Q. So, she was never hungry?

A. Not to my knowledge.

Q. When did you last see her? I'm talking about before her death...

A. It would have been the day of the accident.

Q. At what time of day did you last see her alive?

A. Just right before dark.

Q. That's just before dark on April 8, 1978?

A. Yes, sir.

Q. Did the sun set?

A. Yes, sir.

Q. Where did you see her at that time?

- A. Well, my last sight of her was up in the field, but my purpose for seeing her in the first place was I was feeding all of the horses.
- Q. When you say up in the field, referring you to the diagram that your father put on the board, can you tell us which field you are referring to by the identifications of P1, HH and P2?
- A. It would have been in P1. Right about the center of where the P1 is would have been the approximate area.
- Q. Where were you at the time? Were you in the field?
- A. No sir. I was just outside of it.
- Q. Do you recall a barn near a pond?
- A. Yes, sir.
- Q. Where were you in relation to that?
- A. I was on the west side of the barn.
- Q. Down in the lane?
- A. Yes.
- Q. And you looked around this side of the barn?
- A. Well, not around it, but I was to the side of the barn.
- Q. At the time that you saw the filly, where were the other horses, if you know?
- A. One of them was in the barnyard, still picking up little scraps and everything. He always stayed behind, and the

other three of them were up on the hill with the filly.

The other two of them were with the filly.

Q. Do I understand, then, that you had completed feeding, and they had gone up on the hill?

A. Yes, sir.

Q. Did you have occasion to go into the field at all, yourself?

A. Only during feeding.

Q. Which gate did you go through?

A. It would have been the gate right beside the barn.

Q. How was that fixed when you went up to it?

A. It had a piece of heavy wire around it, twisted shut.

Q. You had left the field, after feeding, when you last saw the filly?

A. Yes, sir.

Q. Had you closed that gate?

A. Yes, sir.

Q. In what fashion did you do that?

A. I wired it the same way it had been closed before. I wrapped the wire around the post and wired it shut.

Q. How did you travel that day, what mode of travel?

A. I had a pickup truck.

Q. Where did you park it?

A. Right on the outside of that gate.

Q. In the lane?

A. In the lane, yes.

Q. Was anyone with you at the time?

A. No, sir.

Q. And you returned to where?

A. I went to my home.

Q. In Strasburg?

A. My father's home.

Q. Sulphur Spring Road?

A. Yes.

Q. When you left the Route 50 farm, did you know whether that was before or after your father was there?

A. I don't really know, sir.

Q. Had you seen him at the farm that day?

A. No, sir.

Q. Then, what was the next thing you knew?

A. It would have been Sunday morning, about ten o'clock in the morning. I received a phone call down at my apartment in Strasburg. I had gone home that evening, and they said that...

Q. Said there had been an accident?

A. Yes.

Q. Did you go to the scene, then?

A. Yes, sir.

Q. What time did you get there?

A. About eleven o'clock.

Q. When you got there, who was present?

A. My fiance, now husband, had followed me up in his car.

Q. Anyone else present then?

A. No, sir.

Q. Where did you stop on initially arriving?

A. I believe I stopped inside the median.

Q. Out at 50?

A. Yes.

Q. What did you observe at that time?

A. Well, I saw the filly in the grass.

Q. In the median?

A. Lying in the median, yes.

Q. Did you, then, go on the farm property?

A. Yes, sir.

Q. What did you do at that time?

A. I went down around to look at the gate near the barn.

Q. Did you look at any other gates?

A. No, sir.

Q. Did you know your father had been on the property that

day?

A. No, sir.

Q. Did you know he had been on the night before? Did he tell you when you all saw each other at Sulphur Spring Road?

A. I don't recall if we discussed that then.

Q. So, you went to the gate by the barn and examined it?

A. Yes, sir.

Q. Did you examine any other gates?

A. No, sir.

Q. Were you concerned that any of the other gates might be open?

A. Well, the only other gate that might have been open would have been the one on the Airport Road side, and I didn't even consider it because it had been chained shut with a lock.

Q. You went and examined the one down by the barn because that's the one you had used?

A. Well, not because of that, but because if there was any way of gaining access, aside from cutting the fence down or something, that would be the way.

Q. What did you find?

A. The gate was completely closed and wired shut.

- Q. Did you look at it in comparison to the way it was that you left it the night before?
- A. To the best of my recollection, yes.
- Q. How did it compare?
- A. As far as I remember, it was the same way I had left it.
- Q. Have you ever been aware of any persons coming on the farm to ride the horses?
- A. No, sir.
- Q. Are you aware of anybody walking across the fields?
- A. No, sir, I'm not.
- Q. Have the gates ever been tampered with, to your knowledge?
- A. No, sir.
- Q. Did anybody ever express any animosity to you or your parents, that you know of?
- A. No, sir.
- Q. Did you walk the fence line?
- A. On a semi-regular basis, yes.
- Q. Did you walk it the day following the accident?
- A. No, sir.
- Q. Other than to examine the gate to see if it was closed, did you make any investigation on your own to determine how the horse might have gotten out?

A. No, sir.

MR. MONAHAN: Your witness.

MR. WEST: I have no questions,

Your Honor.

EXAMINATION BY
MR. KUYKENDALL:

Q. What breed of horse was the mother of this filly?

A. She was, I bought her to be a grade Arabian.

Q. What breed of horse was Wimpie, the father?

A. He was a quarter horse.

Q. Had Wimpie been castrated or altered before April 3th,
1978?

A. Yes, sir.

Q. How long before, approximately?

A. It was in 1976, two years.

Q. He was a gelding at the time of this accident, is that
right?

A. Yes, sir.

Q. How high were the fences that enclosed the pasture that
these horses were in...

MR. MONAHAN: Your Honor, I'll
object to this. It makes her his own witness.

MR. KUYKENDALL: I think I have

the right to cross-examine on the condition I asked her whether or not she had checked to see whether there was any way the horse could have gotten out.

THE COURT: Objection overruled.

MR. MONAHAN: Note my exception,
Your Honor.

THE COURT: Exception noted.

Q. Can you state how high the fences were in relation to you when you stood up?

A. It would be shoulder height on me.

Q. All the fences in that field where the horses were?

A. Yes, sir.

Q. Was that the condition of the height of the fences on April 8, 1978?

A. Yes, sir.

Q. Did they have anything on top, any kind wire on top of the fences?

A. Yes, sir, they have barbed wire. I was including that height when I indicated my shoulder.

Q. Had you ever had any trouble with the horses getting out of that field prior to April 8, 1978?

A. No, sir.

Q. Describe the disposition of the mother of this filly,

this mare.

A. She was very quiet and gentle.

Q. Describe the disposition and the nature of the filly.

A. About the same. she just liked being loved and petted.

That was all I could do with her at that point.

Q. State the relationship, other than mother and filly of those two, how they got along and whether they stayed together.

A. Yes, they did. They didn't like to be separated. I never saw either one of them very far apart. They were always within sight of each other and, basically, if one was in one end of the field, you knew the other one would be near.

Q. What kind of a horse was the father of this filly?

A. Quarter horse.

Q. Was he in the field with these other horses?

A. Yes, sir.

Q. What was his characteristics and his behavior?

A. Very, very quiet and gentle.

Q. Still about the pony, that was a Chincoteague pony?

A. Yes, sir.

Q. Tell about its nature and its characteristics.

A. Well, I've always considered him quiet. I've let

children ride him occasionally, when I was out riding him.

Q. Did you ever ride a horse around that field, P1, that's shown on that diagram?

A. Yes, sir.

Q. Which was that, the mare?

A. It was usually the horse, the gelding.

Q. When you rode around, did you have occasion to look at those fences that enclose that field?

A. Yes, sir. That would have been my purpose.

Q. How long before April 8th, 1978, was it that you rode around and looked at the fences that enclose that field?

A. It would have been that week. About a week prior to the accident.

Q. State what you found with respect to the condition of the fences that enclose that field where the horses were.

A. What was the condition?

Q. Yes.

A. Perfect.

Q. Did you find any fence that had been damaged or in dis-repair?

A. No, sir.

Q. When you went there on the evening of April 7th, or 8th, rather, to feed the horses, what time did you get there, approximately?

A. It would have been about 5, 5:30.

Q. Was the feed already there or did you take it there?

A. No, sir. I brought it.

Q. After you fed, did you stay while the horses ate?

A. Yes, sir.

Q. What gate did you go through?

A. The wooden gate near the barn.

Q. Is that the one on the waystand?

A. Yes, sir.

Q. Then, after the horses had eaten, what did they do?

A. They filtered back up into the field. They just wandered up in there.

Q. Is there any good grazing up there on top of that hill?

A. Yes, sir.

Q. What was it?

A. Well, where my father has indicated, there was a large bed of clover. It was just lush grass to me.

Q. I believe you said that Wimpie, the gelding, had sort of hung back a little when the others went up on the hill.

A. Yes, sir.

Q. Am I correct that the last time you saw Wimpie and the other horses was after you had gone out of the field?

A. Yes, sir.

Q. What did you do when you went out of the field? Did you close the gate?

A. Yes, sir. And wired it shut.

Q. Had you ever trained the filly to jump?

A. No, sir.

Q. Had the filly ever had a saddle on her?

A. No, sir.

Q. The filly ever had a bridle on her?

A. No, sir.

Q. Did you ever know that the filly had ever jumped anything?

A. No, sir.

Q. ~~What~~ do you mean. that she had or hadn't?

A. To my knowledge, she had not jumped.

Q. Did you ever know that the mare ever jumped anything?

A. No, sir. I don't believe she ever had.

Q. Now, the next day after you had been told that the filly had been killed, I believe you said you went up to the gate where you had been the day before?

A. Yes, sir.

- Q. Did you have an occasion to go into that field where the horses were at any time after the 8th to look around at the fences?
- A. Not immediately after that, no.
- Q. How soon after it?
- A. Again, it would have been within that week, that next week.
- Q. Did you find, on your inspection, the fences had anything wrong with them?
- A. No, sir.
- Q. What condition were the fences in when you did inspect them after this accident, as compared to the condition they were in on your last inspection before the accident?
- A. There had been no change in their condition.
- Q. Were they still the same height that you described before?
- A. Yes, sir.
- Q. Up to your shoulders?
- A. Yes, sir.
- Q. Do you know your height?
- A. Yes, sir. I'm about 5'6".
- Q. How high would you say your shoulder is, above the ground?

A. Just under five feet.

MR. KUYKENDALL: I believe that's all.

MR. MONAHAN: Just one question.

EXAMINATION

BY MR. MONAHAN:

Q. You got to the farm and you had to get the feed out of the truck?

A. Yes, sir.

Q. Was it a bucket?

A. Yes, sir. I measured it out.

Q. Never having fed horses, did you put the feed out or did you call the horses in and then put the feed out? How does one do that?

