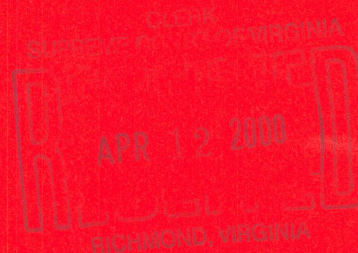


266 Va 366

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In The  
**Supreme Court of Virginia**

RECORD NO. 992331



**SUGARLAND RUN HOMEOWNERS ASSOCIATION,**

*Appellant,*

v.

**WALTER D. HALFMANN and BARBARA B. HALFMANN,  
PERSONAL REPRESENTATIVES OF THE ESTATE OF  
WALTER R. HALFMANN, DECEASED,**

*Appellees.*

---

**APPENDIX**

---

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*Counsel for Appellees*



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VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WALTER D. HALFMANN AND  
BARBARA B. HALFMANN, PERSONAL  
REPRESENTATIVES OF THE ESTATE OF  
WALTER R. HALFMANN, DECEASED,

Plaintiffs,

V.

AT LAW NO. 20501

TRINA KABIRI,

and

SUGARLAND RUN HOMEOWNERS ASSOC.,

and

VIRGINIA ELECTRIC & POWER COMPANY,  
T/A VIRGINIA POWER,

Defendants.

**AMENDED MOTION FOR JUDGMENT**

COME NOW the Plaintiffs, Walter D. Halfmann and Barbara B. Halfmann, Personal Representatives of the Estate of Walter R. Halfmann, deceased, by counsel, and move for judgment pursuant to § 8.01-50 of the Code of Virginia, 1950, as amended, on the grounds and in the amount set forth below:



## COUNT I

1. Walter D. Halfmann and Barbara B. Halfmann qualified and were duly appointed Administrators of the Estate of Walter R. Halfmann, deceased, by the Circuit Court of the County of Loudoun, Virginia, on May 26, 1995.

2. On or about the 19<sup>th</sup> day of January, 1995, at approximately 2:40 p.m., Plaintiffs' decedent was riding his bicycle home from school crossing over Route 1701 (Sugarland Run Drive), where said roadway intersects with a paved pathway utilized by pedestrians and bicycle riders.

3. At the same time and place, Defendant, Trina Kabiri, was operating her 1988 Jeep motor vehicle, traveling southbound on said Route 1701 near the aforesaid intersection with the paved pathway.

4. Defendant had a duty to operate her motor vehicle without negligence and with due regard for the safety of other persons and pedestrians utilizing the roadway, knowing that at said time of day students were being dismissed from Meadowland Elementary School and further knowing that young children would be using said paved pathway and would be crossing Route 1701 at the subject location, Defendant herself being on her way to the aforesaid school to pick up her children.

5. Notwithstanding these duties, her knowledge of the subject roadway, and the time of day, Defendant recklessly, carelessly, and negligently operated her motor vehicle so that it struck Plaintiffs' decedent. Defendant was negligent in that she failed to keep a proper lookout, exceeded a reasonable speed under the existing circumstances and conditions, failed to apply her brakes in time to avoid the collision, failed to give full time

and attention to the operation of her vehicle, and otherwise operated the same in a careless and reckless manner.

6. As a result of the aforesaid collision, Plaintiffs' decedent was thrown from his bicycle and received severe and violent injuries, which caused his death.

7. Plaintiffs' decedent, Walter R. Halfmann, was eight years of age at the time of the aforesaid collision, having been born on February 10, 1986, was in good health and in good academic standing.

8. Plaintiffs' decedent died intestate survived by his parents, Walter D. Halfmann and Barbara B. Halfmann, and his sister, Amanda.

9. As a direct and proximate result of the negligence of the Defendant, the aforesaid beneficiaries have sustained financial and pecuniary loss and are entitled to recover damages for their sorrow, and the loss of decedent's company, counsel and comfort, and compensation for reasonably expected loss of income of the decedent, expenses associated with his death and reasonable funeral expenses.

WHEREFORE, Plaintiffs, Walter D. Halfmann and Barbara B. Halfmann, Administrators of the Estate of Walter R. Halfmann, demand judgment against the Defendant, Trina Kabiri, in the amount of ONE MILLION DOLLARS (\$1,000,000.00), plus interest thereon from January 19, 1995, and their costs in this behalf expended.

#### **COUNT II**

**(Paragraphs 10-16 dismissed as a result of the Court sustaining Defendant's Plea in Bar of sovereign immunity)**



### COUNT III

(Paragraphs 17-22 dismissed as a result of the Court sustaining Defendant's Plea in Bar of sovereign immunity)

### COUNT IV

23. Plaintiffs incorporate Paragraphs 1 through 22 herein as though fully set forth.

24. The Sugarland Run Homeowners Association ("SRHOA"), is the owner of, and responsible for, the care and maintenance of the common areas in the planned community known as Sugarland Run.

25. Said common areas include a system of walkways and/or pathways which are utilized by the public, including persons going to and coming from the public schools located within the community.

26. SRHOA had notice and knowledge of the unreasonably dangerous condition of the location and area in which the subject tragedy occurred.

27. Despite said notice and knowledge, SRHOA failed to take such steps as were reasonable and necessary to ensure that persons utilizing said common areas, including the Plaintiff, could do so in a safe manner.

28. As a direct and proximate result thereof, the beneficiaries of Plaintiffs' decedent have sustained financial and pecuniary loss and are entitled to recover damages for their sorrow, and the loss of decedent's company, counsel and comfort, and compensation for reasonably expected loss of income of the decedent, expenses associated with his death, and reasonable funeral expenses.

WHEREFORE, Plaintiffs, Walter D. Halfmann and Barbara B. Halfmann, Administrators of the Estate of Walter R. Halfmann, demand judgment against the Defendant, the Sugarland Run Homeowners Association, in the amount of ONE MILLION DOLLARS (\$1,000,000.00), plus interest thereon from January 19, 1995, and their costs in this behalf expended.

#### **COUNT V**

29. Plaintiffs incorporate Paragraphs 1 through 28 herein as though fully set forth.

30. Virginia Electric and Power Company t/a Virginia Power ("Virginia Power") has an easement on and/or within the property of the School Board and SRHOA in the area where the subject tragedy occurred.

31. Virginia Power installed two (2) large box shaped electrical devices on and/or within the aforesaid easement adjacent to the subject paved pathway near the point where said pathway intersected with Sugarland Run Drive.

32. Virginia Power had notice and acknowledge that pedestrians and bicycle riders within the planned community of Sugarland Run, including children who attended Meadowland Elementary School, utilized said pathway and that in doing so they crossed over Sugarland Run Drive to get to that portion of the subject pathway which continued on the opposite side of the roadway.

33. Virginia Power had a duty to users of the subject pathway, including plaintiff, not to place their devices on or within the subject easement such that they interfered with the ability of persons utilizing the same and crossing Sugarland Run Drive to see traffic



traveling southbound on that roadway, or the ability of such southbound traffic to see persons on the pathway who were crossing Sugarland Run Drive.

34. Virginia Power had notice and knowledge of the foregoing unreasonably dangerous condition prior to the time this tragedy occurred.

35. Notwithstanding its duties, and notwithstanding such notice and knowledge, Virginia Power recklessly, carelessly and negligently proceeded to install the referenced electrical devices such that they did, in fact, interfere with the use of the subject pathway as aforesaid.

36. Notwithstanding its duties, and notwithstanding such notice and knowledge, Virginia Power failed to take any action to ameliorate the unreasonably dangerous condition created by the placement of the aforesaid electrical devices.

37. As a direct and proximate result thereof, plaintiff's decedent was struck by a motor vehicle operated by defendant Kabini.

38. As a direct and proximate result thereof, the beneficiaries of Plaintiffs' decedent have sustained financial and pecuniary loss and are entitled to recover damages for their sorrow, and the loss of decedent's company, counsel and comfort and compensation for reasonably expected loss of income of the decedent, expenses associated with his death, and reasonable funeral expenses.

WHEREFORE, Plaintiffs, Walter D. Halfmann and Barbara B. Halfmann, Administrators of the Estate of Walter R. Halfmann, demand judgment against the Defendant, Virginia Electric & Power Company t/a Virginia Power, in the amount of ONE MILLION DOLLARS (\$1,000,000.00), plus interest thereon from January 19, 1995, and their costs in this behalf expended.

**COUNT VI**

**(Paragraphs 35-40 dismissed as a result of the Court  
sustaining Defendant's Plea in Bar of sovereign immunity)**

WALTER D. HALFMANN AND  
BARBARA B. HALFMANN, PERSONAL  
REPRESENTATIVES OF THE ESTATE OF  
WALTER R. HALFMANN, DECEASED  
By Counsel

GLENNON, GOODMAN, LUBELEY,  
VAUGHN & WALKER, L.L.P.  
11480 Sunset Hills Road  
Reston, Virginia 20190  
(703) 689-2100

By: \_\_\_\_\_

Robert L. Vaughn, Jr.  
VA BAR #20633



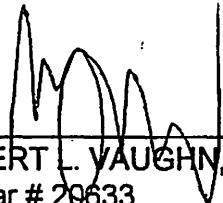
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of June, 1998, a copy of the foregoing Amended Motion for Judgment, was sent via U.S. Mail, postage prepaid to:

Kathryn Y. Aspegrien, Esquire  
Hunton & Williams  
1751 Pinnacle Drive  
Suite 1700  
McClean, VA 22102

John A. Johnston, Esquire  
Slenker, Brandt, Jennings & Johnston, PLLC  
P. O. Box 2908  
Merrifield, VA 22116-2908

Daniel Robey, Esquire  
Robey & Teumer  
12500 Fair Lakes Circle, Suite 125  
Fairfax, VA 22033-3804

  
\_\_\_\_\_  
ROBERT L. VAUGHN, JR.  
VA Bar # 20633\_

VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

WALTER D. HALFMANN AND :  
BARBARA B. HALFMANN, :  
PERSONAL REPRESENTATIVES OF :  
THE ESTATE OF WALTER R. :  
HALFMANN, DECEASED, :

Plaintiffs, :

v. : LAW NO. 20521

TRINA KABIRI, et al. :

Defendants. :

GROUND OF DEFENSE  
TO AMENDED MOTION FOR JUDGMENT

COMES NOW the Defendant, SUGARLAND RUN HOMEOWNERS ASSOCIATION, by counsel, and in response to the Amended Motion For Judgment heretofore filed by the Plaintiffs in this cause, states as follows:

1. The Defendant admits the allegations contained in paragraphs one, two, seven, and eight of the said Amended Motion For Judgment.

2. It denies the allegations contained in paragraphs twenty-five, twenty-six, twenty-seven and twenty-eight of the said Amended Motion For Judgment.

3. It does not have sufficient knowledge with which to determine the truth of the allegations contained in paragraphs three, five, six, nine, thirty-one,

thirty-two, thirty-four, thirty-five, thirty-six, thirty-seven, and thirty-eight of the said Amended Motion For Judgment.

4. The allegations contained in paragraphs four, twenty-four, thirty and thirty-three of the said Amended Motion For Judgment constitute legal conclusions and require no response.

5. In response to paragraphs twenty-three and twenty-nine of the said Amended Motion For Judgment, wherein the Plaintiffs incorporate allegations contained in other paragraphs of the said Amended Motion For Judgment, the Defendant hereby incorporates by this reference its responses to those paragraphs herein contained.

6. Any allegations contained in the said Amended Motion For Judgment not herein specifically admitted are hereby denied.

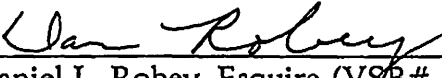
7. By way of further defense, the Defendant states that this accident was caused by the sole negligence of the Plaintiffs' decedent, caused by parties joined and not joined in this action, and, or, without admitting any negligence on the part of the Defendant, this action was caused by the contributory negligence of the Plaintiffs' decedent.

8. The Defendant hereby asserts the defenses of accord and satisfaction, and that this action is barred by the applicable statute of limitations.

WHEREFORE, having fully responded to the Amended Motion For

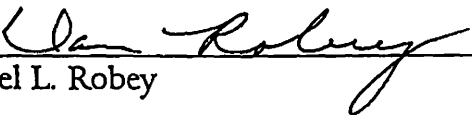
Judgment heretofore filed by the Plaintiffs in this cause, the Defendant prays that this action be dismissed against it with costs assessed against the Plaintiffs.

SUGARLAND RUN HOMEOWNERS ASSOCIATION  
By Counsel

  
Daniel L. Robey, Esquire (VSB# 15531)  
ROBEY & TEUMER  
Counsel for Defendant/Sugarland Run Homeowners Association  
12500 Fair Lakes Circle, Suite 125  
Fairfax, Virginia 22033-3804  
(703) 449-0076

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 1998, I mailed a true copy of the foregoing pleading, first class and postage prepaid, to Robert L. Vaughn, Jr., Counsel for Plaintiffs, 11480 Sunset Hills Road, Reston, Virginia 20190; to John A. Johnston, Slenker, Brandt, Jennings & Johnston, PLLC, P.O. Box 2908, Merrifield, Virginia 22116-2908, Counsel for Trina Kabiri; and Kathryn Y. Aspegrien, Hunton & Williams, 1751 Pinnacle Drive, suite 1700, McLean, Virginia 22102, Counsel for Virginia Electric & Power Company, t/a Virginia Power.

  
Daniel L. Robey

f:\296-467\answer.

992331

III

ORIGINAL

1

PARTIAL TRANSCRIPT

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WALTER D. HALFMANN and  
BARBARA B. HALFMANN,  
Personal Representatives of  
the Estate of Walter R.  
Halfmann, Deceased,

Plaintiffs,

v.

TRINA KABIRI, et al.,

Defendants.

At Law No. 20521

DAY ONE

PAGES 1 - 233

Leesburg, Virginia

Tuesday, July 20, 1998

The proceedings commenced at 9:02 a.m.

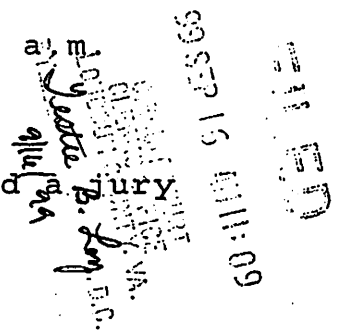
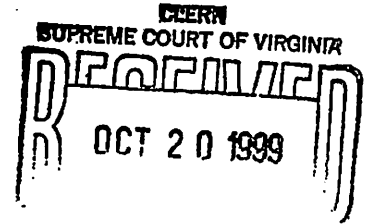
BEFORE:

The Honorable Jean H. Clements and a Jury

APPEARANCES:

ROBERT L. VAUGHN, JR., Esquire  
Glennon, Goodman & Lubeley, L.L.P.  
11480 Sunset Hills Road, Suite 200W  
Reston, Virginia 20190  
COUNSEL FOR THE PLAINTIFFS

Reporter: Caren Benge



Objection of counsel for Kabiri to testimony of Dr. Darren Lisse

36  
10 MS. SNEE: Yes, Your Honor, that is in  
11 regards to the de bene esse deposition of Dr. Lisse  
12 that we discussed before. Based on your ruling that  
13 the helmet is not coming in one way or the other and  
14 the fact that the defendants agree that the boy died  
15 as a result of this accident, we would request that  
16 Dr. Lisse's deposition not be read to the jury and  
17 plaintiff not testify -- plaintiffs' counsel not say  
18 in opening the fact that the boy's head was actually  
19 separated from his spine.

20 There is no reason for that except to, in  
21 a sense, inflame the jury or to show, as he said, an  
22 impact. But there's no showing in the mere fact  
23 that the spine separated from the head that my

37  
1 client was negligent. It shows that there was an  
2 impact, but there's no dispute about that.

3 I think they're trying to say, look, the  
4 fact that the head separated from the spine shows  
5 that she was speeding, she was doing something else  
6 negligent.

7 There's no evidence, without medical  
8 testimony, that if the head separates from the spine  
9 it means my client was exceeding the speed limit.  
10 There's nobody here who's going to come in and say  
11 if the head separates from the spine, it means she's  
12 going 40 to 45. There's no evidence of that.



Objection of counsel for Kabiri to testimony of Dr. Darren Lisse

13                   And the mere fact that the doctor says  
14   the head is separated from the spine -- you can see  
15   how that would, in a sense, twist in the jury's mind  
16   and be considered as something that it's not  
17   necessarily for. If we're all stipulating to it,  
18   why is it relevant that the head separated from the  
19   spine?

20                   The other thing that Dr. Lisse testified  
21   to was that the medical bill for his final care, in  
22   a sense, was about \$3,000. He said that was  
23   reasonable and necessary.

38

1                   I would move that Dr. Lisse's deposition  
2   not be read, because the medical bills in this case  
3   are not that of the estate. As a minor, it's the  
4   parents' responsibility. It is their claim, a  
5   separate claim, not of the death, not of the estate.

6                   And I would ask that the medical bills do  
7   not come into evidence. It is the parents' right  
8   and it's the parents' claim. It is not that of the  
9   estate for a minor.

10                   You can, and as is often done, file two  
11   different suits. By law, they have to be put  
12   together for the trial. But in this particular  
13   case, there was no separate claim made for the  
14   medical bills on behalf of the parents. So I would  
15   ask that that not be included and all of Dr. Lisse's  
16   deposition be excluded at this point.

Objection of counsel for Kabiri to testimony of Dr. Darren Lisse

17

THE COURT: Mr. Robey?

Objection of counsel for SRHOA to testimony of Dr. Darren Lisse

18                   MR. ROBEY: Judge, I very much enjoin and  
19 agree with that motion on both counts. Number one,  
20 we stipulate that this child was injured as a direct  
21 and proximate result of his accident and his  
22 injuries were the cause of his death.

23                   That is not an issue outstanding in this

39

1 case, based upon my stipulation and Ms. Snee's. No  
2 evidence relative to those issues need be  
3 introduced, because we agree with that.

4                   The purpose of introducing that evidence  
5 would be to inflame the jury. This is a wrongful  
6 death case of a child, the most emotional type of  
7 civil case you can see.

8                   And that's the danger here. And given  
9 the fact that those issues are not outstanding in  
10 the case, there is no purpose for introducing that  
11 kind of evidence.

12                   Now, also concerning the bills, the  
13 discovery I have received -- I haven't seen the  
14 exhibits counsel would intend to offer in this case,  
15 but I did get his discovery.

16                   And with that were copies of the bills,  
17 the medical bills and the funeral bill. The medical  
18 bills were addressed to the parents. They didn't  
19 have the estate or the child's name on them.

20                   As the Court well knows, these parents

Objection of counsel for SRHOA to testimony of Dr. Darren Lisse

21 have a derivative claim for those medical expenses.

22 And the fact that this case is proceeding doesn't

Response of counsel for Halfmann to objections to testimony of  
Dr. Darren Lisse

23 bar them from doing that.

40

1 In other words, they would make those  
2 claims in this case and then turn right around and  
3 sue again for the recovery of those medical  
4 expenses. That's their right as their derivative  
5 claim for the recovery of medical expenses.

6 And as I said, the bills were not  
7 addressed to the child. They were not addressed to  
8 the estate. They were addressed to the parents.  
9 It's the parents' bill.

10 THE COURT: Mr. Vaughn?

11 MR. VAUGHN: Your Honor, in terms of the  
12 cause of death, whether there is a stipulation now  
13 at the last minute as to what that cause is or not  
14 is irrelevant. It is a fact in this case which the  
15 jury is entitled to know.

16 To simply say the child died as a result  
17 of the collision in no way, shape, or form informs  
18 the jury of the circumstances of the child's death,  
19 which the plaintiffs are entitled to put before the  
20 jury.

21 It is, just as Ms. Snee indicated  
22 earlier, you never know how the case is going to go.  
23 The jury is entitled to know the full picture, and

41

1 then the Court can instruct them in the law and they

Response of counsel for Halfmann to objections to testimony of  
Dr. Darren Lisse

2 can make their determination based upon what the law  
3 is.

4 The Court should not be limiting the  
5 evidence that the jury hears on clearly and directly  
6 relevant evidence. The stipulation that the  
7 incident caused the death does not address very  
8 relevant, poignant issues to the jury.

9 In this particular case, there is going  
10 to be substantial evidence. We'll see photographs  
11 of the motor vehicle and the damage that occurred.

12 We will hear testimony from Sergeant  
13 Leonard and I believe at least one other that the  
14 force of the impact threw the child almost 100 feet  
15 into the air, 100 feet in distance from the point of  
16 impact.

17 And Dr. Lisse himself will testify that  
18 it takes a tremendous amount of force in order to  
19 literally separate the head from the spine. And I'm  
20 paraphrasing him, but that's the words in the course  
21 of his deposition.

22 Those are all bits of information, facts,  
23 and circumstances the jury is entitled to hear in

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1 order to make its ultimate determination: Was  
2 there, in fact, negligence in this particular case.  
3 It's all part and parcel.

4 Rarely in a case do you have a police



Response of counsel for Halfmann to objections to testimony of  
Dr. Darren Lisse

5 officer with a properly-calibrated radar gun focused  
6 on the defendant driving down the road in order to  
7 assert that the defendant was, in fact, speeding.

8                   And because of the nature of this  
9 particular case, there will be, to the best of my  
10 knowledge, no one who was in a position to make an  
11 assessment by visual, if you will, of what the  
12 defendant's speed was. I'm fairly confident there  
13 is no evidence of that.

14                   The best people who know -- Ms. Kabiri, I  
15 don't know exactly what she will ultimately say.  
16 Based on her deposition, it wasn't clear what her  
17 position on that situation was. But certainly, I  
18 would suspect that she's going to take some position  
19 with regard to her speed.

20                   The jury's entitled to know all of the  
21 other factors that existed in this particular case  
22 in order to make a determination whether, in fact,  
23 what ultimately is the case is negligence, or

43

1 ultimately if she takes a position as to what her  
2 speed was, whether, in fact, that is credible in the  
3 context of this entire case.

4                   They're entitled to use their common  
5 sense. They'll be instructed as to that. And the  
6 cause of death in this case is a specific cause of  
7 death that the jury is entitled to know. And the

Response of counsel for Halfmann to objections to testimony of  
Dr. Darren Lisse

8 plaintiffs are entitled to let them know what it is.

9 The second aspect of that, quite frankly,  
10 I've forgotten.

11 THE COURT: Medical bills.

12 MR. VAUGHN: Oh, the medical bills. I'm  
13 sorry, Your Honor.

14 8.01-52, Subsection 3, expressly says  
15 that among the damages which the jury is entitled to  
16 return if, in fact, they find liability, are the  
17 expenses for the care, treatment, and  
18 hospitalization of the decedent incident to the  
19 injury resulting in death. And that's exactly what  
20 Dr. Lisse testified to.

21 We don't have control over who they send  
22 the medical bills to. If that were the determining  
23 factor of liability, I think we'd all jump for joy,  
44

1 because I'd give them a fake name and a fake address  
2 every time I went to the hospital. But that doesn't  
3 denote who ultimately is responsible for the bill.

4 In this particular instance, whoever paid  
5 it certainly has a claim back against the estate for  
6 those bills. And in this particular instance, the  
7 statutes expressly allow recovery.

8 And if, in fact, then, the parties who  
9 ultimately paid have a claim back against the estate  
10 for reimbursement, that's between them and the

Response of counsel for Halfmann to objections to testimony of  
Dr. Darren Lisse

11 estate. But the statute and the amount of damages  
12 to be recovered in a wrongful death case are  
13 expressed in 8.01-52, Subsection 3.

14 THE COURT: What's the statute again?  
15 8.01 --

16 MR. VAUGHN: 8.01-52, Subsection 3. And  
17 I'm reading it verbatim: "Expenses for the care,  
18 treatment, and hospitalization of the decedent  
19 incident to the injuries resulting in death."

20 So ultimately, whether there's a right of  
21 subrogation, there's an assignment, whatever it may  
22 happen to be, some claim against the estate, is not  
23 an issue to be determined today.

45

1 But the estate, regardless of who paid  
2 it, regardless of who ultimately may end up being  
3 reimbursed or being responsible for it, is entitled  
4 to recover those expenses by statute.

5 THE COURT: In rebuttal, Ms. Snee?

6 MS. SNEE: Yes, Your Honor. Statutes are  
7 to be read in conformity with each other. In other  
8 words, it's assumed that they're not going to  
9 contradict each other.

10 If you look at -- and there's no doubt,  
11 8.01-52 says you can recover -- that the estate can  
12 recover for the medical bills for trying to save the  
13 decedent.

Response of counsel for Halfmann to objections to testimony of  
Dr. Darren Lisse

14                   But obviously, that wasn't written,  
15   8.01-52, with the idea of a discrepancy between  
16   child and adult. It was just it's the wrongful  
17   death statute.

18                   So then you would look at it with  
19   8.01-36, which says, and the law -- and I actually  
20   would disagree, also, with Mr. Robey just slightly



Rebuttal of counsel for Kabiri in support of objection to the  
testimony of Dr. Darren Lisse

2 months to bring that suit.

3           So if you allowed the medical expenses to  
4 go forward today, Mr. Robey is correct: We could  
5 have a verdict today that designates the estate to  
6 pay the medical bills of approximately \$3,000, and  
7 two months from now, Mrs. Kabiri could be standing  
8 at her door taking from a sheriff another service of  
9 summons for the medical bills from the parents.

10           And they are owed. It wouldn't be res  
11 judicata and it wouldn't be collateral estoppel,  
12 because the cause of action lies with the parents.  
13 And that is why that argument ends.

14           In regards to Mr. -- Dr. Lisse's -- I'm  
15 sorry -- in regards to the testimony of him that,  
16 quote, "it takes a tremendous amount of force," that  
17 is what I'm concerned about.

18           "Tremendous amount of force" does not  
19 equal my client is going 31 in a 30 mile an hour  
20 zone. My client is -- the speed limit is 30. There  
21 is nobody who puts her above 30. There is no  
22 testimony that puts her above 30.

23           The fact that the boy was thrown 100 feet

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1 doesn't make her higher than 30. Mr. Vaughn knows  
2 this. Everybody knows this, because he hired an  
3 expert who says it means she's going between 22 and  
4 26 miles an hour.

Rebuttal of counsel for Kabiri in support of objection to the testimony of Dr. Darren Lisse

5 I don't believe it's proper for the jury  
6 to say, well, Dr. Lisse says there is a tremendous  
7 amount of force to separate the skull from the head  
8 (sic); therefore, she must be speeding.

9 "Tremendous amount of force" is at 28  
10 miles an hour when you're a boy on a bike and you  
11 get hit by a Jeep. But he's trying to use  
12 "tremendous amount of force" to equal negligence.

13 To me, that's the same as if we say to a  
14 lay witness, how fast was somebody going? Fast.  
15 That's not admissible, because it doesn't bring it  
16 down to is "fast" faster than the speed limit or  
17 less than the speed limit?

18 You're allowing a generalization,  
19 "tremendous amount of force," to be used to  
20 specifically show negligence, and that is not  
21 permissible.

22 And there is no other reason for  
23 Dr. Lisse to testify about the head separating

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1 except to show it's a tremendous amount of force,  
2 which is not admissible or relevant to the issues  
3 they're to decide. What is admissible in regards to  
4 how the injury occurred is that he died as a result  
5 of the accident.

6 If -- and it doesn't occur in this  
7 case -- the boy had been, in a sense, alive or



Rebuttal of counsel for Kabiri in support of objection to the  
testimony of Dr. Darren Lisse

8 suffering and the parents saw that, that does come  
9 in, because that goes to their own solace before the  
10 death. That doesn't occur in this case. That is

Rebuttal of counsel for Kabiri  
Ruling of trial court

11 not in the case.

12 So the mere fact that the boy died as a  
13 result of the accident is all the jury needs to know  
14 to determine for these beneficiaries the solace and  
15 loss of companionship.

16 If you look at what the damages  
17 instructions would be, Mr. Vaughn cannot proffer to  
18 you how the fact that the boy's head was separated  
19 from his spine has anything to do with what these  
20 folks can recover for.

21 THE COURT: In rebuttal, Mr. Robey?

22 MR. ROBEY: No, ma'am, I have nothing  
23 else.

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1 THE COURT: On this motion, I have heard  
2 counsel for the defendant Kabiri and counsel for the  
3 defendant homeowners association stipulate that the  
4 decedent was injured and died as a result of  
5 injuries, all being the direct and proximate cause  
6 of the accident.

7 However, the Court's understanding of the  
8 general law is that parties may not by stipulation  
9 preclude others from otherwise admissible evidence.  
10 Therefore, as to that aspect of the motion, it is  
11 overruled.

12 The second aspect of the motion is  
13 whether 8.01-52, Subparagraph 3, or 8.01-36 shall

Rebuttal of counsel for Kabiri  
Ruling of trial court

14     apply in this case to the medical bills which may  
15     have been incurred in the treatment of the decedent.

16                 This I believe to be a proceeding brought  
17     pursuant to 8.01-50. The decedent, it is alleged,  
18     was a child. That statute provides that, among  
19     others, an infant who is in the custody of a parent  
20     shall be granted first the right to qualify as  
21     administrator and to bring a cause of action.

22                 In fact, in this case, the mother and  
23     father, it is alleged, are the parties plaintiff as

1     the administrators of the decedent's estate. 51

2                 In reviewing 8.01-36 -- and I agree that  
3     the intent of the legislature as expressed by the  
4     Courts is to read statutes in such a way that they  
5     may be blended with harmony.

6                 And to assume that the legislature  
7     intended such, I construe that 8.01-36 refers to a  
8     cause of action and expenses for curing or  
9     attempting to cure an infant as a result of a  
10    personal injury.

11                This, however, is an action pursuant to  
12    8.01-50, and 8.01-52 clearly provides that among  
13    those things which the administrator may recover are  
14    the expenses for the care, treatment, and  
15    hospitalization of the decedent incident to the  
16    injuries resulting in death.

