

FEB 14 1978

RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia

AT RICHMOND

RECORD NO. 771124

J & E EXPRESS, INC.,
and CHARLES SPEARS,
Appellants,

v.

HANCOCK PEANUT COMPANY,
Appellee.

JOINT APPENDIX

Donnell P. Davis, Esquire
Richard A. Saunders, Esquire
FURNISS, DAVIS and RASHKIND
P.O. Box 3746
Norfolk, Virginia 23514
Counsel for Appellants

Richard C. Grizzard, Esquire
Boykins, Virginia, 23827
Counsel for Appellee

TABLE OF CONTENTS

	<u>Page</u>
Motion for Judgment	1
Joint Answer and Grounds of Defense	3
Testimony of George Flythe	5
Testimony of Herbert Ellsworth	21
Testimony of Louis Ellsworth	31
Stipulation of Damages	40
Motion to Strike the Plaintiff's Evidence	41
Testimony of Harvey G. Pope	46
Testimony of Charles Spears, Jr.	54
Testimony of Jaubert Nimmo	64
Testimony of Leonard Rothman	70
Motions made by both counsel at close of all the evidence and Court's Ruling	74
Defendants' -- Plaintiff's Exhibits (photographs)	83
Defendants' exceptions to the Court's refusal to grant jury instructions 7-A, 7-B and 7-C	90
Jury verdict for defendants	95
Judge James C. Godwin's letter--opinion of May 23, 1977	96
Judgment Order of the Court	97
Notice of Appeal	98
Assignments of Error numbered 1, 2, 3, 4, 5, 8, 9 and 10	100

VIRGINIA: IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

Hancock Peanut Company,
A Virginia Corporation
Courtland, Virginia

Plaintiff

v.

MOTION FOR JUDGMENT

J & E Express, Incorporated,
A Virginia Corporation
Suffolk, Virginia

Registered Agent
Moody E. Stallings
104 Western Avenue
Suffolk, Virginia

Defendant

John Doe, whose name is
believed to be Charles
Spears
1229 Exchange Road
Suffolk, Virginia

Defendant

Comes now the plaintiff and moves the Circuit Court of South-
ampton County, Virginia, for an award of judgment against the above
named defendants, jointly and severally, in the amount of Thirty-nine
Thousand Five Hundred Seventy-eight and 28/100 Dollars (\$39,578.28),
and its costs in this behalf expended, for the damages, on the follow-
ing grounds:

1. That on or about the 19th day of December, 1973, at approxi-
mately 11:30 A. M., the defendant, John Doe, whose name is believed
to be Charles Spears was operating a tractor trailer vehicle owned
or under the control of the defendant, J & E Express, Incorporated.

2. That on the date and time aforesaid, the defendant, John Doe,
whose name is believed to be Charles Spears, was operating the said
tractor trailer within the normal scope of his employment and pursuant
to the normal course of business of the defendant J & E Express,
Incorporated.

3. That at the aforesaid time, the defendant, John Doe, whose name is believed to be Charles Spears, did negligently, carelessly and recklessly back the said tractor trailer owned or under the control of J & E Express, Incorporated, up to the loading dock of Hancock Peanut Company in Southampton County, Virginia at an unauthorized area thereby striking a water pipe in the sprinkler system.

4. That as a result of the careless and negligent operation of the tractor trailer by John Doe, whose name is believed to be Charles Spears, a water pipe in the water sprinkler system was broken causing extensive water damage to bagged peanuts inside the building.

5. That as a result of the said careless and negligent actions of defendants, plaintiff has suffered out of pocket expenses and damages to its products in the sum of Thirty-nine Thousand Five Hundred Seventy-eight and 28/100 (\$39,578.28) Dollars.

Wherefore, the plaintiff demands judgment against the defendants, jointly and severally, in the amount sued for.

HANCOCK PEANUT COMPANY

By:


Counsel

Richard C. Grizzard
Attorney at Law
Boykins, Virginia

Filed in the Clerk's Office the 21 day of July, 19 75
Total Paid \$ 30.00
By Richard C. Grizzard Clerk
Richard C. Grizzard D. C.

VIRGINIA: IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

HANCOCK PEANUT COMPANY,

Plaintiff

v.

J & E EXPRESS, INC.,

and

JOHN DOE, Whose Name is
CHARLES SPEARS,

Defendants

JOINT ANSWER AND GROUNDS OF DEFENSE

Now come the defendants, J & E Express, Inc. and Charles Spears, by their counsel, and for their Answer and Grounds of Defense to the plaintiff's Motion for Judgment, say as follows:

1. These defendants admit the allegations contained in Paragraph One of the Motion for Judgment

2. These defendants admit that the driver of the vehicle was Charles Spears, and that he was working in the scope of his employment with the defendant, J & E Express, Inc.

3. These defendants deny the allegations contained in Paragraph Three of the Motion for Judgment.

4. These defendants deny the allegations contained in Paragraph Four of the Motion for Judgment.


5. These defendants deny that the plaintiff "has suffered any out of pocket expenses" and demand strict proof thereof, and further deny any act of negligence on their part.

6. The plaintiff was contributorily negligent, and the author of its own misfortune.

7. This was an unavoidable accident, inasfar as the defendants are concerned.

8. These defendants will rely upon any and all defenses which may arise between now and the time of trial, or be justified by the evidence upon trial.

J & E EXPRESS, INC. and JOHN DOE, Whose
Name is CHARLES SPEARS

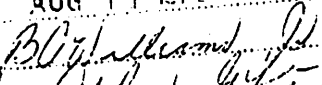
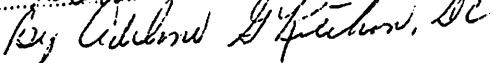
By 
Counsel

I hereby certify that a copy of the foregoing pleading
was mailed to all counsel of record this 6th day of August, 1975.



Donnell P. Davis, Esquire
FURNISS, DAVIS and SACHS
P. O. Box 44
Virginia Beach, VA 23458

Furniss, Davis and Sachs
Attorneys at Law

Entered and Filed, this 11th day of AUG 11 1975
By 


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

GEORGE FLYTHE,

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

DIRECT EXAMINATION

BY MR. GRIZZARD:

Q Mr. Flythe, state your full name,
address, and occupation, please.

A George Flythe.

Q And your address?

A Route One, Capron, Box 211.

Q Capron. And your occupation?

A I work -- I'm with Hancock.

Q You work for them all year long?

A No, sir, just part-time. That's
when I get my work in and I work there and come to the
farm again.

Q How many years have you worked for
Hancock Peanut Company during the off-season?

A I'd say ten or eleven years.

Q Were you working with them on
December 19th of 1973?

1 A. Yes, sir.

2 Q. Where were you working that day?

3 A. Over there at --

4 Q. Is that warehouse number eight?

5 A. Yes, sir.

6 Q. I want to call your attention to
7 approximately eleven-thirty that morning and ask you
8 what you were doing that particular time.

9 A. I took the time I was fixing to
10 eat lunch.

11 Q. And were you by yourself or were
12 you with someone?

13 A. It was about six or seven of us
14 were there fixing to eat lunch.

15 Q. Do you know Herbert Ellsworth and
16 Louis Ellsworth?

17 A. Yes, sir.

18 Q. Were they there?

19 A. Yes, sir.

20 Q. Where were you going to eat lunch?

21 A. We call it the scale room.

22 Q. Is that at warehouse number eight
23 or the cold storage warehouse?

24 A. Yes, sir.

25 Q. Where is that in relation to your --
strike that.

1 Where were you standing at the time
2 you said you were getting -- inside the office itself?

3 A. Yes, sir.

4 Q. Are there any windows looking out
5 over that office to the main part of the plant?

6 A. Yes, sir. There are two big windows
7 where you could see out.

8 Q. Directing your attention to
9 approximately eleven-thirty, at the time you were getting
10 ready to eat lunch, could you tell the Court whether
11 you observed anything occurring at the platform.

12 A. We were fixing to eat lunch and
13 the truck was backing up there then at kind of an angle
14 and then it hit the platform then and pulled back up
15 again.

16 Q. Did it hit the platform?

17 A. He nearly hit it.-- backed up at
18 an angle and I remember he got it on the platform and
19 about that time, he pulled back up. And then I went
20 out there and waved him in to stop and I knew in advance
21 that he had hit the pipe because water was going
22 everywhere.

23 Q. The first time he backed up and
24 nearly hit the platform, did he hit the pipe that time?

25 A. I think he touched the pipe, but

1 didn't hit it hard enough to break the pipe.

2 Q Is that why you ran outside, to
3 try and stop him?

4 A Yes, sir.

5 Q How far did he pull up?

6 A About six or seven feet or more,
7 along in there.

8 Q And you went on the platform -- or
9 where were you standing when he was backing up this
10 time?

11 A I was inside on the platform and
12 I was there waving in front of him to stop.

13 Q Were you doing anything besides
14 waving?

15 A Hollering and waving.

16 Q Did he slow down at all or come
17 on back?

18 A He come on back.

19 Q All right. When he came on back
20 this time while you were standing on the platform, you
21 say he hit the pipe again?

22 A Yes.

23 Q When he hit the pipe this time,
24 what happened?

25 A He busted the pipe all to pieces and

1 water was going in the cold storage and we had to get
2 brooms and stuff to sweep it out.

3 Q. How close were you to this
4 pipe that he hit the first time?

5 A. He was near me.

6 Q. When he hit that -- when he hit
7 it the second time. When he first hit the pipe, how
8 far were you from the truck when he tapped it the
9 first time, from the pipe itself?

10 A. From where the Judge is there.

11 Q. And after he hit the pipe the second
12 time, water started coming; and then what happened?

13 A. I got the broom and swept it up
14 and had to move all the peanuts and everything in
15 there.

16 Q. You say you have been working there
17 how many years?

18 A. About ten or eleven years off and
19 on.

20 Q. Have you ever had any accidents
21 like that before --

22 A. No, sir, not that I remember.

23 Q. -- or since?

24 A. No, sir.

25 MR. GRIZZARD: All right. Answer

1 Mr. Davis.

2
3 CROSS-EXAMINATION
4

5 BY MR. DAVIS:

6 Q George, at eleven-thirty -- was
7 it eleven-thirty or twelve-thirty?

8 A Eleven-thirty.

9 Q It was your lunchtime, right?

10 A Yes.

11 Q You and Herbert and Louis Ellsworth
12 were inside this shack eating or getting ready to eat
13 lunch?

14 A Getting ready to eat.

15 Q Getting ready to eat. And how long
16 had you been inside the shack when Charles Spears came
17 up with the trailer?

18 A We were heading there when he came
19 up with the trailer.

20 Q You were already inside?

21 A Yes.

22 Q And you actually started eating?

23 A No. We were fixing to eat.

24 Q And so you were looking out of a
25 window, I believe, when -- where was he when you first

1 saw him? Where was his truck or trailer when you
2 first noticed it in the yard?

3 A. He was fixing to back in there.

4 Q. Was it five or ten feet from the
5 dock?

6 A. When he was fixing to back in?

7 Q. Yes.

8 A. When he was fixing to back into
9 the dock there?

10 Q. When he was fixing to back in,
11 what would you say the trailer was, five or ten feet
12 from the dock when you first saw it?

13 A. Something like that.

14 Q. And you saw him back up and you
15 say it was at a little bit of an angle?

16 A. Yes, sir, an angle there.

17 Q. And you stood there inside and
18 watched him?

19 A. Yes, sir.

20 Q. And you saw him come back and you
21 say you think you saw him tap this pipe.

22 A. He didn't exactly hit it, but I
23 thought he was going to hit it, but he didn't exactly
24 hit it.

25 Q. And then you said he pulled up six

1 or seven feet and started backing in again; is that
2 right?

3 A Yes, sir.

4 Q And that's when you ran out and
5 yelled at him.

6 A That's right.

7 Q Is that correct?

8 A Yes.

9 Q And by the time you got there to
10 yell at him, he was backed up against the dock, wasn't
11 he? When you ran out, he was already started backing
12 up the second time, wasn't he?