A. I usually call them before I put the feed out. If they weren't hungry, sometimes they wouldn't come.

Q. On this occasion, do you know what you did?

A. Yes, I called them first.

Q. They were out in P1 at the time?

A. Yes.

Q. In what part when you...

A. They would have been on top of the hill where the P1 is in that drawing.

- Q. Better than half-way across the field.
- A. Yes, sir.
- Q. How does one call horses?
- A. Well, I usually yell and whistle, a combination.
- Q. Do they come immediately or as they see fit?
- A. Usually, they come in a run.
- Q. And then you would pen them in some place?
- A. No.
- Q. They just mill around down where they know they'll be fed?
- A. Yes.
- Q. Where is the bucket at this point, still in the truck or have you brought it over to the edge of the...
- A. I have it in my hand. What I would do is I would get the feed out of the truck and go inside the field and stand with the bucket until they came.
- Q. Do you spread it so that all of them can get a fair shot of it?
- A. Yes, sir.
- Q. How long did that feeding process take?
- A. Well, they ate slowly. It would have been about a half hour.
- Q. And then as each became content, he'd just move off?

A. Yes, sir.

Q. So, Wimpie was the last finished?

A. Yes, sir.

Q. How long was it until he finished?

A. Probably about 45 minutes.

Q. Had he gone up in the field by the time you left?

A. He was leaving, yes. He was heading out.

Q. So about 45 minutes after you started feeding him?

A. Yes, sir.

Q. While they were doing their eating, did you just kind of stay and talk to them and pet them?

A. Yes, I always walked around and petted them.

Q. When Wimpie trailed off, you picked your bucket up?

A. Yes, sir.

Q. And put it back in the truck?

A. Yes, sir.

Q. This necessitated going back to the truck. Had the gate been opened during the period of feeding?

A. No, sir.

Q. Basically, you got out of that truck, got the bucket from the rear, came over, unwired the gate, closed it again?

A. After I got through.

Q. After you were already inside?

A. Yes, sir.

Q. Did you wire it at that time?

A. No, it wasn't necessary. The gate was too heavy. It had to be...

Q. Then, you spread the feed, or excuse me, called the horses in, spread the feed, petted and talked to them for about 45 minutes until the last one left...

A. Yes, sir.

Q. Either had the bucket in your hand or picked it up...

A. Yes, sir.

Q. And went over, opened the gate, went back through it, wired it...

A. Yes, sir.

Q. And looked up and saw them in the pasture up at P1?

A. Yes, sir.

Q. Got in the truck and went home?

A. Yes, sir.

Q. That was, therefore, some 45 minutes to an hour after you arrived?

A. At least.

Q. More than an hour after you arrived?

A. Well, no. I'd say it was a full hour, but not more.

MR. MONAHAN: Thank you very much.

MR. KUYKENDALL: Excuse me, do...

MR. WEST: I have no questions.

MR. KUYKENDALL: I have just a couple of other questions I overlooked.

EXAMINATION BY
MR. KUYKENDALL:

Q. Jennifer, where did the horses get water in that field?

A. Well, there was a very large pond in the bottom of the field, in between the barn and the hill where they fed.

Q. Now, that gate that was at the barn which you passed to feed the horses that evening, was that gate easily opened or did you have to lift it?

A. No, it required some effort. You had to drag it or pick it up and carry it.

Q. How high was that gate?

A. In inches or feet or...

Q. According to your...

A. Well, I guess about four feet.

Q. What kind of a gate was it?

A. Wooden, wood gate.

MR. KUYKENDALL: I think that's all.

courtroom, if you wish.

(WHEREUPON, the witness was excused.)

ANDREW J. PAGE, being duly sworn by the Clerk of the Court, was examined and testified as follows:

EXAMINATION BY

MR. MONAHAN:

Q. Would you state your name, please, your age and where you live?

A. My name is Andrew J. Page. I'm 46 years old. My address is 4050 Doveville Lane, Fairfax, Virginia.

Q. And, of course, you are the defendant in this case?

A. Yes, sir.

Q. You are also married to Wanda Page, the plaintiff?

A. Yes, sir.

Q. How long have you been married, sir?

A. 22 years.

Q. You had two children, a girl and a boy?

A. Yes, sir.

Q. What are their ages?

A. 21 and 18.

Q. Who is the 18 year old?

A. My son.

Q. And he is where today?

A. Fort Eustus, he's in the Army.

(185)

I mean at the time of the accident, yes, sir.

Q. How long had you been coming to Frederick County on any regular basis?

A. I'd say around 10, 12 years.

Q. How often did you come down to Frederick County, say, on a monthly basis after you acquired your property?

A. Well, during the summer some time we'd come just about every other week. We had, before we acquired the property in Mountain Falls, we also owned land in what's called Shawnee Land. And we used to go there camping quite often on the weekends, and sometimes for a week at a time.

Q. Would you customarily use Route 50 to come down?

A. Yes, sir.

Q. When had you come down, prior to April 8th?

A. The last time was the week before, the weekend before the accident.

Q. And on the weekend of the accident, what day did you come down?

A. Came down on Friday morning, around nine or ten o'clock.

Q. Prior to the accident, your wife drove?

A. Yes, sir.

Q. How many cars did you have?

A. Two.

Q. When you would come to Frederick County, who would do the driving?

A. Well, I would usually drive up, and a lot of times she would drive back. Or, most of the time I'd drive down and back. She drove occasionally when we would come up, sometimes up and sometimes back.

Q. So, really you both drove enough that you were fairly familiar with the road?

A. Oh, yes.

Q. Of the two cars, one was a Toyota?

A. Yes, sir.

Q. Whose was that?

A. Nobody's. It was the family's.

Q. Let me rephrase it. I assume that the reason you had two cars was that you went to different places to work?

A. Right. She drove the Toyota most of the time because she liked to drive it. She drove it to work. And I drove the other car.

Q. Were you familiar with the Toyota? You drove it enough that you were familiar with it?

A. Oh, yes, sir.

Q. How long had it been in the family?

A. Five years.

Q. Was it a straight stick or an automatic?

A. Automatic.

Q. Why were you going home on the evening of the 8th?

A. Well, we were going home on Saturday because our daughter was coming home from college Saturday afternoon or early Sunday morning.

Q. Did you have a time to be home?

A. No, sir.

Q. What time did you leave up at Mountain Falls?

A. I think it was just before or a little after six, right at six o'clock, I think, or something. At five-thirty or six.

Q. Was it daylight or dark at that time?

A. It was starting to get a little dark.

Q. To come in from Mountain Falls, you came in 50 West?

A. Yes, sir.

Q. Proceeded straight through town?

A. No, sir. We stopped at McDonald's and had something to eat because it was about lunchtime, dinnertime rather.

Q. That was the downtown McDonald's, near the high school?

A. Yes, sir.

Q. How long did you stay there?

A. Maybe 30 minutes, 45, something like that.

Q. And you don't drink, do you Mr. Page?

A. No, sir.

Q. And neither does your wife?

A. No, sir.

Q. When you left McDonald's, was it daylight or dark?

A. It was starting to get to where, I imagine, you would have to, well, you're supposed to have your lights on an hour before dusk. So I would imagine I had my lights on when I left McDonald's.

Q. Would you describe it as dusk or dark then?

A. Dusk.

Q. You proceeded out, then, to 50 East to go on home to Fairfax.

A. Well, we made one more stop. I stopped and got gas.

Q. Where did you do that?

A. The service station just beyond 81 headed East.

Q. Esso?

A. Right. Sits on the right. The Exxon station.

Q. And that would be how far from the scene of the accident?

A. I would say it's about two and a half, maybe three miles from 81.

- Q. When you left the Exxon station, you were operating the car?
- A. Yes, sir.
- Q. Your wife was on the right-hand front seat?
- A. Yes, sir.
- Q. Do you recall going through the hollow there where the road off to the county dump is?
- A. Yes, sir. I'm very familiar with that, yes sir.
- Q. And you come up a hill, but you can't see it, but the Silver Diner is over on the other side of the road?
- A. Right.
- Q. You remember all of that?
- A. Yes, sir.
- Q. What was the traffic behind you, at that point, if there was any that came to your notice?
- A. Well, I didn't notice if there was anyone behind me. I don't recollect if there was any car behind me.
- Q. How many lanes eastbound were there?
- A. Two.
- Q. And there was no car, at least, within...that affected your driving or brought itself to your notice by its headlights?
- A. No, sir.

Q. At that point, as you came up to where this accident occurred, was there any traffic in the westbound lanes of which you were conscious?

A. Yes, there was some cars because they had their lights on. You could tell there was cars in the westbound.

Q. Were those lights interferring with your vision, sir?

A. No, sir.

Q. Can you describe the road as you go up that hill and come to the place where this accident happened? That is, describe in terms of curves, up and down, et cetera.

A. Well, there is a curve that kind of comes to your right, comes around like so (indicating)...not a real deep curve. But as you come out of the hollow, you come around a curve to your right and then it levels off, but it's still just a little bit of a grade going up headed east.

Q. As you came around that curve, were you conscious of any vehicles down the road in front of you?

A. Yes, sir. There was a truck that was in front of me that I pulled out behind him after I left the Exxon station.

Q. What kind of a truck?

A. They have quite a few names. I reckon you'd call them

transfer trucks or one that has a cab with the big flat bed in the back of it. I think it was a flat bed because there was no lights up on the top. You could just see the lights across the bottom.

Q. As you went through this area of the hollow, how far behind that truck were you, sir?

A. Well, I'm not really sure, but I was back far enough that my lights were not blinding because I'm almost sure I had on my low beams.

Q. Can you give me an estimate of the distance you were behind it, sir?

A. I'd say maybe three, four hundred feet.

Q. Three or four hundred feet, sir?

A. Yes, sir.

Q. I'll call your attention to your testimony at the deposition when you said, I believe, page 12, three to four hundred yards; and again on page 13, you said two hundred, three hundred, or four hundred yards.

A. Yes, I'm sorry. Yards, feet, yes, yards.

Q. Two hundred feet would be less than a football field.

A. That's right. Because three hundred feet is a...

Q. And this was more than a football field?

A. Oh, yes, sir.

Q. So, your best estimate now is three to four hundred yards?

A. Yes, sir. I would say about three hundred yards. I was back far enough to where I, you know, I could not read his license plates or anything like that; but I know it was a large truck that was in front of me.

Q. Could you see much more than the lights across the bottom of the truck at the distance you were?

A. Well, I could tell he had, maybe, those mud flaps on the back of the rear wheel.

Q. What color were they? White or black or what?

A. I don't remember what color they were.

Q. Just mud flaps and light?

A. Right.

Q. Was there any traffic, in addition, traveling in the same direction you were in front of or behind him that you saw?

A. Well, there was a vehicle in front of him. I'm not sure what kind it was because just before we went into where the hollow is, he gave a signal to pull over to the left lane. And up far I could see a light blinking, like it was a car turning to the right. So, I moved into the left lane behind him.

Q. When you say that this was before you went into the hollow down by the road to the dump, where was the truck at that point?