Rebuttal of counsel for Kabiri  
Ruling of trial court

17                    This aspect of the motion is likewise  
18    overruled.   Counsel may have their respective  
19    objections and exceptions. .



Stipulation of defendants that accident was proximate cause of death

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23 I've heard counsel for each of you this

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1 morning stipulate the issue of proximate cause, and  
2 for purposes of explaining to the jury the nature of  
3 the case, I move to confirm that I may advise the  
4 jury in that way, based upon your earlier  
5 statements.

6 Ms. Snee?

7 MS. SNEE: Your Honor, there is no  
8 dispute that as a proximate cause of the accident,  
9 the boy died. We are not conceding that any  
10 negligence on behalf of Ms. Kabiri, if proven, was  
11 the proximate cause. It is our contention that the  
12 proximate cause was the boy riding out right in  
13 front of her without stopping.

14 THE COURT: Would you like to state it as  
15 you believe you have stipulated it in order that the  
16 Court may appropriately advise the jury?

17 MS. SNEE: The defendant Kabiri  
18 stipulates that Walter R. Halfmann, known as Robbie,  
19 died as a direct and proximate result of the  
20 accident.

21 THE COURT: Mr. Robey, do you so  
22 stipulate?

23 MR. ROBEY: Yes, ma'am, I do. And I will  
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1 tell you, the accord and satisfaction, that came out

Stipulation of defendants that accident was proximate cause of death

2 of my grounds of defense --



11           As you've heard, again through voir dire,  
12   this particular pathway is about three-tenths of a  
13   mile from the school. "Up" is the way I phrase it.  
14   I'm from the southern part of Virginia, so I'm not  
15   sure if that makes a lot of sense, but kind of back  
16   north from the school.

17           The school is here (indicating) as you're  
18   coming Sugarland Run Drive up north, northerly sort  
19   of direction. You come to a crossroads, which are  
20   Biscayne Court on one side and Biscayne Place on the  
21   other. It's the same road, just has a different  
22   name on either side.

23           Then the next intersection you come to is

1   Meadowland. On the left as you're driving in that  
2   direction is West Meadowland; on the right is East  
3   Meadowland. Anyway, got my directions correct.

4           Between those two roadways along  
5   Sugarland Run Drive, between Biscayne Court slash  
6   Biscayne Place and Meadowland Lane -- Road, was the  
7   pathway in which this tragedy occurred.

8           You'll see photographs. You'll hear  
9   descriptions of that pathway. And so those will  
10   speak volumes as to what the layout of the  
11   particular road is, but what I would like to tell  
12   you at this point is that this particular pathway  
13   began more or less at the back door of Meadowland



Opening Statement for Halfmann

14 Elementary School.

15 Robbie was in the third grade. And by  
16 happenstance or one of my favorite words,  
17 serendipity, his classroom was right near that back  
18 door. And by happenstance or serendipity, the bike  
19 rack was by that back door.

20 And if you come out that back door to  
21 that bike rack, that's where you pick up a path,  
22 which happens to be this particular path that wraps  
23 around through -- around Biscayne Court and then

83  
1 bisects, for lack of a better way to express it, the  
2 area in Sugarland Run Drive between Biscayne Court  
3 and Meadowland Lane.

4 That is all, as you'll hear it -- I don't  
5 believe there's any contest about that -- is all on  
6 common ground that is owned and maintained by the  
7 Sugarland Run Homeowners Association.

8 And this actually is a fairly wide  
9 expanse of common ground where this particular  
10 incident occurred. The actual width is about 130  
11 feet.

12 This particular pathway, as it approaches  
13 Sugarland Run Drive, is on an incline. You'll hear  
14 testimony that will put it in more scientific terms,  
15 but it's a fairly good little hill as you're coming  
16 down just before the roadway.

17 And as you approach the roadway on the

Opening Statement for Halfmann

18 bike path, as you're coming down and looking to your  
19 left, which is the direction that Ms. Kabiri was  
20 coming, there is a house which is adjacent to the  
21 pathway, maybe 603 Sugarland Run Drive.

22 And there are two Virginia Power what I  
23 believe are technically switch boxes, although I

1 think most people are probably going to refer to 84  
2 them as transformer boxes, which are located  
3 immediately adjacent to the pathway immediately  
4 adjacent to the point where it ends, if you will, at  
5 the curb of Sugarland Run Drive.

6 These particular boxes -- and again,  
7 there will be specific testimony -- are substantial  
8 items. You'll see in the photographs of them, one  
9 box is somewhere in the neighborhood of four feet  
10 tall and almost six feet long and somewhere in the  
11 neighborhood of eleven feet square.

12 The other box is four by eight, in terms  
13 of size, the size of what you might say is a sheet  
14 of plywood or something, and it's five feet tall.  
15 They sit right beside each other at or about where  
16 the pathway connects with Sugarland Run Drive.

17 There is, right where the pathway ends,  
18 from my days, we called them manhole covers.  
19 There's a storm sewer that's a cinder block -- not  
20 cinder block, but a cement cover which the manhole  
21 cover sits on. That's literally where the pathway

Opening Statement for Halfmann

22 ends.

23 Too, if you're on the road facing up the

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1 pathway, to the right is what I refer to as a curb  
2 cut-out. I don't know what the politically-correct  
3 term is these days: Wheelchair ramp, handicap  
4 access ramp.

5 But immediately adjacent to that is this  
6 curb cut-out, and there is asphalt added to the  
7 pathway around the manhole cover onto the curb  
8 cut-out.

9 And on the opposite side of Sugarland Run  
10 Drive is another curb cut-out and a continuation of  
11 this path, or another path, whichever way you want  
12 to phrase it, but it lines up as if you were on a  
13 straight line across the road between those two  
14 pathways.

## Opening Statement for Halfmann

8                   The evidence will show -- as we believe  
9     that the evidence will show, that this particular  
10    pathway was constructed sometime in the summer or  
11    fall of 1974.

12                  Sugarland Run itself was a subdivision  
13    that was begun in the early '70s. This portion,  
14    which is in Section 6 of Sugarland Run Drive -- it's  
15    broken down into -- I think there's actually more  
16    than six sections, because there's a 2-A and a 5-A  
17    or something like that.

18                  But in any event, it's built in sections.  
19    This particular section, wherein the pathway was  
20    constructed, and the pathway itself was constructed  
21    in 1974.

22                  You'll hear testimony that the Virginia  
23    Power boxes that are stationed at the area adjacent

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1    to the pathway adjacent to Sugarland Run Drive were  
2    installed sometime in late 1972 or early '73.

3                  But in any event, the evidence is that  
4    these boxes were there upwards to at least a year to  
5    the time frame before the pathway itself was  
6    installed.

7                  Again, you'll see the photographs. The  
8    evidence, as viewed by the plaintiff, is that the  
9    combination of these factors: The downward slope of  
10   the path as it comes towards Sugarland Run Drive,

Opening Statement for Halfmann

11 the placement of the pathway so that it's  
12 immediately adjacent to large Virginia Power  
13 transformer boxes or switch boxes, the configuration  
14 of the road, which at this point is a fairly lengthy  
15 straight-away right there at Sugarland Run Drive --  
16 the road itself is kind of like a circle, but this  
17 is one of the places on the circle where there's a  
18 fairly long straight-away.

19                 Sugarland Run Drive itself is a very wide  
20 road, relatively speaking. It's 43 feet, almost 44  
21 feet in width. You'll hear evidence that the speed  
22 limit on that road was ultimately -- at one point,  
23 it was 35 miles per hour, but it was reduced

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1     sometime prior to this incident to 30 miles per  
2     hour.

3                 The evidence that you'll hear from the  
4     expert that -- plaintiff expects to call a  
5     transportation planner, who is well-trained and  
6     experienced in the design of pathways, including  
7     pathways such as the one in this particular -- or  
8     this particular pathway -- is, in fact, a  
9     situation -- using my words, not necessarily hers --  
10    something akin to a time bomb waiting to go off.

11                The combination of these factors: The  
12     downward slope, the curb cut-out that encourages  
13     egress directly across the road, the lack of any  
14     warning signs on the pathway, along the pathway, the

Opening Statement for Halfmann

15 lack of any warning signs on the road, along the  
16 road, the placement, most importantly, of the  
17 pathway immediately adjacent to these Virginia Power  
18 transformer or switch boxes, the configuration of  
19 road, which gives a fairly lengthy straight-away as  
20 you're coming in that direction that Ms. Kabiri came  
21 from, and the switch boxes themselves, create a  
22 situation in which it was unreasonably dangerous for  
23 the users of that pathway.

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1 And she'll certainly have far more  
2 eloquent and more concise ways to describe that, but  
3 the end result is the evidence, we believe, will  
4 show that the design of the pathway simply created a  
5 situation in which an incident like this was bound  
6 to and did, in fact, happen.

7 Users of the pathway do not have an  
8 adequate view of traffic coming. Because they are  
9 going downhill, momentum is building up. The  
10 natural flow is to cross the road. It's in an area  
11 which is a straight-away, a fairly wide collector  
12 road where traffic is heavy and known to go at a  
13 fairly good clip.

14 This was bound to happen, and  
15 unfortunately, for reasons none of us will ever  
16 understand, on January 19, 1995, it did, in fact,

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17                   You're going to hear evidence -- and  
18   you're not going to hear anything from the plaintiff  
19   to the contrary -- that Robbie Halfmann did not  
20   stop, that eight-year-old Robbie Halfmann, on his  
21   way home from school, came down this pathway, down  
22   the slope, made the little jut over to the cut-out,  
23   and proceeded across Sugarland Run Drive without

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1   stopping.

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17                   You're going to hear evidence -- and  
18   you're not going to hear anything from the plaintiff  
19   to the contrary -- that Robbie Halfmann did not  
20   stop, that eight-year-old Robbie Halfmann, on his  
21   way home from school, came down this pathway, down  
22   the slope, made the little jut over to the cut-out,  
23   and proceeded across Sugarland Run Drive without

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1   stopping.



8                   You're going to see the view that my  
9   client had as she came up Sugarland Run Drive.  
10   You're going to hear that it is a 30-mile-an-hour  
11   zone at the time; that there is a double yellow  
12   line.

13                   It's going to be shown to you, and  
14   counsel have agreed, this will be Defendant's  
15   Exhibit 3 (indicating). This is the view that my  
16   client has as she comes down the road. And you'll  
17   get these. You'll examine them for the rest of the  
18   trial.

19                   This is the view she has coming down.  
20   There are no markings as she comes along that say  
21   "Bike Path Ahead." There are no markings ahead that  
22   say crosswalk, you know, crosswalk marks. There's  
23   nothing on that way at all.

1                   From where this accident occurred, you  
2   can't see the school. Mrs. Kabiri knew the school  
3   was up ahead, because that's where she was going to  
4   pick up her daughter.

5                   She will tell you that she doesn't  
6   remember whether or not she even knew there was a  
7   bike path there. Her daughters did not ride on the  
8   bike path in that area at all.

9                   You're going to see what will be known as  
10   Defendant's Exhibit 4 (indicating), which is a copy



Opening Statement for Kabiri

11 of a picture of the bike path in the direction  
12 Robbie was coming. He was coming down this hill,  
13 around behind these electrical boxes, and out into  
14 the road (indicating).

15 You're going to see other pictures, which  
16 are Defendant's 1 and 3, of what it's like as my  
17 client gets closer. There's no showing there's a  
18 bike path approaching.

19 There's bushes, there's driveways,  
20 there's houses, there's giant electrical boxes.  
21 That is the view my client had as she's coming down  
22 the road.

23 It is, as Mr. Vaughn said, the way it's

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1 placed, or the way that the scene is as my client  
2 approaches, did not give her a warning that there  
3 was going to be a bicyclist pedaling out into the  
4 middle of the street right in front of her car. And  
5 when he came out, there was no way she could avoid  
6 him.



2 31, 1973. So between 1972 and '73, the common area  
3 was transferred to the homeowners association.

4 As counsel has already told you, at that  
5 point in time, these transformers, these boxes, had  
6 already been placed there by VEPCO. VEPCO has an

5           Q       Can you describe for the jury, in this  
6 particular instance, the lay of the road, so to  
7 speak?

8           A       The road is a -- surrounded by homes,  
9 residential. The lane of travel is a -- two lanes  
10 of traffic. Directions would be east and west. It  
11 was divided by a double yellow line.

12          Q       In this particular instance in this  
13 particular point of impact or the place where the  
14 collision transpired, is it between two streets  
15 along Sugarland Run Drive?

9           Q     Let me, if I can, show you what's been  
10   previously marked as Plaintiff's Exhibit Number 1,  
11   Sergeant Leonard, and ask if you can identify that  
12   for me, please (tendering document).

13          A     This is Sugarland Run Drive. In the  
14   background is the south side of Sugarland Run Drive.  
15   Depicted here is the toe path, I call it, the black  
16   asphalt. This is the day in question with deputies  
17   on the scene. And this is the proximity where the  
18   collision occurred.

19          Q     Is the pathway that -- did you say toe  
20   path?

21          A     Toe path, bike trail.

22          Q     Is that the pathway you understand that  
23   the Halfmann child was on immediately prior to the

1   impact?

2          A     That is correct.

3          Q     That's the one facing back up on the  
4   background portion of the photograph?

5          A     Background of the photograph.

6          Q     And do you see two objects down, green,  
7   rectangular-shaped objects --

8          A     Yes, I do.

9          Q     -- in that photograph?  
10                Were they there on the day of this  
11   particular collision?

Direct Examination of Edward Leonard

12           A       That's correct.

13           Q       And the photograph, as it's there, was  
14   taken and truly and accurately depicts the area as  
15   it existed on January 19th of 1995?



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22 Q I'd like to show you what we previously  
23 marked as Exhibit Number 2 (tendering document).

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1 Does that depict the same general area, just a bit  
2 closer in?

3 A Yes, sir.

4 Q Does it truly and accurately depict the  
5 scene as it existed on January 19th of 1995?

4           Q       Let me give to you, if I can, Exhibit  
5   Number 3 (tendering document) and ask if you can  
6   identify that for us, please.

7           A       This is Sugarland Run Drive. The picture  
8   is taken looking toward the east end of Sugarland  
9   Run Drive. Depicted to the right is the toe path  
10   and the electrical boxes, which would be on the  
11   south side.

12          Q       Is the bicycle on there?

13          A       The bicycle is located in the middle of  
14   the roadway.

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16 Q All right. Did you investigate as to  
17 whether or not the bicycle was in the same location  
18 at or about the time of the impact?

19 A Yes, I did.

20 Q And based on that investigation, were you  
21 able to make a determination as to whether, in fact,  
22 it was at the point at or about when the impact took  
23 place?

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1 A It was in the proximity of the impact.

2 Q Okay. Let me if I can, approach.

3 THE COURT: Yes.

4 BY MR. VAUGHN:

5 Q It probably goes without saying, but this  
6 photograph was taken during the course of your  
7 investigation that afternoon?

8 A That's correct.

9 Q Okay. The vehicle that's kind of behind  
10 the fire truck --

11 A Yes, sir.

12 Q -- on the left-hand side (tendering  
13 document), are you able to identify that particular  
14 vehicle?

15 A That vehicle was belonging to the  
16 striking part of the -- the driver of the  
17 striking -- striking the bicycle that day.



1           Q       And what was related to you by the driver  
2   as to how it came to be on that side of the road?

3           A       After the collision, continued eastbound  
4   and made a U-turn in the roadway and pulled off to  
5   the north end portion of the roadway facing  
6   westbound.

7           Q       As you approach that area on Sugarland  
8   Run Drive, are there any markings along the roadway  
9   of any kind that relate to a pathway in that  
10  vicinity?

11          A       No, sir.

12          Q       Is there anything on the roadway itself  
13   that indicates a pathway in that vicinity?

14          A       No, sir.

15          Q       Is there a crosswalk or anything of that  
16   nature where the pathway is located, at least as of  
17   that point in time?

18          A       No, sir.

19          Q       The pathway itself, to your knowledge,  
20   are there any markings on, about, around the pathway  
21   that indicate that it's -- up on the part where the  
22   Halfmann child came from -- that it's approaching an  
23   intersection with Sugarland Run Drive?

1           A       No.

2           Q       At the time of this incident on January  
3   19th of 1995, were there any kind of devices,

Direct Examination of Edward Leonard

4 barriers, whatever phraseology you want to use, on  
5 the pathway that in any way impeded or stopped  
6 persons from coming off the pathway into the  
7 highway?

8 A No, sir.

9 Q The pathway itself abuts the highway; is  
10 that a fair statement?

11 A Yes.

12 Q And off to the right, there is -- if  
13 you're facing the pathway, off to the right is a --  
14 for lack of a better way to express it, a cut-out,  
15 wheelchair, handicap access?

16 A Yes, there is.

17 Q That was in existence on January 19th of  
18 '95?

19 A Yes, it was.

20 Q And does the pathway continue on the  
21 opposite side of the road there?

22 A It does.

23 Q And is there also a cut-out or a handicap

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1 access through that curb on the opposite side?

2 A Yes, there is.



Direct Examination of Edward Leonard

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15           Q       Let me show you what we've marked as  
16   Plaintiff's Exhibit Number 4, and I'd ask if you can  
17   identify that for us, please (tendering document).

18           A       This is the bicycle that was struck  
19   driven -- driven by the young boy.

20           Q       And was that photograph taken the day of  
21   this incident, shortly thereafter, on January 19th  
22   of 1995?

23           A       It was.

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1           Q       Does it truly and accurately depict the  
2   manner in which that bicycle came to look, I should  
3   say, as a result of this collision?

4           A       Yes, sir.

Direct Examination of Edward Leonard

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15           Q       Again, in an effort to speed things along  
16       a little bit, I can show you 6 and 7. If you could  
17       tell us by referencing the number that you're  
18       describing what that depicts.

19           A       This is damage to the striking vehicle.  
20       The damage depicts the left front or driver's side  
21       quarter panel and headlight being damaged. The  
22       damage through the investigation revealed that it  
23       was from the striking of the bicycle.

142

1           Q       Do those truly and accurately depict the  
2       damage to the Jeep vehicle on January 19, 1995, as a  
3       result of this collision?

4           A       Yes, sir.

3           A       The impact was the left -- the driver's  
4   side headlight, quarter panel had struck the bicycle  
5   in mid -- the rear of the bicycle.

6           Q       And vis-a-vis if we -- well, first of  
7   all, do you know how wide Sugarland Run Drive is at  
8   that point from curb to curb?

9           A       I believe it's about 46 feet in width.

10          Q       Do you know from what expanse -- if you  
11   were measuring from the curb where the pathway is  
12   that he came down to the physical point of the  
13   impact, do you know how far across that drive that  
14   would be?

15          A       Halfway. It measured out approximately  
16   22 feet.

6 Q Did you investigate to determine whether

7 there were any skid marks on the roadway?

8 A I did.

9 Q Were there?

10 A No, sir.

11 Q Did your investigation reveal any braking

12 activity before the point of impact?

13 A Nothing was revealed of any braking

14 activity, no, sir.

Direct Examination of Edward Leonard

147

1           Q       Did she indicate to you or did she state  
2   to you whether she ever saw the child before the  
3   point of impact?

4           A       No, sir.

5           Q       Meaning that she related to you she had  
6   not seen him?

7           A       She had not seen him.

Direct Examination of Edward Leonard

149

15                   THE WITNESS: At the time of the  
16   accident, there were two vehicles parked on the  
17   south side of the roadway on Sugarland Run Drive.



150

9           Q       Do you know how far from the point of  
10 where the intersection and the pathway -- the  
11 roadway and the pathway intersect that first vehicle  
12 was, how far back?

13          A       I'd say approximately 30 feet.

14          Q       And is there a house to the right,  
15 further back up, as you've described it -- or maybe  
16 I've used that word; I'm good about that -- on  
17 Sugarland Run Drive on that right-hand side?

18          A       Yes, sir.

19          Q       Do you know how far that is up the road  
20 from the point of impact?

21          A       Approximately 70 feet.

22          Q       Do you know how far from where the  
23 pathway and Sugarland Run Drive intersect it is

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1 before you get to Meadowland Elementary School?

2          A       To Meadowland Elementary School?

3          Q       Yes, sir.

4          A       Probably about two-tenths of a mile.

Cross Examination of Edward Leonard

156

- 9           Q     And did you determine that there were  
10   some green transformer boxes there?  
11           A     Yes, ma'am.

1 BY MS. SNEE:

2 Q Sergeant Leonard, did you get in your car  
3 and proceed in the same direction as my client had?

4 A I did.

5 Q And where did you start from?

6 A I was in front of that residence I spoke  
7 about earlier.

8 Q I'm going to show you what's been  
9 previously marked, and it's Defendant's Exhibit 1  
10 (publishing document to counsel).

11 Showing you what's been previously marked  
12 as Defendant's Exhibit 1 (tendering document), was  
13 that the direction in which you were proceeding?

14 A That is correct.

15 Q Is that a fair and accurate description  
16 of what you could see as you were proceeding on  
17 Sugarland Run Drive at the time of this accident?

18 A At the time, there were vehicles parked  
19 on the south side there.

20 Q Okay. Taking apart that, is that --

21 A But the roadway, the residence, yes,  
22 that's correct. And it's headed towards the  
23 eastbound, which is correct.

1 Q And the residence that you had just  
2 stated, is that depicted in Exhibit 1?

3 A Yes, it is.

4 Q Where is it?

Cross Examination of Edward Leonard

5           A       It's on the south side of the roadway.

6           Q       That's the right side of the photograph?

7           A       Right side of the roadway.

8           Q       Okay. And as you went towards where this

9       accident occurred, were there things to the right

10      side of the roadway that were permanent in nature?

11          A       Yes, the --

12          Q       Were they in between you and the bike

13      path?

14          A       Between me --

15          Q       In other words, as you're proceeding down

16      the road -- we've established southbound -- are

17      there things to your front right --

18          A       Right.

19          Q       -- that are between you and the bike

20      path?

21          A       Yes, the green -- I call them transformer

22      boxes or electrical boxes.

23          Q       Anything else?

165

1           A       Of course, the residence here, the home.

2           Q       I'm going to show you what's been

3      previously marked as Exhibit 3. Let me show these

4      guys first (publishing document to counsel).

5                   Now I'm going to show you Defendant's

6      Exhibit 3 (tendering document). Is Defendant's

7      Exhibit 3 proceeding a little bit closer to where

Cross Examination of Edward Leonard

8     this accident occurred?

9           A       That's correct.

10          Q       And to the right, are there bushes?

11          A       That's correct.

11 Q You said that you know where the impact  
12 occurred between the bicycle and the Jeep; is that  
13 right?

14 A That's correct.

15 Q I'm going to show you what I would ask be  
16 marked as Exhibit 7 (publishing document to  
17 counsel).

18 (A document was marked as  
19 Defendant's Exhibit No. 7  
20 for identification.)

21 BY MS. SNEE:

22 Q Showing you what's been marked as Defense  
23 Exhibit 7 (tendering document), do you know what

171

1 that is?

2 A Yes, ma'am.

3 Q What is it?

4 A These are the gouge marks left from the  
5 collision, the bicycle grinding into the black  
6 asphalt.

7 Q Would you indicate that those gouge marks  
8 actually represent where the point of impact was?

9 A Yes, ma'am.

10 Q And is that in the southbound lane of  
11 Sugarland Run Drive?

12 A Yes, it's -- that's correct, the south  
13 side eastbound lane of travel.

Cross Examination of Edward Leonard

14           Q       Did you measure what that distance is,  
15   those gouge marks are, from the side of the road?

16           A       I did.

17           Q       What were they?

18           A       I -- I'd have to refer to my notes. I  
19   don't know what they were recorded.

20           Q       Do you have your notes with you?

21           A       I do. They're on the bench here.

22           Q       Are these your notes (indicating)?

23           A       Yes, ma'am.

172

1           Q       (Tendering documents.)

2           A       Let me see here. Are you talking about  
3   the gouge marks to the curb?

4           Q       Yes, of the southbound lane. I assume  
5   that's the way you measured.

6           A       All right. Twenty-one feet.

Cross Examination of Edward Leonard

173

8           Q       If there had been skid marks, would they  
9       have shown up on a wet road?

10          A       Yes, ma'am.



7           Q       In regards to when you talked to

8   Mrs. Kabiri, could you understand her?

9           A       Yes, ma'am.

10          Q       And you said that when you spoke to

11   her -- did you ask her how the accident happened?

12          A       I did.

13          Q       And what did she say?

14          A       She was -- I was driving. I -- I -- I

15   didn't see the young boy drive his bicycle out in

16   the roadway. Collision occurred.

Direct examination of Edward Leonard

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20           Q       Sergeant Leonard, I'm going to hand you  
21   back Defendant's Exhibit 3 that you just looked at a  
22   minute ago (tendering document).

23           A       Yes, sir.

176

1           Q       I think you've already told us that this  
2   is a photograph heading eastbound on Sugarland Run  
3   Drive. Is that correct?

4           A       That's correct.

5           Q       And we're approaching the accident scene,  
6   correct?

7           A       Correct.

8           Q       The defendant Mrs. Kabiri was also  
9   traveling eastbound on Sugarland Run Drive, correct?

10          A       Correct.

11          Q       So this photograph is showing us the same  
12   view she had approaching the accident scene; is that  
13   correct?

14          A       That's right, sir.

15          Q       How far from the accident scene does this  
16   photograph show us? In other words, how far are we  
17   from the accident scene in Defendant's Exhibit 3?

18          A       About a hundred feet.

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2                   THE COURT: Redirect examination?

3                   MR. VAUGHN: No, Your Honor, but I would  
4   ask that the exhibits that were given to the

Direct examination of Edward Leonard

5 investigator -- the sergeant to look at be placed  
6 into evidence.

7 They've been referred to, and I think  
8 they need to be into evidence so we have a record of  
9 what everyone was looking at at the time.

10 MR. ROBEY: No objection.

11 THE COURT: They've been identified for  
12 the record as defendant's exhibits, so should the  
13 Court mark and receive them as exhibits for the  
14 plaintiffs?

15 MR. VAUGHN: I think they were  
16 defendant's exhibits, and I think they should be  
17 marked as defense exhibits, because they were  
18 displayed to this particular witness and described  
19 and utilized by him. The fact that they didn't  
20 physically offer them I don't think changes the  
21 tenure of what they were.

22 MS. SNEE: Defendant can't move them in  
23 at this time or waive the Motion to Strike, and

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1 defense is not willing to do that. I'll move them  
2 in in my case in chief, but I'm not waiving a  
3 procedural ground on my Motion to Strike. That's  
4 what he's asking me to do. He can put them in or he  
5 can wait till it's my case.

6 MR. ROBEY: Perhaps we could deal with  
7 that issue, Judge. I know that's an arcane rule not  
8 written anywhere. Perhaps this Court could tell us

Direct examination of Edward Leonard

9 right now.

10 It's my position that introducing these  
11 exhibits into evidence right now on behalf of  
12 defendant Kabiri does not waive any Motion to Strike  
13 anybody might have.

14 MR. VAUGHN: I don't have a problem with  
15 that insofar as these three photographs are  
16 concerned.

17 THE COURT: The Court has no such motion  
18 pending before it. The issue at bar is whether the  
19 Court shall receive the documents previously marked  
20 for identification as Defendant's Exhibit 1, 3, and  
21 7.

22 I'm not aware of any rule which permits  
23 the Court to, if you will, force a defendant to

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1 produce evidence which is not being offered at this  
2 time by either defendant.

3 Therefore, Mr. Vaughn, if it is your  
4 request, they would be marked and received, unless  
5 there is an objection, as plaintiffs' exhibits.

6 MR. VAUGHN: I didn't even get a chance  
7 to write down the numbers, if I could look at them  
8 really quickly.

9 MR. ROBEY: You know, Judge, somewhere in  
10 the middle of this, the Court could certainly  
11 receive them without actually receiving them into

Direct examination of Edward Leonard

12 evidence. They have been --

13 THE COURT: They have been marked for  
14 identification.

15 MR. ROBEY: Yes, ma'am, they've been  
16 marked for identification. The clerk could  
17 certainly hold them until they're formally moved  
18 into evidence.

19 MS. SNEE: I have no problem with the  
20 clerk holding them.

21 THE COURT: That is where they are as  
22 identified documents. They're being held by the  
23 clerk, but not part of the evidence in the case.

180  
1 Mr. Vaughn moved their admission, as I understand  
2 it.

3 MR. VAUGHN: That's correct, Your Honor.

4 THE COURT: And I am ruling that I cannot  
5 force the defendants to introduce them at this time,  
6 and they make no motion to do so. However, if he  
7 wishes to offer them as exhibits for the plaintiffs,  
8 depending on whether there is an objection by either  
9 defendant, they may received, but then they would be  
10 received as plaintiffs' exhibits.

11 MR. VAUGHN: I would so move, Your Honor.

12 THE COURT: Any objection, Ms. Snee?

13 MS. SNEE: No objection to plaintiff  
14 moving in these exhibits.

15 THE COURT: Or Mr. Robey?

Direct examination of Edward Leonard

16 MR. ROBEY: No, ma'am, no objection, but  
17 could we for the record find out what numbers  
18 they're going to be?

19 THE COURT: Yes, we certainly can.

20 MR. VAUGHN: One was already marked.

21 THE CLERK: They will be plaintiffs'?

22 THE COURT: Yes.

23 THE CLERK: Exhibits 8, 9, and 10.

1 MR. VAUGHN: One of them was already 181  
2 marked as 7, I believe.

3 THE CLERK: But that was as defendant's.

4 MR. VAUGHN: So we only have two, then.

5 THE COURT: No. There was a previously  
6 admitted Plaintiffs' Exhibit Number 7. These would  
7 be marked and received as Plaintiffs' Exhibit 8, 9,  
8 and 10, which were offered to the witness 8 as  
9 Defendant's Exhibit 1, 9 as Defendant's 3, and 10 as  
10 Defendant's 7 for identification.