13 A Explain that again, please.

14 Q Excuse me. When you ran out, he
15 had already pulled up about six or seven feet and when
16 you ran out, he had already started backing up.

17 A That's right.

18 Q And tell me what kind of weather
19 was it that day. Was it ice and snow, a really bad
20 day?

21 A No, it wasn't a real bad day. The
22 sun was shining.

23 Q Hadn't there been some ice and
24 snow around that day, do you remember?

25 A As best I remember, I don't think so.

1 Q You don't think so?

2 A I don't think so.

3 Q Now this thing -- I'm going to show
4 you a picture and ask if you can -- is that the shack
5 you were inside eating lunch or getting ready to eat
6 lunch --

7 A Yes, that's the one.

8 Q -- looking through the double
9 window?

10 A Yeah.

11 MR. DAVIS: Can we have this as
12 an exhibit, Your Honor?

13

14 (Whereupon the aforementioned
15 photograph was received in
16 evidence and marked for
17 identification as Defendant's
18 Exhibit Number One.)

17

18 BY MR. DAVIS:

19 Q Come up here for a moment and tell
20 the jury. This picture shows the dock at warehouse
21 number eight?

22 A That's right.

23 Q This is where the incident took
24 place.

25 A That's right.

1 Q And this is the shack, the shack
2 which is on the dock where you and the other two men
3 were eating or getting ready to eat.

4 A That's right.

5 Q And this is the pipe that was struck.

6 A That's the pipe.

7 Q There weren't any signs or warnings
8 on that pipe, were there?

9 A No signs or warnings on the pipe?

10 Q Yes.

11 A No warning signs on the pipe.

12 Q Now this pipe has a little extension
13 that extends out about five or five and a half inches;
14 is that right or do you know?

15 A I don't know. I wouldn't know how
16 long that pipe were, but it wasn't too -- stick back
17 under the shed, you know, that pipe under there went
18 back under the shed.

19 Q What I'm talking about -- do you
20 know this little extension out beyond the loading dock
21 extends out about five inches, doesn't it, or do you
22 know how far it extends out?

23 A I wouldn't know how far it extends
24 out.

25 Q Does this represent how that pipe

1 looked at that time?

2 A. Yes.

3 Q. There are no posts or anything out
4 front to keep a truck backing into the dock from striking
5 it, is there?

6 A. No.

7 Q. Now this dock is of reinforced
8 concrete, isn't it?

9 A. Yes, sir.

10 Q. And that sprinkler pipe we have
11 been talking about is dropped down and underneath the
12 metal canopy, the roof.

13 A. Yes, sir.

14 Q. And trucks and tractor-trailers
15 back into that dock all the time, night and day, twenty-
16 four hours a day and night; isn't that true?

17 A. I wouldn't know that, all night
18 and things like that.

19 Q. At that time, do you know -- along
20 that dock there were also some five or six other trailers
21 backed up to the dock at that time?

22 A. Really, I don't know because that's
23 been about three years ago. I don't remember.

24 Q. Do you know Charles Spears?

25 A. No, sir, but I've seen him.

1 Q You've seen him there before the
2 accident?

3 A I've seen him before the accident.
4 I've seen him there before.

5 Q When the tractor-trailer was backing
6 up, does it make a noise?

7 A I heard the engines making a noise.

8 MR. DAVIS: I think that's all I
9 have.

10 MR. GRIZZARD: One question.

11

12 REDIRECT EXAMINATION

13

14 BY MR. GRIZZARD:

15 Q You didn't go out there and wave
16 after he hit the pipe a second time, did you?

17 A No, sir.

18 Q You went out there before he hit
19 the pipe?

20 A Yes, sir.

21

22 RECROSS-EXAMINATION

23

24 BY MR. DAVIS:

25 Q The break that occurred was inside

1 the warehouse, wasn't it?

2 A. Say it again.

3 Q. The break in the pipe was inside
4 the warehouse, wasn't it?

5 A. The break of the pipe?

6 Q. Yes. Where the water spilled was
7 inside the warehouse?

8 A. Inside the building.

9 Q. And so what happened was -- did you
10 actually see the trailer strike the pipe yourself?

11 A. Yes, I saw it.

12 Q. But you didn't see whether it hit it
13 the first time or not?

14 A. No.

15 Q. So the break occurred inside the
16 warehouse, not outside in the front on the loading
17 dock; isn't that right?

18 A. Yeah.

19

20 REDIRECT EXAMINATION (further)

21

22 BY MR. GRIZZARD:

23 Q. George, the break inside the warehouse
24 that caused the damage, was the pipe outside separated,
25 also?

1 A. The pipe was broken on the outside --
2 the inside, too.

3 Q George, does this show the break
4 outside the warehouse?

5 A. Over there.

6 MR. GRIZZARD: Here is Plaintiff's
7 Exhibit One, Your Honor.

8
9 (Whereupon the aforementioned
10 photograph was received in
11 evidence and marked for
12 identification as Plaintiff's
13 Exhibit Number One.)

14 BY MR. GRIZZARD:

15 Q Look at Plaintiff's Exhibit One
16 and point out where you were standing, trying to prevent
17 the defendant, Spears, from backing up.

18 A. About right here.

19 Q Would you mark it. Put an X there,
20 a big mark so it can be seen.

21 MR. GRIZZARD: That's all I
22 have.

23 MR. DAVIS: Let me take a look
24 at it again after you make your mark.

25

RECROSS-EXAMINATION (further)

BY MR. DAVIS:

Q This mark is back where that shovel is; right?

A Yeah.

Q When he started backing up the second time from six or seven feet away and you went out and yelled at him, you don't know whether he heard you or not, do you?

A I hollered loud enough for anybody to hear me and I waved for him to stop.

Q And you were over there toward the right side of the truck, weren't you?

A He could see on both sides of the truck the way he was backing in there.

Q Do you know whether or not he heard you?

MR. GRIZZARD: That is calling for a conclusion this witness is not capable of making.

THE COURT: I don't know whether he heard. He can say that he heard him. He can say what he saw.

1 BY MR. DAVIS:

2 Q As a matter of fact, when you got
3 out there, then -- I guess that's true -- he was right
4 back on the dock already, right up against the dock
5 when you ran out.

6 MR. GRIZZARD: To please the Court,
7 the witness answered the question three times.
8 That's not what he said. He was not already
9 on the dock.

10
11 BY MR. DAVIS:

12 Q How was he backing his tractor-trailer,
13 very slow or how?

14 A The best I would say, he was coming
15 back there about like a -- like you back into a place,
16 you know, coming on back there.

17 Q Well then, how far was the rear
18 of his trailer from the dock when you came out and
19 started to wave?

20 A Almost up to the platform.

21 Q All right. To the platform. Okay.

22 MR. DAVIS: ***
23 That's all I have,
24 Your Honor.

25 MR. GRIZZARD: That's all.

(Witness excused.)

1 HERBERT ELLSWORTH,
2 called as a witness on behalf of the
3 plaintiff, having been first duly
4 sworn, was examined and testified
5 as follows:

6
7 DIRECT EXAMINATION

8
9 BY MR. GRIZZARD:

10 Q State your name, address, and
11 occupation, please.

12 A Herbert Ellsworth, Route One,
13 Box 279-P, Courtland, Virginia, and am presently
14 employed at Hancock Peanut Company.

15 Q Do you work for them all year
16 round?

17 A No, season's work.

18 Q What do you do during the summer
19 or spring?

20 A Farming.

21 Q And when you finish farming, you
22 work for Hancock Peanut Company.

23 A That's right.

24 Q How many years have you been doing
25 this, Herbert?

1 A. Well, off and on about twelve or
2 thirteen years.

3 Q. Were you working for them on the
4 date of December 19, 1973?

5 A. That's right.

6 Q. Where were you working that day?

7 A. Oh, number eight warehouse in the
8 cold storage.

9 Q. I want to call your attention
10 to approximately eleven-thirty that morning and ask
11 you what you were doing that time.

12 A. I was just getting ready to eat
13 dinner.

14 Q. Who was with you when you were getting
15 ready to eat dinner?

16 A. It was Buck and me and my brother
17 and George and -- I can't remember all the names.

18 Q. Your brother Louis Ellsworth and
19 George; is that George Flythe?

20 A. That's right.

21 Q. Where were you all eating?

22 A. Right in the scale office there.

23 Q. I want to call your attention to
24 approximately this time when you were eating dinner
25 and ask you what, if anything, happened in front of the

1 warehouse then.

2 A That's when the J and E Express
3 truck was backing up to the loading dock out there,
4 the platform.

5 Q Tell the ladies and gentlemen what
6 happened when he was backing up.

7 A He was backing up to the platform
8 and didn't get it quite square to the platform, so he
9 pulled up and when he backed up then, he tapped the
10 pipe that was up there and pulled up to straighten it
11 out. And when he backed up and straightened up, that's
12 when he hit the pipe solid.

13 Q You said he didn't get it in there
14 square and tapped the pipe?

15 A That's right.

16 Q When he pulled up to straighten
17 it out, how far did he pull up?

18 A He pulled up a few feet to get
19 across the yard.

20 Q Can you pick an object in the
21 courtroom to show how far he did that?

22 A I can't exactly say. It wasn't
23 too far, just average for a truck or a trailer to pull
24 up and straighten it out.

25 Q Was it as far as from you to

1 Mr. Davis, from you to the court reporter, from you
2 to the Judge, from you to the wall? Can you give us
3 an idea to show how far he pulled up?

4 A. From there to over there, to that
5 place right there.

6 Q What place are you speaking of?

7 A Right there behind the lady.

8 Q To the rail there.

9 MR. GRIZZARD: For the record, Your
10 Honor, that would be what, twelve or fifteen
11 feet?

12 THE COURT: (Nods head affirmatively.)

13
14 BY MR. GRIZZARD:

15 Q Twelve feet when he was backing
16 up. Did anyone notice him or say anything?

17 A George ran out there then and hollered
18 at him.

19 Q Where was the truck or the trailer
20 when George was out there hollering at him?

21 A The first time he backed up, he
22 was pulling up and came back. The next time, that's
23 when George was hollering at him.

24 Q Where was the tractor-trailer when
25 George got outside and started waving and hollering to

1 him? How close to the platform had it gotten?

2 A. I imagine about five or six feet,
3 I reckon.

4 Q. And where was George standing when
5 he was hollering at him?

6 A. Standing at the loading dock at
7 the platform.

8 Q. Was he doing anything besides
9 hollering?

10 A. He was waving his hand at him.

11 Q. And how was he waving his hand,
12 if you remember?

13 A. I don't know exactly how, but he
14 was hollering and waving at him.

15 Q. Did the truck stop?

16 A. No, it didn't.

17 Q. Did it keep on coming?

18 A. Yes, it did.

19 Q. It kept on coming. Was it coming
20 straight back this time?

21 A. Yes.

22 Q. You said the first time it didn't
23 get square.

24 A. That's right.

25 Q. Was it square when it came in this

1 time?

2 A. Yes, it was square that time.

3 Q. What happened when he hit the pipe
4 the second time?

5 A. It broke the pipe loose in the cold
6 storage building.

7 Q. Did it break it loose outside, too?

8 A. I don't know whether it broke on
9 the outside or not, but the water came from inside of it.

10 Q. Was there anything between where
11 George was standing and the cab of the truck other
12 than the trailer?

13 A. No.

14 Q. The trailer was straight and the
15 cab was straight as they were coming by?

16 A. I don't know exactly whether it
17 was straight or not.

18 Q. Could you see anything out there
19 to block the vision of the driver?

20 A. He had straightened out there.

21 Q. What happened after the pipes were
22 broken and the water started running out there?

23 A. We had to quit eating dinner and
24 get the water out of there and we had to turn out peanuts
25 and get the wet ones on the floor and re-pile them again.