A. He had moved over into the left lane, also.

Q. Had he reached the road to the dump, from the truck? You were entering the hollow. Had he reached the road? Had he started up or was he still going down?

A. I think it was before we got into the hollow that he moved over and I moved over behind him.

Q. The car on beyond the truck, how far beyond the truck was that car, sir?

A. I'm not really sure how far in front of the truck he was, but I could see the signal light on the car blinking as he moved over into the left lane before I moved over to the left lane.

Q. And you also could see the lights of the car itself on beyond him?

A. Yes, sir.

Q. Did it have a turn signal on?

A. Yes, sir.

Q. Which way was it going to turn?

A. Right.

Q. Did you, in fact, observe that car make a turn?

- A. Well, I'm not sure if he turned off or not. I just know that he had his signal light on to make a turn.
- Q. Did the truck pass him before the accident?
- A. No, sir. I'm not sure if the truck passed him or not because, evidently, he turned off to the right and then the truck moved back over to the right lane.
- Q. At the time of the accident, which lane was the truck in?
- A. He was in the right lane up ahead of me.
- Q. So, he had apparently gone around this car or around the spot where he started to turn off?
- A. Well, he had passed the spot where the car had...
- Q. During the entire time that you were watching from when you saw...this truck about three hundred yards ahead of you move into the left-hand lane up until the time of the accident, was there ever a time when you couldn't see the truck ahead of you? Not the car, but the truck?
- A. No, sir. I always had it in view.
- Q. Were you traveling about the same speed?
- A. I would say we were.
- Q. You did not appear to be gaining on him or him pulling away from you?
- A. No, sir.

Q. Maintained that distance about three hundred yards?

A. Right.

Q. When you saw the truck pull back to the right-hand lane, can you locate where you believe that was on Route 50 in terms of the road to the dump, the Silver Diner, the Airport Road, anything at all?

A. Well, he pulled back to the right right after we come up and hit the straight part of the road after you come up and out of the hollow.

Q. He pulled back to the right after he got on the level part?

A. Yes, sir.

Q. That was then on the level between, in your opinion, between the crest and the Airport Road?

A. I would think that would be the right spot.

Q. He proceeded on down that road?

A. Yes, sir.

Q. And, that's the last that you saw of him?

A. Right.

Q. Then, what happened to you?

A. Well, I was still in the left lane.

Q. Were you still coming up or had you crested the hill?

A. I think I had crested the hill, yes, sir.

Q. You were still in the left lane at the time you crested the hill?

A. Yes, sir.

Q. Then what happened?

A. I observed that there was something in the road. At that time I did not know what it was right when my lights first hit it.

Q. Then tell me, what did you see?

A. Well, I seen something go over the car. When I hit it?

Q. Bad question. I apologize. I meant to say when your lights first hit something in the road, what was your impression of what you saw?

A. Oh, I thought it was someone standing in the road because all I could see was like two legs standing in the road.

Q. That joined on to something, I suppose?

A. Well, at that point, all I could see was the legs.

Q. How far were you away from those legs?

A. At what?

Q. When you first saw them?

A. I don't really know. However far my car lights were shining down the road on dim. I'm not really sure exactly how far in...

Q. Do you remember previously testifying...

MR. WEST: Mr. Monahan, could you read him the question and the answer, please, sir.

MR. MONAHAN: Yes, sir. I sure could.

Q. Do you remember giving a deposition?

A. I sure do, sir.

Q. I think we were actually in my office on the 3rd of July, 1980.

A. Yes, sir.

Q. All of us gentlemen were present at that time?

A. Yes, sir.

Q. Do you remember this question asked you, backing up on the 14th, 'About how far from the horse were you when you saw this object', this object that you first saw?

A. Right.

Q. He was in sight of him in the lights, 'I would say maybe a hundred feet,' a hundred twenty feet, 'a hundred twenty-five feet, something like that.' Remember saying that?

A. Yes, sir.

Q. Again, over on page 21, 'Approximately how close were you to this horse when you first saw it in the road?'

'I would say maybe a hundred feet, a hundred twenty-five when I realized there was something in the road. I did not know it was a horse until I actually hit it.' That was your best estimate at that time?

A. Yes, sir.

Q. Is your best estimate any different today, sir?

A. Well, no. I would say that that would be just about the distance that your dim lights would probably go down the road. I'm not really sure how far they reflect down the road.

Q. When you saw the object, where was it in the highway in relation to the sides of the highway?

A. Well, it was standing, actually, on the divider line of the two lanes headed east.

Q. And by just to the left?

A. Well, I would say not really right in the center, but he was closer to the center than he was to the right lane. It was fairly close to the center or the center of the left lane.

Q. If you divided up the left lane which, of course, has no mark down its middle, but divide it in your imagination, was it closer to the mid-line of the left lane or closer to the dividing line between the two lanes?

A. You mean the shoulder of the road or the dividing line?

Q. I'm afraid I've confused you. Let us imagine that the left-hand traveled lane, that's what you were in yourself, is divided into two halves. A left half and a right half. In what portion of the right-hand half of the left lane was the object, closer to the middle of the lane or closer to the divider...

A. It was either just to the right of the center of that road of the left lane or either just off to the right of the dividing line.

Q. So it was hard to say. It might be just equal distance from both?

A. Right, sir. Not exactly in the middle, so to speak.

Q. Was anything said in your car at that time?

A. I'm not really sure if anything was said or if I'm not sure if I said it or if I thought it that I said there's something in the road.

Q. It immediately flashed in your mind?

A. Yes.

Q. What did you do?

A. I applied the brake and steered to the left because he was to my right.

Q. When you saw that horse up, excuse me, that object in

- the road, how fast were you traveling?
- A. I'd say the speed limit, between 50 and 55 miles an hour.
- Q. What part of your car and the object came together?
- A. Well, the portion of the front that was damaged out in the front of the car was just to the right-hand front in about four to six inches; and then as the object come over, it came down on the top of the car and pushed the top of the car, the whole windshield and the top and the side in even with the dash and almost down to the top of the bucket seat.
- Q. Do you know how wide your car was?
- A. I'd say it's about four, four and a half feet wide, something like that.
- Q. It is a compact?
- A. Yes.
- Q. You say the impact was about six inches in? Did I understand you to say that?
- A. You mean from the right-hand corner. About four to six inches is where the object first hit the front of the car.
- Q. Did you see the car after the accident?
- A. Oh, yes.
- Q. I will show you just for the purpose of so...the refer-

ence Plaintiff's Exhibit #4 and ask you is there a dent left by the impact on the car?

A. Yes, sir, right over the headlight.

Q. Would you step up and point that out to the jury, please. Does that portion of metal extend over here, sir?

A. Yes, sir.

Q. So it actually was your first description across the top of the headlight is about right, isn't it?

A. Right.

Q. Were you still moving?

A. When I hit the object?

Q. When this dent was put in the car?

A. Yes, sir.

Q. Did you continue to move for a distance?

A. Yes, sir.

Q. Had you identified it as a horse by then?

A. Well, I thought it was a horse or either a large animal that had hit the car.

Q. When did you first make that identification?

A. When I walked back to see what was in the road when the officer came.

Q. During the course of the accident itself, at any time did you make an identification that it was, in fact, a

horse or an animal?

A. Well, I was not really sure that it was a horse.

Q. When did you become aware that it was an animal?

A. When I seen it at the windshield right before the impact or right at the time of the impact.

Q. Almost simultaneously?

A. Right.

Q. Where did that animal go after being struck by the right front corner of the car?

A. Well, he hit the windshield and that brought the top of the car and portion of the right side in towards the right front passenger seat.

Q. I'd like to show you Plaintiff's Exhibits #10, #12 and #13 and ask you whether that is damage incurred in the accident and the way that car appeared after the accident?

A. Yes, sir.

Q. Were you injured?

A. No, sir.

Q. Where did you stop your car, sir?

A. Well, I finally got it stopped just at the turnoff right there at the...there's a cut-through at Perry Engineering and a place where you can bear, turn off to your

left to make a left-hand turn into Perry Engineering, and I got it stopped just in that little turnoff area.

Q. Now, were there any artificial lights in that area that you noticed that shone on the area where the accident happened?

A. No, sir.

Q. At the time of the accident itself, was there any traffic coming up behind you with headlights on?

A. Well, I'm not sure if there was any traffic behind me, but there was a car that passed after the accident.

Q. Let me put it this way, at the time of the accident was there any headlights of cars behind you that affected your driving?

A. No, sir.

Q. At the time of the accident, were there any cars in the westbound lane with headlights on that affected your driving?

A. I don't think so, no, sir.

Q. After you stopped your car, what did you do, sir?

A. Well, I got out of the car and I was really dazed. The first thing I did was try to shake my wife really before I got out of the car to see if there was...if

she was all right; and as I looked over, she was slumped over in the seat with her head almost leaning against me. And I could see blood in the corner of her mouth and I called to her and there was no response. And I put my hand on her hand right here (indicating) to see if there was any pulse and I imagined that mine was worse than hers were because she was knocked out and so I couldn't get any. So I finally put my head right down to her chest and I could hear a heart beat, so I finally...I kind of got my composure after I knew that she was all right and I got out of the car and at that point I didn't really know what I was going to do. I knew I had to get some help.

And one car came by and slowed down and he kept going. He was in the right lane. So, just right behind that car was a car in the left lane and it pulled in and it was a young lady in there and she says do you need any help. I said I sure do. I need someone to call the rescue squad. I said we've struck something in the road and I says my wife is hurt and she needs to go to the hospital. So just as she... said I'll call them. And she lived over somewhere behind Perry Engineering or that's what she says. And, so

just before she started to pull out, another truck, a truck pulled off to the right. And he started to get out of the car, the truck, and he says do you need any help. And she said yes. She hollered to him and said yes, that we need the rescue squad. So he got on his CB and that's when he called the rescue squad and they came out.

Q. She was transported, then, to the Winchester Memorial Hospital?

A. Yes, sir.

Q. You spent the time that she was in the hospital largely with her?

A. Yes, sir.

Q. Did you, Mr. Page, have occasion on that evening or at any time subsequent to that evening to observe the fencing along the road?

A. Yes, sir.

Q. Can you tell me whether you noticed how high the fencing was?

A. Well, there's a portion of the fence along the, I think what they call the Airport Road, which I walked up to it and stood side of it to see how high it was at different spots along the Airport Road, and I would say

down about 50 to 60 feet from where you turn off of 50 into the Airport Road. And I'm 5'9 1/2" tall, and the top of the fence reaches just to the bottom of the pocket on my shirt...along the Airport Road.

Q. Would you stand up and show the jury where that is?

A. Most pockets are about the same height on most shirts. It would be right along in here (indicating).

MR. KUYKENDALL: I'm sorry, I didn't see that. Would you show me?

A. Right along here, sir (indicating).

Q. Has that fencing been changed since that time?

A. Not as I know of, sir.

Q. Did you make any other examination on that night?

A. No, sir.

Q. So, you don't know what the condition of the gates or fences were on that night?

A. No, sir. Because right after they carried my wife, the rescue squad left and carried my wife in. they called and had the highway patrol bring me into the hospital.