11 (Documents were marked as  
12 Plaintiff's Exhibit Nos. 8,  
13 9, and 10 for  
14 identification.)

15 MR. ROBEY: So Defendant's Exhibit 3 is  
16 now Plaintiffs' Exhibit 9, Judge?

17 THE COURT: Correct. Plaintiffs' 3 for  
18 identification (sic) is Plaintiffs' Exhibit 9.

Admission of Plaintiff's Exhibits 8, 9, 10

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3                   THE COURT: All right. The photographs  
4 in question have been marked and received as the  
5 Plaintiffs' Exhibit Number 8, 9, and 10.

Stipulation of Parties

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5                   MR. VAUGHN: Your Honor, the defense has  
6   graciously agreed to a very brief stipulation that  
7   would avoid the necessity of calling Edward  
8   Williams, and if I can state for the Court that  
9   stipulation?

10                  THE COURT: Yes. Is it in written form  
11   or are you going to state it orally?

12                  MR. VAUGHN: I will state it orally, and  
13   I can thereupon reduce it to writing and submit it  
14   as one of the jury instructions.

15                  THE COURT: State the stipulation.

16                  MR. VAUGHN: The stipulation is that the  
17   Virginia Power switch slash transformer boxes, the  
18   two that are depicted in the photographs nearest the  
19   pathway and their intersection with Sugarland Run  
20   Drive, were installed in the 1973 time frame and  
21   were there in existence prior to the construction of  
22   the subject pathway.

23                  MR. ROBEY: So stipulated, Your Honor, on

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1   behalf of Sugarland Run Homeowners Association.

2                  THE COURT: And on behalf of defendant  
3   Ms. Kabiri?

4                  MS. SNEE: Yes.

5                  THE COURT: And that would be the  
6   testimony of Mr. --

7                  MR. VAUGHN: Edward Williams.



Stipulation of Parties

8                   THE COURT: -- Edward Williams if he were  
9   called to testify.

10                  The jury shall receive this stipulation  
11   of evidence as part of the evidence to be considered  
12   by you in this case.

Direct Examination of Brian Harpster

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10 Q If I could hand you what's been marked as  
11 Exhibit Number 11 and ask if you can identify what  
12 that particular photograph depicts (tendering  
13 document).

14 A Yes, I can.

15 Q And what does it?

16 A It's the paved portion of a bike path  
17 that basically traversed east and west off Sugarland  
18 Run Drive at the location of the accident site.

19 Q Is that the pathway that your  
20 investigation revealed that the Halfmann boy was on  
21 immediately prior, came down that pathway before the  
22 impact?

23 A That was my understanding.

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1 Q Let me, if I can approach -- and does  
2 that truly and accurately depict the way that  
3 pathway existed on January 19th of 1995?

4 A It does. There's some yellow crime scene  
5 banner that's placed inside the photograph that  
6 appears in the photograph that wouldn't have been  
7 there; otherwise, yes.

8 Q The crime scene banner is placed by the  
9 Sheriff's Office?

10 A Correct.

11 Q Let me show you item number 12 or Exhibit  
12 Number 12 (tendering document). And is that

Direct Examination of Brian Harpster

13 essentially the same view closer down to the  
14 highway -- or the roadway, I should say?

15 A Right. This, referring to Exhibit Number  
16 11 -- if I were to walk east down the path, this is  
17 merely another photograph taken at the foot of that  
18 path just before entering into the roadway.

19 Q And there is in Exhibit Number 12, I  
20 believe, an area of cement, for lack of a better way  
21 to express it, off to the left, which would be on  
22 the right as you face the highway. Do you know what  
23 that is?

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1 A I'm not sure exactly what you're  
2 referring to, sir.

3 Q I mean the area to the left of where the  
4 manhole cover is here (indicating). If this area is  
5 the manhole cover, that cement in this area off to  
6 the left (indicating).

7 A Yes.

8 Q What is that?

9 A I believe that was just the ramp that  
10 basically provided access out onto the roadway,  
11 Sugarland Run Drive, in this case.

Admission of Plaintiff's Exhibits 11, 12

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1 THE COURT: Without objection, 11 and 12  
2 will be received.

1 DIRECT EXAMINATION

2 BY MR. VAUGHN:

3 Q Good afternoon, ma'am. If you could,  
4 please, for the members of the jury, identify  
5 yourself by name.

6 A My name is Jennifer Toole.

7 Q Ms. Toole, and what is your occupation?

8 A I'm a transportation planner.

9 Q And where are you currently employed?

10 A I'm employed by the RBA Group of  
11 Columbia, Maryland.

12 Q And what is your educational background?

13 A I have a degree in landscape  
14 architecture.

15 Q And from when -- or I should say from  
16 where and when did you receive that?

17 A From North Carolina State University in  
18 1990.

19 Q And did you graduate with any sort of  
20 distinction or honors?

21 A Cum laude.

22 Q And are you licensed in any field or do  
23 you have certification in any particular field?

1 A I'm a certified planner by the American  
2 Institute of Certified Planners.

Direct Examination of Jennifer Toole

3           Q       Can you tell the members of the jury what  
4       that is, what the American Institute of Certified  
5       Planners is?

6           A       It's a professional organization for  
7       transportation planners and urban planners  
8       practicing that profession in the United States.

9           Q       And within the field of transportation  
10      planning, do you concentrate in a particular area?

11          A       Yes, I do.

12          Q       What is that?

13          A       Mainly over the course of my career, I've  
14      focused in bicycle trail and path design, bicycle  
15      and pedestrian planning and design, those areas.

16          Q       And can you relate to the jury some of  
17      the work experience that you had that relates to  
18      that specific field, if you will?

19          A       I have designed numerous trails and paths  
20      in North Carolina, Virginia, South Carolina,  
21      Maryland, New Jersey, Pennsylvania. I've also done  
22      bicycle and pedestrian plans for communities as  
23      well.

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1           Q       Okay. And are you familiar with an  
2      organization by the name of -- or the acronym of  
3      "AASHTO"?

4           A       Yes, I am.

5           Q       Can you tell the members of the jury what

Direct Examination of Jennifer Toole

6 "AASHTO" stands for?

7 A "AASHTO" is the American Association of  
8 State Highway Transportation Officials. They set  
9 the standards for roadway design, trail design, bike  
10 design, pedestrian design as well.

11 Q When you refer to standards, are you  
12 referring to standards that are to be followed by  
13 transportation planners in doing whatever  
14 transportation plan they're involved in?

15 A That's correct.

16 Q And have you had any affiliation with or  
17 done any work on behalf of AASHTO?

18 A Yes, I have. In 1996, I helped to  
19 develop the new edition of the AASHTO Guide for the  
20 Development of Bicycle Facilities, or actually for  
21 FHWA as presented to AASHTO, and it was published in  
22 1989.

23 Q For us folks that are not as quite up on

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1 the acronyms, FHWA --

2 A FHWA. It's the Federal Highway  
3 Administration.

4 Q And can you tell us what that guide --  
5 what the purpose of it is, what it's utilized for?

6 A The AASHTO Guide for the Development of  
7 Bicycle Facilities is the national standard on  
8 bicycle facility design. It covers both trail

Direct Examination of Jennifer Toole

9 design and on-road bike facilities, like bike lanes.

10 Q Are you also familiar with something  
11 called "The Transportation Planning Handbook"?

12 A Yes.

13 Q By whom is that published?

14 A This is published by ITE, which is the  
15 Institute of Transportation Engineers. And I  
16 authored the chapter on bicycle/pedestrian  
17 transportation, which is due for publication next  
18 month.

19 Q Within your field itself, have you  
20 published in any textbooks, treatises, things of  
21 that nature?

22 A I've written articles for presentation at  
23 conferences, for publications such as "Design

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1 Magazine," which is a publication from the National  
2 Park Service, written articles on -- specifically on  
3 bicycle path design for the National Park Service.

4 Q Have you authored -- I mean, this may be  
5 repetitive, and I apologize if it is: Have you done  
6 any work with regard to any course books?

7 A Yes. I -- I developed a course book for  
8 the Federal Highway Administration to be distributed  
9 to university professors in teaching bicycle and  
10 pedestrian design to planning and engineering



Direct Examination of Jennifer Toole

11 curriculum students.

12 Q Okay. And at my request, did you provide  
13 me with a copy of your resume?

14 A Yes, I did.

15 Q CV might be more -- if I could approach,  
16 Your Honor?

17 A Yes.

18 Q I'll ask you, is this a true and accurate  
19 copy of your CV or resume, as it may be called  
20 (tendering document)?

21 A Yes, it is (tendering document).

22 MR. VAUGHN: I had that previously  
23 marked, Your Honor. I would ask that that be

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1 marked, I believe as Plaintiffs' Number 15.

2 (A document was marked as  
3 Plaintiffs' Exhibit No. 15  
4 for identification.)

5 MR. VAUGHN: And at this point, I would  
6 move it into evidence.

7 THE COURT: Any objection to Plaintiffs'  
8 15?

9 MS. SNEE: No objection.

10 MR. ROBEY: I'd like to reserve my  
11 objection, Judge. The question's going to be  
12 whether this is relevant testimony at all.

13 THE COURT: The exhibit's being offered

Direct Examination of Jennifer Toole

14 at the time. Have you an objection?

15 MR. ROBEY: Yes, ma'am, I do, because  
16 the plaintiff has not yet established that this  
17 exhibit has any relevance to this case.

18 THE COURT: Mr. Vaughn?

19 MR. VAUGHN: The relevance of that  
20 exhibit at this time is that it is this witness's  
21 list of certifications, affiliations, educational  
22 accomplishments that relate specifically to the  
23 field of transportation planning.

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1 THE COURT: Mr. Robey?

2 MR. ROBEY: It still doesn't mean it's  
3 relevant. Judge, once I think Mr. Vaughn has  
4 finished his qualification and I have a chance to  
5 voir dire, then I think I probably would be able to  
6 be more clear in my position.

7 THE COURT: Sustained at this time, 15  
8 for identification.

9 BY MR. VAUGHN:

10 Q Ms. Toole, are you familiar with the  
11 design standards for bicycle and pedestrian pathways  
12 as they would have existed in -- first of all, let  
13 me back up.

14 Are there different standards based upon  
15 the particular locality?

16 A There are sometimes different standards

Direct Examination of Jennifer Toole

17 for different communities, but there are also  
18 national standards that all communities are supposed  
19 to follow.

20 Q Okay. And are you familiar with the  
21 standards that would be applicable to the design and  
22 construction of bicycle or pedestrian pathways,  
23 whatever phraseology you want to use, in Virginia,

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1 specifically in the Loudoun County area? And I've  
2 got two times frames I want to ask you about, both  
3 in the 1974 time frame and the 1995 time frame.

Direct Examination of Jennifer Toole  
Cross Examination of Jennifer Toole

4           A       Yes, I am.

5           Q       And also, the standards as they existed  
6       in those interceding periods?

7           A       Yes.

8                   THE COURT:   In the what period?

9                   MR. VAUGHN:   Interceding period between  
10       '74 and '95.

11                   At this time, Your Honor, I would move  
12       the Court to accept Ms. Toole as an expert in the  
13       field of transportation planning, specifically the  
14       design standards for construction of bicycle and  
15       pedestrian pathways, including the issue that we're  
16       here to discuss today.

17                   THE COURT:   Any objection?

18                   MS. SNEE:   No objection to her  
19       qualification as a bicycle path specialist.

20                   THE COURT:   Any objection, Mr. Robey?

21                   MR. ROBEY:   May I voir dire, Judge?

22                   THE COURT:   You may voir dire.

23

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1                   VOIR DIRE EXAMINATION

2                   BY MR. ROBEY:

3           Q       Ma'am, you've mentioned these national  
4       design standards.  Are these standards that are  
5       required under Virginia law?

6           A       They are required for anyone who designs

Direct Examination of Jennifer Toole  
Cross Examination of Jennifer Toole

7 paths or transportation facilities in Virginia.

Cross examination of Jennifer Toole  
Objection to the testimony of Jennifer Toole

8           Q       What Code sections of Virginia law  
9       require these standards?

10          A       I don't know, I don't believe.

11          Q       You don't know? All right.

12                   Now, you mentioned something: All  
13       communities are supposed to follow these design  
14       standards. Is that also this -- whatever design  
15       standards you just mentioned all communities are  
16       supposed to follow, is this based upon Virginia law?

17          A       I'm not aware of whether it is or not.

18                   MR. ROBEY: Judge, may I approach the  
19       bench on this?

20                   THE COURT: Sidebar.

21                   (Whereupon, a bench conference was held  
22       outside the hearing of the jury, at which time the  
23       following proceedings were held:)

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1                   MR. ROBEY: I'm going to object to this  
2       witness testifying, first of all, because her  
3       testimony is irrelevant. Now, the pleading before  
4       the Court is that we are charged with knowledge of a  
5       dangerous condition. Now, there's no evidence of  
6       that at this point in time.

7                   This witness's testimony cannot possibly  
8       be relevant, because according to the designation in  
9       the interrogatory answer, she's going to tell us  
10      what we should have done right and how we should

Cross examination of Jennifer Toole  
Objection to the testimony of Jennifer Toole

11 have redesigned this bike path.

12                   Until you have evidence that we had a  
13 duty to redesign the bike path, then her testimony  
14 is irrelevant as to what we should have done.

15                   And again, the allegation against us in  
16 the Motion for Judgment is that we knew something  
17 was wrong. And there's no evidence of that.

18                   Now, Judge, I also object, because this  
19 witness's testimony is incompetent. Now, number  
20 one, again, we're charged with knowledge that there  
21 was an unreasonably dangerous condition. We're not  
22 charged in the Motion for Judgment with violating  
23 any particular standard, number one.

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1                   Number two, even if we were, this witness  
2 has not given us a basis upon which she can tell us  
3 that, because this lady is a landscape architect.

4                   Now, we are not held to the standard of  
5 doing it the way a landscape architect requires us  
6 to do it. That's not the standard of care required  
7 of us.

8                   I mean, can you imagine that, Judge, if  
9 every time a landscape architect spotted something  
10 that she felt violated her professional standards on  
11 a bike path, we could be sued for that? That is not  
12 the standard required of us.

Cross examination of Jennifer Toole  
Objection to the testimony of Jennifer Toole

13                   So just because this lady says we didn't  
14 do it according to her standards, that doesn't make  
15 it so and that doesn't make it relevant. The  
16 plaintiff has to prove that we had a duty and that  
17 we violated that duty.

18                   Now, the duty would be a duty under  
19 Virginia law, and this witness can't tell you that.  
20 She just sat there and said, I don't know. And in  
21 fact, there is no legal duty under Virginia law that  
22 she's prepared to tell us about, unless she tells us  
23 something completely contrary to what was said in

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1 the designation of experts.

2                   And once again, Judge, what is  
3 unreasonably dangerous is not supposed to be based  
4 upon what this landscape architect says.

5                   So that's my objection. This lady is  
6 irrelevant to this case. We have no obligation to  
7 redesign or maintain that bike path according to  
8 what a landscape architect says. That would be like  
9 suggesting that we're negligent if we fail to  
10 maintain a position for a landscape architect on our  
11 board.

12                   In other words, we have the duty to hire  
13 a landscape architect, we have a duty to have her  
14 evaluate every bike path as it intersects every road  
15 in the Commonwealth in Virginia, and we have to do



Cross examination of Jennifer Toole  
Objection to the testimony of Jennifer Toole

16 what she says in terms of design or redesign or  
17 we're negligent. That's just simply not Virginia  
18 law.

19 So number one, we're not charged with  
20 violating a standard. We're charged with knowing  
21 and not doing anything about this. There is no

Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

22 evidence that we knew about this supposedly  
23 dangerous condition.

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1                   Number two, we do not have the obligation  
2 or the duty to maintain our bike paths according to  
3 what a landscape architect says. Unless the  
4 plaintiff can prove specific standards that are  
5 required of us, the homeowners association, in  
6 Virginia under Virginia law, this witness is  
7 irrelevant.

8                   THE COURT: Mr. Vaughn?

9                   MR. VAUGHN: You don't have a dog in this  
10 fight.

11                   Your Honor, I mean, first, Mr. Robey has  
12 mentioned a few things together. I don't know if I  
13 can respond to them in the way he raised them.

14                   First I'll try to deal with the issue of  
15 relevancy. There certainly is nothing in the law  
16 that I'm aware of that says there's got to be a  
17 statute, and absent a statute, that means there is  
18 no standard of care.

19                   If that is the case, there cannot be  
20 medical malpractice. There cannot be legal  
21 malpractice. There cannot be architectural  
22 malpractice. There cannot be malpractice of a  
23 multitude of ranges and areas.

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Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

1                   So the existence or nonexistence of a  
2   Virginia Code provision that says you should or  
3   should not do this is in no way, shape, or form  
4   dispositive as to whether, in fact, there is a  
5   standard of care to be applied here in this  
6   particular instance regarding the design and  
7   construction of this particular pathway.

8                   So first, I don't know where that  
9   argument comes from. I don't think it has any merit  
10   whatsoever.

11                  Secondly, with all due respect to  
12   Mr. Robey, in giving Ms. Toole her respect, she is a  
13   transportation planner, certified as such, has  
14   extensive experience in the design of trails, which  
15   encompassed the time frame which this incident  
16   occurred, in 1995.

17                  She's already testified specifically that  
18   she is, in fact, aware of the design standards as  
19   they existed both at the time this pathway was  
20   constructed in 1974, at the time of this incident in  
21   1995, and during the time frames in between  
22   throughout the periods of time.

23                  Mr. Robey makes reference to notice, and

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1   I understand that that's a big argument that he'll  
2   have in his case here, and I'm sure he'll make an

Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

3 argument on it on closing, but the pleadings are  
4 related to both actual and constructive notice.

5           We say they had knowledge and should have  
6 known. And we say they had knowledge and should  
7 have known at least on two bases: Number one, she  
8 will testify -- I believe she will testify that --  
9 at least, that's what I anticipate the testimony  
10 would be -- that at the time this pathway was  
11 constructed, which was 1974 -- we're a little out of  
12 order, so I don't have that evidence in as of yet,  
13 but Mr. Robey said in his opening it was '74 -- the  
14 boxes were in place before that, before the  
15 construction of this particular pathway.

16           And her testimony -- just gelled down in  
17 words that I'm sure are not as succinct or eloquent  
18 as hers -- is that anyone designing and installing a  
19 path in 1974, knowing that as they were laying  
20 asphalt, they were laying it within inches of these  
21 large transformer boxes, which block the view of  
22 traffic coming down Sugarland Run Drive and do not  
23 give adequate sight distances -- and I think she'll

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1 talk about sight distances as being almost  
2 elementary in the field of transportation  
3 planning -- that anyone should have known that --  
4 been on notice from the simple fact that what

Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

5 they're doing that, that did not comply, and that  
6 the failure -- the act of doing it that way means it  
7 did not, in fact, comply with the applicable  
8 standards, did not give a sufficient sight distance  
9 under any standards that you want to apply or  
10 propose.

11 And therefore, the conclusion is --  
12 whether it's argument or testimony, but the  
13 conclusion is it creates an unreasonably dangerous  
14 situation.

15 There will be evidence, and I certainly  
16 think there will be evidence from two categories --  
17 again, I'm getting ahead of the evidence, because  
18 we're taking this witness out of turn, because she's  
19 not local and she could not be back tomorrow without  
20 a lot of difficulty -- but there will be additional  
21 evidence that these curb cut-outs, despite what  
22 Ms. Waters had said in the course of her deposition  
23 did, in fact, exist at the time this pathway was

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1 done.

2 In the course of doing these curb  
3 cut-outs, a survey is, in fact, done to determine  
4 areas of which there should be ingress and egress.

5 And during the course of having those  
6 curb cut-outs put in, anyone would be put on notice,

Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

7 and specifically the association, that, in fact,  
8 this is an area where there's ingress and egress.  
9 People are using the bike path. These things are  
10 put there particularly for that reason.

11 At that point in time, they had a duty to  
12 determine whether, in fact, that was a safe place to  
13 ingress and egress. This took place sometime  
14 between '74 and '95.

15 There also will be evidence that the  
16 Declaration and the basic duties of the association  
17 require them to maintain and improve on the common  
18 areas. In fact, they make substantial assessments  
19 to do just that.

20 It is their ongoing duty to do just what  
21 they didn't do that here; that is, to make sure and  
22 eliminate or alleviate the unreasonably dangerous  
23 situation.

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1 Quite candidly, it gives Mr. Robey a  
2 little bit of advantage, but that's exactly in a  
3 nutshell what this witness is going to testify to.

4 If he thinks a different standard  
5 applies, he had a right to designate his own expert  
6 to say this expert's wrong; that's not the standard  
7 that applies.

8 And he can certainly argue with the

Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

9 witness in cross-examination that she's wrong about  
10 which standard applies, but that doesn't mean that  
11 she's not competent to testify that, in her opinion,  
12 based on her review and knowledge of what  
13 transportation planners are to do and what the  
14 standards for construction of bicycle pathways are,  
15 that this one was improperly designed and created an  
16 unreasonably dangerous condition.

17 MR. ROBEY: Number one, the plaintiff did  
18 not plead that we knew or should have known. It's  
19 very specific in the pleading that we knew, and

Rebuttal of counsel for SRHOA

20 that's what they have the right to try to prove, and  
21 nothing else.

22 Number two -- and I will liken this to a  
23 medical malpractice case -- what counsel is trying

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1 to do and what the plaintiff's trying to do is, for  
2 example, let's assume that I represented a licensed  
3 practical nurse who comes across a scene, sees a  
4 patient -- or a victim of an accident who is not  
5 breathing, and administers CPR.

6 Well, as it turns out, what he's got is  
7 some kind of a heart condition. And they bring in a  
8 cardiologist to testify that she didn't do it the  
9 way a cardiologist should have done it.

10 I think the Court would have no problem  
11 saying, this isn't a case about a cardiologist; this  
12 is a case about a licensed practical nurse.

13 That's what we've got here. This is a  
14 landscape architect. We're not held to the  
15 standards of a landscape architect. This is not  
16 someone that's going to come in and testify that I  
17 am the president of the National Homeowners  
18 Association Union or something of this sort.

19 That's not what we're dealing with here.  
20 We're talking about a landscape architect who's  
21 going to come in -- and I think the problem with  
22 that is exemplified by counsel's further argument  
23 when he explains to you they're going to come in and



1 say when this path was originally built, it violated  
2 the standards that she believes applied.

3 The builder built it. We just inherited  
4 it. And the builder had it approved by the State of  
5 Virginia and by Loudoun County. And somehow it  
6 offends her standards and she wants to testify to  
7 that effect.

8 And we're not held to that standard,  
9 Judge. That's the problem. We've got a  
10 cardiologist testifying in a licensed practical  
11 nurse case. That's the problem.

12 THE COURT: It often occurs that the  
13 Court is called upon to rule in a manner which is  
14 premature, and frankly, for me on this issue, this  
15 is premature.

16 This witness acknowledgedly has been  
17 called out of order. It appears to the Court that  
18 there may be other evidence which, of necessity,  
19 should be received for the Court to be able to rule  
20 on the objection.

21 I must of necessity at this time  
22 determine that without other foundation, the  
23 testimony of this witness does not appear to the

1 Court to be relevant to the issues alleged against  
2 the defendant homeowners association. And until  
3 such time as that has been established, she's

## Rebuttal of counsel for SRHOA

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Objection to the testimony of Jennifer Toole  
Response of counsel for Halfmann

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214

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2 the defendant homeowners association. And until  
3 such time as that has been established, she's

## Rebuttal of counsel for SRHOA

4 premature.

Further argument of counsel for Halfmann

5                   MR. VAUGHN: Might I suggest to the Court  
6     that Mr. Robey, in his own opening argument, said  
7     that this land was transferred to the association at  
8     least no later than '73 and that this trail was  
9     constructed in 1974?

10                   Regardless of who did it or why they did  
11    it, it was done on property owned by the  
12    association, over which the association had complete  
13    control. And that's a stipulation -- I agree, not a  
14    stipulation, but that's what the evidence is.

15                   And unless Mr. Robey's going to tell us  
16    that's not now going to be -- after he said in his  
17    opening it was, and after we took Ms. Waters's  
18    deposition, who said that it was -- in fact, that  
19    evidence, then we do have that. It just hasn't  
20    physically been placed.

21                   THE COURT: It's not before the Court.  
22    It's not before the jury. You're asking me to  
23    accept this witness's testimony out of order, and

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1    the facts upon which the Court could determine  
2    whether the objection is well-founded are not yet  
3    before me.

4                   MR. VAUGHN: Can I ask, then, that we let  
5    the jury know that, in fact, because this witness  
6    was called out of turn, we're going to, for lack of  
7    a better way to express it, recess in terms of her

Further argument of counsel for Halfmann

8 testimony and will come back to it, if plaintiff  
9 desires, at a later time, so that there's not a  
10 misinterpretation left before the jury that for some  
11 reason the Court found this witness incompetent to  
12 testify?

13 MR. ROBEY: I'd object to editorials.

14 THE COURT: I'm not going to editorialize  
15 for the jury. You have the right, in view of this  
16 ruling, to rest with your questions. They may then  
17 be the subject of cross-examination as to the  
18 testimony that she's already given by counsel for  
19 each of the defendants. You're certainly at liberty  
20 to recall this witness at any time prior to the  
21 resting of your case.

22 MR. VAUGHN: I think the jury just needs  
23 to know.

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1 THE COURT: I don't believe that it's  
2 incumbent upon the Court to tell the jury that. I  
3 would have no idea whether you're going to recall  
4 her or not.

5 MR. VAUGHN: Am I entitled to say to  
6 Ms. Toole when we ask her to stand down that we'll  
7 come back to her testimony at a later time?

8 THE COURT: When you're finished with the  
9 witness, she is excused. If she's not excused, I  
10 will place her on call, just as I have the other



Further argument of counsel for Halfmann

11 witnesses.

12 MR. VAUGHN: Well, the jury will be left  
13 with the unmistakable impression that the Court, in  
14 some form or fashion, ruled that she shouldn't  
15 testify.

16 THE COURT: I am ruling that the  
17 foundation for the relevance of this witness's  
18 testimony to the issues as alleged and as presented  
19 in the evidence of this case to this point are not  
20 relevant.

21 MR. VAUGHN: At the risk of upsetting the  
22 Court, may I ask Mr. Robey if he --

23 THE COURT: It doesn't matter. The

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1 evidence is not before the Court.

2 MR. VAUGHN: Well, I can do it in the  
3 form of a hypothetical, but I've not heard an  
4 objection that the foundation is lacking. I've  
5 heard an objection that she has a different  
6 standard.

7 THE COURT: It was argued by Mr. Robey  
8 that the foundation was lacking because the specific  
9 allegation against the defendant homeowners  
10 association in the pleadings does not establish  
11 their alleged duty of care. To this point in this  
12 case, no witness has identified what that standard  
13 is, what that legal duty may be.

Further argument of counsel for Halfmann

14 MR. ROBEY: Exactly.

15 MR. VAUGHN: That's what this witness has  
16 testified -- is going to testify to once she's  
17 qualified. At this point, I didn't have her  
18 qualified, so I cannot ask her the aspects of the  
19 testimony that I don't have.

20 But I can ask her as a hypothetical:  
21 Assume, if you will, that the homeowners association  
22 has a duty to do X, Y, and Z, and I can ask her  
23 those questions.

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1 MR. ROBEY: Judge --

2 MR. VAUGHN: There's no dispute as to  
3 what the Declaration is. I have it. Ms. Waters has  
4 identified it. It's not in controversy.

5 There is no dispute as to when the  
6 association installed the pathway. That's not in  
7 controversy. That was in 1974. That information is  
8 not going to be controverted.

9 And I would simply say that -- I would  
10 ask that I be allowed to ask the witness: Assume,  
11 if you will, that this particular pathway was  
12 constructed in 1974, and assume, if you will, that  
13 the Virginia Power boxes were in existence at that  
14 point in time.

15 Do you have an opinion as to whether or  
16 not this particular pathway conformed with the  
17 applicable design standards at that point in time?

18 I think that's a very standard way to do it. But I  
19 have to get past the qualification issue first.

20 MR. ROBEY: That's always the case in an  
21 expert. They don't get to testify until they have  
22 qualified. That's exactly the rub, is she's --  
23 we're not held to that standard. There is no

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1 evidence to that standard of care what our duty is.  
2 That is the whole case, is the duty of care.

3 MR. VAUGHN: My question specifically to  
4 this witness is: Are you familiar with -- do you  
5 know what the standards are that are applicable?

6 Are you familiar with the design  
7 standards for bicycle and pedestrian pathways as  
8 existed in two time frames, 1995 and 1974, and in  
9 the interceding time frame as applied to this  
10 particular path? And she answered in the  
11 affirmative. So she said she knows what those  
12 standards are.

13 MR. ROBEY: But she's got to prove --  
14 see, the problem, Judge, is I can put on an expert  
15 witness or somebody who has some education and we  
16 can ask them, do you know what the standard is?

17 If they answer, yes, the standard of a  
18 licensed practical nurse is to diagnose a cardiac  
19 condition, that doesn't make it so, just because the  
20 witness says, I know the standard.

Further argument of counsel for Halfmann

21                   Any witness could come in and all they  
22   have to say is, Dan Robey is an attorney who has  
23   been practicing for 23 years in medical malpractice

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1   cases, so I knows what the standard required of a  
2   cardiologist is.

3                   That's essentially what she's doing.  
4   That doesn't make it true. We have to establish  
5   what's the standard and what is her basis for  
6   testifying to it. And her basis right now is, I'm a  
7   landscape architect.