1 Q You say you have been working down
2 there twelve years?

3 A Something like that.

4 Q All right. Answer Mr. Davis.

5

6 CROSS-EXAMINATION

7

8 BY MR. DAVIS:

9 Q Herbert, you recall that day and
10 what time that was?

11 A About eleven-thirty.

12 Q You were working inside the shack
13 with your brother, Louis, and with George Flythe --

14 A Yes, sir.

15 Q -- eating lunch or getting ready
16 to eat lunch.

17 A Yes, sir.

18 Q And -- this is Defendant's Exhibit
19 One. Is that the shack you fellows were in?

20 A Yeah, that's right.

21 Q Does that picture show how the
22 situation looked on that day, to your best recollection?

23 A Yeah.

24 Q Now when the truck driver pulled
25 up and started to back the second time you said, were you

1 still in the shack?

2 A. The second time?

3 Q. Yes.

4 A. I was still in there.

5 Q. You never came out of the shack
6 until after the accident?

7 A. Yeah, until he hit the pipe.

8 Q. Also -- your brother is Louis
9 Ellsworth, you said.

10 A. Yeah.

11 Q. He was inside, also?

12 A. Yes.

13 Q. And he didn't come out until after
14 this thing happened; is that correct?

15 A. I don't know whether he came out or
16 not.

17 Q. You don't remember?

18 A. I don't know.

19 Q. But as you recall now, only George
20 came out.

21 A. I know George did.

22 Q. Now where were you standing inside
23 this shack?

24 A. In the window you see there.

25 Q. Sir?

1 A. In that window you see there.

2 Q. Okay. Now there weren't any posts
3 there in front of that little sprinkler extension,
4 were there?

5 A. No.

6 Q. No warnings or signs or anything
7 like that were there?

8 A. No.

9 Q. And that little pipe just barely
10 extends straight out from the dock just about five or
11 five and a half inches or so; isn't that true?

12 A. I don't know how far it is, but
13 it's out there.

14 Q. What?

15 A. I don't know how far it is, but
16 it extends out there.

17 Q. Just a little bit.

18 A. That's right.

19 Q. Now at that time when Charles Spears
20 came into the yard and backed up and was backing up,
21 there were some five or six other trailers down against
22 the dock, weren't there?

23 A. I don't know.

24 Q. You don't know?

25 A. Not that.

1 MR. DAVIS: I guess that's all I
2 have.

3 THE COURT: All right, sir.

4 MR. GRIZZARD: Just one thing.

5

6 REDIRECT EXAMINATION

7

8 BY MR. GRIZZARD:

9 Q You have been working there twelve
10 years. Have you ever had any problems with that pipe
11 being hit before by anything?

12 A. No.

13 Q While you were in the building,
14 was the window closed or open, or what?

15 A. Had it open.

16 Q You could hear George hollering,
17 couldn't you?

18 A. That's right.

19 Q Was he hollering loud?

20 A. Yes. He was hollering like anybody
21 would holler.

22

23 RECROSS-EXAMINATION

24

BY MR. DAVIS:

25

Q Was the tractor-trailer engine

1 making a noise?

2 A. Yes.

3 ***

MR. DAVIS: That's all.

4 MR. GRIZZARD: Thank you.

5
6 (Witness excused.)

7
8 -----o0o-----

9 ***

10 LOUIS ELLSWORTH,

11 called as a witness on behalf of the
12 plaintiff, having been first duly
13 sworn, was examined and testified
14 as follows:

15
16 DIRECT EXAMINATION

17
18 BY MR. GRIZZARD:

19 Q. State your full name, your address
20 and your occupation, please.

21 A. Louis W. Ellsworth, Route One,
22 Box 359-F-13, Courtland, Virginia; occupation, farmer.

23 Q. During the off-season, Louis, what
24 do you do during that period you're not farming?

25 A. Work at Hancock Peanut.

1 Q And how many years have you been
2 doing this?

3 A Twelve to fifteen.

4 Q I want to direct your attention
5 to the nineteenth day of December of 1973 and ask you
6 if you were working at Hancock Peanut Company that
7 day?

8 A Yes, I was.

9 Q And where were you working?

10 A Cold storage.

11 Q Is that warehouse number eight?

12 A Yes, sir.

13 Q I want to call your attention to
14 approximately eleven-thirty that morning and ask you
15 what you were doing particularly at this time.

16 A Getting ready to eat dinner.

17 Q And where did you go to eat dinner?

18 A In the scale room at the cold storage.

19 Q Now while you were in the cold
20 storage and getting ready to eat dinner, would you tell
21 the Court and ladies and gentlemen of the jury whether
22 you observed anything or saw anything occur in front
23 of the scale house.

24 A A truck pulled in to back up to the
25 loading dock.

1 Q Tell the Court what happened when
2 this truck pulled in and backed up to the loading dock.

3 A When it backed up to the loading
4 dock and it didn't hit the loading dock, it hit at an
5 angle first and pulled up and backed up and hit the
6 sprinkling system, the water system.

7 Q It came at an angle the first
8 time?

9 A Yes.

10 Q It didn't hit the loading dock
11 perfect, you said. Did it hit the loading dock?

12 A It hit the loading dock first and
13 the sprinkler system at that time.

14 Q While here was a man coming in at
15 an angle the first time and hit the loading dock and
16 touched the pipe, was anything said inside the building?

17 MR. DAVIS: Objection. Getting
18 hearsay, Judge.

19 MR. GRIZZARD: If I want -- if any
20 statement was made at that time by anyone,
21 a particular instance, it would be part of
22 res gestae.

23 MR. DAVIS: If the defendant made
24 the statement.

25 MR. GRIZZARD: No, sir. I am not

1 speaking of the defendant.

2 THE COURT: I know what you're
3 talking about.

4
5 BY MR. GRIZZARD:

6 Q All right, sir. After he backed
7 up and -- strike that.

8 MR. GRIZZARD: If the Court is
9 sustaining the objection --

10 THE COURT: Yes, I will sustain
11 the objection.

12 MR. GRIZZARD: -- plaintiff notes
13 an exception, Your Honor.

14
15 BY MR. GRIZZARD:

16 Q After he backed up and hit the
17 loading dock and touched the pipe the first time, you
18 said the trailer pulled up. How far did it pull up?

19 A I couldn't say -- about twelve feet.

20 Q As he pulled up about twelve feet,
21 did he start backing up again?

22 A Yes, sir.

23 Q When he pulled up and started to
24 back, did anybody in the warehouse do anything?

25 A George went outside.

1 Q When did he go outside?

2 A When it tapped the first time, he
3 went outside and started waving.

4 Q Had the trailer pulled all the
5 way up and stopped before George got out there?

6 A I can't say.

7 Q You can't say exactly when that
8 was?

9 A No.

10 Q But George did leave as soon as
11 he hit the pipe the first time?

12 A Yes.

13 Q Now where was George on the platform?

14 A Kind of right in front of the scale,
15 you know, right in front of the scale.

16 Q Now what was he doing?

17 A Waving.

18 Q Is that all he was doing?

19 A He was waving and hollering, also.

20 Q How was he waving?

21 A In this fashion here.

22 Q Did the truck start backing, keep
23 coming back?

24 A It came back.

25 Q What happened when it kept coming back?

1 A. When it hit, it hit the pipe and
2 the loading dock at the same time and that was it..

3 Q. What was that?

4 A. It hit the loading dock and the
5 pipe and that was it.

6 Q. What happened when he hit the pipe
7 this time?

8 A. The water system busted.

9 Q. When he was coming back the second
10 time -- you said the first time he came in at an angle --
11 was he straight this time?

12 A. It was just about perfect.

13 Q. Was anything, any object, between
14 where George was standing there waving and the cab of
15 the truck other than the trailer itself?

16 A. No.

17 Q. After the water system busted, then
18 what happened?

19 A. Well, after the water system busted,
20 we didn't have time to eat dinner, so we went inside,
21 had to cut the water off and went inside and started
22 sweeping water out.

23 MR. GRIZZARD: All right. Answer

24 Mr. Davis.

25

36

CROSS-EXAMINATION

BY MR. DAVIS:

Q Louis, this sprinkler extension, this is what the trailer hit, wasn't it, that little extension that comes out?

A Yes.

Q And it comes out about five and a half inches or something like that.

A I can't say how far it comes out.

Q Just a tiny bit?

A I guess. I don't pay that much attention to stuff like that.

Q On the day this thing happened three years ago, there were some five or six other trailers at the dock, weren't there?

A I couldn't say that either.

Q You don't know? You never came out of the shed or scale room or whatever you call it until after the damage had happened; is that right?

A That's right.

Q Now there weren't any signs up there, on there, showing where that thing extends those five inches, were there?

A I don't think so. I never noticed.

1 Q No warning or anything like that
2 to alert any driver backing in there that this little
3 thing sticks out five inches, nothing like that, is
4 there?

5 A I don't think so.

6 Q No posts up there in the ground
7 right in front of you to keep a truck from coming in
8 those last five inches there?

9 A No, I don't think so.

10 Q At the time, as a matter of
11 fact-- I want you to think real hard about this question,
12 if you would. At the time the driver -- you say the
13 driver pulled forward about twelve feet; right?

14 A Approximately.

15 Q And then he started backing up.
16 As a matter of fact, when George ran out of the shed
17 on the loading dock, the trailer was almost backed to
18 the dock, wasn't it?

19 A I don't think so.

20 Q You don't think so?

21 A No, I don't.

22 Q Were there any other tractors or
23 trucks in the yard, moving about, that --

24 A No.

25 Q You don't think so?

1 A. No, there weren't.

2 Q. Was this truck -- could you hear
3 the engine of the truck as it was backing up?

4 A. Yeah.

5 MR. DAVIS: I guess that's all
6 I have, Your Honor.

7

8 REDIRECT EXAMINATION

9

10 BY MR. GRIZZARD:

11 Q. There are no signs or posts. The
12 only warning being given was that warning by George.

13 A. George, yeah.

14 MR. GRIZZARD: All right. That's
15 all.

16 Mr. Davis, would you have any need
17 of either of these three witnesses? May they
18 be excused?

19 MR. DAVIS: They're excused as far
20 as I'm concerned.

21 MR. GRIZZARD: Judge, can we take
22 about a five-minute recess?

23 THE COURT: All right, sir. Take
24 a short recess. All right, ladies and
25 gentlemen. Take a short recess.

1 (Witness excused.)

2
3 (Whereupon Court was recessed at
4 eleven-thirty a.m. and re-convened at
5 eleven-fifty a.m.)

6
7 MR. GRIZZARD: If it please the
8 Court, Mr. Pope who is the Vice President
9 of Hancock Peanut Company is here and his
10 testimony was going to be concerning the
11 damages that came about as a result of the
12 accident.

13 And with the stipulation for the
14 record that the damages as a result of the
15 accident were twenty-nine thousand two hundred
16 ninety-five dollars --

17 THE COURT: Thirty-nine thousand,
18 I believe.

19 MR. GRIZZARD: -- thirty-nine thousand
20 two hundred ninety-five dollars and thirty
21 cents, we would not see fit to call Mr. Pope.
22 He is available if the defendant wants him.

23 And with that and the stipulation
24 that Charles Spears was in the scope of his
25 employment at the time of the accident for

1 the record, the plaintiff would rest.

2 ***

MR. DAVIS: Your Honor, may we see
3 you in chambers just briefly?

4 (Thereupon, the Court and counsel
5 retired to the Judge's chambers, and the
6 following proceedings occurred out of the
7 hearing of the jury.)

8
9
10 IN CHAMBERS

11 MR. DAVIS: Earlier this morning
12 before we began the trial, we renewed a pending
13 motion to name the real party plaintiff -- it
14 was Miller Insurance Company and Lloyd's of
15 New York and -- Miller Mutual -- under the
16 provision of the code to bring a subrogation
17 action in its own name or the name of its insured,
18 as I understand, assuming the policy so designates
19 it. And we haven't seen the policy and I do not
20 know whether the policy designates it. And the
21 Court overruled my motion, and this is an exception
22 to that.

23 Now at this point, Judge, the plaintiff
24 has rested. We have still stipulated damages,
25 thirty-nine thousand dollars plus, and next we've

1 got, he's put on three witnesses. His one witness,
2 I guess, is George Flythe.

3 We have a situation here with a
4 sprinkler system that was in existence on that
5 dock at the time of the accident in mid
6 December, seventy-three, with one or two of the
7 boys or maybe all three of them testifying that
8 they were aware of this little extension, but
9 they didn't know how far out, just a little bit,
10 or something to that effect.