MR. MONAHAN: That's all I want to ask.

MR. WEST: I have no questions for this witness at this time. I intend to call him later.

(232)

* * *

March 18, 1981

P R O C E E D I N G S

THE COURT: Counsel ready?

MR. MONAHAN: Ready for the
plaintiff, Your Honor.

MR. WEST: Ready for the de-
fendant, Page, Your Honor.

MR. MONAHAN: I believe we're
still on the direct case of the plaintiff, Your
Honor.

THE COURT: Yes, sir.

MR. MONAHAN: I would like to
recall Mr. Page for one matter, Your Honor.

MR. WEST: Well, Mr. Monahan,
Mr. Kuykendall hasn't examined Mr. Page yet.

MR. MONAHAN: Well, go ahead.
You can call him.

THE COURT: The witness is
still on the witness stand and I believe the exami-
nation by the plaintiff had been completed.

EXAMINATION
BY MR. MONAHAN:

Q. Mr. Page, before you sit down, there's one thing I
want you to do. Would you indicate, again, how high

the fence was by holding your hand on your chest?

A. Right at the bottom of my pocket.

Q. Now, I'm going to ask you to just hold the tape right there. Do you observe that it's on the floor, sir?

Do you observe that that other end is on the floor?

A. Yes, sir.

Q. What does it read at the height?

A. 47 inches.

MR. KUYKENDALL: Wait a minute, let's look at it again, 47 or 48?

A. Well, it's right at the bottom of my pocket.

Q. Try it again, sir. There, it's on the floor. What does it read, sir? Where you saw the fence, that's what I'm asking.

A. 47 and a quarter.

MR. MONAHAN: Thank you, that's all I care to ask him.

EXAMINATION

BY MR. KUYKENDALL:

Q. Mr. Page, what time did this accident happen?

A. Approximately 8 o'clock, about, I'd say, maybe 10 minutes until 8, or 8 o'clock.

Q. Now, I believe you stated that your headlights were

on low beam because normally you change to low beam when you're following another vehicle, isn't that right?

A. Yes, sir, or if there's traffic in the other lane.

Q. Yes, you didn't see any traffic in the other lane, did you?

A. Yes, sir, I did.

Q. In what lane?

A. There was traffic in the two lanes headed west.

Q. But, they didn't interfere with your driving, did they?

A. No, sir.

Q. And, do you remember that when you testified by deposition, you were asked the question, did you have your lights on, your headlights burning? Your answer, I sure did. Question, on high beam or low beam? And you said, I imagine, following the truck, I had them on low beam.

A. Yes, sir.

Q. Now, you didn't know, at the time you testified, then, whether it was low or high, you just imagined it was low beam because you were following the truck, isn't that right?

- A. Well, I'd say 99 percent of the time when I'm following a car, I have respect for the person driving the car in front of me, and I drive on low beam so the light will not shine and reflect back in his mirror into his eyes.
- Q. So, you didn't remember it was low beam, you just imagined it was because there was a truck up ahead of you, isn't that right?
- A. No, sir, I didn't imagine it.
- Q. You said that, didn't you?
- A. Yes, sir, but, as I stated, 99 percent of the time I drive on low beams.
- Q. On low beam regardless of what the situation is?
- A. No, sir, I didn't say regardless of the situation.
- Q. Well, why did you say that I imagine, following the truck, I had them on low beam?
- A. Because I know how I drive a car, sir; and most of the time I drive on low beam if I'm following someone.
- Q. Now, the truck that you were following, it was 300 to 400 yards ahead of you, wasn't it?
- A. Approximately 300 yards, yes, sir.
- Q. And going uphill around the turn, wasn't it?
- A. Well, he was going up around a grade and up around a

small curve, yes, sir.

Q. And your lights on high beam would not have shown a much greater distance than 300 feet, wouldn't it?

A. I'm not really sure how far the high beams on a car shine, sir.

Q. Now, I believe you were driving your car in the left lane of the eastbound traffic lane, isn't that right?

A. Yes, sir.

Q. And how far west of where the accident happened would you estimate that you drove into the left lane?

A. Do you mean after the accident, how far did I travel?

Q. No, as you were driving from Winchester to where the scene of the accident happened, how far west of the place where the accident happened would you say that you got into the left lane?

A. I'm not really sure how far I was...

Q. Approximately.

A. I'd say maybe half a mile, sir.

Q. And, why was it you got into the left lane instead of staying in the right lane?

A. The truck had moved over to the left lane.

Q. And then you moved into the left lane, is that right?

A. Yes, sir.

Q. And, you saw a car ahead of the truck?

A. Yes, sir.

Q. How far?

A. I'd say maybe 300 or 400 yards ahead of the truck.

Q. So, that would have meant that the car was 600 to 800 yards ahead of you when you saw it, the car?

A. Yes, sir, I could tell it was a vehicle because it had taillights on it.

Q. Now, you weren't getting ready to pass the truck, I gather, because it was so far ahead of you?

A. No, sir, I was not passing the truck.

Q. And you weren't passing any other vehicle, were you?

A. No, sir.

Q. So, you didn't move into the left lane for the purpose of passing another vehicle or because the right lane was obstructed by any vehicle, isn't that true?

A. No, sir.

Q. It is not true?

A. Would you repeat the question, sir?

Q. Let me rephrase it. You did not drive into the left lane of travel because you were getting ready to pass another vehicle?

A. No, sir.

Q. And, you did not drive into the left lane because the right lane was obstructed?

A. The right lane was not obstructed, sir.

Q. So, you could have driven in the right lane all the way, couldn't you?

A. All the way to where, sir?

Q. To where this accident happened.

A. Yes, sir, I was in the left lane.

Q. I said you could have driven in the right lane all the way to where this accident happened because there was nothing obstructing that lane of travel, isn't that true?

A. There was a car giving a signal in front of the truck after he had pulled over.

Q. But that was 600 to 800 yards ahead of you, wasn't it?

A. Yes, sir.

Q. So, you could have stayed in the right lane without the necessity of getting in the left lane, couldn't you?

A. Well, I was not sure if he was going to turn off or stop in the road. He was giving a signal, but that doesn't mean he was going to turn off.

Q. Well, did he give a signal, you said to make a right

turn, I believe?

A. Yes, sir.

Q. So, you figured he was making a right turn?

A. Well, I don't know if I figured he was, but he was giving a signal, sir.

Q. What was the condition of the weather that day?

A. It was dry.

Q. Was it clear?

A. The day was clear, yes, sir.

Q. Was the night clear?

A. Fairly clear, it was not a real bright, moonlight night.

Q. Now, was the object that you saw, which I believe you stated earlier was 100 to 125 feet ahead of you, right in front of you in the left lane, or was it to your left or right?

A. It was just to the left, to the right of the center of the car.

Q. The object was in what lane?

A. It was in the left lane, the lane that I was traveling in, sir.

Q. Now, you said a moment ago, I believe, that you put your headlights on low beam because there were cars in the westbound lane?

A. Yes, sir.

Q. Did you see those cars in the westbound lane as you approached this point where the accident occurred, where you hit the horse?

A. Well, I'm not sure if they were...do you mean were there some up ahead of me in the westbound lane or the right side of the...

Q. Well, as you approached this horse and got reasonably close to it, did you see any cars traveling in the westbound lane?

A. I don't recall if there was any directly across from me or coming toward me at that moment, sir.

Q. Well, there wasn't any need, was there, for you to keep your car lights on low beam after you got in the left lane?

A. Well, that depends on what one might consider a need, sir.

Q. Well, I'm asking you if you saw anything that prompted you to keep your lights on low beam when you got into the left lane?

A. Well, the reason I had them on low beam is because the truck was still in front of me about the same distance.

Q. Now, when you first saw this object in the road, did

you reduce your speed?

A. Yes, sir, and hit my brakes.

Q. With how much force did you apply your brakes?

A. I don't know. Do you mean pounds per square inch?

I'm not really sure. I just know that I took my foot off of the gas, put my foot on the brake and pulled the steering wheel to the left, and I cannot tell you how hard I hit the brakes, sir.

Q. Do you know how fast you were going at the time that you struck the animal?

A. No, sir, I do not. I was looking at the object that was in front of me, not at my speedometer.

Q. Could you tell whether the animal was walking, or running or standing still?

A. Well, he was not running and I'm not sure if he was standing still or walking.

Q. Now, how close was the animal to the center of the two lanes when you first saw it?

A. How far to the center lane?

Q. The center of the two lanes of the eastbound traffic.

A. He was just to the right of the center of the car, so he would have been to the left of the center lane.

Q. Center lane?

(243)

A. Well, the dividing lane, sir. You've got two lanes of traffic and you have a line dividing headed east. The horse was standing just to the left of the divider line of the two eastbound lanes.

Q. Now, how far to the left was this animal?

A. I'm not really sure. How wide is a road, 14 feet, 12 feet wide? I'm not really sure.

Q. Well, I just want to know how far the horse was from the centerline, not how wide the road was.

A. I would say maybe six or eight feet, approximately.

Q. To the left of the centerline?

A. To the left of the centerline, he was almost in the center of the left-hand lane; but really just to the right of the center of the car or just to the left of the divider line of the two lanes headed east.

Q. And, you have no way of knowing how long the horse had been in the road?

A. Oh, no, sir.

Q. Now, after the accident, what did you do? I believe you stated that you got out of the car and some lady stopped and asked if you needed help.

A. Yes, sir.

Q. And, about how soon was that after the collision?

A. I'd say approximately four to five minutes, maybe.

Q. And then how soon after that did the trucker come along that called for the ambulance?

A. Well, within just a matter of 30 seconds or a minute, probably less time than that because she was starting to get back in her car to go call when the truck slowed down and pulled off to the right.

Q. And, did you stay until the ambulance got there?

A. Oh, yes, sir.

Q. And where did you go after the ambulance left?

A. They towed my car away and I went to...the officer that came to investigate the accident drove me up to the hospital. They called and requested that I come to the hospital.

Q. I believe you testified yesterday that you went out on the Airport Road and looked at the Airport Road fence in that field?

A. Yes, sir.

Q. And when did you do that?

A. Do you mean what day?

Q. Yes, and date.

A. I'm not sure of the date, but I would say it was maybe three or four days after the accident.

Q. Who did you go there with?

A. I went with myself, no one else.

Q. What time of the day was that?

A. It was around 3 or 4 o'clock in the afternoon.

Q. And how long did you stay there looking at the fence?

A. I'd say maybe 15, 20 minutes.

Q. And did you measure the fence?

A. Yes, sir.

Q. What with?

A. I did not have a tape measure in my hand, but I was wearing clothes and I had on a shirt that had pockets on it. I walked up to about three different places along the fence and stood by the fence, and it was just above my waist maybe six inches and right at the level of the bottom of my pocket that was on my shirt that I was wearing.