8                   Can you imagine someone sitting on any  
9   homeowners association board, and because some  
10   landscape architect says that you violated her  
11   standards, I'm all of a sudden negligent for  
12   something I don't even know about?

13                  That's the whole point of the dispute. A  
14   duty can't exist unless the people have a way of  
15   knowing about it. A landscape architect can't tell  
16   us what it is. That's why we have things like  
17   Virginia law and standard of care which are  
18   described under Virginia law.

19                  And part of the problem that I have on  
20   this issue to this point is that this question is  
21   not being directed to establish standard of care as  
22   to the person who constructed this facility.

23                  And if there is a dispute against the

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1 homeowners association for a specific duty as  
2 alleged -- and the evidence to this point, in the  
3 foundation of the witness, by law or by any other  
4 standard, is not, there's insufficient evidence for  
5 her to render an opinion against the homeowners  
6 association.

7 MR. VAUGHN: May I suggest that the  
8 evidence is uncontroverted that the property was  
9 owned by the association and construction took place  
10 upon the property already owned by the association?  
11 It was a common area that's maintained by the  
12 association.

13 To suggest that because they -- if I go  
14 out and hire somebody to build on my property but  
15 they screw it up, I'm not responsible in the end for  
16 what they do is just -- I don't quite get that gist.

17 THE COURT: But you've called this  
18 witness -- I don't say that you may not eventually  
19 reach that point, but you've called this witness out  
20 of turn, and I don't have the foundation for  
21 understanding why her testimony may be relevant to  
22 the issues of this case. I'm not precluding you  
23 from doing so when the foundational evidence may

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1 exist.

2 MR. VAUGHN: I don't think I'm -- well, I

Further argument of counsel for Halfmann

3 mean, I don't want to belabor the point.

4 THE COURT: You may have your exception.

5 MR. VAUGHN: Just so everybody knows, I'm  
6 going to say to Ms. Toole that that's all the  
7 questions I have at this time. I will call you back  
8 later on in the case or something to that effect.

9 (Whereupon, the bench conference was  
10 concluded and the following proceedings were held:)

11 THE COURT: For the record at this time,  
12 I sustain the objection.

13                   MR. VAUGHN: Ms. Toole, as we indicated,  
14 we're a little out of order. At this time, I'll ask  
15 you back at a later point in time.

3           Q       In regards to pedestrian and bicycle  
4    paths, that seems to be your specialty. Is that  
5    right?

6           A       That's right.

7           Q       Is it important for you to determine  
8    sight lines?

9           A       Yes, definitely, both the intersection  
10   and along the path.

11          Q       And did you do that in regards to the  
12   intersection of Sugarland Run Drive and the bike  
13   path that's at issue in this case?

14          A       I did visually, a visual analysis.

15          Q       Well, is visual good enough for your  
16   field?

17          A       I think so in this case, in my opinion.



ORIGINAL<sup>1</sup>

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

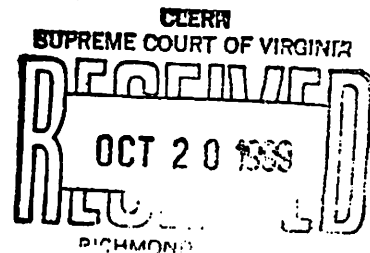
WALTER D. HALFMANN and  
BARBARA B. HALFMANN,  
Personal Representatives of  
the Estate of Walter R.  
Halfmann, Deceased,

Plaintiffs,

v.

TRINA KABIRI, et al.,

Defendants.



At Law No. 20521

DAY TWO  
VOLUME ONE  
PAGES 1 - 191

Leesburg, Virginia

Thursday, July 22, 1998

The proceedings commenced at 9:00 a.m.

BEFORE:

The Honorable Jean H. Clements and a jury

APPEARANCES:

ROBERT L. VAUGHN, JR., Esquire  
Glennon, Goodman & Lubeley, L.L.P.  
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Reporter: Caren Benge

Further objections of defendants to the testimony of Dr. Darren Lisse

15

8 MS. SNEE: Next objection, Your Honor, is  
9 found at Page 11. And that is, the doctor testified  
10 that when the boy arrived, he was clinically  
11 deceased when he arrived. And then they start to  
12 say what did the hospital and the staff do from that  
13 point forward, and that's where my objection is.

14 THE COURT: I'm sorry. Page 11?

15 MS. SNEE: Yes, Page 11. My objection  
16 appears at Line 8.

17 THE COURT: Yes.

18 MS. SNEE: My objection is, Your Honor,  
19 if the boy arrived clinically dead in accordance to  
20 the doctor, the fact that they tried to revive him  
21 for 45 minutes is not relevant to the issues in this  
22 case.

23 They never got him alive. He was dead

1 when he arrived. He was dead 45 minutes later.

2 They did not at any point resuscitate the boy.

3 And the fact that he goes through that is  
4 irrelevant to this issue. Once he's been determined  
5 to be dead, I don't see why, on a death case, we go  
6 farther to say, well, we spent 45 minutes -- and  
7 nobody's criticizing them, but 45 minutes, and we  
8 never revived the boy.

9 So my objection is, from that point  
10 forward, it is unnecessary to the issues to be  
11 decided by the jury that once clinically dead when  
12 arrived, to go into 45 minutes of resuscitation that  
13 was unsuccessful.

14 THE COURT: Mr. Robey?

15 MR. ROBEY: Judge, I will apologize,  
16 because I've said this before, so I'll keep it  
17 brief. I'd ask this Court, in looking at any item  
18 of evidence, to compare what issue outstanding in  
19 this case this intends to prove; what's its  
20 probative value versus its prejudicial value, and  
21 weigh those.

22 If we did that in bar graph, Judge, the  
23 bar wouldn't raise above zero for probative value,

1 because this information is absolutely irrelevant to  
2 any issue outstanding in the case.

3               However, its prejudicial value would be  
4 off the charts. And that's the sole purpose for  
5 introducing this evidence. It will inflame the  
6 jury. It won't prove anything that's not already  
7 proven.

9               MR. VAUGHN: Your Honor, to suggest that  
10 the doctor's care and treatment -- and there's  
11 testimony in the deposition -- I asked specifically:  
12 Was, in fact, the care and treatment in attempts to  
13 resuscitate Mr. Halfmann, Robbie Halfmann,  
14 reasonably, medically necessary?

15               And the doctor answered absolutely in the  
16 affirmative and even said the words, it's standard  
17 procedure. There's nothing unusual about that.

18               The fact that he is, quote, "clinically  
19 dead" does not mean that reasonable and medical --  
20 that the care wasn't reasonably and medically  
21 necessary and that in doing what the medical  
22 professionals are required to do that they weren't,  
23 in fact, administering health care to this

1 particular individual.

2                   We don't know that those efforts would  
3 not have been successful until we get to the end and  
4 the doctor terminates those efforts and tells us why  
5 he terminated those efforts. That is the totality  
6 of Dr. Lisse's testimony.

7                   People come in. They are, for whatever  
8 reason, from time to time, I'm sure -- I can't cite  
9 an example, but I'm sure it happens, where there  
10 isn't a heartbeat or something and they are able to  
11 resuscitate a patient. It is the normal course of

12 care.

13                   And to essentially say all I can tell the  
14 jury is he was dead is not telling the jury all of  
15 the relevant information in this particular case.

16                   This is a qualified expert, stipulated to  
17 be qualified as such, who administered care which is  
18 the ordinary and reasonable care administered under  
19 these circumstances. He continued to administer  
20 that care, described what care was being  
21 administered.

22                   And once the diagnosis was available --  
23 in this particular instance, it was the x-ray,

1 basically, of the neck area which showed the  
2 occipital dislocation.

3           Once that was known to the doctor is when  
4 those efforts ceased and, to use the word, and I  
5 think I'm using it wrong, but the code was called.

6           That is all relevant information as to  
7 the care and treatment. And in fact, as the statute  
8 says, we're entitled to put before the jury the  
9 expenses for that last care and treatment.

10           And without the doctor describing what he  
11 did, why he did it, that it's reasonably, medically  
12 necessary, we can't put that information before the  
13 jury.

14           You're telling me that in any wrongful  
15 death case, once someone comes into the hospital and

Argument of Halfmann Ref. Dr. Lisse

16 they're at that point, quote, "clinically dead," but  
17 not pronounced dead, and reasonable efforts are made  
18 to resuscitate the party, that it stops, that means  
19 that those damages, in effect, could never be  
20 recovered.

21 That would be the end of the medical care  
22 if the defendants' position were to prevail. The  
23 doctor doesn't say that I didn't administer any care

thereafter. 20

2 The doctor did, in fact, administer care,  
3 regular, reasonable care, until such time as it  
4 became apparent that that wasn't going to be  
5 successful.

6 It's no different than a case where  
7 someone's heart stops on the operating table. And  
8 at that point, yes, they're clinically dead. Does  
9 that mean that none of the evidence of attempts to  
10 resuscitate thereafter becomes part of the case?

11 It's not alarming. It's not prejudicial,  
12 as Mr. Robey would say. Your Honor yourself can  
13 read it. It's not graphic. It's not designed to  
14 inflame the jury. It does not inflame the jury.  
15 It's routine medical care as Dr. Lisse described it.

Further stipulations by defendants that treatment and bills of Dr. Darren Lisse were necessary and reasonable

22

9                   MR. ROBEY: If I may, Judge -- and I  
10    can't speak for Ms. Snee, although as I recall,  
11    yesterday I thought that we advised this Court, and  
12    if not, I do so now: I do not disagree that the  
13    medical treatment provided was unnecessary or  
14    unreasonable.

15                   I do not disagree that the medical bills  
16    were unnecessary or unreasonable in amount. They,  
17    in fact, were, and I so stipulate. Those medical  
18    bills were necessary and reasonable to provide  
19    medical attention to Walter Halfmann. There's no  
20    question about that.



2 I don't know Ms. Snee's position. We  
3 both objected because the bills do not belong to the  
4 estate. They belong to the parents. And that's a  
5 different objection.

6 That's different than arguing that the  
7 bills were not necessary or they represented medical  
8 treatment that wasn't necessary. That's not in  
9 contest.

10 The medical treatment was necessary and  
11 the medical expenses are reasonable in amount. And  
12 that's the only reason why this testimony could be  
13 brought into evidence.

14 And those issues are stipulated. I can't  
  
15 speak for Ms. Snee, but that may be her position as  
16 well. And if so, this testimony is absolutely  
17 irrelevant.

18 THE COURT: I do wish to know the  
19 position of Ms. Kabiri, Ms. Snee.

20 MS. SNEE: Mrs. Kabiri's position has  
21 been told before, and that is that the bills  
22 themselves are reasonable and necessary. There was  
23 no objection to that in the deposition. There's no

1 objection to that now.

3                   MR. VAUGHN: Your Honor, may I inquire,  
4   if counsel stipulates that the bills are reasonably  
5   medically necessary, I can offer no testimony as to  
6   what the doctor did that constitutes those bills?

7                   How do the bills themselves come into  
8   evidence and the defendants agree that it's  
9   reasonably medically necessary, but I can't have my  
10   own witness describe what those bills represent,  
11   what he did, what the services are that are  
12   described by those bills? It's a stipulation,  
13   again, attempting to keep me from putting evidence  
14   before the jury.

15                  THE COURT: As to this particular  
16   objection, it appears to the Court to be irrelevant  
17   to the issues that are before the Court. I sustain  
18   the objection.

18                   Now, the third objection begins, as I  
19 understand, on Page 13.

20                   MS. SNEE: Page 13, Line 10.

21                   THE COURT: And what is the objection?

22                   MS. SNEE: It is the objection that we  
23 voiced yesterday, Your Honor, that the fact that the

1 skull was separated from the spinal column would be  
2 irrelevant for the consideration of what the jury is  
3 to decide.

4 And it is on Page 13 that the doctor  
5 testifies to that and testifies that it's a  
6 dislocation and goes through that on Line 13 all the  
7 way up to Page 14, Line 15. It is at that point  
8 that he is describing what that type of injury --

9 THE COURT: So you are articulating for  
10 the Court where in the evidence the testimony would  
11 be proposed to be which is the subject matter of the  
12 Court's earlier ruling?

13 MS. SNEE: Yes, Your Honor. I think  
14 since it is now being offered into evidence, it  
15 would be improper for us not to object to the  
16 specific language.

17 And I think that very clearly can show  
18 the Court, when you see it, what the evidence is  
19 going to be and why the defendants believe that not  
20 to be relevant to the issues, whether or not we  
21 stipulated.

22 THE COURT: Mr. Robey?

23 MR. ROBey: Ma'am, I voiced my objection

1 yesterday and I continue to object, but I'm not in  
2 the habit of continuing to argue after you've ruled,  
3 and I know you've ruled.

Objection of Kabiri as to medical bills

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19                   What did you say about the  
20 cross-examination?

21                   MS. SNEE: Your Honor, we've withdrawn  
22 our cross, because it dealt with the helmet.

23                   THE COURT: I see.

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1                   MS. SNEE: So Mr. Vaughn and I did that  
2 yesterday so that it will read correctly.

3                   THE COURT: I see. So the record will  
4 reflect that both defendants have withdrawn the  
5 cross-examination of the witness.

6                   MR. ROBEY: As I understand it, there  
7 will be no cross-examination, Judge.

8                   THE COURT: All right.

9                   MR. VAUGHN: Except on that Page 18,  
10 there's something that needs to be addressed.

11                   MS. SNEE: Oh, that was Mr. Robey's. You  
12 wanted to talk to him.

13                   MR. VAUGHN: Look at Page 18.

14                   MS. SNEE: You just started speaking  
15 again about the dislocation.

16                   THE COURT: That is correct. There is  
17 that objection.

18                   MR. ROBEY: Yes, ma'am. That is true,  
19 starting at Page 17, Line 22. And that actually  
20 goes through Page 19, Line 7.

21                   THE COURT: Goes through what page? I'm  
22 sorry. Page 17, Line 22 through --

23                   MR. ROBEY: 19, Line 7, I believe, Judge.

1 Yes, through Line 7. 33

7 MR. VAUGHN: Your Honor, it's difficult  
8 to respond to an objection which I don't see where  
9 the merit of it lies, with all due respect to  
10 Mr. Robey.

11 The question asked the doctor -- he first  
12 defines what the injury is in an earlier portion of  
13 the deposition, and I asked him to describe it  
14 specifically.

15 I asked him to describe it specifically  
16 in this particular instance, and the doctor is  
17 simply telling us exactly what it was in this  
18 particular instance, not as a general description of  
19 what the dislocation is, as he had done in the past,  
20 but specifically relating it to Mr. Halfmann in more  
21 detail than simply a straightforward definition of  
22 what the term means.

23 And it is not repetitive in any sense

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1 other than it touches on the same topic, but it is  
2 describing it as it relates to Robbie Halfmann in  
3 particular, in this particular instance, based on  
4 his review of the x-ray. It's very probative of  
5 what his opinion is.

6 Again, the jury -- to simply say -- as of  
7 this point, with all due respect to the Court,  
8 essentially what the jury's being told is he came in  
9 and he was dead and he had this particular

Argument of Halfmann as to Dr. Lisse

10 condition, which is defined almost in medical terms.

11 And if this is then excised, that's all they know.

12                   So it would be like having a personal  
13 injury case where someone comes in to say, you've  
14 got carpal tunnel syndrome, but Doctor, you can't  
15 tell us what it is.

16                   You can't describe how it affected this  
17 particular patient. You can't relate it to this  
18 individual. All you can do is say it's carpal  
19 tunnel syndrome and maybe give a brief definition of  
20 what it is.

21                   The jury is entitled to know what the  
22 injuries to this particular child were. I can't  
23 imagine why the jury isn't entitled to know that.

2                   MR. ROBEY: Judge, the problem with that  
3    is it's absolutely 100 percent wrong. If you look  
4    starting at Page 13, Line 11, you're going to see  
5    that the question was: And what were the results of  
6    those tests and/or x-ray?

7                   At this point, the doctor spends the  
8    entirety of Page 13, Line 13, all the way through  
9    Page 18, Line 14, talking about what he found  
10   specifically as applies to this patient on x-ray,  
  
11   what that meant, the dislocation, so on and so  
12   forth.

13                  So when Mr. Vaughn says he described it  
14   generally and then he relates it directly to Walter  
15   Halfmann, that's flat wrong. Starting way back on  
16   Page 13, this doctor goes into great and gory detail  
17   as to what he found on x-ray, what that meant  
18   specifically as to this patient.

19                  The objection is because now counsel  
20   wants to have him repeat it all over again so the  
21   jury can hear it twice. If they haven't gotten all  
22   the gore the first time, they get it the second  
23   time.



1                   It's exactly the same question. He's  
2 asking the doctor to repeat the same stuff all over  
3 again. I'll argue that it's highly prejudicial the  
4 first time and it's not probative. It's certainly  
5 highly prejudicial and not probative the second  
6 time.

7                   THE COURT: The question which was the  
8 subject of the objection was: The injury in this  
9 instance gives a little dislocation of the head as  
10 opposed to a fracture or anything of that nature.  
11 The objection is: This is the third time the  
12 question has been asked.

13                   I overrule the objection. The question  
14 included for the doctor to distinguish what he had  
15 previously testified to from a fracture or anything  
16 of that nature. Objection is overruled.

Cross Examination of Trina Kabiri

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14           Q       When this particular incident occurred,  
15   when the accident -- the collision with Mr. Halfmann  
16   occurred, you were on your way to Meadowland  
17   Elementary School to pick up your daughter Metra,  
18   correct?

19           A       Yes.

20           Q       You drove every day to pick your daughter  
21   up from school?

22           A       Yes.

23           Q       From the time she started the third grade

1     until this happened, you drove every day the same  
2     route to pick her up, correct?

3           A       (Consulted with interpreter) Yes.

4           Q       And in the morning, you or one of your  
5     neighbors always drove your daughter to school?

6           A       Yes.

7           Q       Now, when you were on your way to pick up  
8     Metra from Meadowland on that day, Zahara was with  
9     you in your Jeep, was she not?

10          A       Zahara with me, yes.

11          Q       And you were, in fact, driving a Jeep; is  
12     that right?

13          A       Yes.

14          Q       A 1988 Jeep?

15          A       Yes.

16          Q       And that's the same vehicle that you  
17     drove every day?

18          A       Yes.

19          Q       That Jeep was in good mechanical  
20     condition?

21          A       Yes.

22          Q       The windows were okay, there were no  
23     cracks in them, no stickers on them that blocked

1 your view, no baby blinds that blocked your view; is

2 that correct?

3 A (Consulted with interpreter) Yes,

4 everything was okay.

22 Q No problem with the steering, steered

23 okay?

1           A       No, no, nothing.

2           Q       Speedometer was working?

3           A       (Consulted with interpreter) Yes.

4           Q       The brakes were okay?

5           A       Yes.

6           Q       As a matter of fact, that Jeep had power

7       brakes, did it not?

8           A       (Consulted with interpreter) Yes.

9           Q       I want to make sure, this is the school  
10       year, that's '94, that started in the  
11       August-September time frame of '94, correct?

16 Q When you go to Meadowland Elementary  
17 School --

18 A (English) Right.

19 Q -- you leave your house, you make a left  
20 on Homestead, and a right on Sugarland Run Drive?

21 A (Consulted with interpreter.)

22 THE INTERPRETER: From her house -- from  
23 her garage, she'll make a left turn.

1 THE COURT: From my house, sir?

2 THE INTERPRETER: From my house -- from  
3 the house, to be literal. From the house, from her  
4 garage, there's make left turn.

5 BY MR. VAUGHN:

6 Q I believe that's what I said: A left  
7 turn on Homestead, a right on Sugarland Run Drive;  
8 is that correct?

9 A (English) Yes, again left, again right.

10 Q And you are less than a mile from  
11 Meadowland Elementary School?

12 A Yes.

13 Q And you are aware that in that school  
14 year, your daughter's third grade school year, that  
15 all of the children who attended Meadowland  
16 Elementary School got out of school at the same  
17 time?

Direct examination of defendant Kabiri

18           A       Yes, same time.

19           Q       And you were also aware that the  
20 children -- many of the children who attended  
21 Meadowland Elementary School walked to school or  
22 rode bicycles?

23           A       (Interpreted) Both walking, with

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1 bicycles, or with cars.

2                   MR. VAUGHN: What was the last part?

3                   THE INTERPRETER: Cars.

4                   BY MR. VAUGHN:

5           Q       Are you aware that children went to  
6 school by walking and by riding bicycles?

7                   MS. SNEE: Your Honor, I'm going to  
8 object. He just asked this question.

9                   THE COURT: Sustained. The question's  
10 been answered: Walking, bicycles, and by cars.

11                  THE WITNESS: (English) Yes.

12                  BY MR. VAUGHN:

13           Q       And in this school year, your daughter's  
14 third grade school year, when you were going to pick  
15 up your daughter, you did observe children walking  
16 and riding their bicycles in the same area where  
17 this incident occurred?

18           A       (Interpreted) A little bit I see, not  
19 much.

4           Q       My specific question, Ms. Kabiri, is: Is  
5   it not correct that it was very common or a regular  
6   occurrence to see children walking or riding their  
7   bicycles in the area where this incident happened?

8           THE INTERPRETER: The same question? she  
9   asked you.

10          THE WITNESS: (English) The same  
11   question? I don't know. I don't know.

12          BY MR. VAUGHN:

13          Q       You don't know. I'm referring to your  
14   deposition, Page 3, beginning at Line 15 through  
15   Line 18 (tendering document), those four lines.

16          A       (Interpreted) Based on the question that  
17   you asked me, I responded yes.

18          Q       And the question I asked you -- if I  
19   could approach? That's my last copy.

20          THE COURT: Yes.

21          BY MR. VAUGHN:

22          Q       And the question I asked you was: It was  
23   very common or a regular occurrence to see children

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1   walking or riding their bicycles in this area where  
2   this incident happened? And your answer was: Yes.

3           That's the question I asked you here, is  
4   it not, Ms. Kabiri?

5          A       (English) Okay.

6          Q       Is that the question I asked you here,



Direct Examination of Trina Kabiri

7 Ms. Kabiri?

8 A Yes.

9 Q And you responded yes at your deposition  
10 on June the 16th, didn't you?

11 A (Interpreted) Then you asked me to  
12 respond yes or no, and I said yes. Now you did not  
13 ask me for yes or no.

14 Q Ms. Kabiri, show me where in this  
15 transcript in that response to that question I asked  
16 you to give me a yes or no (tendering document).

17 Show me where I asked you to tell me in  
18 answer to that question yes or no. I suggested in  
19 no way, shape, or form an answer to that question.

20 A The tone of your question implied that I  
21 need to respond just yes or no.

12           Q       Ms. Kabiri, as you're driving down  
13   Sugarland Run Drive the particular date and time  
14   that this incident occurred, you are looking  
15   straight ahead; is that correct?

16           A       (Interpreted) When one drives down the  
17   road, you look at all sides. I was looking at my  
18   front and the sides.

19                   (English) If you driving, driver's  
20   looking (indicating).

2           Q       Do you want to say that again?

3           A       (Interpreted) Okay. As far as the  
4   eyesight is concerns, everyone sees more than just  
5   the front.

14           Q       Please tell us whether you were or were  
15   not looking to your left and looking to your right  
16   as you were driving down Sugarland Run Drive on the  
17   date and time this incident happened.

18           A       (Interpreted) was looking ahead of  
19   myself. I was not troubling myself with my left  
20   side. I was looking to see if there's any flashing  
21   lights for school -- if there was any flashing light  
22   at the -- if there was any flashing light, which  
23   wasn't at the time of her driving -- of my driving.

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6           A       I was not looking to my far right or to  
7   my far left. Flashing lights, I would see it in  
8   front of me, not to my far right or to my front  
9   left. I would see if it was in front of me.

Direct Examination of Trina Kabiri

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17           Q       So you have a specific recollection that  
18   you did not apply your brakes?

19           A       (Interpreted) The time -- the time that I  
20   braked was when he had already passed the front of  
21   my car. That's when I braked.

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11           Q       Please answer my specific question. Did  
12   you apply your brakes before your Jeep made contact  
13   with either Mr. Halfmann or his bicycle?

14                   MS. SNEE: Objected as asked and  
15   answered.

16                   THE COURT: Overruled. You may ask and  
17   answer that. You may answer the question.

18                   THE WITNESS: (Interpreted) If I had seen  
19   him, I would have stopped. I didn't see him.

16           Q       The first and only time you ever were  
17 even aware of something in the road was at impact  
18 (indicating), correct?

19           A       (Interpreted) You've asked this question  
20 20 times.

21           Q       Please answer the question, Ms. Kabiri.

22           A       (English) Okay.

23                   (Interpreted) Yes.

Deposition testimony of Dr. Darren Lisse

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12 MR. VAUGHN: By way of deposition, we're  
13 going to put forth the testimony of Dr. Darren S.  
14 Lisse and ask our reader for today to come forward.  
15 Dr. Lisse was not able to be present.

16 THE COURT: All right. Would the clerk  
17 please swear the witness to truly present the  
18 testimony of Dr. Lisse.

19 (Whereupon, the designated reader was  
20 duly sworn by the clerk.)

21 BY MR. VAUGHN:

22 Q Good afternoon, Doctor.

23 A Sir.

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1 Q If you would state your name, please.

2 A Darren Stuart Lisse, M.D.

3 Q And for the court reporter's benefit, if  
4 you could spell your last name.

5 A It's L-I-S-S-E.

6 Q Okay. What is your occupation?

7 A Chairman of the Emergency Department,  
8 Reston Hospital Center.

9 Q And by name, I take it, then, that's  
10 located here in Reston where we're having this  
11 deposition today.

12 A Yes, indeed.

13 Q How long have you had that position?

14 A Well, I had been the Assistant Director

Deposition testimony of Dr. Darren Lisse

15 or Assistant Chairman there since 1988, and then the  
16 Chairman and I, who are best of friends, switched  
17 positions about three years ago.

18 Q About the '96 time frame?

19 A Yes, somewhere in there.

20 Q Okay. And you are licensed to practice  
21 medicine in the Commonwealth of Virginia?

22 A Yes, sir.

23 Q And when did you receive that license?

99

1 A It would have been 1982 or so.

2 Q Are you licensed in any other  
3 jurisdictions?

4 A Maryland.

5 Q And do you recall about when you were  
6 licensed there?

7 A It would have been 1987 or '8.

8 Q And are you board certified in any  
9 particular specialty?

10 A I'm board certified in emergency  
11 medicine.

12 Q When did you receive that certification?

13 A 1987.

14 Q I'm going to take you back a little bit  
15 through your educational history, if we can, please.  
16 Where did you go to undergraduate school?

17 A Franklin & Marshall College.

18 Q F&M?



Deposition testimony of Dr. Darren Lisse

19           A       F&M.  
20           Q       And I take it you received your  
21 bachelor's from there?  
22           A       Unfortunately, I did not receive a  
23 bachelor's from there. I left college after three  
100  
1 years when I was 19 because I was accepted to  
2 medical school.  
3           Q       Okay. And where did you attend medical  
4 school?  
5           A       Georgetown.  
6           Q       And I take it you got your M.D. there?  
7           A       I did get something, yes, 1980.  
8           Q       1980. And from there, you had an  
9 internship?  
10          A       An internship at the University -- I'm  
11 sorry -- USPHS Hospital is the best way to know it;  
12 it's now -- it was closed by the Reagan  
13 administration -- Public Health Service Hospital,  
14 San Francisco, 1981.  
15          Q       After your internship in San Francisco at  
16 the Public Health Service Hospital in San Francisco,  
17 where did you go?  
18          A       I went to West Virginia, because I owed  
19 the government for my medical education. So West  
20 Virginia, being an under-served area, I ended up in  
21 Harpers Ferry.  
22          Q       Okay.

Deposition testimony of Dr. Darren Lisse

23           A       It's the best thing that ever happened to  
101  
1    me.  It was great.

2           Q       How long were you there?

3           A       I was one year as a staff physician and  
4    then I took over as Chairman of their Emergency  
5    Department in 1982, and I was there until 1987.

6           Q       I take it from the history you gave me  
7    that's when you came to Virginia.

8           A       Yes, sir.

9           Q       You have actively practiced medicine here  
10   in the Commonwealth of Virginia since about 1988?

11          A       I was actually moonlighting at Alexandria  
12   and Arlington Hospital and Mount Vernon from 1981  
13   on.  The pay wasn't that wonderful in West Virginia.

14          Q       Very industrious.

15                 I would move at this time to have the  
16   Court accept Dr. Lisse as an expert medical witness  
17   with the specialization in emergency medicine.

18               MS. SNEE:  No objection.

19               MR. ROBEY:  No objection.

20               THE COURT:  So received.

21               BY MR. VAUGHN:

22          Q       Going back to where I was just a moment  
23   ago, January 19th of 1995, I take it from what  
102

1    you've told us, you at that time were working in the  
2    Emergency Department at Reston Hospital Center?

Deposition testimony of Dr. Darren Lisse

3           A       That's correct.

4           Q       And did you have occasion at that point  
5       to become involved in the care and treatment of  
6       Robbie Halfmann?

7           A       Yes, I did.

8           Q       Can you tell us how your encounter with  
9       the Halfmann case began?

10          A       This young man was reported to have been  
11       in a bicycle/motor vehicle accident. I believe it  
12       was Sterling Rescue that responded. So we got the  
13       call.

14                   It was a pretty significant injury. And  
15       what they were doing, what's called CRP and ACO, is  
16       basically trying to revive with medication and fluid  
17       resuscitation. And we had to make ourselves ready  
18       for his arrival.

19          Q       And were you the person in charge of that  
20       at that point in time?

21          A       That's correct.

22          Q       And I take it he did subsequently arrive  
23       at the hospital?

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1           A       That is correct.