11 The trailer proceeds to back up, and
12 George says he does not know whether it touched
13 the tip of the pipe or not; he was not sure.

14 The other two say he did touch it the
15 first time and he began backing.

16 Now the principal witness for the
17 plaintiff is George Flythe who was standing,
18 looking out of that window which is Defendant's
19 Exhibit One.

20 And he sees the truck -- tractor-trailer
21 rig, I should say -- back up right to the dock.
22 And if it did or did not touch this little .
23 extension that we were talking about which is
24 the crux of our problem in this case, he then
25 became alarmed.

1 And the driver pulled forward some
2 six or seven feet is his testimony and began
3 backing up. And he says he ran out and he stood
4 in front of the shed next to a shovel. There's
5 been a mark on Exhibit One where he was standing.

6 And he said he ran out to yell and wave
7 at the driver, that when he got out there, he
8 was almost up to the dock itself.

9 Now I do not feel under this evidence
10 that the plaintiff has made out a prima facie
11 case. I think under their own evidence, they
12 knew a dangerous condition existed, they were
13 aware of it. As a matter of fact, the boys
14 themselves, one of them ran out and the others
15 were aware of the dangerous condition.

16 There is no indication that -- he didn't
17 get out there, according to the principal witness,
18 until the trailer was virtually almost at the
19 dock, was the exact language he used.

20 And I feel that on this testimony,
21 it clearly shows the plaintiff itself was
22 negligent, and I would ask the Court to strike
23 the plaintiff's evidence.

24 MR. GRIZZARD: Your Honor, the
25 testimony is they're aware of it today, testifying.

1 There is no evidence showing they were aware of
2 this projection out beyond the dock on December
3 nineteenth.

4 Of course they're aware of it today
5 because they know what happened and the accident
6 called their attention to it, but there is no
7 evidence anywhere in the record that they knew
8 about it on December 19, 1973.

9 Now George says he was out there
10 waving and hollering at the man and he should
11 have seen him.

12 MR. DAVIS: There is no evidence that
13 he did see him, Richard.

14 MR. GRIZZARD: I say there is no
15 evidence. He should have seen him. Herbert
16 and Louis Ellsworth both said the same thing.
17 The question is in distances.

18 Both Herbert and Louis said the man
19 pulled up about twelve feet. Louis -- Herbert
20 picked out an object in the courtroom. Louis
21 actually said he guessed it was twelve feet. And
22 I stepped it off and it worked out to twelve
23 feet. George said it was six or seven feet.

24 And all three of them testified that
25 George started out immediately and saw the

1 hollering and waving at the man while he was
2 backing up straight. There was nothing blocking
3 the man's vision and he was standing on the
4 platform. Herbert's testimony was that he
5 was some distance away when George got out there
6 and started waving. George says he was close
7 to the dock about the third or fourth time he
8 was asking, almost at the dock, well, six or seven
9 feet maybe, almost at the dock, in his opinion.

10 And that's the only distance George gave
11 us, that he pulled up six or seven feet when he
12 started backing up and he was waving at him to
13 stop.

14 And I think clearly it's a question
15 of the man in this case not looking where he
16 was backing.

17 All three of them testified nothing
18 was blocking his visibility, he was coming
19 straight back and should have seen him out of
20 the right or left window or mirror, a man
21 standing there waving at the truck. He didn't,
22 and kept coming on back and hit the pipe and broke
23 it.

24 THE COURT: Well, I'm going to overrule
25 your motion and note your exception.

HARVEY G. POPE,

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

ADVERSE EXAMINATION

BY MR. DAVIS:

Q. Mr. Pope, how long have you been
connected with Hancock?

A. I have been connected with them
since 1963 when the corporation bought out another
business.

Q. On this date of December 19, 1973
when the sprinkler system was damaged in the warehouse
number eight, where were you that day?

A. I was in my office that's in the
plant building which is some five hundred yards from
this building with another structure in between number
eight and the office building.

Q. I see. Now did you subsequently
come out to where this incident occurred?

A. They called me immediately and I
went out.

1 Q You were out there how soon?

2 A I would say within five minutes,
3 I guess.

4 Q This is warehouse number eight,
5 I believe.

6 A That's correct.

7 Q Is that correct?

8 A That is correct.

9 Q And this warehouse is for the
10 storage of peanuts for Hancock; is that it?

11 A That is correct.

12 Q And it had this sprinkler system
13 attached; part of it is on the dock itself.

14 A That is correct.

15 Q Now Mr. Pope, I've got four colored
16 snapshots. See if you can identify these, please, sir.

17 A Yes, sir.

18 Q Tell the Court and the jury what
19 those four pictures are.

20 A They are all a part of the canopy,
21 the platform, of warehouse number eight.

22 Q And they show where this accident
23 occurred?

24 A They show the sprinkler system,
25 yes, sir, and the part that was hit by the truck.

1 MR. DAVIS: Your Honor, could I
2 have these four colored snaps in evidence?

3 THE COURT: Yes, sir. You've
4 got one?

5 MR. DAVIS: Yes, sir. I think this
6 would be number two.

7 THE COURT: These are two through
8 five.

9 (Whereupon the aforementioned photos were
10 BY MR. DAVIS: Two through Five.)
11

12 Q Do these snaps, Mr. Pope, show the
13 condition of that sprinkler extension and pipe there
14 above the dock at the time this incident occurred?

15 A. Yes, sir.

16 Q Now may I direct your attention
17 to -- I believe this is Defendant's Two. It's sort
18 of smudged on the back -- and Defendant's Five. Do
19 those snaps show this little extension that goes out
20 beyond the dock itself?

21 A. Yes, sir.

22 Q Do you know how far?

23 A. It's beyond the dock and short of
24 the canopy.

25 Q Do you know how far in inches that
is, Mr. Pope?

1 A. I don't know. If you want me to
2 guess, I'd say five inches, approximately, though I've
3 never measured it.

4 Q. Now in December of seventy-three,
5 Mr. Pope, there were not any signs or lights or warnings
6 to the public or to trucks backing into that little
7 extension, were there?

8 A. No, sir.

9 Q. There were no posts or anything
10 there to prevent a truck from backing into that little
11 five-inch extension, was there?

12 A. No, sir.

13 Q. Now did you have anything, Mr. Pope,
14 to do with the movement of vehicular traffic there at
15 that warehouse?

16 A. No, sir. That's one job I don't
17 have.

18 Q. You were in sales, I believe.

19 A. Yes, sir.

20 Q. Well, I mean from a supervisory --

21 A. From the supervisory standpoint,
22 I don't hardly see them.

23 Q. I didn't intend that you were out
24 there with an orange flag. The dock here at this warehouse
25 number eight, I believe, is heavy reinforced concrete.

1 A. It is approximately eight inches
2 thick reinforced concrete.

3 Q. Do you know how high this pipe
4 is, this sprinkler pipe is, above the ground, Mr. Pope?

5 A. I don't know.

6 Q. But you know that this little
7 extension does go out about approximately five inches
8 beyond the dock and underneath that conopy above it.

9 A. The photograph shows it to be
10 about that, yes, sir.

11 Q. Mr. Pope, you people at Hancock,
12 you were aware that tractors and trailers go into this
13 place night and day twenty-four hours at that time.

14 A. Well, there's constant movement
15 actually, but I don't know they come in at night or
16 day. As I say, someone else issues bills of lading
17 and so forth -- I don't get involved in it -- but I
18 think the parking yard's almost twenty-four hours a
19 day.

20 Q. And you're always aware, are you
21 not, Mr. Pope, that these trucks and tractor-trailers
22 are well over twelve feet, twelve to thirteen feet,
23 in height, getting bigger every year through the
24 legislature?

25 A. I know that if you measured the

1 thing to be that high, it had to be over that, but
2 Mr. Nimmo is the truck man, I am not. I am the peanut
3 man.

4 MR. DAVIS: I guess that's all I
5 have, Your Honor.

6 THE COURT: All right, sir.

7
8 CROSS-EXAMINATION

9
10 BY MR. GRIZZARD:

11 Q Mr. Pope, you are aware today that
12 this extension is about five inches out. Did you design
13 this system?

14 A No. We had professionals to design
15 it and professionals to maintain it and all I know is
16 from photographs that it looks like it's five inches
17 out.

18 Q When you say maintain it, do they
19 inspect it?

20 A Yes, about four times a year.

21 Q Do you put the modification cautions
22 up that you're told to?

23 A Yes, sir.

24 Q And you know today that this pipe
25 extends out beyond the loading dock approximately five

1 inches. Were you aware before December 19, 1973 that
2 it projected out?

3 A. No, I was not. We had been all
4 this period of time without any problems, so I never
5 paid any attention to it. All I knew is that it was
6 put in and paid for.

7 Q. And you have been with Hancock since
8 when?

9 A. September, 1963 this corporation
10 was formed.

11 Q. Was this warehouse in existence
12 in September, 1963?

13 A. It was in existence.

14 Q. Was the sprinkler system there in
15 1963?

16 A. It was there.

17 Q. And in the ten years prior to this
18 accident at this warehouse, at this one particular
19 point, had there been any other trouble?

20 A. No trouble.

21 Q. Had there been any suggested
22 modifications or changes or warning devices be put up
23 by the professionals that inspected it?

24 A. No suggestions.

25 Q. Were you aware of the danger presented

1 by this on December 19, 1973?

2 A. No.

3 Q. You mentioned Mr. Nimmo. What
4 capacity does Mr. Nimmo have?

5 A. Mr. Nimmo's truck line hauls --
6 to direct quantities of peanuts to points up and down
7 the east coast.

8 Q. Is he with J and E Express Company?

9 A. I think he's the President of
10 J and E Express Company.

11 Q. Has he ever been to your place of
12 business?

13 A. Yes.

14 Q. In what capacity?

15 A. Calling on me as to business and
16 mutual problems.

17 Q. Has he ever been out looking over
18 the business problems and locations and systems?

19 A. Not that I recall.

✓
20 ***
MR. GRIZZARD: All right, sir.

21 That's all.

22

23 (Witness excused.)

24

25

CHARLES SPEARS, JR.,

the defendant, having been first duly
sworn, was examined and testified as
follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Give the Court and jury your
name, address and occupation, please.

A Charles Spears, Jr., 1229 Exchange
Road, Suffolk, Virginia, employed as truck driver.

Q Were you employed by J and E Express
in December of seventy-three when this incident occurred?

A Yes, sir.

Q Now on this particular day, December 19,
1973, at just about three years ago, did you receive
any instructions to go to Hancock?

A That's right.

Q From whom did you receive your
instructions?

A From Jack Green, the dispatcher,
J and E Express.

Q What did you drive over there?

A A tractor and trailer, number

1 thirty-eight tractor and, I think number forty trailer.

2 Q Were you alone in the tractor?

3 A. That's right.

4 Q Do you recall whether the trailer
5 was empty or loaded?

6 A. The trailer was empty.

7 Q Now when you got over there -- over
8 here, rather, I should say, to the Hancock property
9 here at the edge of town -- what did you do?

10 A. I pulled in the yard, went where
11 the platform was lined up with trailers, made a swing
12 up and backed up, set my trailer down.

13 Q Let me ask you now. Were there
14 any other trailers parked there at this loading dock
15 that day?

16 A. Yes, indeed. It was all along
17 the loading dock.

18 Q Was anyone out there directing
19 traffic?

20 A. No.

21 Q Now had you been to this particular
22 warehouse eight prior to this occasion?

23 A. I had been there several times,
24 night and day.

25 Q Now were you aware, Charles, of

1 this little pipe extension that you have heard the
2 witnesses talk about? Were you aware of it extending
3 out over the dock?

4 A. Not until after the accident.

5 Q. Now as you began to back in there,
6 how close was the nearest trailer to you? Was -- let's
7 see. You were backing in. Were all these trailers
8 to your left as you were backing in?