Q. Did you go on the inside of the fence and measure the fence from that side?

A. No, sir.

Q. Do you remember when you testified by deposition in this case on July the 3rd, 1980, in Mr. Monahan's office?

A. Yes, sir.

MR. MONAHAN: What page are you on, Mr. Kuykendall?

MR. KUYKENDALL: 20.

Q. Do you remember you were asked this question?

A. Yes, sir.

Q. Wait a minute until I read it. You do not know anything about the fences around the field that the horse was in? Answer, no, I don't. Isn't that correct?

A. Well, I'm not sure what you mean by not knowing anything about the fences.

Q. Well, if you knew anything about the height of them, you would have said, yes, I do. I went up on the Airport Road and measured and I know how high it was. That would have been your answer, wouldn't it?

MR. MONAHAN: Your Honor, I'm going to object to this line of questioning at this point, if the Court will examine the deposition and find the questions taken out of context, and the questions were directed to the night of the accident.

THE COURT: All right, I don't have a copy of it.

MR. MONAHAN: Do you have the

copy? That's page 20, Your Honor, 19 and 20.

MR. WEST: Your Honor, I might suggest the proper line of inquiry might be well to ask the witness at the time he responded, at the time of deposition, what he was referring to to give him an opportunity to...

MR. KUYKENDALL: Your Honor, I object to this remark because he's telling the witness how to answer the question. The deposition speaks for itself. He was asked if he knew anything about the fences and he said, no, he didn't, as late as July the 3rd, 1980.

MR. WEST: Your Honor, I think the witness is entitled to explain what he meant when he gave the response in July of 1980.

MR. MONAHAN: Either that or the deposition should be read in sufficient quantity so that the jury can tell whether that's taken out of context.

MR. KUYKENDALL: Well, I have the right, I think, Your Honor, to read the question and the answer.

THE COURT: In this particular

instance, in light of the depositions, I'll leave counsel on redirect examination to inquire further of the witness as to what was stated in the deposition.

MR. MONAHAN: May I? I assume you mean his own counsel may ask those questions, also, not just redirect.

THE COURT: You're the one that raised the objection, initially. That's why I said...

MR. MONAHAN: I'll be happy to make the inquiry.

THE COURT: ...you could, but if his own counsel wishes to, he would have leave to do it, too.

CONTINUATION OF
EXAMINATION BY MR. KUYKENDALL:

Q. Now, Mr. Page, what shirt did you have on on the day that you went up there to look at the fence?

A. I'm not exactly sure what shirt it was, sir.

Q. And you don't know, then, that you had the shirt on you exhibited today, do you?

A. No, sir.

Q. As a matter of fact, you didn't have that shirt on then, did you?

- A. Well, no, sir, I did not have this shirt on that I have on now, sir.
- Q. So, you didn't have that shirt on to determine how near the bottom of that pocket the top of that fence was, did you?
- A. No, sir, not this shirt.
- Q. What kind of a fence was it?
- A. I'm not really sure what kind of fence they call it, but it was...I reckon they call it cattle fence or stock fence. It's the square wire fence.
- Q. Regular stock fence?
- A. Well, I'm not sure what the word regular means, sir; but it was stock fence.
- Q. How would you know anything about stock fence?
- A. How do I know anything about it, sir?
- Q. Yes.
- A. I was born on a farm down in North Carolina. We didn't have a lot of cattle, but I've seen a lot of fencing.
- Q. Well, was this a regular...what you call a regular stock fence?
- A. Well, it was a wire fence.
- Q. Did it have anything on the top of it?

A. There was maybe one strand of barbed wire. but it was laying down on the top of the other fence. I'm not really sure if there was any barbed wire across the top or not, sir, as far as it being nailed.

Q. You don't know whether there was a strand of barbed wire across the top of that fence on April the 8th, 1978, do you?

A. No, sir.

Q. And you don't deny that there was a strand of barbed wire eight inches high across the top of that American wire fence, do you?

MR. WEST: Objection, Your Honor, the witness told him what he found and he's putting words in the witness's mouth.

MR. KUYKENDALL: No, I have a right to ask him if he denies it, Your Honor.

MR. MONAHAN: He already has, Your Honor. He said it was lying down.

THE COURT: What was the question, again?

MR. KUYKENDALL: I asked him if he denies that on April the 8th that fence had a strand of barbed wire eight inches above the American

wire. I think he can answer it.

THE COURT: Objection sustained because he's already stated he didn't know.

Q. Now, did you apply your brakes when you saw this object? Did you apply them with sufficient force to lay tire marks or brake marks on the road?

A. I'm not sure if I did or not, sir. I just know I took my foot off of the gas and put it on the brake.

Q. Well, did you press them down hard as you could to try to stop, or did you just touch the brake?

A. Well, I thought I applied the brake sufficient enough to stop and either avoid the object, not to really stop to keep from hitting it. I was too close, by the time I seen the object, to stop because I automatically pulled to the left to try to avoid it.

Q. Did you look to see whether you'd laid down any tire marks or brake marks?

A. No, sir.

Q. Well, now, Mr. Page, you can state, can't you, that whether you applied the brakes with a lot of force to try to stop quickly or whether you just applied them gradually?

A. Well, I applied them with enough force to try to stop

the car.

MR. KUYKENDALL: I think that's all.

THE COURT: Mr. Monahan.

EXAMINATION
BY MR. MONAHAN:

Q. Well, let's begin, Mr. Page. You say that's not the same shirt you were wearing?

A. No, sir.

Q. Are you familiar with the shirt that you were wearing?

A. No, sir, I don't remember the exact shirt that I was wearing.

Q. So, you don't know whether the pocket on the shirt is at the same height as on this shirt?

A. No, sir.

Q. Let me ask you this, sir. Is that the same waist that you had at that time as far as its height from the floor?

A. Yes, sir, I don't think I've...

Q. You haven't grown or shrunk?

A. No, sir.

Q. And you say that the top of the fence was approximately six inches above your waist?

A. About six inches.

Q. Now, I'm going to have to ask you, then, to stand up again and we'll see how high your waist is.

MR. KUYKENDALL: Well, now, Your Honor, I object to this. It was all gone into in direct examination. It's nonresponsive to the cross. We asked him about the shirt and he's answered it, and it's certainly not the proper redirect.

THE COURT: Objection overruled.

MR. KUYKENDALL: Exception noted.

Q. Stand up and put your hands at your waist level. This is the same tape beginning with zero at the floor. How high your waist is, wait a minute, until we get all the way down. Pull it tight, not tight, but pull it up.

A. Would you say 42 inches, sir?

MR. KUYKENDALL: All right, that looks about right.

Q. What is 6 and 42?

A. About 48 inches.

Q. What did you measure that up to previously?

A. I'm not really sure, it should be written down there.

Q. Directing your attention to the testimony with respect

to the use of low beams, Mr. Page, when was it that you had encountered automobiles in the westward bound lane that had caused you to go to low beam from high beam, or had you ever been on high beam?

A. I don't recall if I was even on high beam because there was traffic all the way coming out of Winchester when I was leaving Winchester.

Q. You left the Esso station and you encountered traffic for that two and a quarter miles as you went to the scene of the accident?

A. Yes, sir.

Q. When did you encounter the last of the westbound traffic? Well, you tell me, sir.

A. Well, there's a little knoll just right where the curve is and you cannot see the cars in the left or the westbound traffic as you're coming up that little knoll and, then, right after that is where I hit the hill and the straightaway, and I'm not sure if there was any cars in the westbound lane at that moment or not.

Q. So, what you're saying is the last cars that you actually can remember encountering would have been before you got to the knoll?

A. Yes, sir.

Q. That knoll is in the approximate location of just a little west of the Silver Diner, is it not?

A. I think it is, sir.

Q. And it's approximately how far from the scene of the accident?

A. I'm not really sure how far it was from that point to where the accident occurred, sir.

Q. But after that time, you do not recall encountering any vehicle?

A. No, sir.

Q. Can you relate where you were in relation to the scene of the accident or that knoll when the car in front of the truck made a right turn, or did whatever it did?

A. Well, this was before we reached the curve or the knoll that the truck had moved over, and I had moved over behind it.

Q. When it moved over, is that when you saw the lights in front of it?

A. Yes, sir.

Q. But when did you see them leave the highway?

A. I never did see if it left the highway or not, sir.

Q. Oh, I see, all right. That was even before you got

into the curve that he moved over and you saw it?

A. Right, sir.

Q. When you state that the animal was standing or walking, you don't know which?

A. No, sir, I'm not sure if it was walking or standing.

Q. Can you tell us in what direction it was facing when you first saw it?

A. It was facing the same way that I was headed. It was headed east.

Q. What is your estimate of the width of the lane in which you were traveling?

A. I'd say maybe 12 to 14 feet wide. I'm not really sure how wide the road is there.

Q. Your best estimate was 12 to 14 feet?

A. Right, sir.

Q. At the time of impact, had you, in fact, moved to the left in relation to where the object was so that it was no longer in the same location with respect to the front of your car?

A. I'm not really sure what you're saying.

Q. Had it been more centered on the car until you cut to the left?

A. Yes, sir, it was, I would say, closer to the center of

the car until I started braking to the left, hit my brakes and pulled to the left.

Q. Was it, at any time, in front of the left-hand portion of the vehicle?

A. No, sir.

Q. And did I understand you to say to Mr. Kuykendall that you thought you applied your brakes enough to avoid or to attempt to avoid hitting the animal, that you were already too close to stop when you saw it?

A. Well, I'm not sure if I was too close to stop or not, but evidently I wasn't far enough away to avoid him because I did hit him. But, I was trying to bear to the left and hit my brake at the same time to avoid him.

MR. MONAHAN: That's all I have.

MR. WEST: I have no questions at this time, Your Honor.

THE COURT: Any further questions? All right, that's all.

MR. MONAHAN: Your Honor, at this time, we would propose to read the deposition of Dr. Chandler. If I could make an introductory statement or if the Court would care to make one, I

half an hour.

Q. Do you remember going up to the cabin in April of 1980, the weekend that you were injured?

A. No.

Q. What's the last thing you remember, Mrs. Page?

A. Well, we had gone down the weekend before and that's the last thing that's in my mind.

Q. Do you remember being at work, at anytime, the week between the weekend before and the week of the accident?

A. No, I can't. I've often tried to think about this and something's just in there, but nothing stands out.

Q. How about from the time after the accident, how early do you remember?

A. It was about three weeks after I came home.

Q. You don't remember anything until you were already home?

A. Nothing in the hospital, I can't remember even being there.

Q. So, you don't remember the accident, or approaching the scene or anything?

A. No, I would say that there's about seven weeks there that I can remember nothing.

(272)

* * *

MR. MONAHAN: Your Honor, at this time, the plaintiff rests.

THE COURT: The plaintiff rests.

MR. KUYKENDALL: If the Court please, we'd like to address the Court in Chambers.

MR. WEST: I would also, Your Honor.

THE COURT: I contemplate that this might be an extensive recess, so far as the jury is concerned.