2           Q       Do you know what time he arrived?

3           A       He would have arrived at 15:23.

4           Q       I take it that's military time for us.

5           A       For us Public Health Service people, it's

Deposition testimony of Dr. Darren Lisse

6 military time.

7 Q So about 3:40, 3:43 in the afternoon?

8 A Yes.

9 Q Okay.

10 A 3:23.

11 Q I'm sorry. I can't even add and subtract  
12 correctly.

13 Could you tell us what his condition was  
14 at the time he arrived at the hospital?

15 A He had no blood pressure. He had no  
16 pulse. He was unresponsive. He was clinically  
17 deceased when he arrived.

18 Q And what, if anything, did you and/or the  
19 staff of the hospital do from that point forward?  
20 What were the results of those tests and/or x-ray?

21 A He had a chest x-ray, which showed fluid  
22 in his lungs, not uncommon in a case such as this,  
23 but also from the fluid resuscitation. And he had a

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1 neck x-ray, which unfortunately showed that he had  
2 what's called an atlantooccipital dislocation.

3 Q Would you put that latter phraseology in  
4 layman's terms for us, Doctor?

5 A Certainly. The top cervical vertebra,  
6 Cervical Vertebra Number 1, is called the atlas.  
7 And we named it that because we think of Atlas  
8 holding up the globe or the skull. And the occiput  
9 is the bottom part of the skull in the back.

Deposition testimony of Dr. Darren Lisse

10                   And obviously, those two bones are  
11   supposed to sit next to each other, very important,  
12   because the spinal cord and the lower part of the  
13   mid-brain, such as the medulla, which controls  
14   cardiac and respiratory activities, comes right down  
15   through that area.

16                   And unfortunately, those two bones were  
17   what we call non-opposed. They were pretty far  
18   apart. And the skull had shifted anteriorly, thus  
19   taking the lower part of the brain and the spinal  
20   column with it.

21           Q       Can you put it in any sort of terms how  
22   big a shift it was in terms of distance vis-a-vis  
23   what it should have been?

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1           A       Just let me take a glance, not having the  
2   x-ray in front of me. I would be happy to review  
3   it.

4           Q       Go ahead.

5           A       The reading that I have in front of me  
6   says anterior atlantooccipital dislocation. I don't  
7   know how many millimeters. I remember seeing the  
8   films. It was very significant looking.

9           Q       What does that literally mean? I mean,  
10   the head is out of position on the spinal column?

11          A       Yes. The head was shifted considerably  
12   forward on the spinal -- bony spinal column, thus  
13   making almost an S shape in the top of the spinal

Deposition testimony of Dr. Darren Lisse

14 cord. And I'm quite sure that was the cause of his  
15 death.

16 Q That was going to be my next question.  
17 Do you have an opinion within a reasonable degree of  
18 medical certainty what the cause of death was?

19 A Yes.

20 Q And what is that, Doctor?

21 A I think, as I mentioned, that the  
22 atlantooccipital dislocation and trauma to the  
23 spinal column and lower part of the brain was the

1 cause of his death.

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2 As a matter of fact, I recall the  
3 anesthesiologist and I both seeing the film, at that  
4 point, before it was read by the radiologist, and  
5 that's when we terminated any other attempts.

6 Q At the time the x-ray was reviewed and I  
7 understand a code was called -- I'm sorry. I got  
8 the -- at the time the x-ray was reviewed. And I  
9 understand a code was called at some point in time  
10 that day, or is that a term that I've watched on TV  
11 too much?

12 A No, we do call them codes. But the  
13 calling verb is the proper one. To call a code  
14 means to respond to a serious or significant  
15 situation. To terminate, or some people call it  
16 call a code, can also mean to stop resuscitative  
17 attempts.

Deposition testimony of Dr. Darren Lisse

18                   So when we saw the x-ray, which would  
19   have been some 20 minutes into our attempts, at that  
20   time we terminated our attempts. That's what we  
21   hear. That's called a code on TV.

22           Q       I see. And what transpired, according to  
23   these records, at approximately 15:46?

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1           A       That would be correct.

2           Q       I'm sorry. I missed it.

3                   And that transpired, according to these  
4   records, at approximately 15:46?

5           A       That would be correct.

6           Q       That would be 3:46 p.m.?

7           A       Yes.

8           Q       The injury in this instance is a little  
9   dislocation of the head as opposed to a fracture or  
10   anything of that nature?

11          A       The injury is -- I'm sorry. Did you use  
12   the term "little"?

13          Q       If I did, I'm not sure that I meant to.

14          A       The injury is a significant dislocation  
15   of the bony skull from the bony vertebral column; in  
16   other words, the skull's on top of the neck bones,  
17   thus causing a problem with an angulation of the  
18   spinal column, as opposed to a fracture or an injury  
19   inside the skull itself.

20          Q       And I recognize that we don't have a

Deposition testimony of Dr. Darren Lisse

21 video here and the jury will be hearing this, in  
22 effect, by reading the deposition transcript, but  
23 could you indicate, I guess using your own body, if  
108  
1 you could, the location of where this dislocation  
2 was?

3 A To the best I can, yes. If everyone were  
4 to put their finger in the back right here  
5 (indicating), there is a small depression that you  
6 can feel as the skull tucks in. That is where the  
7 first cervical vertebra is. It's in this  
8 neighborhood (indicating). Unfortunately, the skull  
9 had shifted forward.

10 Q Did you have an occasion to come in  
11 contact with Mr. and Mrs. Halfmann that day, the  
12 parents of the child?

13 A Yes, I did.

14 Q What was the occasion of your contact  
15 with them?

16 A It was to tell them of the death of their  
17 son.

18 Q When the death was pronounced, for lack  
19 of a better way to express it, what, if anything,  
20 was done with Robbie at that point?

21 A We try to make the situation as  
22 presentable as possible, considering the severity of  
23 the situation. We don't pull all the tubes out. We

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Deposition testimony of Dr. Darren Lisse

1 leave the child in a room with some lighting turned  
2 down and ask the family if they want to see him.  
3 Some do, some don't.

4 Q I have placed in front of you what we  
5 have had marked as Exhibit Number 2. Can you  
6 identify them for us, please?

7 And if I could approach the deposition  
8 witness, those I believe are them (tendering  
9 documents).

10 A One is mine and the other two are not.

11 Q Okay.

12 A One appears to be a bill from the  
13 hospital itself for the emergency services and  
14 supplies. One is from the Reston Radiology  
15 Associates Group that provide radiological service  
16 for the hospital. And the third is from my group of  
17 Emergency Medicine Associates. We have a contract  
18 with the hospital to supply emergency care.

19 Q And you have reviewed for us the care and  
20 treatment that was administered to Robbie Halfmann  
21 on the 19th of January, 1995. Do you have an  
22 opinion within a reasonable degree of medical  
23 certainty as to whether or not that medical care was

110  
1 reasonable and medically necessary under all the  
2 given circumstances?

3 A I don't think there is any doubt about

Deposition testimony of Dr. Darren Lisse

4 the fact that it was reasonable and medically  
5 necessary. It was, unfortunately, unsuccessful.

6 Q And as far as the charges that are  
7 referenced on the three bills that you have  
8 identified, are they reasonable and customary for  
9 services of that nature in the Northern Virginia  
10 area?

11 A Yes, I believe they are.

12 MR. VAUGHN: Thank you, Doctor. That's  
13 all the questions I have.

14 And I would, at this time, move what was  
15 previously marked as Deposition Exhibit Number 2  
16 into evidence. I believe that would be Plaintiffs'  
17 Number 18.

18 THE COURT: Any objections to Plaintiffs'  
19 Number 18?

20 MS. SNEE: Only as previously expressed.

21 MR. ROBEY: That's my same response,  
22 Judge.

23 THE COURT: Plaintiffs' Exhibit 18 will

111  
1 be received.

2 (A document was marked as  
3 Plaintiffs' Exhibit No. 18  
4 and received in evidence.)

5 MR. ROBEY: Your Honor, I take it the  
6 original deposition transcript will be filed for the  
7 record?

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18 Q Good morning, ma'am. Would you state  
19 your name, please?

20 A My name is Constance Marie Waters.

21 Q And Ms. Waters, I understand that you are  
22 affiliated with the Sugarland Run Homeowners  
23 Association?

113

1 A Yes, I am.

2 Q And what position do you hold with them?

3 A I am a board member.

4 Q And how long have you held that position?

5 A Four and a half years.

6 Q And I understand as well you are a  
7 resident of Sugarland Run?

8 A Yes, I am.

9 Q And I believe you told me before that you  
10 moved in there sometime in '73, was it?

11 A The day after Christmas.

12 Q Okay. And you've lived there  
13 continuously since that point in time?

14 A Yes, I have.

15 Q I understand that as a member of the  
16 board, you are familiar with what I believe you  
17 refer to as the governing documents?

18 A Yes.

19 Q And as I understand, that consists of the  
20 Articles of Incorporation, the Declaration, the

Direct Examination of Constance Waters

21 Covenants, and the Bylaws.

22 A There's one thing that I did leave out,  
23 and that's State Code.

1 Q As far as the Articles of Incorporation 114  
2 are concerned, I think you previously identified  
3 those for me, if I can find them in my pile of  
4 papers here.

5 If I may approach, Your Honor?

6 THE COURT: Yes.

7 BY MR. VAUGHN:

8 Q Referring to what we utilized at your  
9 deposition as Deposition Exhibit Number 1, the  
10 first -- let me count back: One, two, three, four,  
11 five, six -- the first six pages of that document  
12 (tendering document) constitute the Articles of  
13 Incorporation of the Sugarland Run Homeowners  
14 Association?

15 A The only thing missing is the state seal.  
16 There's a cover sheet that goes with it. And  
17 that's -- those are the ones that we must hand out,  
18 according to state law.

19 Q The document itself is an accurate copy  
20 of that document?

21 A It seems to be, yes.

22 Q As I understand, the corporation itself  
23 was formed in '71. Is that correct?

1           A       Yes, in February.

2           Q       Okay. And the second document that  
3 appears in there is the Declaration; is that  
4 correct?

5           A       No. In here you have the Bylaws, but the  
6 Bylaws rank bottom. The next would be the  
7 Declaration and then Covenants, Conditions, and  
8 Restrictions. And then state law supersedes all.

9                   MR. VAUGHN: If I can approach, Your  
10 Honor?

11                   THE COURT: Yes.

12                   BY MR. VAUGHN:

13           Q       You had previously identified this  
14 (tendering document). I have placed before you a  
15 document entitled "Declaration." Is that the  
16 Declaration for Sugarland Run?

17           A       Well, this is not the one with deed book  
18 and page. This is not the legal one. I brought  
19 mine with me. I did find it.

20           Q       We can use yours if you'd rather.

21           A       Yes, I'd rather use mine, because --

12 THE COURT: I understand that will be  
13 without objection. When the clerk returns, that  
14 will be Numbers 19 and 20.

15 BY MR. VAUGHN:

16 Q Ms. Waters, if you could, the makeup of  
17 Sugarland Run Homeowners Association, as I  
18 understand it, consists, first of all, of a board of  
19 directors of which you are one of the members?

20 A Yes.

21 Q There is also, as I understand it, a paid  
22 administrative staff?

23 A Yes, there is.

1 Q And can you identify what the makeup of  
2 the staff is for the Court, please?

3 A We have a general manager, a certified  
4 general manager. We have a bookkeeper/accountant,  
5 which is one position. We have an administrative  
6 assistant. We have a covenants coordinator. And we  
7 have one employee that kind of aids everybody else.  
8 We have two land service crew.

9 Q That's the paid staff you're referring  
10 to?

11 A Yes.

12 Q That's in addition to the board of  
13 directors themselves?

14 A Yes. We are not paid.

Direct Examination of Constance Waters

15           Q       And I understand that in the 1995 time  
16 frame, the makeup, as you've described it, was the  
17 same, except potentially the general manager was  
18 called executive director?

19           A       We had a larger land service crew,  
20 because they did all of our grass cutting and stuff,  
21 but we've subcontracted that out.

22           Q       And in the 1995 time frame, you also  
23 subcontracted out work on the pathways?

123

1           A       Yes.

2           Q       The board of directors and the paid  
3 staff, in fact, are the ones responsible for taking  
4 care of the common areas, which include those  
5 pathways, correct?

6           A       The board oversees -- we -- the staff,  
7 they are responsible for the contracting. The board  
8 approves it. They recommend to us who they want to  
9 contract.

10          Q       Recommendation's made by the staff, the  
11 board approves it, and then you subcontract out the  
12 maintenance of the common areas?

13          A       Yes.

123

14 Q And the common areas include specifically  
15 the system of pathways that's in the subdivision?

16 A Yes.

17 Q And specifically, as well, the path that  
18 is involved in this litigation, correct?

19 A Yes.

20 Q And I understand you're familiar with  
21 this particular pathway?

22 A I live close to it, right around the  
23 corner.

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1 Q And that pathway is located in what they  
2 call Section 6 of Sugarland Run?

3 A Yes. It comes right next to Section 2.

4 Q And I understand that pathway -- the  
5 totality of the pathway is located on common ground?

6 A Yes.

7 Q And the area as it abuts Sugarland Run  
8 Drive where that pathway runs, the common ground is  
9 a width of about 130 feet; is that right?

10 A The common ground?

11 Q Yes, ma'am.

12 A I have no idea.

13 Q You've seen photographs of that area?

14 A Yes.



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22           Q       Let me show you what was previously  
23   marked and admitted as Plaintiffs' Number 1 and

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1   Number 2 and Number 3, if I could stand beside the  
2   witness for just a second, please?

3                   THE COURT:   Yes, you may.

4                   MR. VAUGHN:   Thank you.

5                   BY MR. VAUGHN:

6           Q       Ma'am, I'm going to try to do this in  
7   some fashion so the jury can see as well.   Looking  
8   at this particular photograph, this is the pathway  
9   that we're dealing with, correct?

10          A       Yes.

11          Q       And this area (indicating), this green  
12   area to the left in this photograph, is all part of  
13   the common area; is that correct?

14          A       Yes, it is.

15          Q       This photograph depicts that area just a  
16   little bit closer in; again, depicts all the common  
17   grounds that existed in this particular area?

18          A       Yes (indicating).

19          Q       And this photograph of a little bit  
20   different angle (indicating) shows the pathway to be  
21   right to the left of those boxes?

22          A       Yes.

23          Q       Okay.   The common ground begins somewhere

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1   to the right of these boxes, correct?

Direct Examination of Constance Waters

2 A Yes.

3 Q Referring back to Exhibits 1 and 2, the  
4 common ground begins somewhere to the right of the  
5 boxes over here (indicating)?

6 A I can't see the angles. Now, ask the  
7 question one more time, please.

8 Q The common ground here begins somewhere  
9 to the right of those boxes (indicating)?

10 A Yes.

11 Q And going back to Exhibit 3, again, just  
12 so that we have a sense, the common ground ends  
13 somewhere on the left side of those boxes in this  
14 particular photo?

15 A It would end right at the fence line,  
16 right there in the corner (indicating).

17 Q So it covers the expanse from right here  
18 over to that fence (indicating)?

19 A Yes.

20 Q We had earlier -- I think you were  
21 present when we made a stipulation -- the  
22 property -- the common ground that we've just  
23 referred to was conveyed to the association, and

127  
1 certainly it was conveyed by the deed in December of  
2 1973; is that correct?

3 A That is correct.



- 13           Q       You consider yourself very knowledgeable  
14   as to what happens and what goes on in Sugarland  
15   Run, do you not?  
16           A       Yes, I do.  
17           Q       And you made a point of telling me at  
18   your deposition that you have a vast array of  
19   knowledge of what goes on in that subdivision.  
20           A       Yes, I do.

9           Q       You were called upon and identified in  
10   the course of that deposition as the person within  
11   Sugarland Run who had knowledge of the construction  
12   of this particular pathway.

13           A       Right.

14           Q       You understood that?

15           A       Yes, I did.

16           Q       And you came to the deposition  
17   specifically as the one designated by the  
18   association to answer that very question.

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17 Q Ms. Waters, before we get to that, I want  
18 to back up and ask you a specific question. Is it  
19 not correct that the pathway on which Robbie  
20 Halfmann was riding immediately before his death was  
21 constructed in the summer or fall of 1974?

22 A The first time I saw it, from what I  
23 remember, to the best of my recollection, it was in

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1 1974, very early. I could possibly be wrong.

2 Q You told me at your deposition without  
3 hesitation and without qualification it was the  
4 summer or fall of 1974, correct?

5 A Yes, I did, and I'm not hesitating now.

6 Q And that's your testimony as the  
7 representative of the association, that that pathway  
8 was constructed in the summer or fall of 1974?

9 A I do believe it was, yes.

10 Q The association has made no changes of  
11 which you are aware to that particular pathway since  
12 the date and time it was constructed through January  
13 19th of 1994 -- excuse me -- '95?

14 A '95. Excuse me. You asked me that in  
15 deposition, and I do believe I told you no. And  
16 after I went home, I was sitting down doing board  
17 work -- as a matter of fact I was doing more board  
18 work last night -- and something was gnawing at the  
19 back of my head about that.

Direct Examination of Constance Waters

20                   And I kept thinking about it. And I came  
21 across one of the present board member's names. He  
22 has a retarded child. Back in '95 or '94 -- I don't  
23 know what date; I have not a clue -- I remember --

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1 and I was not a board member then -- I remember  
2 discussion taking place about the mother wanting to  
3 take the wheelchair and go up to the school. And I  
4 do not know -- I think that John Shields contacted  
5 VDOT --

6           Q       So there was --

7           A       -- to accommodate her.

8           Q       And as a result of that, the wheelchair  
9 cut-out that has been shown in those photographs --

Direct Examination of Constance Waters

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13           Q       If you will accept that this picture has  
14   been previously marked and moved into evidence, I  
15   believe without objection, as depicting the pathway  
16   on the date when this incident occurred, does that  
17   picture not show the wheelchair ramp or cut-out?

18           A       It does show it.

150

15 Q Are there any signs along that pathway as  
16 you view that picture, Ms. Waters?

17 A Physically on the pathway, written on it?

18 Q Along the pathway. Are there any signs  
19 along that pathway, Ms. Waters?

20           A       No, there are not.

21 Q Are there any markings on that pathway?

22           A       No, there are not.

23 Q Are there any devices in any way, shape,

1 or form to slow down somebody as they come down that  
2 hill?

3           A       No.  If you were to put speed bumps on  
4   any bike path, that --

5 Q I don't want your opinion as to whether  
6 that would be proper or not. My question is: There  
7 is nothing there, is there?

8 A No.

9 Q And there is nothing that would inhibit  
10 or impede someone from coming off that pathway  
11 across the road to the adjoining pathway on the  
12 other side, is there?

13                      A                      No.



15           Q       This particular pathway was built such  
16   that, for lack of a better word to express it --  
17   sometime, in fact, before this incident that  
18   wheelchair ramp was added which enables people  
19   coming down the pathway to go down the curb and  
20   across to the other side without even having to jump  
21   the curb.

22           A       ADA regulations.

23           Q       So the answer is yes?

1           A       Yes.

14           Q       There are no control signs, no warning  
15 signs, no nothing?

16           A       No, there's not. That would be a VDOT  
17 issue.

18           Q       And you're not aware of Sugarland Run  
19 making any request to VDOT at any time to put up any  
20 signs, are you?

21           A       Give me some dates.

22           Q       At any time prior to January 19, 1995.

23           A       No.

16           Q       The board never communicated with VDOT  
17   about its concern?

18           A       That is a different question.

19           Q       So you are aware that the board has, in  
20   the past, communicated with VDOT?

21           A       Yes.

155

19           Q       This particular path is used for bicycle  
20 riding, is it not?

21           A       That, and roller bladers and  
22 skateboarders and people walking their children,  
23 dogs. It's multipurpose.

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1           Q       And there are no limitations in the  
2 association's rules, policies, bylaws, regulations,  
3 whatever it may happen to be, that prohibit use of  
4 this pathway by bicyclists?

5           A       No, just motorized vehicles.

6           Q       The photograph -- do you still have that  
7 in front of you?

8           A       This one (indicating)?

9           Q       -- shows some power boxes there, those  
10 green boxes?

11          A       Yes. As I'm looking at it, it's to the  
12 right.

13          Q       I believe you told me earlier that you  
14 recall that those boxes were installed when Section  
15 2 of Sugarland Run was constructed. Is that  
16 correct?

17          A       Yes.

159

9           Q       Okay. Now, you told us that in the  
10       spring or the summer of 1974, you're sure the bike  
11       path that's in question in this case did exist. Is  
12       that correct?

13           A       Yes.

14           Q       Now, as of that time, the spring or the  
15       summer of 1974, did the bike path exist exactly the  
16       way it did on the day of this accident, January 19,  
17       1995, some 21 years later?

18           A       Most definitely.

19           Q       Same design, same construction?

20           A       Yes.

21           Q       The VEPCO power boxes, were they in the  
22       same places that they were in in 1974?

23           A       Yes.

160

1           Q       What about Sugarland Run Drive, the road  
2       that's in question; was that essentially the same as  
3       it was in 1974?

4           A       Yes, it was.

5           Q       So '74 and January 1995, it was the same?

6           A       Yes.

7           Q       So the entire area where this accident  
8       occurred did not change between 1974 and January 19,  
9       1995; is that correct?

10          A       Correct, yes.

Direct Examination of Constance Waters

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18           Q       Do you know one way or the other whether  
19       the homeowners association either designed or built  
20       this bike path in question, whether it was in '73 or  
21       '74?

22           A       The HOA did not.

23           Q       Sugarland Run Homeowners Association?

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1           A       Yes.

1           Q       You were asked on direct examination  
2       whether the homeowners association had ever done  
3       that before the date of this accident from -- and  
4       let's go back.

5                   1973 or '74 up to January 19, 1995, had  
6       the board ever asked VDOT -- other than this curb  
7       cut, had the board or the homeowners association  
8       ever asked VDOT to come out and do a study or make  
9       changes in this area where the accident occurred?

10          A       Not in any -- any of the areas.

11          Q       Why?

12          A       There wasn't any need to. We never had  
13       any complaints. We never had anybody coming forward  
14       saying anything about it.

15          Q       From the board's perspective -- now, you  
16       live right up the street, I think you told us?

17          A       Yes.

18          Q       How far do you live from this accident  
19       scene?

20          A       I live right around the corner, first  
21       house on the corner across from the house right here  
22       (indicating).

23          Q       You've lived there since December 26,

1       1973?

2          A       Uh-huh, yes.

3          Q       Now, from December 26, 1973, up until

Cross examination of Constance Waters

4    this accident occurred, January 19, 1995, was there  
5    ever even one complaint about this bike path as it  
6    intersected the road?

7           A       No. All the children in my court,  
8    including my four, they would ride their bikes and  
9    they would play on it.

10          Q       Ever any problems, ever any incidents,  
11    anything at all that would cause the homeowners  
12    association to ask VDOT to do anything?



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15           Q       What does it take before the association  
16 takes some kind of action?

17           A       I think you're asking me to voice my  
18 opinion, and I will not voice my opinion on behalf  
19 of the association. That's not why I was elected.

20           Q       Well, in your capacity as a member of the  
21 board of directors, someone with vast knowledge of  
22 Sugarland Run, do you not know what it takes before  
23 the association takes some kind of action?

171

1           A       That question would have to be placed  
2 before the entire board and a collective response  
3 given.

4           Q       And you've told us a number of different  
5 times in response to Mr. Robey's questions and  
6 certainly, that's sacred territory down there where  
7 the VDOT right-of-way is. The homeowners  
8 association would never go down there, right?

9                   THE COURT: I'm sorry. I didn't hear the  
10 question.

11                   BY MR. VAUGHN:

12           Q       The homeowners association would never do  
13 anything in VDOT's right-of-way, correct?

14           A       We're not allowed to by law.

15           Q       Okay. That right-of-way extends past the  
16 curb some distance, does it not?

17           A       It all depends on where the center line

Redirect examination of Constance Waters

18 of the road is.

19 Q In this particular instance, the  
20 right-of-way extends some distance past that curb  
21 into the grassy area, does it not?

22 A It could, yes.

11 Q Sorry. I couldn't locate it. If I can  
12 borrow your Number 2, what's this coming down here,  
13 touching on and ending at this manhole cover  
14 (indicating)?

15 A What, right here (indicating --)

16 Q Yes. What is that?

17 A -- and up?

18 Q What is that?

19 A Well, it looks like a trail or bike path.

20 Q And whose trail is that?

21 A It belongs to Sugarland Run.

22 Q The homeowners association.

23 A Yeah.

1 Q The entity you're here representing.

2 A Yes.

3 Q It comes all the way down and runs into  
4 the manhole cover.

5 A It touches -- it abuts it, but the sewer  
6 drain is water and sewers, Loudoun County Sanitation  
7 Authority. That's a sewer drain that actually goes  
8 under the road six feet.

9 Q So it comes down all the way down into  
10 the right-of-way, that sacred territory y'all would  
11 never touch, right?

12 A Well, I think that VDOT probably does  
13 classify it sacred territory. They're very touchy

Redirect examination of Constance Waters

14 about it.

15 Q They made an exception for you guys in  
16 this instance?

17 A We did not put the cement in. We cannot  
18 do that.

19 Q All right. I understand. I see.

20 And you also, I believe, responded to  
21 Mr. Robey that you're very well aware of -- what  
22 you've said to us about this curb cut that you  
23 responded to, you're very confident about all these

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1 details. Do you recall at your deposition you told  
2 me repeatedly that this curb cut was put in even  
3 after this collision took place?

4 A You're absolutely right --

5 Q So you made a mistake there, didn't you?

6 A -- and I explained.

7 Am I going to be allowed to finish?

8 Q You were wrong about that, weren't you?

9 A Yes, I was wrong.

10 Q You were very adamant when I asked you  
11 that a number of different times.

12 A Yes, I was. And I told you that there  
13 was something in the back of my brain that kept  
14 gnawing at me.

15 Q And you're also --

16 A And I remembered Bob's little child.

17 Q And you're also very clear, as you said,

Redirect examination of Constance Waters

18 that you reviewed the records relative to the  
19 construction of this pathway, and I think you  
20 answered Mr. Robey's question, we didn't do it,  
21 right --

22 A Do what?

23 Q -- "we" being the association --

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1 A We didn't do what?

2 Q -- didn't construct that pathway.

3 A We didn't. The plans were drawn up by  
4 Boise.

5 Q And you know all that?

6 A We have the actual charts up at the  
7 center. I found them.

8 Q Well, that's interesting. When did you  
9 find them?

10 A About a week ago. No, it wasn't even a  
11 week. I was looking for the old rec hall.

12 Q Must have been after your deposition,  
13 huh?

14 A Yes, sir, it was.

15 Q Oh, isn't that -- because you recall me  
16 asking you at your deposition: Do you know of any  
17 records within the association that relate to the  
18 construction of this trail, and your answer being,  
19 no, not that I know of?

20 A And I didn't. These are very old.

21 Q So on July 15th, there weren't any

Redirect examination of Constance Waters

22 records. We took your deposition July 15th,  
23 Thursday, less than a week ago.

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1 A That's right.

2 Q And after that deposition, you decided  
3 then you'd go and look, and you found these  
4 documents. Where are they?

5 A They're in Room -- in Room C --

6 Q You didn't bring them today, did you?

7 A -- in a box.

8 I didn't think they were important. If  
9 you want them, I can bring them tomorrow.

10 Q You didn't choose to bring them today,  
11 did you?

12 A But I can bring them tomorrow.

13 MR. ROBEY: Judge, the question's been  
14 asked and answered and it's argumentative.

15 THE COURT: Mr. Vaughn, do you wish to  
16 respond?

17 MR. VAUGHN: I'll withdraw the last  
18 question, Your Honor.

19 BY MR. VAUGHN:

20 Q You said that there's been no changes to  
21 that pathway. Well, you identified the curb cut-out  
22 for us. That's a change, is it not?

23 A Yes, it is.

4           Q       I'm going to go back to the pathway  
5       itself, Ms. Waters. In response to Mr. Robey's  
6       question, I believe you went back to something that  
7       you said on direct that I thought you had retracted  
8       from.

9                   Now you're saying again that you're not  
10      confident that the trail was constructed in the  
11      summer or fall of 1974. Is that correct?

12          A       I thought we went over that when you  
13      asked me the question.

14          Q       I thought we had, too, and I thought you  
15      said without hesitation, without equivocation, in my  
16      very last question, or most of my very last  
17      questions, that the trail had been constructed in  
18      the summer or fall of 1974, and that was your best  
19      recollection.

20                   MR. ROBEY: I object, Judge. That's a  
21      mischaracterization. Her testimony was: It could  
22      have been. That was her response. I object to the  
23      mischaracterization.

1                   THE COURT: Overruled.

2                   BY MR. VAUGHN:

3          Q       That's what you told me on your direct  
4      examination.

5          A       No, I don't believe I did. I told you  
6      that that's what I could remember. That's what I

Redirect examination of Constance Waters

7     thought.  There is a difference in making a definite  
8     statement and a maybe.

9           Q     Well, in your deposition, you made a very  
10    definite statement, didn't you?

11          A     Yes, I did.

12          Q     On Page 22, I asked you:  Do you know  
13    when that particular pathway was constructed?  And  
14    then you said, it would have been the summer of '74.

15                   "QUESTION:  Summer of '74?

16                   "ANSWER":  Or fall.

17                   "QUESTION:  Summer or fall of '74?

18                   "ANSWER:  Yes."

19                   Is there some equivocation in there?

20          A     Everybody can be wrong.





7           Q     When did you decide to change your  
8 testimony?

9           A     That evening when I came home from the  
10 deposition and last night, I kept thinking about it.

Direct examination of Susan Toepfer

9 Q Don't tell me the speed of the bicyclist.

10 The question to you is: Can you tell whether the  
11 bicycle was slowing down, going the same, or  
12 increasing its speed from when you first saw it to  
13 the point of impact?