9 A. The trailers was to my right as
10 I was backing in. Can I explain?

11 THE COURT: Yes.

12 THE WITNESS: When I come in
13 from this end, the trailers all along here
14 and anywhere we can get to set a trailer down,
15 we set it down. And when I get up here, I
16 was about two trailers down from where the
17 other trailers was at because they had a lot
18 of stuff in there. And I swung out and I
19 backed up.

20

21 BY MR. DAVIS:

22 Q. Did you see anybody out there on
23 the loading dock yelling at you or did you hear anyone?

24 A. Not until after that happened,
25 after I set my trailer down.

1 Q You neither heard nor saw?

2 A No.

3 Q Were there any signs there to
4 warn of this extension out over the dock?

5 A No, sir.

6 Q Any light or alarm?

7 A No, sir.

8 Q Any posts out in front that would
9 keep a truck from hitting?

10 A No.

11 Q None whatsoever?

12 A No.

13 Q Now you said your trailer was
14 empty.

15 A That's right, sir.

16 Q And did anybody come out to direct
17 you, to show you how to back in or to direct you in
18 backing into the dock?

19 A No, sir.

20 Q Do you recall anyone trying to stop
21 you as you were backing into the dock?

22 A No, sir.

23 Q Do you know whether or not the
24 windows, say, particularly on your driver's side --
25 was it up or down when you were --

1 A. The one on my driver's side was
2 down. I always back up with the window down and my
3 head out so I can watch from both sides.

4 Q When did you learn about the
5 accident itself and the water? Was it after you
6 stopped?

7 A. After I had set the trailer down
8 and pulled out from under.

9 Q Pulled your tractor down?

10 A. Yes. And the tall colored boy --

11 Q Was that George Flythe?

12 A. I didn't see them.

13 Q Do you recall seeing the particular
14 three men who testified earlier?

15 A. No, sir.

16 Q And what did -- well, a tall colored
17 man said something?

18 A. He was standing on the platform.

19 Q You can't say what he said?

20 A. He didn't say anything until I
21 got out of the tractor and he had a broom in his hand.

22 Q You can't get into a conversation;
23 that's hearsay.

24 A. I'm telling what I know happened.
25 I'm sorry.

1 Q Were any of the tractor-trailers
2 moving on the lot or any other trucks moving other
3 than yours?

4 A I didn't see any.

5 Q And how many other trailers do you
6 recall being there at the dock when you came in that
7 day?

8 A I'd say five or six or more.

9 MR. DAVIS: You may inquire.

10

11

CROSS-EXAMINATION

12

13 BY MR. GRIZZARD:

14 Q You say five or six tractor-trailers?

15 A Trailers. It wasn't all tractors.

16 Q Just trailers then.

17 A That's right.

18 Q They filled up the whole loading
19 dock?

20 A Yes, sir.

21 Q One end to another?

22 A Yes, sir.

23 Q With the exception of this area
24 of about two trailer widths in the middle.

25 A This was on the end where I parked

1 there.

2 Q Right.

3 A That was on the end. You know what
4 I mean -- end of the dock.

5 Q Well, actually, Mr. Spears, the
6 warehouse is divided into four loading doors, isn't it?

7 A I don't know.

8 Q Two from the sprinkler toward the
9 road and two from down the other way.

10 A I couldn't say.

11 Q Where were all the tractor-trailers
12 or trailers parked that you're talking about?

13 A Right up to the dock.

14 Q On both sides?

15 A Right.

16 Q Do you know how long that loading
17 platform is?

18 A No, sir.

19 Q Would two hundred feet be a fair
20 estimate?

21 A I'd say something like that, maybe
22 longer.

23 Q Can you tell the ladies and gentlemen
24 of the jury how five or six trailers can take up the
25 whole loading dock from one end to another?

1 A. If a man had to back a trailer in
2 that spot to go, they would run together.

3 Q. What I'm saying is that you said
4 the whole loading dock was filled except for a place
5 for two trailers right in the middle and I want you
6 to explain how five trailers take up two hundred
7 feet.

8 A. The loading dock can be longer
9 than that. I can't say how long it is because I don't
10 know, but I know they had five or six trailers setting
11 up.

12 Q. And it took up everything but that
13 little space in the middle where you put your trailer
14 down?

15 A. On the very end.

16 Q. Now how many times did you back
17 up to that dock?

18 A. Once.

19 Q. You didn't have to pull it up and
20 correct it?

21 A. No, sir.

22 Q. And since you didn't have to pull
23 up and correct it, you wouldn't have seen George Flythe
24 outside trying to stop you the second time you came
25 back to the loading dock.

1 A. I hadn't seen no one until after
2 it was over.

3 Q Because you didn't go back there
4 two times.

5 A. That's right.

6 Q Only one time. And you backed up
7 to it perfect, right square into the loading dock,
8 and didn't have to do anything to correct your trailer.

9 A. I parked about two feet from the
10 loading dock is where I set my trailer down. My
11 trailer was not against the dock when I set it down.

12 Q You set your trailer two feet from
13 the loading dock?

14 A. That's right.

15 Q Will you tell the ladies and
16 gentlemen of the jury how you could hit something that
17 projects, something that's no more than five inches
18 off that.

19 A. That's something I don't know.

20 Q You were driving a tractor-trailer
21 that day, that thing, weren't you?

22 A. I don't know. That's what they
23 say. I don't know.

24 Q You got out of the tractor-trailer
25 and you said you had taken your tractor from the trailer

1 before you knew there was an accident.

2 A. That's right.

3 Q. How long did that take?

4 A. I'd say about five minutes, maybe
5 a little more. I couldn't say exactly.

6 Q. Well, take five minutes to get
7 out and get your landing gears down and disconnect your
8 trailer and get back in and pull your truck out.

9 A. I'd say five minutes.

10 Q. Is that when you were stopped and
11 told you had hit the thing?

12 A. They didn't stop -- I saw this boy
13 out there and he waved the hand and I stopped and asked
14 him where was that water coming from.

15 Q. You hadn't disconnected your trailer
16 then?

17 A. Yes.

18 Q. You had already disconnected your
19 trailer?

20 A. That's right.

21 ***
MR. GRIZZARD: That's all.

22 MR. DAVIS: You may come down.

23

24 (Witness excused.)

25

JAUBERT NIMMO,

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

DIRECT EXAMINATION

BY MR. DAVIS:

Q Give the Court and jury your name
and profession.

A My name is J-A-U-B-E-R-T Nimmo.
I am President of J and E Express, Incorporated whose
principal office is in Suffolk, Virginia, and my home
is at 3800 Crittendon Road, Suffolk, Virginia.

Q What is your position with J and E?

A I am President of the company.

Q Were you President back in
December of seventy-three when this accident took
place?

A I was.

Q Charles Spears, of course, is
one of your employees, no question about that.

A He was at that time.

Q Operating one of your vehicles.

1 A. Right.

2 Q. Now when did you learn yourself
3 that day of the accident, Mr. Nimmo?

4 A. Well, it's been three years ago.
5 I don't recall the exact time. It was sometime around
6 lunch or right after lunch. I don't recall what I
7 was doing prior to that time.

8 Q. How did you learn of it?

9 A. When I came back in the office,
10 one of my employees advised me that Charles Spears had
11 called and reported what had happened.

12 Q. And what did you do then? Did
13 you go there?

14 A. I went directly there because I
15 wanted to see the circumstances surrounding it. We
16 were having snow that morning. It had been very light
17 in Suffolk, but I didn't know whether there was more
18 snow up here or whether or not there was the possibility
19 of snow piled up against the platform -- just to see
20 what the circumstances were.

21 I had never been to that particular
22 building and had never seen the sprinkling system
23 there prior to that day.

24 Q. When you got over here in Courtland
25 that morning, what did you observe as to the weather

1 conditions here?

2 A. It was snowing, but snow wasn't
3 a factor.

4 Q. Was it a particularly cold day?

5 A. It warmed up by then. It was
6 pretty cold that morning. There was still ice at the
7 end of the sprinkler pipe because I recall it was
8 still there, but I think the sun was shining.

9 Q. Now this particular trailer that
10 was involved in this accident: Mr. Nimmo, will you
11 tell the Court and the jury the height of that trailer.

12 A. That trailer is -- the top of that
13 trailer is twelve feet six inches from the ground.

14 Q. Now do trailers vary in height
15 and that sort of thing?

16 A. They will vary very slightly.
17 It is very seldom you get one over twelve-six because
18 that requires more material and the manufacturer is
19 not going to put it in there. But different manufacturers
20 will sell a twelve-six trailer and it may be twelve-six
21 or maybe twelve-five and three quarters. It's a minor
22 difference.

23 Q. Now I am going to show you
24 Defendant's Exhibit One. Can you identify that to
25 the jury?

1 A. This appears to me to be the pipe
2 that was projecting out over the edge of the concrete
3 platform and extended back through the wall of the
4 warehouse which on the inside the pipe was broken.
5 And that had released water onto the peanuts stored
6 in the warehouse.

7 Q. Did you yourself determine how
8 far out that little extension comes?

9 A. I didn't determine it as far as
10 inches or anything. What I did was walk to the end
11 of the platform or down the platform on the ground
12 and look up to see how far -- whether or not that pipe
13 extended out and whether or not it extended out enough
14 so that a truck could hit it.

15 Q. Let me show you Defendant's Exhibit
16 Two and Five. Is that what you're talking about
17 there?

18 A. Yes. These pictures show it very
19 well.

20 Q. Now when you say show it very well,
21 show what?

22 A. The pipe extending beyond the
23 platform. And it is far enough for a truck to strike
24 it.

25 Q. Did you see any type of signs or

1 warnings to alert drivers going in there?

2 A. No.

3 Q. Were there any?

4 A. No sign or warning; no pipe in the
5 ground; no post in the ground. There was just a
6 perfectly flat platform.

7 Q. This twelve-foot-six-inch height
8 for this trailer; is that a standard height, sir?

9 A. That is what we consider a
10 standard height. They run twelve-six, thirteen and
11 thirteen-six.

12 Q. Were you able to -- you told the
13 Court and jury that you went out and took a side view
14 like in Exhibit Two and Five. I believe it was to see
15 if that little extension did go over the dock and it
16 did.

17 A. Yes, sir.

18 Q. Standing facing to the dock like
19 the dock is over there where the jury is sitting, can
20 you determine whether or not it extends over the dock
21 there, this point?

22 A. I don't think I could.

23 Q. In other words, you have to take
24 a side view.

25 A. I went up there purposely to take a

1 side view and to see what the condition of the rest
2 of the sprinkler system was.

3 Q Was the trailer still there that
4 was involved?

5 A To the best of my recollection,
6 it was.

7 Q Was Charles Spears still there or --

8 A I don't think Charles was there.
9 I might clarify as to why the trailer was there and
10 Charles wasn't.

11 Q And why was that then?

12 A When Hancock gets into their decision,
13 we take an empty trailer and leave it up there. They
14 have tractors available and have their own equipment.
15 And they can back these trailers up to the platform
16 and load them and one of our men will call us and tell
17 us the load is ready.

18 And we carry another empty trailer
19 up and set it down and pick up the load and bring it
20 back.

21 Q So he'd already picked up the load.

22 A He'd already picked up the load
23 and left.

24 MR. DAVIS: You may inquire.

25 MR. CRIZZARD: I don't have any

1 MR. DAVIS: It's all right with
2 me.

3 THE COURT: Yes, sir. All right,
4 sir.

5
6 (Whereupon Court was recessed for
7 lunch at 12:32 p.m. and re-convened at 1:55 p.m.)

8 ***

9 LEONARD ROTHMAN,
10 called as a witness on behalf of the
11 defendant, having been first duly sworn,
12 was examined and testified as follows:

13
14 DIRECT EXAMINATION

15
16 BY MR. DAVIS:

17 Q Would you give the jury your name
18 and profession.

19 A Leonard Rothman and I am a commercial
20 photographer.

21 Q Mr. Rothman, where is your office,
22 business address?

23 A In downtown NORfolk on 420 West
24 Bute Street.

25 Q Would you take a look at these four

1 pictures and can you identify them?