(WHEREUPON, the jury was excused.)

IN CHAMBERS

THE COURT: All right, which defendant moves to strike first?

MR. KUYKENDALL: First, Your Honor, I'd move to strike the evidence for summary judgment as to the defendant, Thelma Arnold.

MR. MONAHAN: No objection.

THE COURT: That's the mother, all right, motion's sustained.

MR. KUYKENDALL: I, now, move, if the Court please, to strike the evidence for summary judgment as to Gilbert Arnold and Jennifer.

THE COURT: On what grounds?
Can you contemplate that they're in the same position
or situation or not? And if not, can you explicate
into the difference?

MR. KUYKENDALL: The move to
strike, first, is to Mr. Arnold, Gilbert Arnold, be-
cause, one, he was not the owner of the horse that
was killed; and therefore, he had no duty or responsi-
bility for the keeping the horse in the field.

Secondly, there is no evidence in which this jury
will find that Gilbert Arnold did anything for which
there could be any liability on his part for the
injuries sustained by the plaintiff, except for the
ownership problem and the duty of Gilbert Arnold to
take some action to enclose and retain the horse in
the field.

The motion, I believe, as to both of these defen-
dants, Gilbert and his daughter, involves somewhat
the same argument; and I want to address myself to the
grounds of the motion relating to both of those
defendants.

Now, the plaintiff has charged and has undertaken
to prove that these two defendants were negligent in

that they permitted this horse to get out of the enclosure and onto the highway in violation of a duty to properly retain the horse in the field. The burden is on them to prove that; and we submit that the evidence in this case fails to show one, any negligence, or that any such negligence that was shown was the sole, proximate cause of the collision.

The plaintiff has introduced evidence in this case to show, and has introduced its evidence by the two defendants, Gilbert Arnold and Jennifer, his daughter. They proved that this field was enclosed by a fence, American wire fence, with a strand of barbed wire across the top of it; and that this fence has been variously estimated in height from the ground of waist high to the trooper, pocket high and shirt pocket high on the part of Mr. Page, and by Mr. Arnold that the fence was 56 inches from the ground.

The evidence is that the fence had two gates. One gate was secured by a chain and padlock, which is a metal gate that stood, as I recall from the evidence, about four and a half to five feet high. The wooden gate, which was used when the daughter went in to see the horses, was approximately shoulder high to the

daughter, and it was fastened by baling wire.

Now, the testimony is that these horses had been put in that field, according to the daughter, about November, 1977, and I believe that the father, that he thought, perhaps, around February of '78. The horses that were put in that field was a gelding and before he was a gelding, he was the sire of this filly, the mother of the filly that was killed, the sire was a quarter horse. The mare was an Arabian and there was a Chincoteague pony and this filly. Those were the only four animals in the field.

The evidence is that these animals had been running together ever since the filly was born. I believe she got the mother and the filly when it was probably six weeks old. After acquiring the mother and the filly, they ran with the Chincoteague pony and the gelding. The evidence is that there was good grass, a good patch of clover for the horses in that field, that there was plenty of water in the pond, that there was a barn; that the horses had never gotten out or strayed from that property from the time they were put in there, that the mare and filly were docile and quiet pets, that the same was true of the

gelding and the pony. That they were fed approximately three times a week in accordance with the grass that they had. That the gelding had never had a saddle on him, never had a bridle on him. There's no evidence that there was any training of the filly other than to be led by a halter or rope.

No evidence that the fence was not sufficiently high or secured to retain these horses, nothing. There's no evidence here that these horses were jumpers, had been schooled to jump, had the capacity to jump or had experienced jumping at any time.

There's no evidence that the gates were open. The trooper testified that after this accident that he went to the scene and went around and looked at the fences and they were intact. He saw no evidence of any place in the fence that indicated the place that the filly had gotten out.

It's a fact that this wooden gate could have been opened by someone. All they had to do was unwind the wire and open it.

The filly could have gotten out if somebody else went in there, somebody, if you want to speculate, who might have tried to steal this filly, gotten it

outside of the gate, lost control of it and abandoned it.

There isn't a scintilla of evidence that this filly ever jumped the fence and the argument is, well, the trooper testified that when he talked to Mr. Arnold and he said, well, it's possible that the filly could have jumped the fence. And in this connection, you could be holding one of these cases that I have, Your Honor.

The possibility is not sufficient, and I move to strike out that statement of the trooper of what Mr. Arnold said, that it was possible that the filly might have jumped the fence.

Now, those are the fact of the situation. Other than that, I'd like to say this, that the horses were seen in the field on the evening of this accident. The last was about 5:30 or 6 in the evening. This accident happened about 8 o'clock that night. So, about two hours after the daughter had been there and seen the horses, fed them and after they had left and gone back up to the clover field, the daughter said that when she went out, she closed the gate and fastened it as had been usual.

So, I submit to Your Honor that there is no evidence for which this jury could find that Mr. Arnold or Jennifer Racey failed to keep the fences in the state of repair and at such height that were adequate to turn these horses.

Now, I guess the kind of a fence that you have and the height and the quality of it would depend somewhat on the nature of the animals. These animals had always been together. They were docile and quiet, well fed. They'd been fed that evening. They had plenty of water to drink. They had good grazing, they had shelter. So, there was no explanation as to how this animal got out of there.

Now, the fences, whether they be waist-high to the trooper or pocket high to Mr. Page, and whether they be, as Mr. Arnold testified, 56 inches based on measurements that he made, that it was a woven wire fence with a strand of barbed wire eight inches above the top of it, and that isn't denied. The horses had never gotten out and been in there anywhere from two and a half to four months without any problem.

The burden, as Your Honor knows, is on the plaintiff to prove not only that the fence was not ade-

quate. There was not evidence, no expression of anybody that knows anything about horses, that this fence was not adequate. There's no evidence that these horses were capable of jumping that fence with a strand of barbed wire over it.

There's no evidence that the horse jumped and scraped itself on the barbed wire as she went over. There's no evidence that hoof prints were found on the outside of the fence or on the inside of the fence that indicated a place where the horses jumped.

So, to bring ourselves within the purview of these cases that I'll relate to Your Honor, they've got the... the jury's got to say, look, here was an accident. In order to find for the plaintiff, they've got to say here was an accident. This horse had been in this field that evening about two hours before. It was out on the highway. Here the height, the jury could believe that the height of the fence was either this or that. Now, that's as far as we can go. That's as far as the plaintiff can go and they say, then, now the jury has the right to find that the horse got out because the fence wasn't high enough, or it was not strong enough, or that the defendant had left the gate

or gates open. Now, there's no evidence of either of those things, and there would have to be speculation.

Now, in this case of Rice v. Turner, 191 Va., 601...

THE COURT: That was the cow, okay.

MR. KUYKENDALL: Now, Your Honor is familiar with the facts, I gather.

THE COURT: I've got notes on that, not particularly to facts as evidence, where the man was taking his dairy cows back to the barn or back to the pasture and apparently didn't get them all in, or something to that effect.

MR. KUYKENDALL: What happened was that this farm was divided by a highway and they pastured the cows, I believe, on the west side, I'm not certain.

MR. MONAHAN: East side.

MR. KUYKENDALL: And they had the barn and the milking stalls over on the west side. As was customary that day, they had taken the cows from the east to the west side. It was dusk or dark and three of the people handled them and they had a lantern

and flashlight, I believe, out on the highway stopping traffic until they got the cows across and in that field on the east side.

Shortly after that, this one cow, which had been among the herd that had been milked and that's being taken back to the east side, was struck by this car and the person was injured.

It was claimed that the defendant was negligent. Now the Court said this, 'the trial Court held that proof of the fact that the cow was on the highway unattended was not in itself sufficient to establish a prima facie case of negligence on the part of the defendant.' That is, the doctrine res ipsa loquitur did not apply. This is the correct instruction on the statute, that the Court did, in part, there agree it should be unlawful for the owner of any horse, mule, cow, hog, sheep or goat, to let any such animal to run at large beyond the limits of his own land.

This language implies knowledge, consent, or a willingness on the part of the owner for such domestic animals to run at large. The statute does not cover a situation where the owner has used ordinary care to keep his stock confined to his premises.

A statute is not necessary to establish the duty of ordinary care. Such duty may arise from statute from municipal ordinance in relation to parties.

The common law imposes upon every person the duty to exercise ordinary care in the use and maintenance of his own property without damaging others.

And then the Court said, plaintiff conceded that the defendant exercise ordinary care in maintaining his fence, including the pasture on the east side of the highway. At least he offered no evidence tending to prove to the contrary. The only evidence introduced to prove negligence on the part of the defendant consisted of five photographs taken several months after the accident by the lane.

The wire fence extending a short distance on the south side of the land appears to be old and somewhat dilapidated, but this fact didn't materialize because the uncontradicted testimony is to the effect that the cows weren't in the barn or in the lane, or under the immediate control of the defendant's employees.

The only other testimony tending to establish the defendant's negligence is alleged oral statements claimed to have been made by both Mr. Stewart and

Webster, two witnesses for the plaintiff. Shortly after the accident Stewart, who lived nearby, went to the scene of the collision. He, in an effort to assist plaintiff in ascertaining the owner of the cow, went to the defendant's home where Brogan lived, told Brogan of the accident and together they walked to the scene.

And then the Court quoted the testimony that was material. 'What did Brogan say, if anything, what did Brogan say in reference to the cow?' 'He said, they were late doing their work and it was after dark when they milked. And that they were putting the cows across the road and he was watching the traffic and the other man was putting the cows across the road and the cow never was put up. She was left out.' Question, 'He said the cow never was put up, she was left out?' 'Yes, sir, just left out. I asked him how she got out and he said she didn't get out, she was left out.' 'Did he make any references to whether or not she was under a fence?' 'He said, when she is not over here, she is out.' Question, 'Not over here, what did he mean by not over here?' Answer, 'She was not over here in the pasture field. She was

turned out of the barn and the milk house, she was out.'

Webster testified that on this occasion he heard Brogan say, we bring the cows across the road and milk them and then we take them back. And he said that he missed this one, she was left out.

Brogan denied making the statement; but assuming that he did, what does that mean? If they are interpreted to mean that Brogan, at the time he drove the cows to the pasture, knew that this particular cow to be left on the west side of the highway and made no effort to find her, then he intentionally permitted the cow to remain outside the enclosure. The plaintiff does not claim that this is a fair construction of the alleged oral statement as his own witness, Webster, testified.

Question, 'When was the first time Brogan missed the cow?' Answer, 'I don't supposed he had missed it.'

And then the Court went on to say this, 'the only fair and reasonable construction that can be placed upon the statement is that Brogan intended to express his own opinion as to how the cow might have strayed from the defendant's premises onto the highway

The witnesses themselves did not construe Brogan's statements to them to mean that Brogan, at the time, knew that the particular cow was not among the herd when they were driven across the highway.