14 A It seemed to be going the same speed.

15 Q In regards to the time that you saw the  
16 bicyclist up until the time of impact, did the  
17 bicyclist stop?

18 A No.

19 Q When you saw the bicyclist come down the  
20 bike path, did you see him actually enter Sugarland  
21 Run Drive?

22 A Yes.

23 Q At any point did it appear to you, from

202

1 your eyesight, that he looked to the left?

2 A No.

3 Q Was to the left of the bicyclist where  
4 Mrs. Kabiri was coming from?

205

7 A I observed the bicycle coming down the  
8 bike path and the car coming down the road.

9 Q What was their relationship to each  
10 other?

11 A They seemed to be coming together at the  
12 same angle that they were going to hit.

13 Q Can you tell us how far the bicyclist was

Direct examination of Susan Toepfer

14 from the Kabiri vehicle when it entered Sugarland  
15 Run Drive?

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14 Q In regards to when the bicyclist entered  
15 Sugarland Run Drive, can you tell us how close it  
16 was to the Kabiri vehicle? I know you can't give us  
17 an exact measurement, but can you give us --

18 A It was -- it was pretty much right in  
19 front of the Kabiri vehicle.

20 Q All right. In regards to the bicyclist  
21 when it entered Sugarland Run Drive in front of the  
22 Kabiri vehicle, tell us what you saw next.

23 A The bicyclist seemed to almost get past  
208

1 the vehicle, and just as I thought he would get  
2 past, the car clipped the far end of the bicycle.

6           Q     In regards to the speed limit at that  
7 time, do you know what the speed limit was at  
8 Sugarland Run Drive on that day?

9           A     I don't remember. I know it was more  
10 than 25, but it's been lowered to 25 since. I don't  
11 remember what it was at the time.

7           Q       So you have the curb and then you have  
8   ten or fifteen feet, then you have these VEPCO  
9   boxes, right?

10          A       The VEPCO boxes on that side were not  
11   there at the time.

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22           Q       So you've got the road where the bike  
23 path is, some space, and then whether the boxes were

212

1   there or not, there's a house over here, right  
2   (indicating)?

3           A       (Moved head up and down.)

4           Q       You're with me? I know it's kind of  
5   confusing. Then the meadow area, is that back  
6   behind?

7           A       It's a grassy knoll, and it leads up to  
8   the bike path.

9           Q       That leads up to the bike path, but is  
10 that behind where the house is and all the other  
11 things?

12          A       It's, I believe, to the side and then  
13 goes back.

- 10           Q       I want to make sure we're talking about  
11   the same thing. Your recollection is the boxes that  
12   are shown in this photograph weren't there that day?  
13           A       That's my recollection.

Cross Examination of R. Susan Toepfer

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3           Q       So when you saw him, he may have been  
4 even down to where the boxes were?

5           A       He may have been down as far as that box,  
6 yes.

7           Q       Okay, referring to the Virginia Power  
8 boxes.



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23                    Now, as Ms. Kabiri was coming down

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1    Sugarland Run Drive, at any time before the impact  
2    between herself and Robbie, did you, from your  
3    observation, see the Jeep do anything other than  
4    continue as you had seen it before?

5            A        No.

6            Q        Did you see it swerve to the right or the  
7    left?

8            A        No.

9            Q        Did you see anything to indicate any  
10   braking activity?

11           A        I was seeing the front of it, so I  
12   couldn't tell about brake lights, but I didn't see  
13   it do anything except come down the road.

14           Q        Was the speed as you observed it of the  
15   Jeep essentially consistent from the point that you  
16   first saw it until the impact?

17           A        Yes.

- 18           Q       And these are the transformer boxes  
19       (indicating) that mark directly where the trail  
20       empties onto the road?  
21           A       It empties onto the road just below, yes.

12                   THE COURT: Are we now returning to the  
13 case of the plaintiffs?

14                   MR. VAUGHN: Yes, Your Honor. I would  
15 recall Jennifer Toole at this time.

16                   MS. SNEE: Your Honor, I'm going to have  
17 motions right away. I don't know how you want to  
18 handle them.

19                   THE COURT: Is that something that we can  
20 do at sidebar or would you like me to ask the jury  
21 to briefly retire?

22                   MR. ROBEY: I would recommend the latter,  
23 Judge, because I'm going to have a case for you and

1 discussion.

2                   THE COURT: All right. Ladies and  
3 gentlemen, the Court has a matter to attend to at  
4 this time. I'll ask that you please retire.

5                   (Whereupon, the jury exited the  
6 courtroom.)

7                   MS. SNEE: Your Honor, may my client be  
8 excused to go to the restroom at this time?

9                   THE COURT: Yes, she may.

10                   MR. ROBEY: I'll join in that request.

11                   THE COURT: All right. We'll take a  
12 three-minute recess before we hear this.

13                   (Whereupon, a brief recess was taken.)

Further objection to testimony of Jennifer Toole

14 MR. ROBEY: Judge, I know the plaintiff  
15 is now going to attempt to recall Jennifer  
16 O'Toole -- Toole, I stand corrected -- who is the  
17 witness that the Court excluded yesterday.

18 And I renew my objections to her  
19 testifying in this case. I incorporate by reference  
20 the arguments I had before, which in a nutshell are  
21 these: First of all, the lawsuit against us is that  
22 we had specific knowledge, that we knew of a  
23 dangerous condition and we did nothing about it.

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1 Now, the plaintiff hasn't proved that we  
2 knew anything. They have not proved any knowledge  
3 whatsoever. So it would certainly be premature to  
4 put on a witness to tell the jury what we could have  
5 done until they've proven we had some kind of a  
6 notice. And they haven't done that. So that was my  
7 first objection, but not my only one.

8 Now, we have not been sued for violating  
9 any kind of a standard of care. That's not what the  
10 suit is against us, and I think that that's what  
11 this witness is going to come in and testify to.

12 She's going to say that -- because we  
13 heard her credentials, that I'm a landscape  
14 architect and I know all of the national standards,  
15 et cetera, et cetera, not that they're legal  
16 standards.

Further objection to testimony of Jennifer Toole

17                   In other words, she's not going to be  
18   able to tell us that I'm going to give you a list,  
19   and if you violate this list, if you fail to  
20   maintain your path the way I'm about to describe,  
21   then you're in violation of Virginia law. She can't  
22   do that, because, frankly, there is no standard.  
23   There is no standard.

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1                   But number one is we haven't been sued  
2   for violating any kind of standard of care, so this  
3   plaintiff would be allowed to go off on a brand-new  
4   cause of action not heretofore pled and well beyond  
5   the statute of limitations for which we have no  
6   notice. The suit is very specific against us.  
7                   But even if this plaintiff were allowed  
8   to do that; in other words, start bringing a  
9   brand-new cause of action here on the trial date  
10   alleging that we breached some kind of a standard of  
11   care, this isn't the witness who could do that. And  
12   that's another part of my problem.  
13                   Now, in order for them to make this  
14   testimony relevant, they're going to have to prove  
15   that we had some kind of a duty. That's a standard  
16   tort: Duty, breach of duty, resulting injury and  
17   damages. The first thing they would have to prove  
18   is what is our duty.  
19                   Now, we're not talking about the duty of

Further objection to testimony of Jennifer Toole

20 a landscape architect. If this was a lawsuit by,  
21 for example, the homeowners association suing a  
22 landscape architect, saying, we hired you to design  
23 this bike path or to redesign it and you did it not

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1 according to standards, well, we can bring in  
2 another landscape architect to establish what are  
3 the standards required of a landscape architect.

4 But this isn't a case about a landscape  
5 architect. This is a case about a homeowners  
6 association. And the plaintiff has the burden of  
7 proving, even if they had sued us for this, what the  
8 duty of care is required of a homeowners  
9 association.

10 And this witness has not given us any  
11 qualification. We heard her credentials, and there  
12 are no credentials whereby she can tell us what the  
13 standard of care is required of a homeowners  
14 association, frankly, because there is none. There  
15 absolutely is none.

16 But we haven't been sued for that, Judge.  
17 That's the first problem. They're going off into  
18 the violating the standard of care.

19 Now, going back to this concept of  
20 standard of care, last night I tried and I looked  
21 for a case where perhaps the Virginia Supreme Court  
22 has dealt with the issue.

23                   And if I could hand you a case, it's

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1    called Charles Hegwood, H-E-G-W-O-O-D,  
2    Administrator, versus Virginia Natural Gas, Inc.  
3    It's a 1998 case. It's reported at 256 Va. at Page  
4    362.

5                   Now, Judge, this is a case where the  
6    Virginia Supreme Court addressed the issue of what  
7    are you going to use as an expert witness? What  
8    qualifications does that expert have to have?

9                   Now, yesterday, we argued -- and I think  
10   the analogy I used was a medical malpractice case  
11   where the hypothetical was perhaps a registered  
12   nurse comes upon some kind of an accident victim who  
13   is not breathing and the nurse begins CPR.

14                  As it turns out, the victim has a heart  
15   condition and CPR is the worst thing you can do and  
16   the victim dies. And the plaintiff's estate sues  
17   the nurse, claiming that she violated standard of  
18   care.

19                  Then they want to march in a cardiologist  
20   to tell us what the standard of care is. I think  
21   this Court would have no problem determining that  
22   that cardiologist is not relevant in this case.

23                  We're talking about a nurse's standard of

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1    care, not a cardiologist's. Well, here, Judge,  
2    we're talking about a homeowners association's

Further objection to testimony of Jennifer Toole

3 standard of care, not a landscape architect's.

4 Now, that's one of the things that the  
5 Virginia Supreme Court dealt with in Hegwood versus  
6 Virginia Natural Gas, Inc. The basic facts of the  
7 case are that the plaintiff's decedent was living in  
8 low-income housing and at one point became  
9 delinquent in their bill. As a result of that, the  
10 gas was cut off.

11 At a later time, the decedent paid the  
12 bill up and the gas company came out and turned the  
13 gas back on at the meter outside the house, thereby  
14 allowing natural gas to go to the appliances in the  
15 house.

16 Then the gas company's mechanic went in  
17 the house and inspected the various appliances that  
18 burn natural gas and determined that several of them  
19 were faulty.

20 So what the mechanic did was simply turn  
21 off the knob leading into the appliance itself and  
22 then red-tagged the appliance, saying, danger, don't  
23 use natural gas for this, and then left.

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1 At a later time -- and this really  
2 doesn't surprise anybody -- the appliances ended up  
3 being turned back on by sources unknown. Those  
4 appliances create carbon monoxide, and the decedent  
5 and several other people in the house died. And in



Further objection to testimony of Jennifer Toole

6 fact, this is actually four combined cases for the  
7 four decedents in the house.

8 The plaintiffs, in trying to prove that  
9 the gas company did something wrong, brought in a  
10 fellow who was an expert in designing and building  
11 heating systems, natural gas heating systems.

12 And the Virginia Supreme Court -- and  
13 they discuss this as one of their topics; you'll  
14 find it at Page 10; it's the left-hand column,  
15 Judge, under Roman numeral III, which is the point  
16 where they discussed that -- that the trial court  
17 had no problem saying, you're an expert in designing  
18 and building natural gas systems; boilers, for  
19 example.

20 But this isn't a case about a natural gas  
21 mechanic, somebody who designs and builds natural  
22 gas systems. This is a case about a retailer.

23 The natural gas company is a retailer in

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1 the business of selling natural gas. And unless you  
2 present an expert on retail sales, that person's out  
3 of here.

4 And the Virginia Supreme Court agreed  
5 completely, saying, this is well within the  
6 discretion of the trial court, and this particular  
7 expert was not an expert in retail gas sales.

8 Judge, what that shows us is that close

Further objection to testimony of Jennifer Toole

9 is not good enough. You know, this is close to  
10 being right. It's just not good enough when you're  
11 going to allow an expert to come in and testify and  
12 give evidence to a jury. We have to be dealing with  
13 a person who is familiar with the standard of care  
14 required of the defendant.

15 Now, this landscape architect has no idea  
16 what standard of care is required of a homeowners  
17 association in Northern Virginia. And I will say to  
18 you she can't, because there is no standard  
19 required.

20 And then let me back up as I finish,  
21 right back to the beginning. This is not a case  
22 about a violation of a standard of care. That's not  
23 why they sued us.

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1 The lawsuit against us, Count 4 of the  
2 Motion for Judgment, is very, very specific. That  
3 Motion for Judgment alleges that we knew of a  
4 dangerous condition and we did nothing about it.

5 If I may quote, "SRHOA," Sleepy Hollow --  
6 Sugarland Run Homeowners Association, "had notice  
7 and knowledge of an unreasonably dangerous condition  
8 of the location and the area in which the subject  
9 tragedy occurred.

10 "Despite said notice and knowledge, SRHOA  
11 failed to take such steps as were reasonable and

Further objection to testimony of Jennifer Toole

12 necessary to ensure that persons utilizing said  
13 common areas, including the plaintiff, could do so  
14 in a safe manner."

15 Now, that would require two different  
16 areas of expert testimony, Judge. First of all --  
17 well, not expert. It's just going to have to  
18 require two different parts of proof: Number one,  
19 prove that we had notice.

20 And this doesn't say knew or should have  
21 known. And in fact, that's a correct statement of  
22 law, because this decedent was a bare licensee, it's  
23 not a knew or should have known standard. Counsel

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1 was correct when he pled this. But they have to  
2 prove that we knew that this was a dangerous area,  
3 and they haven't done so.

4 Now, if they can't, then they can't go on  
5 and argue or prove what we should have done about  
6 it. You can't do one without the other, because  
7 what we should have done about it is irrelevant  
8 unless they prove that we knew about it.

9 The other reason this expert might be  
10 called is to talk about standard of care, which is  
11 what she was qualifying to do on the witness stand.

12 That's irrelevant in this case. We  
13 haven't been accused of violating a standard of  
14 care, which, frankly, doesn't exist anyway.

Further objection to testimony of Jennifer Toole

15                   And nothing's changed since yesterday.  
16   Nothing's changed, Judge. My arguments are the same  
17   as they were yesterday. The evidence before you is  
18   the same as it was yesterday. Thank you.

19                   THE COURT: Mr. Vaughn?

20                   MR. VAUGHN: Yes, Your Honor. Mr. Robey  
21   has just told the Court that a homeowners  
22   association is completely immune to suit.  
23   Regardless of whatever happens on their common

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1   ground, there is no standard of care they owe to  
2   anybody.

3                   That on its face is a ludicrous

Response of counsel for Halfmann to objection

4 statement. The homeowners association is not  
5 immune. He has pointed to no case, no statute,  
6 nothing that indicates a homeowners association is  
7 immune from suit.

8 The issue in this case is very simple.  
9 Let's substitute Giant for the homeowners  
10 association. Let's substitute a customer of Giant  
11 for Robbie Halfmann.

12 Robbie Halfmann goes into Giant, a shelf  
13 falls over on him, and he dies. The issue in the  
14 case is: Was the condition of the shelf  
15 unreasonably dangerous? Did Giant have notice or  
16 knowledge of a defect that made it an unreasonably  
17 dangerous aisle or whatever this example is, that  
18 caused this to happen?

19 That is a routine, everyday type of case.  
20 The homeowners association has no great character  
21 beyond that. I don't understand how all of a  
22 sudden, Sleepy Hollow or Sugarland Run, whichever it  
23 is, is suddenly this entity that's equivalent to the

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1 government.

2 I originally did bring a claim against a  
3 number of entities who did, in fact, claim immunity.  
4 And this Court -- not Your Honor, but this Court, in  
5 its wisdom, decided they were entitled to immunity.

6 But one of the defendants who was not

Response of counsel for Halfmann to objection

7     entitled to immunity was Sugarland Run Homeowners  
8     Association. So the idea that they have immunity  
9     just makes no sense to me, with all due respect to  
10    Mr. Robey.

11                   And I appreciate your compliment on  
12    getting the pleading correct, but beyond that, Your  
13    Honor, it makes no sense to make that argument.

14                   The issue is just as was pled, was there  
15    an unreasonably dangerous condition? So what you  
16    literally do -- there's two groups of cases in  
17    Virginia that deal with that issue. One is  
18    basically landlord-tenant, but the other is a  
19    premises liability case.

20                   And we talk about an owner, and it says,  
21    to recover -- I'm reading to you from Roller Rinks,  
22    Inc. versus Michael Lester Smith. This was decided  
23    in 1977 by the Virginia Supreme Court, 218 Va. 321.

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1                   Just reciting -- I just pulled up the  
2    first owner-premises liability case that I could  
3    get. It says, to recover against an owner, an  
4    injured invitee must show that the owner had  
5    knowledge, actual or constructive, that a defect  
6    existed and such defect created an unsafe condition.  
7    That is the gravamen of the plaintiffs' complaints,  
8    if you will, in this particular situation.

9                   Going back to my analogy, there are

Response of counsel for Halfmann to objection

10 several other cases. Maybe I should get them all.  
11 There's Apartments, Inc. versus Bisson, 207 Va.  
12 474 -- again, I just pulled these up somewhat at  
13 random -- a 1966 case which talked about it.

14 We have consistently held with respect to  
15 such other defects -- this one was talking about the  
16 snow and ice. This was a landlord-tenant case.

17 Landlord is under an implied duty to use  
18 ordinary care to keep such reserve portions in a  
19 reasonably safe condition for the breach of which  
20 duty the landlord is liable for one injured while  
21 putting such reserve portions to its use.

22 We can conceive of no logical reason why  
23 a landlord should not be held liable for an injury

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1 caused by a defect in a common walkway resulting  
2 from negligent construction or maintenance, and yet  
3 be released from liability with injuries caused by  
4 natural accumulation of snow and ice.

5 Again, the facts aren't relevant, but the  
6 recitation of the Virginia Supreme Court of what the  
7 law is is very relevant. Part of the unique issue  
8 or aspect of this case is you don't find cases, per  
9 se, on point, because it's an issue that I don't  
10 think has been litigated, because it's so basic.

11 That owner liability -- Sugarland Run  
12 owned this property on which my client was injured.

Response of counsel for Halfmann to objection

13 And the question then becomes, the ownership of this  
14 property: Did the owner have on its property a  
15 condition which made it unreasonably dangerous for  
16 people who were invitees to use that property?

17 In fact, Mr. Halfmann, Robbie Halfmann,  
18 goes way beyond an invitee. He's a member of the  
19 association. Under the bylaws, under the covenants,  
20 under the Declaration, he is one of the owners -- I  
21 mean -- excuse me -- one of the members of the  
22 association.

23 He is -- I think member is defined as a

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1 property owner and members of their household. So  
2 he's beyond even an invitee. I think that standard  
3 is probably higher with regard to him.

4 But we've pled unreasonably dangerous  
5 condition. That is what is for the jury ultimately  
6 to determine; whether, in fact, there was a defect.

7 Now, this particular witness is called  
8 forth to ascertain or to provide evidence as to was  
9 this particular condition unreasonably dangerous?

10 We're back -- I hate using analogies,  
11 because everybody can argue whether they're off  
12 point or otherwise. We go back to the grocery store  
13 analogy.

14 When we argue that the shelf was  
15 negligently constructed or improperly designed so it



Response of counsel for Halfmann to objection

16 fell over on Robbie Halfmann, if that were the  
17 actual way unfortunate death came about, Mr. Robey's  
18 argument would say, well, the only people we can  
19 bring in is people who run grocery stores, and the  
20 only people who can testify whether that was a  
21 proper or improper condition is the grocery store  
22 owner.

23 Well, that's ridiculous, because that's

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1 not an area within a grocery store owner's  
2 expertise. It's the expertise of an engineer or  
3 whomever designs those items.

4 Go back to -- it's obvious in the news --  
5 go back to a plane crash. If a plane crashes, the  
6 only people we can bring in to ascertain or testify  
7 as to whether or not the plane was safe or had a  
8 defect is the owner of the airlines? I'm sure we'll  
9 get a good answer there. We bring in aeronautical  
10 engineers.

11 The issue in this case is this pathway as  
12 it existed in January of 1995 when Robbie Halfmann,  
13 who had every right to use it -- the evidence in  
14 this case from Ms. Waters's own mouth is that this  
15 path is used by bicyclists. There's no prohibition  
16 or inhibition. It's commonly used by anybody --  
17 that he used the pathway by way of right, on that  
18 day and time, was that pathway in such a condition

Response of counsel for Halfmann to objection

19     that it was an unreasonably dangerous situation for  
20     Robbie Halfmann?

21                     This particular witness and -- well, this  
22     particular witness is knowledgeable of what the  
23     standards are to create a pathway such as this so

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1     that it does not constitute an unreasonably  
2     dangerous condition.

3                     And this witness I put before the Court,  
4     and I believe she will so testify that based on her  
5     review of the photographs, the documentation she's  
6     been supplied, looking at the site, whatever  
7     information she needed to formulate her opinion, it  
8     is her opinion that the layout of that pathway as it  
9     existed in January of 1995 was unreasonably  
10    dangerous; that there were not sufficient sight  
11    lines for traffic for people such as Ms. Kabiri  
12    coming up the pathway to be able to see out.

13                    It doesn't take away the fact that had  
14    she even made the slightest effort to slow down or  
15    do something, it might not have happened. I'm  
16    certainly not in any way trying to absolve  
17    Ms. Kabiri of responsibility.

18                    But the problem is, as far as the  
19    Halfmann boy is concerned, it diminishes sight lines  
20    to the point that once you hit those transformers,  
21    everything is blocked and you don't know whether

Response of counsel for Halfmann to objection

22 somebody's coming or not. It created an  
23 unreasonably dangerous condition.

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1 The person who's best equipped, who's  
2 qualified to testify to that, is Ms. Toole. And she  
3 is a certified transportation planner who plans and  
4 designs bike paths.

5 Quite frankly, I was astonished when I  
6 came across her, because I thought I've not seen a  
7 more perfect witness in a case in which I didn't  
8 think there was any such expertise. I learned as we  
9 went along.

10 The issue, as I believe Mr. Robey is  
11 framing it, is that there is some different standard  
12 that applies when the property is owned by a  
13 homeowners association as opposed to when it's owned  
14 by Joe Blow or Giant.

15 And I've seen no case law that indicates  
16 to me in any way, shape, or form there is a  
17 different standard to be applied to a homeowners  
18 association.

19 In fact, Ms. O'Toole -- I'm doing it  
20 myself -- Ms. Toole I believe testified -- and if  
21 she didn't, I certainly would ask her the question  
22 again if she were permitted to testify -- ask her:  
23 Do the standards vary? Do they differ depending on

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Response of counsel for Halfmann to objection

1     who owns the property?

2                     In other words, if it's owned by a  
3     homeowners association, can you do anything you want  
4     and it's okay? It doesn't create an unreasonably  
5     dangerous condition? Or does it vary from place to  
6     place?

7                     And the answer to that question, I  
8     believe, would be an unequivocal it doesn't matter  
9     whether the pope owns the property. The same  
10    standards are applied.

11                    They're engineering standards. They  
12    apply across the board. It doesn't require a  
13    statute, doesn't require anything to impose those  
14    standards.

15                    It is a pedestrian pathway employed by  
16    the association for use by its members and its  
17    invitees to come down it on a bicycle. And as a  
18    result of putting it out there, they've got a  
19    responsibility.

20                    And this witness can tell us what that  
21    responsibility is, vis-a-vis the design and  
22    construction of this particular pathway.

23                    And there have been two occasions, at a

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1     minimum, of which the association has been put on  
2     notice that this particular pathway constitutes a  
3     problem and an issue.

Response of counsel for Halfmann to objection

4                   Sometime prior to 1995, these curb  
5 cut-outs were put into place. In the course -- and  
6 this witness will so testify, despite what  
7 Ms. Waters has to say, that when those curb cut-outs  
8 are put in, it is the responsibility of the local  
9 landowner, the landowner in this case being  
10 Sugarland Run Homeowners Association. VDOT doesn't  
11 care, less or otherwise.

12                   Now Sugarland may have, in effect,  
13 subcontracted out with VDOT or through one of its  
14 representatives to physically perform it, but the  
15 responsibility of putting those curb cut-outs exists  
16 on the homeowners association. It's their job.  
17 It's their pathway.

18                   And ADA says they must provide access and  
19 egress to their pedestrian and bicycular pathway.  
20 In fact, curb cut-outs are for only one type of  
21 persons, and that's people who are on wheels. It's  
22 the only reason they exist.

23                   If they didn't have wheels, they wouldn't

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1 need a cut-out. So that's what the ADA requirement  
2 is about, is people on wheels. And so that includes  
3 bicycles.

4                   And when the association went through and  
5 made a determination as to where the curb cut-outs  
6 were going to be and who was going to have access to

Response of counsel for Halfmann to objection

7    which particular ones, they clearly were on notice  
8    that if they're making this pathway subject to  
9    ingress and egress, they better darn sure -- they  
10   better make darn sure that it is a safe pathway,  
11   because exactly what you're doing is -- what you're  
12   doing is exactly what happened.

13                You are not only encouraging, you're  
14   almost compelling someone who comes down off of that  
15   hill in a situation where they can't see what's  
16   coming to their left -- you're encouraging, almost  
17   compelling that person to go right across the road,  
18   because now, there's no curb, no dead end.

19                The trail doesn't dead end, as the  
20   association would have you believe. It continues  
21   around through that curb cut and across to the other  
22   side.

23                So at that point in time, the association

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1   has notice and knowledge that if this trail is going  
2   to be used as a pedestrian trail, they better make  
3   sure that it's not unreasonably dangerous.

4                If they chose to ignore it, that's okay.  
5   But when the time bomb finally goes off, they've got  
6   to pay the piper. And that's where we are in this  
7   particular situation. The time bomb has gone off.

8                Abstinance or ignorance or refusal to do  
9   anything has nothing to do with notice and

Response of counsel for Halfmann to objection

10 knowledge. If somebody smacks you in the face, but  
11 you choose to ignore it, that's -- you ignore it at  
12 your own peril.

13 The second aspect insofar as that is  
14 concerned is when this path was constructed. With  
15 all due respect to Ms. Waters, I think she purposely  
16 changed her testimony for purposes here today, but I  
17 think she did specifically answer my question at  
18 least once, that this pathway was constructed  
19 sometime in the summer or fall of 1974.

20 I think it's unfortunate that she chose  
21 to change her testimony for purposes of today, but  
22 there's sufficient testimony in the record that the  
23 jury can certainly draw the conclusion that what she

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1 said the first time on direct and what she said in  
2 her deposition is true, and not what she decided to  
3 say in the last two or three days.

4 With that evidence in there -- and that's  
5 for the jury to determine. Maybe they won't make  
6 that decision. But right now, that's for the jury  
7 to determine.

8 And the evidence is that in 1973,  
9 December 31st of 1973, Sugarland Run became the  
10 owner of that property. And sometime thereafter,  
11 construction on this pathway began.

12 They are responsible for the construction

Response of counsel for Halfmann to objection

13 on that pathway. I don't care if they subcontracted  
14 it out to Boise Cascade, Larwin Atlantic, whoever  
15 was the developer at the time, you know, Joe's  
16 Paving and Grading. I don't care. It doesn't  
17 matter. It doesn't absolve them from responsibility  
18 for what happens.

19 We have -- the second prong of that is  
20 that at the time that this pathway was being  
21 constructed on their land when they owned it, over  
22 which they had complete control, these VEPCO switch  
23 boxes were in place. The evidence is they were

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1 there at least as of 1973. The pathway is being  
2 built in 1974. It's there.

3 Ms. Toole will tell us that in the course  
4 of constructing that pathway, the problems with the  
5 sight distance, if you will, by putting the path  
6 right beside those switch boxes and transformers was  
7 so readily apparent that that in and of itself is  
8 notice.

9 You don't need, as she said and didn't  
10 get the chance to fully respond to Ms. Snee's  
11 questions -- you don't need a sextant or whatever  
12 surveyors or engineers use to make that  
13 determination.

14 You just look at it and you know, my God,  
15 we've got boxes here of five feet tall. One of them



Response of counsel for Halfmann to objection

16 is four feet tall, eleven by seven and four by  
17 eight.

18 We've got humongous boxes out there  
19 sitting beside the road, sitting -- yeah, sitting  
20 beside the road, and we're going to drop a pathway  
21 right beside it.

22 Anybody -- in this instance, the  
23 homeowners association -- is put on notice by doing

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1 so that they've created a problem. And therein lies  
2 the crux of what I believe is their liability and  
3 responsibility.

4 Notice comes in two forms, Your Honor.  
5 Notice comes from actual notice and comes from  
6 constructive notice. Actual notice is if -- and I  
7 think they had both, because when they put the  
8 pathway in, they were on actual notice that those  
9 transformers created a problem, and they compounded  
10 the problem by putting the pathway on a hill on a  
11 collector road on a straight-away where the speed  
12 limit is just designed to kill.

13 By the grace of God, Robbie was the  
14 first. And thank God he was the only. But that's  
15 what they did. So they had actual notice. They had  
16 actual notice when they got to the progress and  
17 process of putting in the curb cuts.

18 They also, if one weren't inclined to

Response of counsel for Halfmann to objection

19 believe that that's actual notice -- and I think  
20 that's, again, a jury question -- they certainly had  
21 constructive notice, because that condition was  
22 there -- and I asked those questions -- from 1974 to  
23 1995, is when they decided to change it.

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1                   And once they decided to change it, they  
2 had been on notice throughout. The fact that it's  
3 there -- and the case law again -- and I can  
4 probably recite -- I don't know if "case law" is the  
5 right word -- the closest place I can put my hands  
6 on it is from a jury instruction. I think it's one  
7 of the ones that I tendered to the Court.

8                   Of course, I can't put my hands on it.  
9 Somewhere in this pile of papers, I have a  
10 definition specifically -- I thought it was in my  
11 jury instructions -- of constructive notice.