2 A. Yes, I can. I took these pictures.

3 Q. You took these yourself?

4 A. Right.

5 Q. Where were these photographs taken?

6 A. At Hancock Peanut Company.

7 MR. DAVIS: Your Honor, I would
8 like to have these pictures as Defendant's
9 Exhibit Six, I believe it is.

10 (Whereupon the aforementioned
11 photographs were received in
12 evidence and marked for
13 identification as Defendant's
14 Exhibits Six through Nine.)

14 BY MR. DAVIS:

15 Q. Now Mr. Rothman, could you stand
16 up at about this point here and face the jury. I will
17 hand you this first one that the Judge has marked as
18 Defendant's Exhibit Six. Can you tell the Court and
19 the jury what this picture is?

20 A. This is the loading dock at Hancock
21 Peanut and we're measuring the height of this particular
22 pipe up here from the ground at the junction of the
23 pipe with the pipe running this way and also showing
24 that it is parallel or the same length as the loading
25 dock here.

1 Q And the measurement is from the
2 bottom of that pipe?

3 A Right.

4 Q Now the next one is Defendant's
5 Exhibit Seven. Can you tell the jury what this one is?

6 A A closeup of that same photograph
7 there taken shortly after that photograph was taken
8 to show the measurement or the measuring tape being
9 right up to the loading dock here.

10 Q Is that metal tape?

11 A It's a steel tape.

12 Q And I show you Defendant's Exhibit
13 Eight. What does this picture show?

14 A This is another closeup showing
15 the measurement of the height of the pipe and it measures
16 to be twelve feet three inches from the ground below
17 the loading dock.

18 Q That's from the pipe down to the
19 ground.

20 A Right.

21 Q Twelve feet three inches.

22 A Right.

23 Q And these three, Exhibits Six, Seven
24 and Eight were all taken with the time in the same
25 position?

1 A. They were taken within forty-five
2 seconds total time span, something like that.

3 Q. Now Defendant's Exhibit Number Nine;
4 can you tell the Court and the jury what this picture
5 is?

6 A. This went the length of the protrusion
7 of this piece of pipe here out from the pipe that's
8 running parallel to the loading docks and it measures
9 about five and a half inches in depth.

10 Q. Five and five-eighths.

11 A. Right.

12 MR. DAVIS: You may inquire.

13

14 CROSS-EXAMINATION

15

16 BY MR. GRIZZARD:

17 Q. Mr. Rothman, I have one question.
18 In Number Seven, was your tape measure against the
19 wall?

20 A. I think there was a little gaff
21 there, maybe a quarter of an inch, something like that.

22 Q. And how did you suspend this? Did
23 you have someone standing there the whole time? This
24 man was holding it while you were taking the pictures?

25 A. Right.

IN CHAMBERS

1
2 MR. GRIZZARD: Your Honor, at this point
3 in time, the plaintiff would make a motion to
4 strike the evidence of the defendant. The motion,
5 as I understand it, is based on the fact that
6 the defendant is trying to prove contributory
7 negligence on the part of the plaintiff as the
8 proximate cause of the accident and that the
9 whole basis of their proof is the fact that the
10 plaintiff didn't have signs up there and, therefore,
11 the failure to put signs or to have a barricade
12 or what have you is a proximate cause of the
13 accident.

14 The evidence in the case is clear
15 that the accident was due to the driver, Charles
16 Spears, backing into the pipe. The evidence
17 shows that he hit the pipe one time; he pulled
18 up, by one witness, six or seven feet, by two
19 other witnesses approximately twelve feet, and
20 proceeded to start backing back.

21 And George Flythe went on the platform
22 and was hollering and waving at him, trying to
23 get him to stop, and he didn't hear him or see
24 him and continued to back up until he struck
25 the pipe. And this is the proximate cause of

1 the accident, that the driver, Charles Spears,
2 just wasn't watching and paying attention to
3 what he was doing.

4 According to his testimony, Judge, he
5 backed up there perfectly the first time, saw
6 no warning in lights, no posts -- no one was on
7 the dock or trying to stop him -- backed straight
8 into the dock, stopping about two feet short of
9 it, and that he didn't even know an accident
10 had occurred until some five minutes later.

11 That testimony is inherently incredible.
12 So you're left with the testimony of the plaintiff
13 in the case as to how the accident did occur.
14 And the mere fact that there was no sign up there
15 has nothing to do with the case.

16 If I'm drunk out of my mind, driving
17 down the highway eighty miles an hour, and a
18 man runs a sign and hits me, the mere fact that
19 I'm drunk and going eighty miles an hour has
20 nothing to do with the case.

21 The proximate cause of the accident is
22 the man running the sign.

23 And that is the case we have here. In
24 this particular case, the mere fact that there
25 are no signs, barriers or anything, it's a

1 condition existing, but it has nothing to do with
2 the proximate cause of the accident.

3 We know that it is clear from all the
4 evidence that the pipe is less than the height
5 of the truck in this case because otherwise you
6 wouldn't have an accident. Whether or not
7 twelve feet three inches or six inches off
8 the ground, the height of the truck, is not what
9 we're concerned with in this thing.

10 The plaintiff owes a duty of ordinary
11 care, and ordinary care is what reasonable
12 people do.

13 In 1973, the plaintiff in this case had
14 owned this system over ten years. It had been
15 in use over ten years and the same situation
16 existed for over ten years with no accidents.
17 It was designed and installed by other people.

18 Now where is the duty on the plaintiff
19 to see this condition that the defendant is
20 claiming we should have seen to avoid the
21 accident?

22 If the accident happened at night and
23 there had been no signs up there, we might have a
24 different situation, but the accident happened
25 in broad daylight while a man tried to stop the

1 defendant from backing in the trailer.

2 There is no evidence of contributory
3 negligence. There is only one possible verdict
4 that the jury can find and that is that the
5 defendant is guilty of negligence and it was a
6 proximate cause of the accident and a proximate
7 cause of the damage, and we ask the Court to
8 strike the defendant's evidence in the case.

9 MR. DAVIS: Well, Richard made an
10 argument for me. He said we didn't know the
11 condition was up there. Now how in the world
12 would you expect Charles Spears to know it's
13 up there?

14 It's incredible on its face, and this
15 is what I expect to argue to the jury. They
16 said, "We had this building since 1963 and we
17 didn't know that little pipe was sitting out
18 there five and a half inches." How do they
19 expect Charles Spears who was an occasional
20 truck driver to know it?

21 They did know it because one of the
22 employees ran out there to warn him. He admits
23 he didn't get out there until the truck was at
24 the dock, George Flythe.

25 But we have a situation here where the

1 plaintiff has a certain duty to us, too, and
2 we're using his premises in a situation like this.
3 We have a right to assume these premises are
4 reasonably safe and there are no hazardous
5 conditions existing there at all. And unless
6 we know or have reason to know, you know,
7 we are not responsible for the condition.

8 They made the condition. If they say
9 they didn't know about it, it's incredible on
10 its face. If they say they didn't know about it,
11 I ask the Court to strike the plaintiff's evidence
12 because there is no evidence we knew about it.
13 We couldn't know about it, nor is there any
14 reason to suspect -- we didn't live there for ten
15 years, Judge.

16 And we have the right to assume as
17 we go back into a loading dock that that dock
18 is safe for us to back up to. We have every right
19 in this world to assume that this condition
20 exists.

21 And there is virtually no way -- some
22 of the witnesses said if you look straight down
23 that dock, not the long way, there is no way you
24 can tell that this little nib is sticking out five
25 inches. And we have a right to assume it isn't.

1 By the time George Flythe got out there,
2 it was too late, by his own testimony. And the
3 plaintiff has a duty to keep his premises in a
4 reasonably safe condition and he's got a duty to
5 exercise reasonable care in having it in that
6 condition for us.

7 Whether or not he knew or didn't know
8 maybe is his own negligence. I think they did
9 know. And the evidence of the employees sitting
10 in the shed and looking out -- they knew something
11 was there.

12 But of all the people who absolutely
13 didn't know about it, it's got to be Charlie
14 Spears, the driver of the truck, couldn't have
15 known about it. And if there's anybody who should
16 have known about it, it should have been the
17 owner, the plaintiff owner.

18 And I feel honestly on this evidence
19 here, the Court really has to strike the
20 plaintiff's evidence, and I so move.

21 MR. GRIZZARD: Judge, just one thing.
22 There is a duty on the driver of a vehicle to
23 maintain a proper lookout. And the instructions
24 tell us and the law tells us it is not only a
25 duty, you can't look in your mirror and start

1 backing up -- glance in your mirror and start
2 backing up; you have to look at something with
3 ordinary care.

4 You've got a question, a conflict in
5 the evidence as far as what the plaintiff witnesses
6 say happened and what Charles Spears says happened.
7 Charles Spears says he only touched its part
8 one time and didn't have to back up and stopped
9 two feet from the platform. Now that is
10 inherently incredible.

11 He didn't hit the pipe that was jutting
12 out five inches, by the testimony of the
13 case.

14 But when you look, you have to exercise
15 ordinary care to see what a person, a reasonable
16 person would have seen. Now George Flythe said
17 the vehicle was almost at the platform, at the
18 dock, when he was out there. The other witnesses
19 said the vehicle was much further away. But the
20 point is that Charles Spears, if he had been paying
21 attention to what he was doing, would have seen
22 or should have seen the man standing there and
23 waving and hollering at him; but he didn't, and
24 that's what caused the accident.

25 The mere fact that there was no sign

1 there -- if it had been in the dead of night
2 with nobody there, maybe you have a defense, but
3 in this particular case, the facts in this case,
4 it happened in broad daylight and the man didn't
5 pay attention to what he was doing. He didn't
6 see what he should have seen when he was backing
7 up.

8 It's no case to go to the jury with.

9 MR. DAVIS: For the defendant.

10 THE COURT: Well, frankly, gentlemen,
11 it boils down to a question of lookout and, of
12 course, what a reasonable person might or might
13 not have seen in the same situation.

14 And, of course, those questions, that's
15 a question for the jury to decide, whether they
16 felt he was keeping a reasonable lookout.

17 It is, of course -- it is somewhat of
18 a question as far as I'm concerned because
19 driving one of these big tractor-trailers you
20 necessarily have less visibility and a greater
21 degree of difficulty, and this thing is twelve
22 and a half feet tall.

23 You've got to be as concerned about
24 that twelve-and-a-half-foot roof as you have the
25 wheels in the back, and you just can't go back in

1 and assume everything is all right.

2 But I think that is a question the
3 jury is going to have to decide and I am going
4 to overrule both motions to strike and note both
5 your exceptions on the record.