Now, Mr. Carter's statement to the trooper, if it's permitted to stay in, is it's possible that it could have jumped, but he certainly can't be construed to mean that he knew that the animal had any reason to be there. He merely expressed Brogan's opinion and was not intended to be statements of fact. They were made sometime after the accident and were not a part of register. At most, they were mere expressions of opinion of the employee, which opinion is not pertinent or admissible as evidence against the employer.

And the Court went on to say, 'after the gate was shut and fastened, Brogan went to his home satisfied that all of the cows had been driven from the barn to the pasture.'

When this young lady fed the horses they were all there, she knew it was all of them, closed the gate and fastened it, and was satisfied that they were all there within the field that was enclosed by a fence that had been adequate for turning those horses,

and I said, two and a half to four months with no problem.

His first knowledge of the fact that one of the cows was not in the enclosure was when Stewart told him of the accident.

And then the Court concluded in this opinion. Land, as evidence, is insufficient to prove that the cow was at large with the knowledge and consent of the defendant, or that her escape of the defendant's premises were due to his negligence.

Now under those facts of the situation, the Court had no trouble in finding that the evidence was insufficient to show negligence. The cow was left out. He might have argued, and did argue, that, well, that's a jury question; and the Court said that in addressing that, said, 'there's no evidence that this defendant had knowledge that the cow was out, or consented that the cow was out, or that that was true of the employer.' And that that was the way the Court was going to construe that.

Now, in this Wilkins v. Sibley...

THE COURT: Is that the mule case?

MR. KUYKENDALL: That's the mule case.

THE COURT: That's the one I couldn't find any notes on. I had notes on it at one time.

MR. KUYKENDALL, III: I have a copy of the agreement.

THE COURT: If you'd let me see that, that would be helpful. All right, Mr. Kuykendall.

MR. KUYKENDALL: This is a case where a car, at nighttime, struck a mule. Three mules had been enclosed in a field and they all got out. One of them was on the highway and the car struck it, and there were injuries.

The motion for judgment alleged that the defendants acted by and through their service as an employee that negligently permitted certain mule owned by them to run at large along the public highway. That the truck driven by the plaintiff collided with one of the mules to cause his injuries.

The defendants denied that; there was a verdict from the jury for the plaintiff and the Court awarded a writ of error as to the judgment of the Court, and the

verdict was reversed and entered a finding for the defendant. Just as the attendants assigned to the cross area that the verdict resembled a contrary law and the evidence, and that the evidence fails to show that the defendant was guilty of negligence, which was the approximate cause of injury and that the plaintiff was guilty of contributory negligence.

The evidence shows that, at the time of the accident which occurred on July 27, 1961, the defendant owned two mules, used by them in operating a farm in Halifax County. The animals were under the care and custody of the two sharecroppers Blevin Smith and Levi Jones, who worked for the defendant.

These two mules, along with another owned by Smith, were kept at night in the pasture owned by the defendants on U.S. Highway 58. The pasture was enclosed by a woven wire fence with strands of barbed wire on top and at the bottom. Entrance to and exit to the pasture was through a wire gate which was referred to as a gap. This consisted of a panelled fence attached to four small wood posts. When the gate was opened, the panelled portion, of course, was right on the ground. The gap was closed by fastening the end of the post on the

adjacent post. For this purpose, a loop of baling wire was attached to the post of the fence and was hung over the top of the end of the post to the gap. Part of the end post to the gap was put through similiar loop. Between these two loops were three strands of barbed wire which attached to the main post which were usually wrapped around the end gap post, thereby fastening the gap more securely.

THE COURT: Mr. Kuykendall, I've got it in front of me and I can just read it and save the size of the record. I have read the case and I remember it, but I think I ought to refresh my memory. That case sticks in my mind as being a pretty rough case.

MR. KUYKENDALL: Your Honor, I'm not going to read through it if Your Honor has read it. But, if the Court in that case said, in effect, that sure the mule got out, the witness testified it was possible that the mule would have stuck his head in that aperture there at the gate, moved the wires and gotten out. That was a logical way. That the defendant had not proved that some trespasser had let them out and, of course, it isn't up to the defendant to

show how they got out. It's up to the plaintiff to prove that they got out through the gate.

In this case, the case at Bar, Your Honor, the burden is on them to prove that the horse jumped the fence, and there is no other. There's no explanation. In the case at Bar, there's no attempt to explain how this horse got out. It just proved that there was a fence there at varying heights with witnesses varying. There are two gates, one which was padlocked and one was locked with a wire, that the horses were there the evening of this accident and had been fed and left there intact. And as the Court said in this case, what happened in the two-hour interval in that case? What happened in the two-hour lapse from the time that they were put in there until they got out, nobody knows.

Now, that's true here and I have made the observation a minute ago that if you're going to engage in speculation or conjecture, you just as well speculate that we all read in the paper about people stealing horses and cows. Somebody could have opened that gate and taken her out to try to steal her and she got away. Another thing in this case is that this was a suckling filly. She was still not weaned, she was on her mother.

It has been described here that they were very close, had been close. It can't certainly be a reasonable inference that this filly could never jump, had never been trained to jump, had jumped this fence, where we wouldn't know, and left its mark, went out on the highway.

I submit, Your Honor, that there's no showing by the plaintiff and the plaintiff's got the burden, and the Court keeps saying that in this case, to prove how it got out. I submit there's no negligence here because there's no proof that this fence was not adequate to keep these horses and if it was adequate, there's no negligence.

Secondly, even if there was, it wasn't adequate, that would have prompted the question. There's no proof of causing collision; and I respectfully submit, Your Honor, that if this case would go to the jury, the jury return a verdict for the plaintiff, the Court, on a motion, would have to set it aside. The Court's bound in these cases and I don't see how the Supreme Court of Virginia could be any stronger and more effective in its stating of the law.

THE COURT: Wilkins is pretty

strong.

MR. KUYKENDALL: That's all I have.

THE COURT: Mr. Monahan.

MR. MONAHAN: Your Honor, there's no question Wilkins is a strong case. Wilkins is a strong case under the facts of the Wilkins case and I think this is exactly what Mr. Kuykendall and I differ, as to whether or not the facts of the case are analogous and what is the status of the record in this case.

In Wilkins, I think it's very simple. The summarization of the Court appears, it seems to me, over the very paragraph that Mr. Kuykendall alluded to, that is where the Court states, 'The plaintiff argues that there is no evidence that the gap was opened by a trespasser or in other manner than by the mule.' The ready answer is that the burden was not on the defendants to show that the gap was opened by an intruder or the means by which they, the defendants, were not responsible. The burden was on the plaintiff and not on the defendant.

Now, in this instance...I'm still speaking of the Wilkins v. Sibley case...obviously there, the Court is

relying on the previous line of cases...and there have that trespassers can leave gates open, people can go in and leave gates open. Unless, therefore, you show how the horse got out, or what occurred, or eliminate that fact, there are alternative theories.

As a matter of fact, in this case, we submit, today, that we simply have eliminated the alternative theories. We have established, by circumstantial evidence, how this horse got out and we have established that it got out because of the negligence of those two persons charged with its custody. One, the lessee, and I refer to him as a lessee, although he said I didn't have a lease, I had a crop agreement. But, I think it's a synonymic difference. He was, nevertheless, in control of the property and in charge with the responsibility, jointly with his daughter, when the horses were quartered on it.

We went so far and went out of our way to show that there is no alternative theory, such as the trespasser theory one finds in the Wilkins case or the speculation which one finds in Rice v. Turner in which the Court states, they really didn't show that the cow was ever left out. They only, if you recall, the Court ends up

saying, after we discount all these expressions of opinion by Mr. Brogan which are, in fact, contrary to specific statement, when was the first time he missed the cow? I don't suppose he missed it. They go on to say, the uncontradictory evidence for the defendant is that his employees exercised ordinary care as the cow was brought across the road.

Now, in this case, what do we have on the contrary? We have a filly which has just achieved growth. She was then about two years old and had just stopped growing. I'm assuming that the Court can realize that she was not in the same condition a year when she was a yearling as she was a two year old.

She was acquired, according to the statement made by the one defendant to the trooper, as a jumper. She was not trained as a jumper at the time, but on the other hand, she wasn't carrying a rider either. Had she been carrying a rider, we probably would not have had an accident. She was, according to Mr. Arnold, as he stated...and we rely on this testimony not as to his statement that the horse did, in fact, jump the fence but his statement as an acknowledgment of her capacity to jump the fence. He said she could have

jumped the fence, she had the capability of it. At least the jury is entitled to make its own determination as to what he meant when he said, it's possible she could have jumped the fence. I think that is the purpose of the jury, to resolve the testimony in the light of the entire picture.

Now, what do we have? As Mr. Kuykendall points out, the evidence is and the evidence most favorable to the plaintiff is that the fence was only approximately three feet and one-half inch tall. The trooper stated it came up halfway on his body and that he was 6'1" tall. I submit that at the worse the evidence is that the height of the fence varied from place to place.

So, you have a horse purchased as a jumper, capable of jumping the fence, enclosed in a fence. We don't contend that it was the dilapidated condition of the fence, we contend that it was an insufficient fence simply because the filly could jump it.

Now, alternatively, and looking at Rice and looking at Wilkins, what about the intruder theory? What about Mr. Kuykendall's theory that someone could have stolen the horse and then the horse escape from the somebody who was stealing it and it was wandering around on that

basis? We have proved that the property had never been disturbed by intruders in the past, that the party's defendant had never been aware of any persons coming on the property attempting to ride the horses, attempting to remove them. That they had no enemies, no one had threatened them. They, in fact, both testified that the gates were securely fastened and were undisturbed.

And the Court will recall that Mrs. Racey actually went so far as to say that she had closed the gate, she had wound the wire around it. She went back the morning following the accident and the wire was undisturbed. It was still wound in the fashion which she had wound it. Now, that's a jury question, also. If Mr. Kuykendall wants to argue, it seems to me, that her testimony is to be disregarded, that becomes a jury question.

But, we have eliminated the intruder theory. We have eliminated all possibility of that horse being out because somebody else had forgotten to lock the gate, and we don't suggest they forgot to lock the gate or forgot to wire the gate.

Circumstantial evidence is a justified means of

proving a case, and here we have proven that the only remaining possibility of that horse getting out was because they put a horse in a field with a three-foot fence that the horse was capable of jumping. I love the fact that the horse was still suckling. It was suckling a year after it should have been weaned. It was a full-grown horse. It was a full-grown pony, excuse me, the distinction between pony being between 13 hands and 14 hands, but it was of full height. It was purchased as a jumper. It had been trained only to the extent of a lead line, but it was capable of going over the fence. It didn't go out any other way because the gates were locked.

And I submit that if, in fact, it went over the fence, that became a negligence in terms of the enclosure in which it was placed, an enclosure which was unbreached in any other fashion. For whatever reason it went over it, the negligence in not having a fence which would restrain it became a proximate cause of the accident.