12                   But it's to the effect that if something  
13 exists for a sufficient period of time that the  
14 individual -- in this case, the owner, Sugarland  
15 Run -- should have known about it if they were  
16 using -- it's either reasonable or ordinary care,  
17 then they are charged with notice.

18                   And certainly our argument would be if  
19 one didn't consider walking out there and dropping  
20 pavement down beside these boxes as being actual  
21 notice, the fact that it existed in a precarious

Response of counsel for Halfmann to objection

22 situation for in excess of 20 years before the bomb  
23 went off is more than adequate and reasonable time

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1 to discover the problem.

2 I know I've probably spoken longer than  
3 Your Honor wishes me to. I don't know how otherwise  
4 to address Mr. Robey's argument. It seems to me  
5 this is fairly basic and straightforward.

6 If I'm missing something, it wouldn't be  
7 the first time. I tell you, Your Honor, I simply do  
8 not understand the problem of what the objection is.

9 THE COURT: Before I hear in rebuttal, I  
10 want to ask a question or two.

11 It's Paragraph -- it's Count Number 4 --

12 MR. VAUGHN: Yes, Your Honor.

13 THE COURT: -- that is the allegation  
14 against the defendant homeowners association. Am I  
15 correct?

16 MR. VAUGHN: Yes, ma'am.

17 THE COURT: And among the things that are  
18 alleged, you allege that they own and are  
19 responsible for the care and maintenance of the  
20 common areas, and you allege -- or you don't allege  
21 it.

22 Maybe you allege it in -- by reference.  
23 Paragraph Number 25, you say that these are path

1 systems -- system of path -- of walkways and/or  
2 pathways utilized by the public.

3 And then in Paragraph Number 27, you  
4 refer to persons utilizing the common area,  
5 including the plaintiff. So your allegation there  
6 is that the plaintiff or the plaintiffs' decedent --  
7 part of this cause of action arises because he is a  
8 member of the public using the path owned by the  
9 homeowners association.

10 Am I reading that correctly? You don't  
11 allege that he has some other entitlement, vis-a-vis  
12 the homeowners association, other than as a member  
13 of the public using the common way held open to the  
14 public. Am I correct?

15 MR. VAUGHN: No. I don't think that  
16 would limit my assessment or assertion as to what he  
17 was.

18 THE COURT: Well, tell me where in the  
19 allegation you allege a different duty, a different  
20 standard.

21 MR. VAUGHN: Well, I don't know if that  
22 implies a different duty or different standard. The  
23 Declaration is what identifies what this member of

1 the public is. In this particular instance, the  
2 Declaration includes him within the definition of a  
3 member. And I thought --

Response of counsel for Halfmann to objection

4                   THE COURT: Do you allege, then, that  
5   that creates some other standard of care or some  
6   other degree of liability other than the language  
7   used within Paragraphs Number 23 and 28 accounts  
8   for?

9                   MR. VAUGHN: What I'm responding to --  
10   and maybe this -- I hope this is what you're asking,  
11   because I'm not a hundred percent sure. Mr. Robey  
12   used the phraseology -- "licensee," I believe, is  
13   the phrase that he used.

14                  And he uses that intentionally, and I  
15   respect his argument. He has a right to make the  
16   argument that licensee, by definition, implies a  
17   relatively low standard.

18                  And Robbie Halfmann was not a licensee.  
19   That was not his standing in this particular  
20   instance. Worst case scenario, he was an invitee,  
21   which gives a duty of at least ordinary and  
22   reasonable care.

23                  I made the comment that it's my belief

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1   that since he is also a member of the association,  
2   that, in fact, he does have that -- that there's  
3   probably even a higher standard, but I think I said  
4   specifically, I don't know what it is.

5                  And I'm not sure you can get too much  
6   beyond the standard owed to an invitee, other than

Response of counsel for Halfmann to objection

7 strict liability, I suppose. But my position  
8 certainly would be that he's entitled to the  
9 protections at least at the level of an invitee.

10 THE COURT: Do you believe you've alleged  
11 he's an invitee?

12 MR. VAUGHN: Yes, ma'am.

13 THE COURT: And you've alleged it because  
14 you allege that this is a common area used by the  
15 public and that the plaintiffs' decedent was a  
16 member of the public lawfully using the premises?

17 MR. VAUGHN: That and in addition to the  
18 Declaration and the covenants, plus the --

19 THE COURT: You alleged that as part of  
20 the duty?

21 MR. VAUGHN: I don't think you -- to my  
22 knowledge, I do not believe that one in a notice  
23 pleading is to define what they believe the status

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1 of a particular individual is.

2 THE COURT: All right.

3 MR. VAUGHN: In this particular instance,  
4 the facts as I have set them out are that he was in  
5 Meadowland Elementary School, which certainly makes  
6 it clear that he is a resident of Sugarland Run, or  
7 he wouldn't otherwise be going to that school; he's  
8 riding his bicycle, which further verifies the fact  
9 that but for the fact that he lived within a mile of

Response of counsel for Halfmann to objection

10 the school, he wouldn't be riding his bicycle; that  
11 persons know that people who go to that school ride  
12 their bicycles. Those allegations are incorporated  
13 into Count 4.

14 THE COURT: Well, those are the facts,  
15 but if I don't address this issue now, clearly it's  
16 going to be an issue in the instructions.

17 I faced a similar question in a jury  
18 trial just right about the same point that I'm  
19 facing this issue in this case. And I had a  
20 terrible time then, and I feel I'm having a terrible  
21 time now, understanding what the theory of the case  
22 is.

23 And yet the theory of the case, as pled,

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1 may have a great deal to do with how the Court rules  
2 on this issue, as well as how the Court would rule  
3 on providing instructions. That's why I'm asking  
4 this question.

5 It seems to me from these pleadings that  
6 you allege that this is a common area; the plaintiff  
7 was using, as a member of the public, these  
8 premises, as he had a lawful right to do; and that  
9 the homeowners association who owned these premises  
10 had notice and knowledge of an unreasonably  
11 dangerous condition.

12 And my question to you is: Do you not,

Response of counsel for Halfmann to objection

13 then, allege actual notice and the general standard  
14 of negligence?

15 MR. VAUGHN: With regard to the former  
16 question, I allege notice, which constitutes --  
17 which is consisted of both actual and constructive  
18 notice.

19 THE COURT: Did you allege constructive  
20 notice?

21 MR. VAUGHN: Notice -- as I view it and  
22 as I have read the instructions and as I have read  
23 the law, notice is notice, whether it comes

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1 constructively or whether it comes actually.

2 There is no requirement that I used the  
3 word "actual or constructive notice." Those are  
4 legal terms that have no meaning in terms of -- I  
5 should say have no place in the term of a pleading.

6 Notice is the concept that I pled. And  
7 there's no question in my mind that that pleading  
8 relates to and is referring to notice, which  
9 encompasses both types, which is what the  
10 instructions refer to, if I could put my hand on it,  
11 when it deals with premises liability, whether it be  
12 a municipality, whether it be a landlord, whether it  
13 be --

14 THE COURT: Do you view this as a  
15 premises liability case?



Response of counsel for Halfmann to objection

16 MR. VAUGHN: I'm using that phrase  
17 colloquially. In this instance, it's the owner of  
18 property who has a duty to people utilizing that  
19 property to make sure that it does not have an  
20 unreasonably safe -- unreasonably dangerous  
21 condition upon it.

22 THE COURT: So your interpretation of the  
23 allegation of your pleading is actual, constructive,

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1 or is it knew or should have known, or does that  
2 make any difference?

3 MR. VAUGHN: I don't think it makes any  
4 difference. I think that is what actual --  
5 constructive notice is that the problem has existed  
6 for a sufficient amount of time that had you been  
7 using or exercising ordinary care, you would have  
8 become aware of it. Let me take a moment to see if  
9 I can find that specific instruction.

10 I must have stuck it somewhere else. But  
11 that's the best answer I can give, if I understand  
12 Your Honor's questions.

13 THE COURT: Point me to your proposed  
14 instruction which tells me from your theory of the  
15 defendant homeowners association's duty of care and  
16 how they have breached it.

17 MR. VAUGHN: Item 29 -- Instruction 29  
18 and 30, and there should actually be one more.

Response of counsel for Halfmann to objection

19     Somehow or another, the third one must have gotten  
20     left in the Xerox machine. The third one defines  
21     constructive and actual notice.

22                 Those are derivative -- for the Court's  
23     information, I take no pride in authorship. Those

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1     are derivative of the instructions having to do  
2     with -- the two categories that I pulled out there  
3     would be the most direct way to do it.

4                 There is one, a municipality's duty  
5     relative to maintenance of facilities that are used  
6     by members of the public, but they're also very  
7     similar to the instructions that are in -- I think  
8     in two other places, landlord-tenant, and I call  
9     it -- I forget what the jury instructions refer to  
10    it as, but owner-occupant or something like that,  
11    along these lines. But I also did draw upon the  
12    language of the two cases that I cited a few minutes  
13    ago.

14                THE COURT: And tell me the names of the  
15    two cases again, please.

16                MR. VAUGHN: I was afraid you were going  
17    to ask me that. Here they are. The first one I  
18    referred to was Roll Our Way Rinks versus Smith, 218  
19    Va. 321, and Apartments versus Bisson, B-I-S-S-O-N,  
20    207 Va. 474.

21                It's also referred -- one of these cases

Response of counsel for Halfmann to objection

22 refers to an earlier case of Cannon versus Clark,

23 which is -- I think the roller blade case refers to

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1 this one -- 209 Va. 708, which again talks about the

2 obligations of an owner to invitees on the property

Argument of Counsel for Kabiri as to the testimony of  
Jennifer Toole

3 and again recites the basic statement of law that I  
4 put forth earlier.

5 There is a third jury instruction that I  
6 cannot explain why it's missing, but it must be back  
7 at my office, but I do have one other that I will  
8 tender, Your Honor.

9 THE COURT: And the two instructions that  
10 you are offering are ordinary care instructions; is  
11 that correct?

12 MR. VAUGHN: Yes, Your Honor, I believe  
13 they are. Instruction 29 is ordinary care.  
14 Instruction 30 is ordinary care.

15 THE COURT: Thank you.

16 Ms. Snee, did you have some argument that  
17 you wish to make upon this issue?

18 MS. SNEE: Yes. I think I actually have  
19 decided, contrary to yesterday, I do have a bone in  
20 this fight or a dog in this fight.

21 It appears, and I think correctly, that  
22 you are going beyond, at this juncture, whether or  
23 not Ms. Toole can testify, because Ms. Toole is

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1 going to testify as to a number of things, some  
2 which would be admissible and some that would not.

3 If you look at Mr. Robey's argument that  
4 he cites under the case of this case, I don't

Argument of Counsel for Kabiri as to the testimony of  
Jennifer Toole

5 believe Ms. Toole should be allowed to testify that  
6 based on her opinion, this was an unreasonably  
7 dangerous bike path.

8 I don't believe she should be permitted  
9 to testify that the homeowners association knew it  
10 was an unreasonably dangerous bike path. One, I  
11 would think that might be the ultimate issue for the  
12 jury to decide.

13 But I do believe that she should be  
14 permitted to testify, as a bike path person, that it  
15 has bad sight distances; that it creates -- not  
16 creates, but that based on its elevation, it's hard  
17 for bicyclists or cars to see, because all of those  
18 are relevant, one, to the issue of simple negligence  
19 of both Robbie and Mrs. Kabiri.

20 They are also admissible in regards to  
21 showing what the condition was at the time in a  
22 little more elevated, by an expert, opinion in  
23 regards to bike paths.

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1 But I don't believe she's qualified to  
2 testify to that ultimate issue; i.e., it was an  
3 unreasonably dangerous condition, which, to me, has  
4 not been laid in regards to her giving that ultimate  
5 issue, if that's what he's asking the ultimate issue  
6 to be.

7 And I think at that point, we're sort of

Argument of Counsel for Kabiri as to the testimony of  
Jennifer Toole

8     jumping beyond her testimony. And he is attempting  
9     to establish -- and I think you're correct in  
10    asking, what are you charging?

11                 And from what it appears he's charging,  
12    he's charging that they had a duty to maintain,  
13    which I think they actually might concede, based on  
14    the exhibits that are in. They had a duty to  
15    maintain the bike path.

16                 I believe that there won't be any  
17    evidence that's going to say anything about  
18    specifically that issue. In other words, he's not  
19    bringing somebody from a homeowners association to  
20    say, yes, when you have the duty to maintain it, it  
21    means you do X, Y, and Z. There's nobody going to  
22    testify to that.

23                 The question is: Can the jury determine,

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1    based on this testimony, that the sight distances  
2    were poor; that this bike path went beside two  
3    electrical elements -- can they determine, based on  
4    that evidence, whether or not they have violated the  
5    standard or duty of care, or will that be something  
6    you'll have to decide on a Motion to Strike? which I  
7    think we are sort of incorporating at this point.

8                 Those are the things that I see. And I  
9    don't see that she can be excluded completely,  
10   because her testimony on sight distances, her

Argument of Counsel for Kabiri as to the testimony of  
Jennifer Toole

11 testimony on it falls two inches away, and that a  
12 bike path shouldn't do that, why can't she testify  
13 to that? Why isn't that relevant to all the issues  
14 in the case?

15 But I don't think she can go beyond that,  
16 and that's what Mr. Robey's case talks about. In  
17 his particular case, the expert would be able to  
18 talk about, it looks like, industry standards of --  
19 he could testify about installing and repairing  
20 heating systems, but the Court said no, no, no, you  
21 can't give an opinion, as somebody who installs and  
22 repairs commercial heating units, about utility  
23 businesses. You're jumping outside your avenue.

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1 And I think Mr. Robey's correct on that.  
2 She can't jump out of her arena as a bicycle expert  
3 and now become somebody who's an expert on  
4 homeowners associations. But she can stay within  
5 her expertise of bike paths and still give us  
6 relevant testimony to be heard.

7 And in regards to the rest, I think we're  
8 starting -- I'm afraid we're starting to run to a  
9 Motion to Strike, which I'm sure there's going to be  
10 argument about, but it's a little premature for  
11 that.

12 THE COURT: In rebuttal, Mr. Robey?

13 MR. ROBEY: Judge, I disagree with

Argument of Counsel for Kabiri as to the testimony of  
Jennifer Toole

14 Ms. Snee, because if this witness is not presented  
15 to testify as to an issue at standing or a charge in  
16 this case or a claim, then her testimony is not  
17 relevant.

18 I want to start and finish with the  
19 pleadings, because that's where I say the case  
20 should be. We are charging that SRHOA had notice



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Jennifer Toole

21 and knowledge of the unreasonably dangerous  
22 condition of the location and area in which the  
23 subject tragedy occurred.

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1           Despite said notice and knowledge, SRHOA  
2 failed to take steps as were reasonable and  
3 necessary to ensure that persons utilizing the  
4 common areas, including the plaintiff, could do so  
5 in a safe manner.

6           It doesn't say we failed to maintain. It  
7 says we had knowledge. And when we talk about  
8 constructive knowledge, you know, the buzz phrase is  
9 "knew or should have known."

10           And if it had been alleged that we should  
11 have known, then, yes, we were on notice that they  
12 were charging us with constructive knowledge,  
13 assuming they could prove it.

14           That's not what they pled. They said,  
15 you knew of a dangerous condition and you didn't do  
16 anything about that. That's exactly what they've  
17 pled.

18           But now we're going way far afield of  
19 that allegation into something else, and that is:  
20 You should have known of the industry standards of a  
21 landscape architect. And that's the problem with  
22 this particular witness, Judge.

23           Now, counsel talks about the Giant case

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1 or a Giant case or a grocery store case, et cetera,  
2 et cetera. If, in fact, I were representing Giant  
3 Food in a slip and fall in this case and the  
4 pleading was exactly as I've read and exactly as the  
5 pleading we have here, I would still object, because  
6 they're only entitled to prove what they've pled.

7 They're not entitled on the trial date to  
8 come in here and ambush us with a brand-new theory  
9 or cause of action that we've had no time to prepare  
10 for.

11 If this plaintiff had alleged that we  
12 violated an industry standard that applies to  
13 homeowners associations, we could have brought in  
14 people to either establish there is no such standard  
15 or, you know, the standards are as follows.

16 They didn't do that. Now is the time  
17 they want to come in and create a brand-new cause of  
18 action. This witness isn't going to help the jury  
19 as an expert on whether we knew. That's a matter of  
20 fact, and there have been no facts proved. That's  
21 my first problem with this.

22 Now, if this were a slip and fall  
23 involving an invitee, and they had properly pled it,

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1 then they might argue you knew about a dangerous  
2 condition or you had constructive knowledge, and

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Jennifer Toole

3 that's not based upon the fact that when this thing  
4 was built by somebody else in 1973 or '74.

5 And I might point out that essentially  
6 what counsel is saying is, you know, we all know how  
7 these things are laid out. This subdivision is laid  
8 out by a team of architects for a builder and a  
9 developer, and it then goes through painstaking  
10 processes right here in Leesburg over zoning and  
11 such.

12 And every piece of ground has to be  
13 approved by the county, and some parts of it, by the  
14 state, including the highways, before it can be  
15 built.

16 Now, all of that was done in this case,  
17 and yet we're going to have a landscape architect  
18 come in here and tell us it was all wrong and we're  
19 held to that standard.

20 That's the thing I find the most amazing  
21 about this attempt, is after all that happened and  
22 all the approvals and governmental approvals of this  
23 design and construction, one lady is going to come

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1 in here, based upon nothing but her own opinion of  
2 her industry standards, and tell us that it was all  
3 wrong and somehow we're liable for that.

4 If that were the case, Judge, then we  
5 ought to send out a notice to every homeowners

Rebuttal of Counsel for SRHOA as to the testimony of  
Jennifer Toole

6 association in the Commonwealth of Virginia, and  
7 they all better be sitting back here, because this  
8 lady's going to say, here are the industry standards  
9 required of a homeowners association, even though  
10 I'm not a homeowner or association; I'm a landscape  
11 architect; and if you don't follow these standards,  
12 you're negligent.

13 And then all these folks have to run out  
14 and hire landscape architects to inspect every inch  
15 of their bike paths and make sure they comply with  
16 this witness's opinion.

17 Now, that just can't be correct, Your  
18 Honor. And that's essentially what the Supreme  
19 Court said in the Hegwood versus Virginia Natural  
20 Gas case.

21 And if I might, with respect to Powell's  
22 opinion that the gas company, quote, "should  
23 have" -- and this is what's argued here, even though

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1 it wasn't pled -- "discontinued the gas supply at  
2 the meter," the trial court observed that this was  
3 simply Powell's opinion and was not based on his  
4 knowledge of industry standards and practices.

5 See, that's exactly what we have here.  
6 This is Toole's opinion, based upon landscape  
7 architectural theory or her organization's, quote,

Rebuttal of Counsel for SRHOA as to the testimony of  
Jennifer Toole

8 unquote, "standards" as to what we should have done  
9 with this bike path, notwithstanding the fact that  
10 it was designed and built by a team of experts,  
11 approved by the county and approved by the state.  
12 This is what her opinion is going to be, based upon  
13 her county's standards.

14 And that's okay, except for we've got  
15 these homeowners associations who are sitting back  
16 thinking that their bike paths are okay, because  
17 they were designed by a team of experts, builders,  
18 developers, who invested millions of dollars,  
19 approved by the county, the localities, and the  
20 states, and this lady says they're all negligent.

21 They're going to get sued, Judge, because  
22 keep this in mind: This lady's going to say, well,  
23 if your sight line's not A, B, and C and your

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1 setback's not the following, then you're negligent.  
2 It's unreasonably dangerous.

3 Now, somebody can print that in a  
4 transcript and take it out, because this Court has  
5 sanctioned it, and that's the standard that all of  
6 the homeowners associations would have to comply  
7 with, Judge.

8 If it's true in this case, it becomes a  
9 matter of law. Then why isn't it true in every  
10 other case? And if that seems to be an absurdity,

Rebuttal of Counsel for SRHOA as to the testimony of  
Jennifer Toole

11 it's because this lady's not going to tell us what  
12 the applicable standard is.

13 I mean, if we took this standard, this  
14 lady's opinion, over to the zoning commission and  
15 asked the zoning administrator to go out and cite a  
16 homeowners association for not complying with the  
17 standard, we'd be laughed out of his office. They  
18 can't do that, because it's not the law. That's the  
19 problem.

20 So in a nutshell, they didn't sue us for  
21 this. They sued us for actual knowledge. They  
22 didn't sue us for failure to maintain. They didn't  
23 sue us for under anything other than you had actual

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1 knowledge and you didn't do anything about it.  
2 That's exactly what they've done. And this lady  
3 can't help us and can't help the jury in that  
4 respect.

5 Number two, this witness is not qualified  
6 to render a standard by which the defendant  
7 homeowners association has to comply. She's not  
8 qualified to do that. Frankly, there is no  
9 standard. We've got no evidence whatsoever that  
10 there's any such standard.

11 And finally, this case hasn't changed  
12 since you made a ruling yesterday that this witness  
13 was not qualified to testify. The evidence hasn't

Rebuttal of Counsel for SRHOA as to the testimony of  
Jennifer Toole

14 changed. Nothing has changed.

15 Counsel's argument using grocery store  
16 cases where you do have invitees -- you know, these  
17 people were not invitees on this property. They're  
18 licensees.

19 An invitee is somebody that I invite into  
20 my shop for my benefit, my benefit. That's what  
21 grocery stores do. They bring you in to buy their  
22 supplies and their equipment and their products.

Rebuttal of counsel for SRHOA  
Ruling of Trial Court

23 You are an invitee, because they're inviting you in

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1 for their purposes.

2 If you're going somewhere for your  
3 purposes, you're a licensee, and that's exactly what  
4 we have in this case.

5 MR. VAUGHN: I don't suppose the Court  
6 would want to hear further.

7 THE COURT: No, thanks.

8 MR. VAUGHN: I thought I'd try.

9 THE COURT: The objection before the  
10 Court by the homeowners association is that the  
11 Court preclude the plaintiffs from producing further  
12 as a witness Jennifer Toole.

13 Yesterday, the Court attempted to be  
14 clear on the record that the witness had been taken  
15 out of turn and that part of what was being argued  
16 at that time was from the framework of essentially  
17 no facts upon which the Court could rule upon the  
18 issues at bar.

19 Without determining whether the  
20 allegations of the Amended Motion for Judgment  
21 allege constructive knowledge or notice or alleged,  
22 quote, "should have known," end quote, and realizing  
23 that the plaintiffs have not yet rested their case,

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1 and without intending to rule on any other



Rebuttal of counsel for SRHOA  
Ruling of Trial Court

2 subsequent specific objections to any questions  
3 which may hereafter be placed before the witness, I  
4 overrule the motion to exclude further call as a  
5 witness of Jennifer Toole, to which, Mr. Robey, you  
6 may have an objection and exception. Ms. Snee, if  
7 you wish, you may as well.

8 The witness may be called. Are we ready  
9 to have the jury return?

10 MR. ROBEY: She's already been qualified,  
11 Judge. I assume we're going to go right to her  
12 questions?

13 THE COURT: I do not believe that I  
14 determined that she had been qualified. I believe  
15 that I ruled that it was premature.

16 MR. ROBEY: I think she was offered and  
17 you did not rule. I agree, Judge.

18 THE COURT: So the witness may return --  
19 I mean the jury may return.

20 MR. ROBEY: While we're waiting for the  
21 jury, Judge, I think you're correct, and I will be  
22 anxious, because I think the question is going to  
23 be: What is she offered to prove.

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1 THE COURT: Well, I don't know if  
2 Mr. Vaughn's question is going to be to ask the  
3 Court to determine to accept her as an expert. I'm  
4 trying not to predetermine matters.

Rebuttal of counsel for SRHOA  
Ruling of Trial Court

5                   Anybody have a question?

6                   (Whereupon, the jury entered the

7    courtroom.)

Direct examination of Jennifer Toole

8 THE COURT: The plaintiffs may call their  
9 next witness.

10 MR. VAUGHN: Jennifer Toole.

11 (Whereupon, the witness entered the  
12 courtroom.)

13 THE COURT: Ma'am, you were previously  
14 sworn. You remain under oath.

15 THE WITNESS: Okay.

16 Whereupon,

17 JENNIFER TOOLE,

18 a witness, was recalled for further examination by  
19 counsel for the plaintiffs, and having been  
20 previously duly sworn by the clerk, was further  
21 examined and testified upon her oath as follows:

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1 DIRECT EXAMINATION

2 BY MR. VAUGHN:

3 Q Good afternoon. Just so the record's  
4 clear, would you state your name, please?

5 A Jennifer Toole.

6 Q Ms. Toole, I want to go back to what I  
7 think was marked but not yet admitted, by virtue of  
8 your CV or your resume.

9 A Right.

10 Q Can you tell us what relevant experience

Direct examination of Jennifer Toole

11 you've had vis-a-vis pedestrian slash bike pathways  
12 in communities or homeowners associations?

13 A Well, there's a lot of different things  
14 that I've done over the years. I've designed trails  
15 and bike paths for local governments, state  
16 governments, homeowners associations.

17 I've -- I have -- I'm -- I was -- I'm an  
18 elected board member of the Association of  
19 Pedestrian and Bicycle Professionals. I have been  
20 involved in updating design standards as new  
21 editions are published by FHWA and AASHTO.

22 In the past, I've been asked by  
23 homeowners associations to come in and look at their

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1 trail systems that are getting older to see if they  
2 meet standards or if there's anything they can do to  
3 make safety improvements.

4 Q Okay. And in your field, so to speak, is  
5 there a distinction of what standards apply when you  
6 define who the owner of the property is?

7 A Not based on who the owner is. All the  
8 same standards apply, regardless of, really, who the  
9 owner is.

10 Q Let me refine my question a little bit  
11 more. Are there different standards in the industry  
12 for homeowners associations versus a private  
13 individual or some other public concern?

Direct examination of Jennifer Toole

14           A       No, sir, there's not.

15           Q       And are you familiar with the standards  
16   for the construction -- design and construction of  
17   bicycle slash pedestrian pathways as they existed in  
18   the 1970s -- we'll start with that, but certainly  
19   the 1974 time frame as they would have existed for  
20   the particular path we're dealing with here today?

21           A       The design standards that would have  
22   applied in 1974 would have been the 1971 Manual of  
23   Uniform Traffic Control Devices, which is basically

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1   the only standard that discussed bike paths and  
2   pedestrian crossings.

3           Q       Are you familiar with those?

4           A       Yes, I am.

5           Q       Are you familiar with the standards as  
6   they existed in January of 1995 as they would relate  
7   to this particular type -- this particular pathway?

8           A       Yes, I am.

9           Q       What standards would have been applicable  
10   at that point in time?

11           A       The Manual of Uniform Traffic Control  
12   Devices would still have been applicable. It would  
13   have been the 1988 version of that document.

14                   And then, also, by that time, in 1994,  
15   the American Association of State Highway  
16   Transportation Officials had published "The Guide

Direct examination of Jennifer Toole

17 for the Development of Bicycle Facilities."

18 The latest edition that would have been  
19 applied in '95 would have been the '91 edition of  
20 that guide. And I'm very familiar with both of  
21 those documents.

22 Q I think, as you told us before, you've  
23 sat on the committee that helped revise one of

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1 those?

2 A I didn't sit on the committee. I helped  
3 draft new text for the 1999 "Guide for the  
4 Development of Bicycle Facilities." So we took the  
5 '91 guide that would have been applied in '94 and --

6 Q That's been updated since the '91 time  
7 frame?

8 A That's right. It was just published.

9 Q You were involved in that process?

10 A Right.

11 Q Can you tell us, for lack of a better way  
12 to express it, what field are we talking about  
13 specifically? Can you put a name on it that we can  
14 use?

15 A Well, it sort of crosses different  
16 fields. There's elements of engineering. There's  
17 elements of landscape architecture and urban  
18 planning.

19 So the Association of Pedestrian and

Direct examination of Jennifer Toole

20 Bicycle Professionals is the first attempt to sort  
21 of call it what it is, which is bicycle and  
22 pedestrian planning.

23 Q Okay. Let me write that down. Bicycle

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1 and pedestrian planning?

2 A Uh-huh.

3 MR. VAUGHN: Your Honor, at this time, I  
4 would move Ms. Toole be accepted by the Court as an  
5 expert in bicycle and pedestrian planning.

6 THE COURT: Any objection?

7 MS. SNEE: No objection.

8 MR. ROBEY: I object, Judge, because  
9 planning has nothing to do with this case. We  
10 didn't plan this. So yes, I do object. It's  
11 irrelevant.

12 THE COURT: Mr. Vaughn?

13 MR. VAUGHN: Your Honor, that's the  
14 acronym or that's the phraseology for the industry.  
15 I'm asking her to be qualified as an expert in the  
16 industry of bicycle and pedestrian planning, which  
17 encompasses the standards to be utilized in the  
18 design and construction of pathways from 1971  
19 through 1995.

20 THE COURT: In rebuttal?

21 MR. ROBEY: This isn't a case about  
22 designing or planning or building initially. We

Direct examination of Jennifer Toole

23 didn't do that. So this witness has to be specific

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1 to the issue outstanding in this case.

2 THE COURT: The objection is overruled.

3 The Court will recognize the witness as an expert in  
4 bicycle and pedestrian planning.

5 BY MR. VAUGHN:

6 Q Okay. Ms. Toole, first I want to ask you  
7 in terms of procedure, are you being paid a fee for  
8 the time that you've expended in this matter?

9 A Yes, I am.

10 Q And what is that fee?

11 A A hundred dollars an hour.

12 Q And is that fee in any way, shape, or  
13 form related to the nature of your opinion, what  
14 opinion you give?

15 A No.

16 Q It's based strictly on time?

17 A Yes.

18 Q And do you serve as an expert witness on  
19 a regular basis?

20 A No, I don't. This is the first time.

21 Q And at my request, did you undertake a  
22 review of the bike path and the specific location  
23 that's involved in this case?