6 MR. DAVIS: So noted. Except.

7 MR. GRIZZARD: Exception.

8 THE COURT: *** Okay! Let's get the
9 instructions.

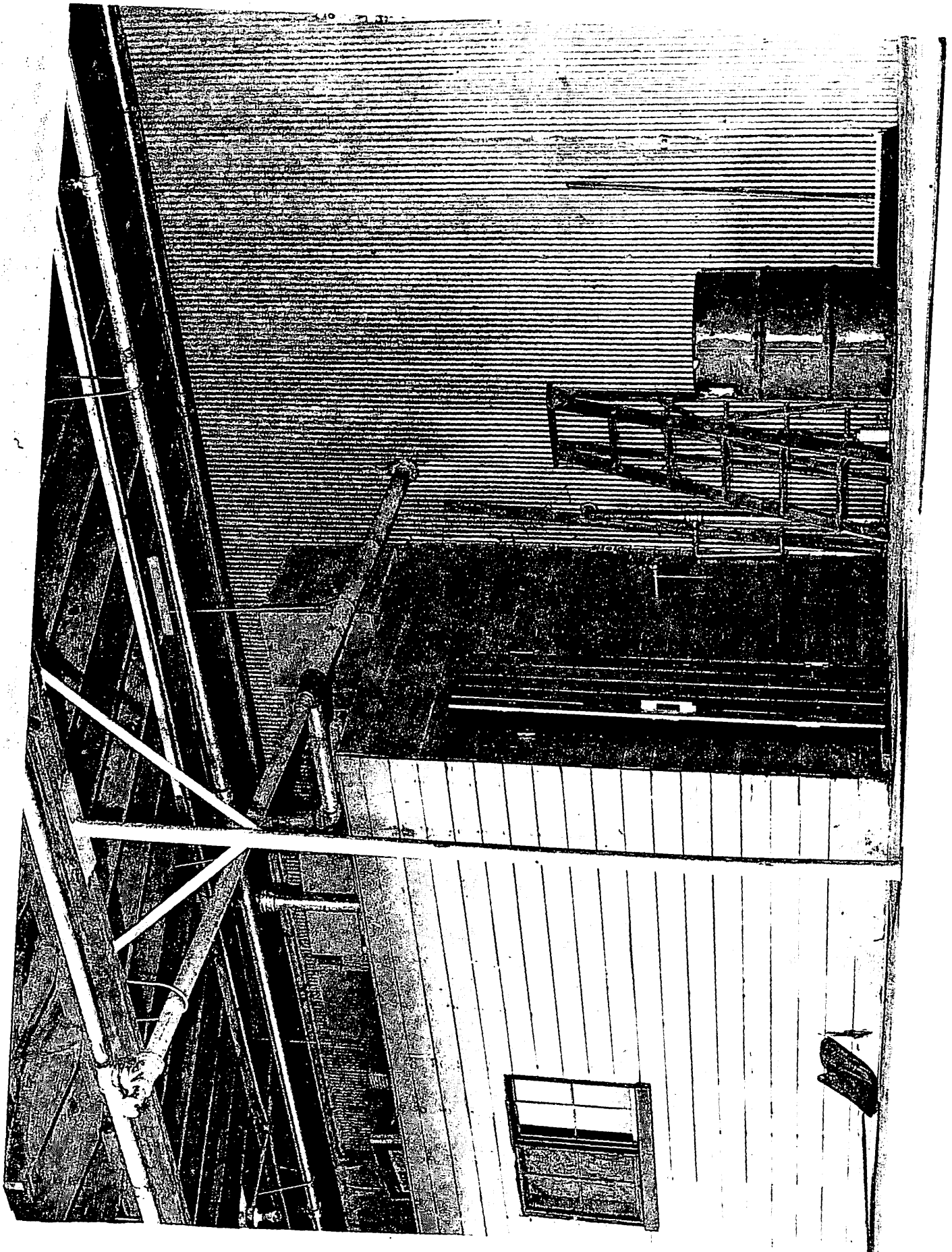
10 (Whereupon at 3:55 p.m. the trial
11 continued.)

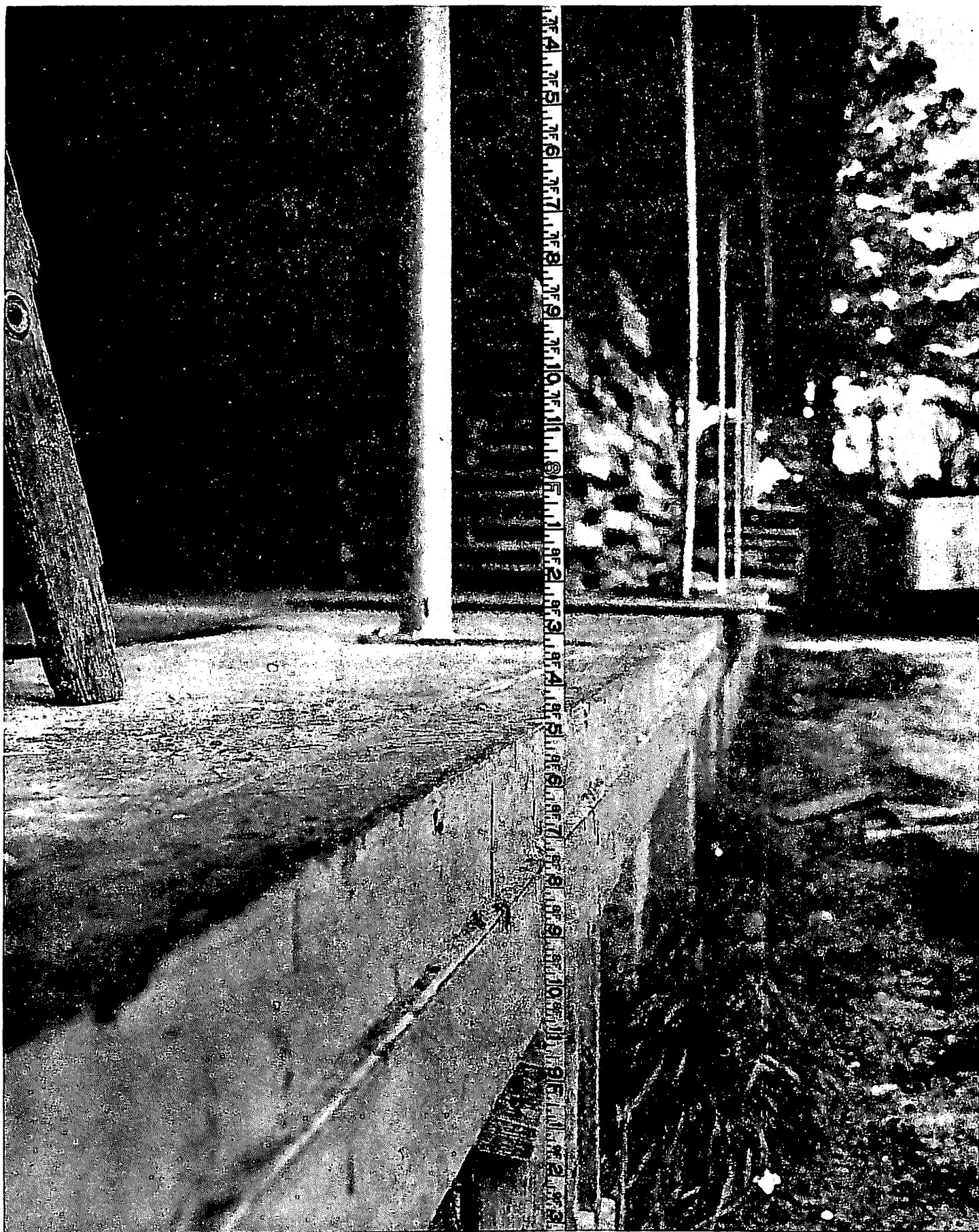
12 THE COURT: All right, ladies and
13 gentlemen, I will read you the Court's instructions.
14 As I told you before, these instructions are
15 the law of this case and you ladies and gentlemen
16 must determine the credibility of the witnesses
17 and, of course, must determine the facts that
18 have been presented to you.

19 (Whereupon the Court's instructions
20 were read to the jury.)

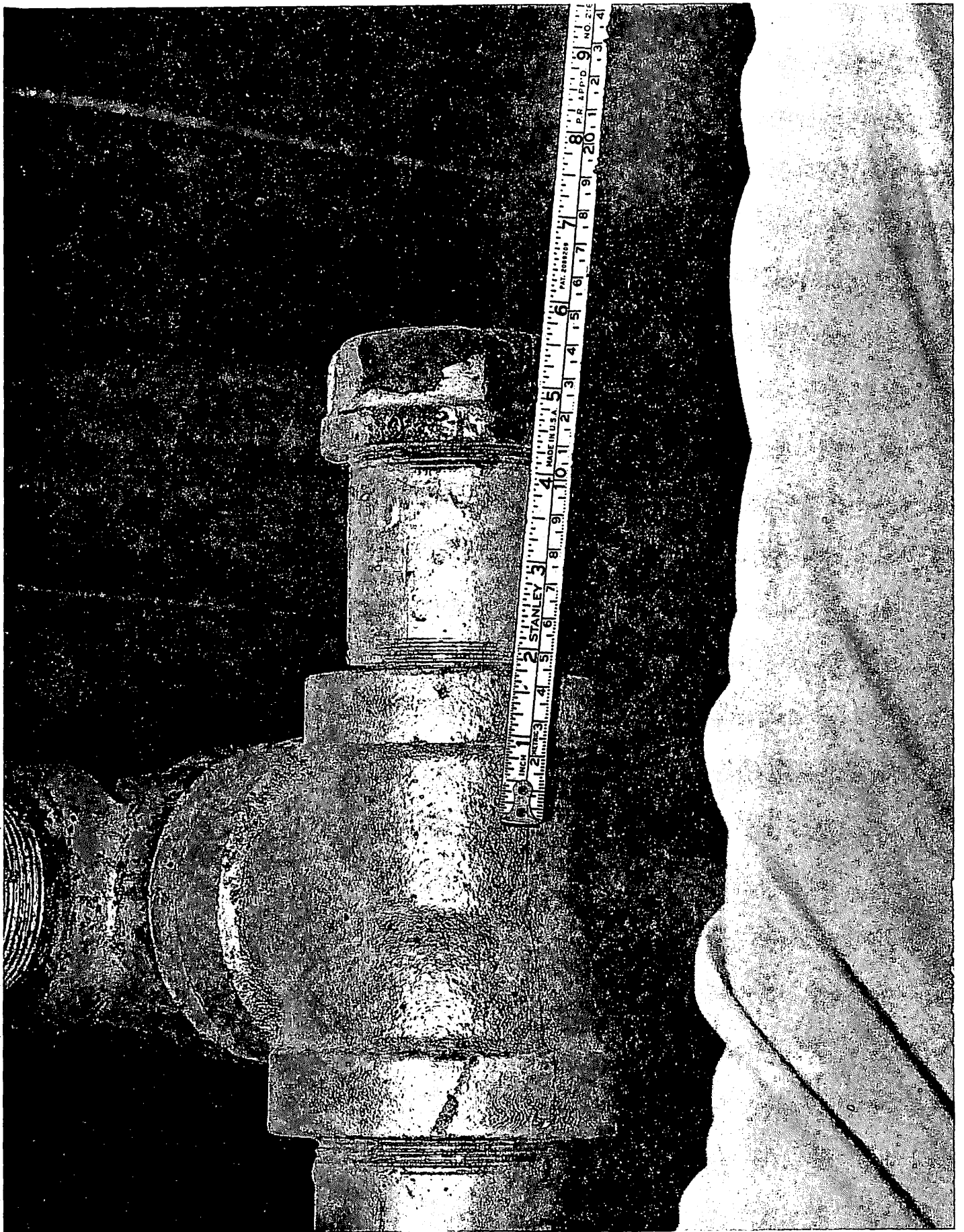
21 (Whereupon both counsel presented
22 their closing arguments to the jury.)