I recognize that the Court has the cases in front of you. I'm going to attempt to read it. I think that the summarization of the testimony by Mr. Kuykendall

was interesting, but I don't believe that it changes the fashion. I do take issue with the phrase which one finds, quite frankly, also in your instruction book where you talk about the sole, proximate cause. We don't have to prove that it was the sole, proximate cause. If, in fact, the negligence of Mr. Arnold and his daughter in quartering this horse in the field with insufficient fences because of the nature of the horse was a proximate cause, that is all that we need at this point in terms of this motion to strike unless Mr. Kuykendall wants to allege contributory negligence in some fashion; and I've not heard that argued.

As far as, to back up, he touched very briefly at the beginning on the fact that Gilbert Arnold was entitled to a motion to strike because he was not the owner of the horse and, therefore, he had no duty. I submit that the horse was placed in the field at his insistence and agreement, as were his own horses. This was joint venture and, therefore, there was certainly a joint responsibility with respect to the filly in the field. I don't think that portion of the motion for judgment deserves more attention than either Mr. Kuykendall or I have given.

In terms of the height of the fence, obviously, we are entitled to argue to the jury rather than have this Court rule that the evidence does not support a finding that it was only three feet tall. More importantly, regardless of the type, we are entitled to argue and have a jury determine whether Mr. Arnold, in fact, meant that it was capable of jumping the fence as it existed at that time.

As I said, the enclosure was unbreached. I think there is sufficient evidence that this was the sole and proximate cause as to why the horse left the field.

THE COURT: Anything further?

MR. MONAHAN: No, Sir.

THE COURT: Mr. Kuykendall.

MR. KUYKENDALL: If Your Honor please, just briefly. In the first place, I don't think it's material that Your Honor resolve the recollection of counsel on the evidence. My recollection is that the trooper first testified that Mr. Arnold said that this horse was capable of jumping or being trained to jump, and that it was possible that it could have jumped.

On cross-examination, I asked him if it was a fact

that he had talked with him about that and asked him if he said, told him that he couldn't recall. He didn't have anything in his notes about it, so he couldn't say that Mr. Arnold said that the horse was a jumper or had ever been trained to jump. All he said was to the trooper that it's possible that the horse might have jumped out of the field. That's my recollection of testimony, but I don't think that's really material.

MR. KUYKENDALL, III: The trooper asked him if it was possible for the horse to jump the fence and that's when he responded.

MR. KUYKENDALL: That's when he responded, well, yes, I guess he could have.

But the point is that, just like I said in the Wilkins case, there was a witness that testified it was possible for that mule to push that latch up and the Court says, that won't do. The closest approach, said the Court, to the required evidence is the testimony of a witness that is impossible to have done so.

Proof that it was a probability of cause and connection is not sufficient. It's purely conjecture.

Now, the point is that the plaintiff has to prove,

not that the horse had got out. Sure the horse got out. We all concede that and nobody knows how, or when, or where. The trooper said he examined the fences. He couldn't find anyplace that the horse had gotten out.

MR. MONAHAN: I'm going to object to that. He said he walked two sides, Mr. Kuykendall.

MR. KUYKENDALL: Well, he walked two sides. He certainly didn't prove that on the other side that the horse...

MR. MONAHAN: I just wanted to be accurate.

MR. KUYKENDALL: All right, the point I make is that there's no proof that from what the trooper saw of the fences he looked at that it never got out there. There isn't any proof to the contrary about the rest of the fences or the gates; and the fact is, as the Court said in the Wilkins case, let's say the evidence is sufficient to show the negligence because they didn't fasten that gate properly. But, said the Court, how do we know the mule got out through that gate? The gate was down, incidentally, when they found it. There was no doubt about how the

mule got out there, but the Court said, well, we can't assume that the mule was responsible for that gate being down.

And I submit, Your Honor, that they couldn't assume or permit a jury to find in that case, you can't find that there's something to it. The filly, who had been with these animals for several weeks or months in this same field, had deliberately jumped that fence. There isn't any reason to have assumed by the owner.

After all, the Court said, in that other case, that this statute implies that it was done with knowledge and consent and willingness.

MR. MONAHAN: Your Honor, I'm going to object to that, also, as a misstatement of law. I'll admit if you're relying on the statute, but the common law duty simply isn't a negligent one in the State of Virginia.

MR. KUYKENDALL: Mr. Monahan, I'm telling the Court what the Court said.

MR. MONAHAN: And it also talked about negligence, Mr. Kuykendall.

MR. KUYKENDALL: Yes, and it

said that the language implies knowledge, consent or willingness on the part of the owners for such domestic animals to run at large.

MR. MONAHAN: That's the statute, Your Honor.

MR. KUYKENDALL: Of course, it is.

MR. MONAHAN: And I'm talking about the common law duty which exists in the State of Virginia.

MR. KUYKENDALL: Well, the statute parallels the common law duty. It says that they shall not permit to be run at large. And I submit to Your Honor that for this jury to say that Mr. Arnold or his daughter knew or had reasonable cause to believe that this filly would jump that fence is to engage in the rankest kind of speculation and assumption.

They say that the filly had never been trained to jump and had never been known to jump. There's no evidence to the contrary. The plaintiff hasn't proved that this filly could have jumped that fence. The plaintiff hasn't proved a set of circumstances that would have prompted it to jump that fence. And the

plaintiff hasn't proved, as a matter of fact, that he did jump the fence.

As the Court said in the Wilkins case, you might assume all kinds of things, but you can't assume one thing that's beneficial to the plaintiff and not assume something else that isn't.

I respectfully submit that to the Court, that if there was ever a case that was controlled by decisions of the Supreme Court of Virginia, this case is.

I urge before the Court, in this case, to strike the evidence because there isn't any evidence of negligence. And I get back to what I said before. It doesn't do just to prove that this is the kind of fence it was. The jury can't speculate as to whether that was adequate to keep horses in. There's no testimony by people that know anything about horses that it was not a sufficient fence, and the fence had been sufficient up until that time, which was a substantial period of time. And there was no reason to get out. They haven't proven any reason for getting out.

I earnestly submit to the Court that this is the case that is controlled by these decisions of Virginia, and that this is the time, now, for the Court to strike

this evidence and to enter summary judgment for these defendants.

MR. MONAHAN: Now, Your Honor, I want to refer to Rice v. Turner, which Mr. Kuykendall talks about creating the statutory duty and...I don't know what it is in the official report but the Court, after discussing the statute, says a statute is not necessary to establish the duty of ordinary care. Such duty may arise from statute from a municipal ordinance or from the relation of the parties. The common law imposes upon every person the duty to exercise ordinary care in the use and maintenance of his own property to prevent the injury to others. And it doesn't rely on the statutory duty and it doesn't say one thing about knowledge being necessary.

And I submit all it says is you can't recover when there are a bunch of other alternatives; but when we eliminate the alternatives, I think that we can recover, and I think it's a jury case in this very issue in this case.

MR. KUYKENDALL: I submit, as I see it, Your Honor, that the statute parallels the common law. All that statute says is that you must

not let them run at large, and that's what the common law was. If the Court says that that statute must be interpreted to mean willingness or consent and knowledge, but that certainly is admirable to the laws in the existing common law, and I respectfully urge the Court to strike this evidence. I don't see how the Court can possibly sustain a verdict for the plaintiff on this case.

THE COURT: Well, to review what my notes say which, of course, are not full on some of the points that have been mentioned.

The defendant, Gilbert Arnold, was quoted as saying that the horse or filly involved was a jumper type and may have jumped the fence. Obviously, it may have, maybe it did.

It's the height of the fence; of course, it varied from witness to witness. The trooper presumably would be at the lowest height when he said he was 6'1" tall, and the fence came waist high on him. Now, how much that means in feet and inches, I don't know. The legs are usually longer than the torso.

MR. MONAHAN: Your Honor, I asked the following question right after that. Do you mean

it came halfway up on you? And he said, yes. I've vouched the record on that.

THE COURT: All right, I think he also said waist high.

MR. MONAHAN: Yes, Sir, he did. I say, then I asked that question.

THE COURT: Well, the horse running at large, of course, obviously from the cases is not a doubt. The plaintiff did take particular care to ask if the gate or gates were disturbed from the evening before when the horses were fed and that they didn't have any enemies they knew of, and they didn't know of any trespassers, which is some evidence to eliminate any theory of some third party causing the horse to be on the highway. It doesn't necessarily eliminate it absolutely, but it is evidence to that effect.

It seems to me that the case is, at this point, one involving foreseeability and not the same issues, the sole question; but it seems to me to be an important question related to negligence on the part of Gilbert Arnold or his daughter, either one, as to the foreseeability of the escape of the horse or if it

wasn't an escape, intentional taking of the horse out of the enclosure. That gives me some concern because that's directly related to their negligence as to whether they could or should have foreseen the escape of the horse.

There might be some temptation, in these cases, there would have been a big temptation, in the Wilkins case, perhaps, to fall back on res ipsa loquitur.

But, in this case, I'm constrained to sustain the motion of the two defendants on the ground that there is not sufficient evidence to establish negligence on their part and in a large measure, due to the fact that the evidence does not establish that they foresaw or should have foreseen, under all the circumstances related, that this particular animal would get out on the highway. Certainly, it was without their knowledge and without their intent and without their consent.

MR. MONAHAN: May I ask for clarification of what you're saying? Are you saying foreseeability relates to getting out of the enclosure or getting onto the highway?

THE COURT: Getting out of the enclosure, if it gets out of the enclosure, then I

think that he could foresee that it would. Especially since it's right by the highway, you could certainly see that it would.

MR. MONAHAN: I just wanted to be sure. You're sustaining the motion on the basis of lack of foreseeability of it getting out of the enclosure under these circumstances.

THE COURT: Out of the enclosure not...because I think if the horse got out of the enclosure, it's highly foreseeable that it would get on the highway.

I simply don't see that the evidence is sufficient to show that they could have foreseen or that they should have foreseen, under everything in the evidence, that this animal was going to escape either on its own or through the agency of some other person.

It's a hard case, but opinions in the Rice case and the Wilkins case, which the Wilkins seems to me, in some respects, to be a stronger case for the defendant rather than this case. That's just my own personal appraisal.

And that's basically the reason for the ruling. I don't think the evidence makes that a prima facie case

of negligence on the part of those two defendants.

MR. MONAHAN: Would you please preserve our exception, Your Honor?

THE COURT: Yes. Corollary to that, of course, would be that it would lead the jury to speculate as to negligence on their part. It's a very hard case. All right, now, Mr. West.

MR. WEST: Yes, Your Honor, it's a hard case. It gets even harder.

The issue in the order, as far as defendant, Page, was concerned, relates to the matter...is recited rather, as being whether defendant Page was guilty of negligence in the matter of his speed, lookout and control of his vehicle. The only witness who testifies, in any way, concerning the circumstances of the accident is Mr. Page. No one else has any knowledge of how the accident occurred.

There is no evidence of any kind as to how the horse got to where it was when it was obviously struck. We have no indication as to whether the horse came from the right or to the left. The great tendency is to speculate that it came from the right. We don't have that information and we can only speculate. We have