23 THE COURT: All right, ladies and
24 gentlemen, you can now retire. We have prepared
25 the two forms of verdict for your use, and when

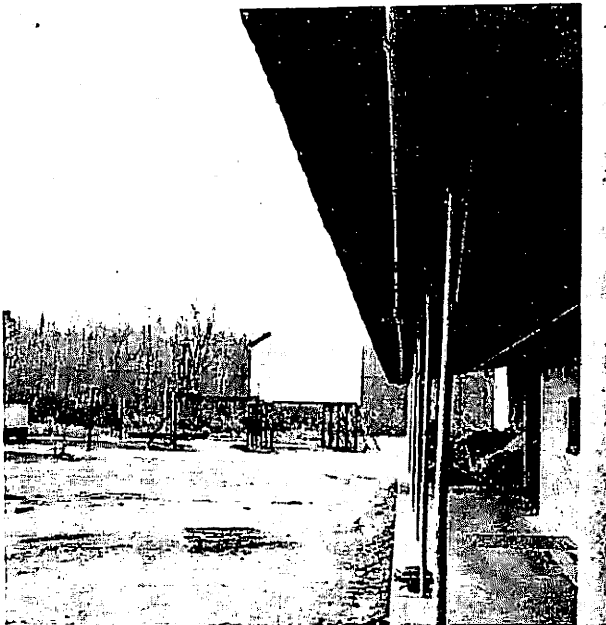
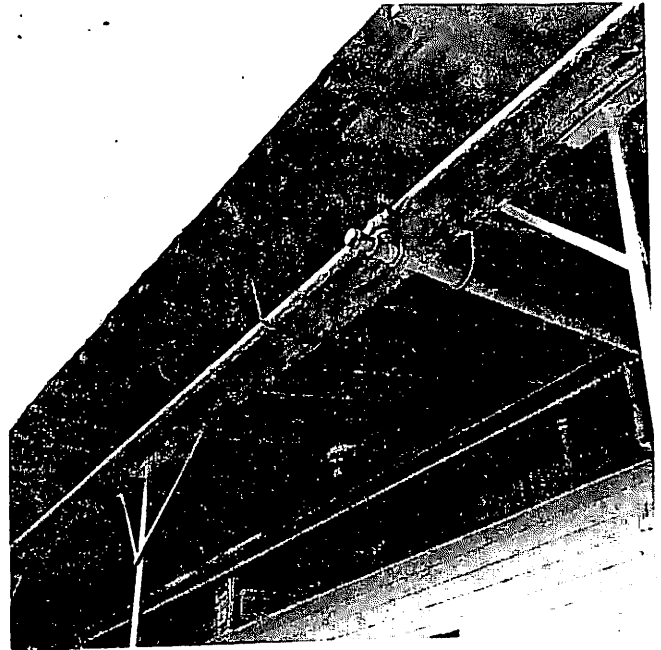
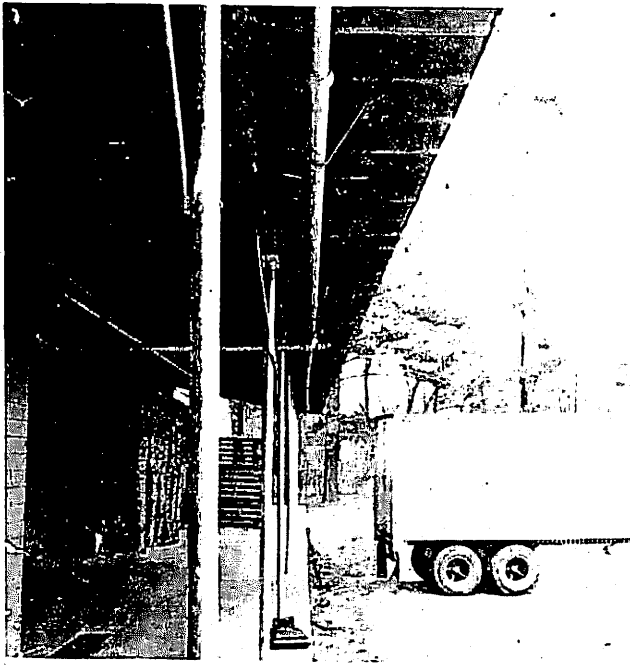


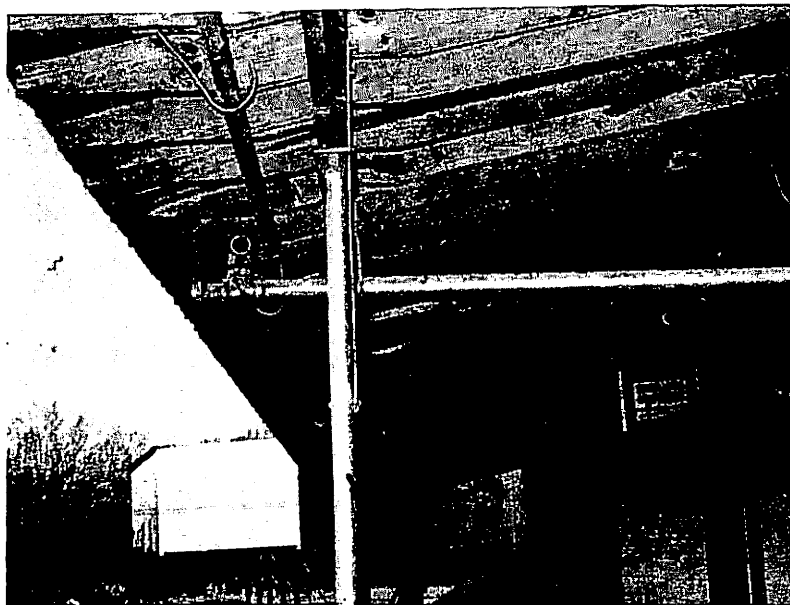












INSTRUCTION NO. 2-A

*Refused
JCS*

The Court instructs the jury that even if you believe from the evidence that the defendants were negligent, and that such negligence was a proximate cause of the accident; nevertheless, if you further believe from the evidence that the plaintiff was also negligent, and that such negligence proximately contributed to cause the accident, then your verdict shall be in favor of the defendants.

The law does not undertake to apportion or balance the negligence of the parties where both are at fault, in order to ascertain which one is most at fault, but the plaintiff is barred from recovery if it committed any act of negligence which proximately contributed to cause the accident.

INSTRUCTION NO. 2-B

Refused
JS

The Court instructs the jury that the defendant had the right to assume that the premises of the plaintiff were in a reasonably safe condition for the defendant to back or position his tractor-trailer at the loading dock, and that the defendant was not required to be on the lookout for danger in the absence of knowledge or warning of any dangerous condition, until the defendant saw, or by the exercise of ordinary care should have seen, a dangerous condition.

INSTRUCTION NO. 2c

The Court instructs the jury that the defendant was an invitee on the premises of the plaintiff and the plaintiff owed the defendant the duty to exercise reasonable care:

1. To have his premises in a reasonably safe condition for the defendant to position his tractor-trailer rig at the loading dock;
2. To warn the defendant of any unsafe condition if it was unknown or not reasonably known to the defendant, but was, or in the exercise of ordinary care should have been known to the plaintiff.

And if you believe from the preponderance of the evidence that the plaintiff failed to exercise ordinary care in the performance of either of the foregoing duties, then the plaintiff was negligent, and if you further believe from such evidence that any such negligence was a proximate cause of the plaintiff's damages, then you shall find your finding for the defendants.

1 that one contends that he ran out to warn the
2 driver at a very late time which we think is
3 sufficient evidence in and of itself of knowledge
4 of the plaintiff of the dangerous condition.

5 And even aside from that, the fact that
6 the plaintiff had occupied the premises for in
7 excess of ten years, the issue should have been
8 submitted to the jury as to its failure to
9 exercise reasonable care in keeping the premises
10 in a reasonably safe condition for the intended
11 business activity.

12 The exception as to two photographs,
13 Nine-A and B, of the adjacent warehouse of the
14 plaintiff which shows physical damage done by
15 trucks in order to show that the plaintiff was
16 aware or should have been aware of what would happen
17 without proper warning to truck drivers in backing
18 up to the dock.

19
20
21 -----oOo-----
22
23
24
25

We, the jury, on the issue joined, find in favor
of the defendants.

Raymond D. Bess
Foreman

Commonwealth of Virginia



JAMES C. GODWIN

JUDGE

SUFFOLK, VIRGINIA 23434

GEORGE F. WHITLEY, JR.

JUDGE

SMITHFIELD, VIRGINIA 23430

Fifth Judicial Circuit

May 23, 1977

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

Mr. Richard C. Grizzard
Attorney at Law
Boykins, Virginia 23827

Mr. Donnell P. Davis
Attorney at Law
Plaza One
Norfolk, Virginia 23510

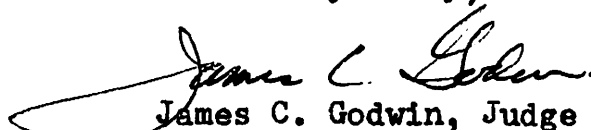
RE: Hancock Peanut Company v. J. & E. Express, Inc. and Spears

Gentlemen:

After reviewing the transcript in the above captioned matter, I am of the opinion that at the conclusion of the defendants' evidence I should have struck the evidence and entered up summary judgement for the plaintiff. The only credible evidence in the case establishes negligence on the part of the driver of the truck. His testimony is that he never even got to the platform, he never struck anything. In fact, he states that he stopped his trailer two feet from the platform. This, of course, is preposterous.

Simply because the visibility and degree of difficulty are greater than an ordinary vehicle does not justify his action. It requires both caution and skill. With a 12½ ft. high trailer it is as important to know where the roof of the vehicle is going as it is the wheels. The Court having ruled that there is no contributory negligence as a matter of law, I will set aside the verdict of the jury and enter judgement for the plaintiff in the amount stipulated by the parties.

Yours very truly,


James C. Godwin, Judge

jes

cc: Mr. B. A. Williams, Jr., Clerk

Grizzard, Co

23827

VIRGINIA: In the Circuit Court of Southampton County, the 2nd day of June, 1977

Hancock Peanut Company

vs. #134-75

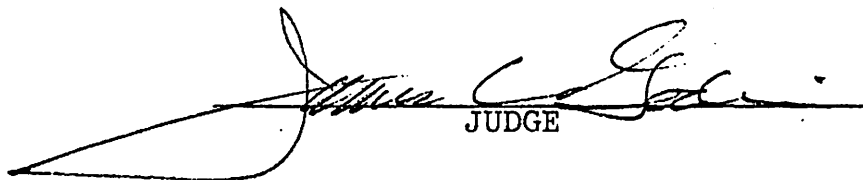
J. & E. Express, Inc. and Spears

The Court having heretofore taken under advisement the plaintiff's motion to set aside the verdict of the jury, doth so decide.

It is therefore ordered that the verdict of the jury in favor of the defendants is hereby set aside and that the plaintiff recover and have judgment against the defendants in the amount of \$39,295.30, with 8% interest thereon from the 2nd day of June, 1977, until paid and the costs, to which ruling of the Court counsel for the defendants excepts.

It is further ordered that the transcript of this trial is hereby made a part of the record in this case as provided by Rule 5:9(a) of the Rules of the Supreme Court of Virginia.

Enter this 2nd day of June, 1977.


JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

HANCOCK PEANUT COMPANY,

Plaintiff

v.

#134-75

J & E EXPRESS, INC.,

and

CHARLES SPEARS,

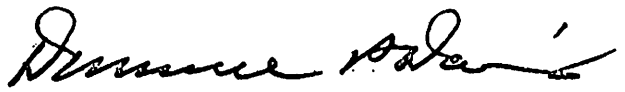
Defendants

NOTICE OF APPEAL

Now come the defendants, J & E Express, Inc., and Charles Spears, by counsel, and gives this Notice pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, that they will seek an appeal from the final judgment order entered by the Circuit Court of Southampton County, entered on June 2, 1977, and will present their Petition for appeal to the Justices of the Supreme Court of Virginia. A transcript of the record of the trial in the Circuit Court of Southampton County has been made a part of the record of this Case, as provided by Rule 5:9 (a) of the Rules of the Supreme Court of Virginia.

J & E Express, Inc. and Charles Spears

By




Counsel

Donnell P. Davis, Esquire
FURNISS, DAVIS and RASHKIND
P. O. Box 3746
Norfolk, VA 23514

CERTIFICATION

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed to Richard C. Grizzard, Esquire, Boykins, Virginia, counsel for the plaintiff, on this 21 day of June, 1977.

Thurman R. Adams

Furniss, Davis, 
and Rashkind
Attorneys at Law

received and filed this day

JUN 22 1977

day of

B. Williams

86.

ASSIGNMENTS OF ERROR

1. The lower court erred in setting aside the jury verdict for the defendants, and entering judgment for the plaintiff as a matter of law.

2. The lower court erred in finding the defendants were negligent as a matter of law.

3. The lower court erred in finding as a matter of law that the plaintiff was free of contributory negligence.

4. The lower court erred in over-ruling the defendants' Motion to strike plaintiff's evidence, and enter summary judgment for the defendants at the close of plaintiff's evidence.

5. The lower court erred in over-ruling the defendants' Motion to strike plaintiff's evidence and enter summary judgment for the defendants at the close of all evidence in the trial of the case.

8. The lower court erred in its refusal to grant Instruction 7-A, offered by the defendants, relating to the issue of the plaintiff's contributory negligence.

9. The lower court erred in its refusal to grant Instruction 7-B, offered by the defendants, relating to the existence of a dangerous condition on the plaintiff's premises, and the issue of the defendants' knowledge or awareness of such condition.

10. The lower court's refusal to grant Instruction 7-C, offered by the defendants, relating to the plaintiff's duty of care to the defendants, with regard to such dangerous condition on the plaintiff's property.