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1 A Yes, I did.



Direct examination of Jennifer Toole

2           Q       Can you tell the members of the jury what  
3   it is that you reviewed, what your review consisted  
4   of, for lack of a better way to express it?

5           A       I have looked at the police report. I  
6   looked at the traffic study or the analysis that was  
7   done by the consultants who looked at -- at the  
8   accident and --

9                   MR. ROBEY: Judge, could we have a  
10   sidebar?

11                  THE COURT: Sidebar.

12                  (Whereupon, a bench conference was held  
13   outside the hearing of the jury, at which time the  
14   following proceedings took place:)

15                  MR. ROBEY: Judge, this witness just told  
16   this jury that VDOT conducted a study after this  
17   accident.

18                  MR. VAUGHN: No, she didn't.

19                  MR. ROBEY: And here we go with  
20   subsequent repairs. I think we're on the verge of a  
21   mistrial. I very much object to this.

22                  And frankly, what she -- what she studied  
23   isn't necessarily relevant to her opinion. I mean,

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1   she wouldn't be allowed to tell the jury what the  
2   study says. I think we're real close to mistrial  
3   over this, and she should be prohibited from going  
4   into it.

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5                   The jury now knows that there was a  
6 post-accident study. Now, it doesn't take much  
7 more. We can't go much further before we have a  
8 mistrial.

9                   MR. VAUGHN: If anybody's prejudiced by  
10 this, it's me. The study she's referring to is not  
11 a VDOT study. It's the one that I objected to being  
12 produced and made available, Virginia Traffic Safety  
13 Consultants.

14                   What she's referring to there is all she  
15 looked at was there were some photographs that were  
16 taken of the scene, measurements done. And in doing  
17 part of her analysis, she reviewed those.

18                   It seems to be very basic information and  
19 very standard and very straightforward. There's no  
20 evidence of any -- there's no -- she has made no  
21 reference whatsoever to anything that's done  
22 post-accident.

23                   MR. ROBEY: She has. She just told the

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1 jury there was a post-accident study, for goodness  
2 sake.

3                   MR. VAUGHN: The study she's referring to  
4 was the Virginia Traffic Safety Consultants.

5                   MS. SNEE: I think he can cross her on  
6 that report, if that's the one she's referring to.

7                   MR. ROBEY: Judge, that simply --

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8 THE COURT: Just a moment, just a moment.

9 Is the witness going to render an opinion  
10 on facts which are not and will not be in evidence?

11 MR. VAUGHN: I don't believe so. The  
12 jury needs to know what it is -- I think the jury's  
13 entitled to know, and it goes specifically to the  
14 weight they're going to give her opinion, how much  
15 effort she took in this or is she shooting from the  
16 hip.

17 It seems to me to be another one of the  
18 very straightforward questions that's turned into an  
19 argument. I'm simply asking her what it is that she  
20 did in order to render her opinion.

21 MS. SNEE: The objection is based on the  
22 fact that what she's looked at and based her opinion  
23 on is a police report, not admissible, not

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1 available, and an expert retained by the plaintiff  
2 who was not disclosed.

3 So therefore, we wouldn't normally be  
4 allowed to go into that area. And I don't know the  
5 answer. Everything she's looked at is something we  
6 won't be allowed to cross on. So everything she's  
7 relying on is not anything that would be admitted  
8 into evidence or has been admitted into evidence.

9 MR. ROBEY: I enjoin with that, Judge.  
10 This is like any other expert. Now, to the extent

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11 that she read documents -- and let's assume those  
12 documents had measurements -- her telling us what  
13 those measurements were, Judge, is hearsay.

14 If she takes measurements, she can say, I  
15 took measurements. She can rely upon measurements  
16 in a study, but she can't tell us about it. And to  
17 tell us about the study itself, I think is  
18 dangerously close to a mistrial.

19 But whatever studies she's reviewed are  
20 irrelevant. She could never tell this jury what a  
21 study said, even if there were measurements. I  
22 mean, she could render an opinion and she could tell  
23 the jury what she knew as a matter of fact.

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1 But what she relied upon out of other  
2 studies to render an opinion is inadmissible. You  
3 know, we went through that yesterday with 401.1 and  
4 McMunn versus Tatum, et cetera, et cetera.

5 She can't tell the jury what those  
6 studies said. And to get into the fact that the  
7 studies exist is getting us very close to an area  
8 that I say we shouldn't be in. It's not relevant.

9 She gets up there, she can tell us that I  
10 did the following myself; in other words, I went out  
11 there. I made measurements. I looked at sight  
12 lines.

13 That's fine, and she can render an

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14 opinion. And the opinion can be based upon things  
15 that are not in evidence, including those reports,  
16 but she cannot describe the reports. That's  
17 hearsay.

18 THE COURT: Mr. Vaughn?

19 MR. VAUGHN: I do not believe she was  
20 describing anything but by category of what she had  
21 reviewed in the course of being engaged as an expert  
22 to render an opinion in this matter.

23 Again, I thought that was very basic.

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1 And the statute specifically refers to the fact that  
2 if it's -- it doesn't mean if the items to which  
3 they refer are inadmissible, it has no bearing on  
4 whether or not the expert's entitled to rely on  
5 them, if, in fact, they're the type of things an  
6 expert would normally rely upon in forming an  
7 opinion.

8 THE COURT: I'm going to overrule the  
9 objection, but I am concerned that the witness may  
10 not understand the previous rulings of the Court and  
11 testify to matters which exist or did not exist at  
12 the time of the accident in question that may have  
13 come subsequently. I, too, would share a concern  
14 that that would create a mistrial in this case.

15 MR. VAUGHN: I mean, you know, she made  
16 no inquiry as to what was done to the path

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17 subsequently, so I can't imagine how she's going to  
18 express any opinion on that.

19 MR. ROBEY: She's already told us --  
20 started to tell us about a study that was done  
21 afterwards, Judge.

22 MR. VAUGHN: No, a study of the accident,  
23 not of the roadway.

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1 THE COURT: Well, that's not clear from  
2 the evidence at this point that it referred to  
3 studies which were done after the accident, but what  
4 that means is somewhat unclear.

5 MR. VAUGHN: I'll clarify it.

6 THE COURT: So I overrule the objection.  
7 It's your witness. You know the prior rulings of  
8 the Court.

9 MR. VAUGHN: Understood.

10 (Whereupon, the bench conference was  
11 concluded and the following proceedings took place:)

12 THE COURT: The objection is overruled at  
13 this time.

14 BY MR. VAUGHN:

15 Q Let me refine my question so that we can  
16 maybe get a little further in. I'm sure the jury  
17 would like to get this thing to a conclusion as  
18 well.

19 Did you, as a result of the review that

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20 you undertook, formulate an opinion as to whether,  
21 in fact, this pathway, as it existed in January of  
22 1995, was in compliance with the standards as you  
23 phrased them either in 1971 when they first came

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1 into issue or the 1991 standards, if that was the  
2 second? Were you able to formulate an opinion?

3 A Yes, I was.

4 Q And what is that opinion?

5 A The pathway didn't meet the standards of  
6 '91, nor did it meet the standards from 1971.

7 Q And if you could, tell the members of the  
8 jury in what ways it failed to meet the standards,  
9 the existing standards in 1971, or from 1971.

10 A Well, there are actually two main flaws  
11 in the design of the path. First of all, the 1971  
12 guidelines stated that bicycle warning signs should  
13 be placed at any point that a bike path crosses a  
14 road.

15 It's the yellow diamond warning sign with  
16 a bike on it with a subplate that says "Bike  
17 Crossing." In lieu of that, it recommends a  
18 "Pedestrian Crossing" sign, if pedestrian activity  
19 is expected at that location.

20 It goes on to say that in addition to  
21 warning signs that crosswalks are recommended,  
22 particularly at locations where pedestrians would be

Direct examination of Jennifer Toole

23 expected, such as mid-block locations. And it also

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1 then recommended that sight lines be maintained in  
2 those locations.

3 Q Can you describe for us what you mean by  
4 "sight lines"?

5 A Good visual -- visual access to --  
6 between the motorist and any -- any pedestrians that  
7 would be entering the roadway.

8 Q Would that include sight lines for the  
9 pedestrians as to approaching motor vehicles as  
10 well?

11 A They don't state anything about  
12 pedestrian sight lines.

13 Q We're dealing with the sight lines of  
14 approaching traffic?

15 A That's right.

16 Q And in this particular instance, this  
17 particular area -- I was going to use the word  
18 "site" again. In this particular area, do you have  
19 an opinion as to whether or not -- and maybe that's  
20 what you've just said -- this particular area had  
21 the required or appropriate sight lines?

22 MS. SNEE: Your Honor, object as to the  
23 basis for foundation first.

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1 MR. VAUGHN: I thought we'd already gone



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2 through that. I apologize, Your Honor. We had  
3 qualified and gone through that, I believe, and it  
4 was one of the areas that we had discussed.

5 MS. SNEE: I don't believe she's laid a  
6 foundation in regards to her ability to state what a  
7 sight line would be. Is it versus distance? She  
8 has not laid that type of foundation as to what  
9 she's going to do.

10 THE COURT: Sustained.

11 BY MR. VAUGHN:

12 Q A sight line is specifically what?

13 A When a designer goes to lay out an  
14 intersection, you would look at the speed limit on  
15 the road, or the speed of prevailing traffic, and  
16 make a determination as to whether a motor vehicle  
17 would have enough adequate visual distance to see a  
18 pedestrian at that crossing and stop in time to  
19 avoid hitting that person. And the same in later  
20 standards goes for a bicyclist approaching an  
21 intersection.

22 Q And in terms of this particular pathway,  
23 did you undertake to determine whether, in fact, the

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1 sight distance was adequate under either the '71 or  
2 the '91 standards?

3 A Yes, I did.

4 Q And as a result of that, did you

Direct examination of Jennifer Toole

5 formulate an opinion as to whether, in fact, the  
6 sight distances were appropriate?

7 A The sight distances in this location are  
8 significantly blocked on one side, on the north side  
9 of the path. On the other side, there's adequate  
10 sight distance.

11 On the north side of the pathway, there's  
12 two junction-type boxes that are very large and that  
13 are immediately adjacent to where the trail was at  
14 that time.

15 MR. VAUGHN: Let me, if I can, borrow  
16 Plaintiffs' Exhibit Numbers 1 and 2.

17 THE COURT: Yes.

18 THE CLERK: (Tendering documents.)

19 BY MR. VAUGHN:

20 Q Let me show you a photograph that's  
21 previously marked and admitted as Plaintiffs' Number  
22 1. Actually, let me use Number 2. It's a little  
23 closer shot.

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1 Referring to Plaintiffs' Exhibit Number  
2 2 -- I'm sorry, Your Honor, if I could approach the  
3 witness?

4 THE COURT: Yes.

5 BY MR. VAUGHN:

6 Q Can you tell us: Are the boxes that  
7 you've described depicted in that particular

Direct examination of Jennifer Toole

8 photograph (tendering document)?

9 A Yes, they are. They're right there  
10 (indicating).

11 Q And for the jury, you're referring to the  
12 two boxes that are to the right of the trail?

13 A That's right.

14 Q And maybe you've said this in terms that  
15 I'm not quite intelligent enough to pick up on.  
16 What is it about that that creates the problem?

17 A They're in proximity to the path as well  
18 as to the actual intersection. They -- they block  
19 access for both the motorist and the path user  
20 approaching the intersection.

21 So the -- and then there's an additional  
22 problem with the path sloping down towards the  
23 intersection. There's only a very narrow window

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1 where the path user can see the roadway, and there's  
2 also a narrow window for the motorist to see the  
3 path user.

4 So by the time the path user clears those  
5 two boxes and is able to see around the boxes to  
6 approaching traffic, that's not enough time, if  
7 they're going at any speed, to stop and avoid a car.

8 Q And the particular road we're dealing  
9 with here, Sugarland Run Drive, in the vernacular of  
10 bicycle and pedestrian planning, does this

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11 particular road have a description, a category, a  
12 type of road? Does that deal directly with the type  
13 of sight distances that are required?

14 A I've seen it described as a secondary  
15 road and as a collector road. So it's a pretty busy  
16 road. It's not considered to be a neighborhood  
17 street.

18 Q You made reference as well when you were  
19 referring to Exhibit Number 1 that the pathway  
20 itself slopes down towards the roadway; is that  
21 correct?

22 A That's right.

23 Q And do you have an opinion -- and I think

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1 you touched on it a moment ago -- do you have an  
2 opinion as to whether that in addition creates a  
3 problem that causes it not to comply with the  
4 applicable standards of '71 or '91?

5 A Well, the 1991 standards state that  
6 bicycle paths should not have a steeper grade than  
7 five percent, which was a bit in conflict with ADA  
8 standards, which -- for ramps, which state that a  
9 path can't be more than eight percent.

10 So the slope on this trail is anywhere  
11 from ten to fifteen percent just prior to the  
12 intersection. So in order to stop at the  
13 intersection, you have to brake really hard.

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14 MS. SNEE: Your Honor, I'm going to  
15 object that that's speculation in regards to that.  
16 First, she's been qualified as an expert to testify  
17 as to how it should be designed. She has testified  
18 that the standards for sight distance were only for  
19 the motor vehicles, not the bicyclist.

20 She's now making, no offense, a gross  
21 statement based on this grade whether or not how  
22 fast somebody could stop or not stop. And she's not  
23 been qualified as an expert in that regard.

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1 THE COURT: Mr. Vaughn?

2 MR. VAUGHN: Your Honor, I think I asked  
3 her specifically in what fashion does this pathway  
4 not comply with the applicable standards of either  
5 '71 or '91, and she identified two, if not three,  
6 different ways.

7 One related to the sign, two related to  
8 the sight distance and the problems created by these  
9 boxes, and the third related to the fact that the  
10 pathway slopes as it comes towards Sugarland Run  
11 Drive and what the standards require to comply in  
12 that respect. I think she's specifically said eight  
13 degrees versus what this one was, ten to fifteen  
14 degrees.

15 MS. SNEE: And I have no objection to her  
16 giving that testimony. It's that final leap that

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17 she makes at the end: Therefore, making it blank.

18 That's the part that I have the objection to.

19 THE COURT: Sustained as to the latter

20 part of the answer following the words "ten to

21 fifteen percent."

22 BY MR. VAUGHN:

23 Q Ten to fifteen percent exceeds the

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1 standards -- the requirement of the standards?

2 A Right, the 1991 standards.

3 Q And what is the reason that an eight

4 percent -- don't relate it specifically to this

5 case, but what is the reason this pathway -- what is

6 the reason -- I withdraw the first part of the

7 question and ask specifically: What is the reason

8 the eight percent is the standard?

9 MS. SNEE: I would object to that.

10 What's it matter? It's irrelevant to our issues.

11 If it's the standard, it's the standard.

12 THE COURT: Mr. Vaughn?

13 MR. VAUGHN: The basis for the standard

14 is a direct link to what the issue is in this case,

15 whether, in fact, in Ms. Snee's point of view that

16 Mr. Halfmann was at fault in the accident, or the

17 association's viewpoint that they have no

18 responsibility either way. It's a direct

19 relationship to that.

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20 MS. SNEE: I would disagree. There has  
21 been no foundation laid that as a result of the  
22 grade being fifteen percent versus eight percent,  
23 Robbie Halfmann was unable to stop his bicycle.

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1 There's been no testimony to that. They're trying  
2 to get to an ultimate issue that they cannot.

3 THE COURT: Sustained.

4 BY MR. VAUGHN:

5 Q Ms. Toole, if you'll make reference to  
6 that photograph as well, to the right of the  
7 pathway -- I think you can see it on that one, if I  
8 could approach again?

9 THE COURT: Yes.

10 BY MR. VAUGHN:

11 Q See to the right of the pathway on this  
12 photograph appears to be some concrete, the lowered  
13 area of the curb (indicating)?

14 A (Moved head up and down.)

15 Q Are you familiar with that?

16 A Yes. It's a wheelchair ramp.

17 THE COURT: I'm sorry. What was the  
18 answer?

19 THE WITNESS: A wheelchair ramp.

20 THE COURT: Thank you.

21 BY MR. VAUGHN:

22 Q And in the context of bicycle and

23 pedestrian planning, are you familiar with the

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1 purposes and the derivation of how those wheelchair

2 ramps come to be?

3 A Yes, I am.

4 Q Can you tell us how those come to be and

5 why?

6 A Usually for two different reasons.

7 MR. ROBEY: Judge, I'm going to object at

8 this point as being irrelevant. What that comes to

9 be for has nothing to do with this case. I mean,

10 there has been specific testimony about why that

11 particular one came about.

12 Now, for this witness to speculate based

13 upon their one or two reasons is absolutely

14 irrelevant in this case. We know why that ramp is

15 there. I object to this testimony.

16 THE COURT: Mr. Vaughn?

17 MR. VAUGHN: Your Honor, I don't think

18 that any testimony has come in as to, quote, "why

19 that ramp is there." I'm asking this witness what

20 is the purpose of a wheelchair ramp within the

21 context of bicycle and pedestrian planning. Why is

22 it there?

23 MR. ROBEY: Judge, VDOT would have to --

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1 VDOT put that in there, and if anybody's competent



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2 to come in and tell us why it was put there, it  
3 would be VDOT. It wouldn't be this witness, or if  
4 it is, it would be based upon hearsay, so I object.

5 THE COURT: Sustained as to the form of  
6 the question.

7 BY MR. VAUGHN:

8 Q Let me rephrase the question to try to  
9 make it a little more artful. The wheelchair ramp  
10 is what? Define it for us. What do you mean by  
11 that?

12 A It's a depressed curb so that wheeled  
13 users can cross the curb without having to ride over  
14 the curb.

15 Q All right. Does a wheeled user include  
16 someone on a bicycle?

17 A Yes.

18 Q And are you familiar with what  
19 requirements -- why it is -- or is there some  
20 requirement in the industry as to where a wheelchair  
21 ramp needs to be? It's a very poor question.

22 What determines where they go?

23 A The 1991 bicycle -- Design Guide for

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1 Bicycles requires that they go at the entrances to  
2 paths and that they be the same width as the path so  
3 the bicyclists can get on and off the path from the  
4 road.

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5 Q Are those standards also related to or  
6 have any connection with any federal statute?

7 A Yes. They're also -- in order to meet  
8 the Americans with Disabilities Act, wheelchair  
9 ramps are required so that people in wheelchairs can  
10 get on and off trails.

11 Q And in this area, specifically, the  
12 Commonwealth of Virginia in a subdivision such as  
13 Sugarland Run, are you familiar with the process by  
14 which a wheelchair ramp comes to be installed?

15 MR. ROBEY: I object, Judge. What in the  
16 world does that have to do with this case? First of  
17 all, we're talking about a specific ramp, what was  
18 the process by which this ramp came into being?

19 That would be the only thing that could  
20 be argued as being relevant. We'd have to know what  
21 that was. What this witness's opinion is as to how  
22 it normally comes about is absolutely irrelevant in  
23 this case.

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1 THE COURT: Mr. Vaughn?

2 MR. VAUGHN: Your Honor, Mr. Robey wishes  
3 to have only his view of the evidence put before the  
4 jury. Just because his witness takes a position  
5 doesn't mean it's the correct position. We've seen  
6 she's changed her mind.

7 This witness has the capacity and

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8 knowledge to testify how wheelchair ramps come to be  
9 in place, specifically in the Commonwealth of  
10 Virginia in the time frame that we're dealing with.  
11 And I wish to ask her that specific question.

12 MR. ROBEY: But that's irrelevant. The  
13 question is: How did this one come to be? And she  
14 doesn't know that.

15 THE COURT: The form of the question, I  
16 believe, is placed beyond the expertise of the  
17 witness in this case. I sustain it as to the form  
18 of the question.

19 MR. VAUGHN: Let me back up and work my  
20 way towards it, if I might.

21 BY MR. VAUGHN:

22 Q Within the context of bicycle and  
23 pedestrian planning, do you get involved in the

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1 placement of such things as wheelchair ramps?

2 A Yes, we do.

3 Q And in the course of doing that, and  
4 including -- or specifically in the Commonwealth of  
5 Virginia, are you aware of who the parties are that  
6 are involved in that process?

7 A It's usually the owner.

8 MR. ROBEY: I object and move to strike,  
9 Judge. That is irrelevant in this case.

10 THE COURT: Mr. Vaughn?

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11 MR. VAUGHN: Your Honor, this witness is  
12 testifying based on her expertise of how it  
13 transpires. The fact that they have a different  
14 view of what transpired, the jury will decide who's  
15 right and who's wrong.

16 THE COURT: I sustain the objection. The  
17 witness has been qualified as an expert in a certain  
18 particular area, not in the determination and the  
19 construction of wheelchair ramps.

20 MR. VAUGHN: Let me lay some additional  
21 foundation, if I might.

22 BY MR. VAUGHN:

23 Q You indicated that in the course of doing

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1 bicycle and pedestrian planning that that  
2 encompasses the installation, or determination, I  
3 should say, of where these types of ramps go. Is  
4 that correct?

5 A Yes.

6 Q And there are standards to be followed in  
7 determining where they go; is that not correct?

8 A That's correct.

9 Q Can you tell us what those standards  
10 are -- were, certainly, in the 1995 time frame?

11 MR. ROBEY: Judge, once again, what does  
12 that have to do with this case? It's absolutely  
13 irrelevant to any issue outstanding in this case.

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14 THE COURT: Overruled.

15 THE WITNESS: The standards are in two  
16 sources. The Federal Register lists design  
17 guidelines for -- to meet the Americans with  
18 Disabilities Act. That's the first place.

19 Then the second place would be the AASHTO  
20 "Guide for the Development of Bicycle Facilities,"  
21 the 1991 edition, which has specifics regarding  
22 wheelchair ramps and curb cuts when a trail meets a  
23 road.

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1 BY MR. VAUGHN:

2 Q And what you see in that photograph, does  
3 that fit within the definition of what you in the  
4 industry call a curb cut or wheelchair ramp?

5 A Yes, it does.

6 Q Are you familiar in the Commonwealth of  
7 Virginia with the process by which a wheelchair ramp  
8 comes to be placed in a particular location?

9 A Yes.

10 Q And can you tell the members of the jury  
11 what that process is?

12 MR. ROBEY: Judge, that's the same  
13 question that I think you've ruled on and sustained  
14 my motion and my objection twice now. We're right  
15 back to exactly the same question. What those  
16 standards are is irrelevant. The question is what

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17 happened to this particular curb cut.

18 What this witness is going to tell you --  
19 in fact, she's trying to tell you the law, and I  
20 think that's for this Court to decide. What the  
21 standards are, what the law requires should be based  
22 upon what actually happened in this case.

23 And unless this witness has a way of

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1 telling us how this particular curb cut came about  
2 and unless it's contrary -- and frankly, I haven't  
3 heard anything to suggest that -- it's contrary to  
4 what the jury already knows, it's irrelevant.

5 THE COURT: Mr. Vaughn?

6 MR. VAUGHN: One of the issues in this  
7 case is what was done and when to this particular  
8 trail. Why it was done might be a better way to  
9 place it.

10 And this witness is competent and  
11 qualified to testify to the origins of how  
12 wheelchair ramps in the Commonwealth of Virginia  
13 came to be in place in the 1995 time frame.

14 They've asked those questions, those  
15 specific questions. I think this witness, both as  
16 her own direct substantive testimony and certainly  
17 in response to testimony that's already been  
18 elicited from the association itself, has a right to  
19 tell us what that process is. It may or may not be

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20 what has been previously referred to.

21 MR. ROBEY: I think Mr. Vaughn argues my  
22 point, Judge. He says, I want to prove how this  
23 curb cut came about, but I don't have any evidence

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1 to that effect, so I want this witness to speculate  
2 how it could have come about.

3 THE COURT: Sustained.

4 MR. ROBEY: Thank you.

5 THE COURT: Question and answer stricken.

6 BY MR. VAUGHN:

7 Q In determining places where -- let me go  
8 back one step. This particular ramp facilitates,  
9 does it not, as you've described, going from the  
10 pathway to the roadway? I mean, that's the whole  
11 purpose of it, and vice versa, correct?

12 A Right, and to get to the other path on  
13 the other side.

14 Q And in this instance, is there -- let's  
15 see. We have a photograph. It's correct, is it  
16 not, that there is a pathway on the other side, as  
17 exhibited in this 1995 time frame (indicating)? I  
18 don't know if you can see it. Can you see it in  
19 that photograph?

20 A Yes.

21 Q Does that photograph indicate to you  
22 whether there's a cut-out on that side as well?

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23           A       Yes, it does. There's a curb ramp on

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1   both sides of the street.

2           Q       And in determining whether a cut-out  
3   should or should not be in a particular location, is  
4   there any -- in the industry, is there any  
5   assessment to be made to determine whether it's an  
6   appropriate place to put one?

7                   MR. ROBEY: Judge, is this not exactly  
8   the same issue that we've now -- this would be the  
9   fourth time I've asked you to rule on this?

10                   How these curb cuts came about is a  
11   matter of fact. And if we have facts, that's fine,  
12   but this witness is going to speculate, and I object  
13   to that. I continue. I've objected three other  
14   times. This is my fourth time to object to the same  
15   thing.

16                   THE COURT: Mr. Vaughn?

17                   MR. VAUGHN: This is a different question  
18   and a specific question, relates to when a curb cut  
19   is placed in a particular location, does the  
20   industry require, or do the industry standards  
21   require, that some analysis be made of the location  
22   of where the curbs are cut? And it goes again  
23   directly to whether or not the association complied

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1   with the standards.

2                   THE COURT: Mr. Robey?



Direct examination of Jennifer Toole

3 MR. ROBEY: We know who did these curb  
4 cuts. It was VDOT. Perhaps we need --

5 MR. VAUGHN: We don't know that, Your  
6 Honor.

7 MR. ROBEY: -- to be more specific to  
8 Virginia law as to that.

9 If this witness is going to tell us what  
10 the "Manual for Uniform Traffic Devices" in 1971  
11 says, the question is: Does it have any application  
12 to Virginia? Does it have any application to how  
13 these curb cuts actually came about?

14 That's why I say, a speculative opinion  
15 is irrelevant in this case. We have to find out  
16 what actually happened here. And I don't think this  
17 witness is prepared to tell us what actually  
18 happened with these curb cuts.

19 THE COURT: The Court understood the  
20 question pending to be: Does the witness have an  
21 opinion based upon the standards as to where a curb  
22 cut should go in relationship to the bike path? If  
23 that's the question, I overrule the objection.

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1 MR. ROBEY: I beg your pardon, Judge.  
2 That question was asked and it was answered. It  
3 was --

4 THE COURT: Well, then, restate your  
5 question, Mr. Vaughn, please. Thank you.

Direct examination of Jennifer Toole

6 BY MR. VAUGHN:

7 Q Let's see if I -- I'm trying to be as  
8 careful as I can. In determining where curb cuts  
9 go, does the industry, in order to comply with the  
10 standards, dictate or mandate or require any sort of  
11 assessment be made as to whether or not that's an  
12 appropriate place to make a cut-out?

13 MR. ROBEY: And that was the question.  
14 And my objection is this: I know Mr. Vaughn is  
15 trying desperately to prove that there was some kind  
16 of assessment made in this case.

17 And whether there should be or not is  
18 irrelevant. The question is: Was there an  
19 assessment made when these curb cuts were made?  
20 Let's cut to it. That's what he's trying to get to.

21 And there's no evidence of that, that  
22 there was ever an assessment done. So this witness  
23 is going to say, there's supposed to be. That

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1 doesn't matter.

2 The question is: Was an assessment done  
3 when these curb cuts were made, not whether it's  
4 supposed to or whether by somebody's standards it  
5 should be done; was an assessment actually done?  
6 because we can't be held to an assessment --

7 MR. VAUGHN: Now he's going into closing  
8 argument --

Direct examination of Jennifer Toole

9 MR. ROBEY: -- that never occurred.  
10 MR. VAUGHN: -- and I object to it.  
11 THE COURT: Do you wish to respond to the  
12 objection to the question?  
13 MR. VAUGHN: The response, Your Honor, is  
14 that this is within the purview of both this  
15 witness's realm of expertise and what is relevant  
16 for this particular case.  
17 I'm asking this particular witness if in  
18 the course of -- or if there is a requirement within  
19 the industry of what should be done when a cut-out  
20 is made or a determination is made to place a  
21 cut-out, what does that entail? What do the  
22 industry standards require be done?  
23 THE COURT: To that question, I overrule

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1 the objection.  
2 BY MR. VAUGHN:  
3 Q Go ahead and answer, Ms. Toole.  
4 A Okay. The industry standards require  
5 that curb cuts meet at crosswalks and that they --  
6 they at least take the person who's exiting the  
7 trail or sidewalk into the crosswalk and not out  
8 into another part of the street. And that's  
9 basically what they require.  
10 Q And in terms of the location of  
11 particular cut-outs, is there an industry standard

Direct examination of Jennifer Toole

12 to be followed in determining whether there's any  
13 particular place you put one?

14 A The 1991 "Guide for the Development of  
15 Bicycle Facilities" has a broad -- sort of a broad  
16 definition of where an appropriate intersection is  
17 and where it is appropriate to take bicycles across  
18 a road with curb cuts.

19 And those locations are -- they have a  
20 lot of different factors that go into choosing those  
21 locations. Good sight distance is one of the  
22 requirements.

23 Q Okay. In terms of this particular

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1 location, does it meet the standards of which you  
2 are aware of the 1991 time frame for the placement  
3 of a cut-out in that location?

4 A No, it does not.

5 Q Why does it not?

6 A Because a path user coming downhill,  
7 which is already steeper than the 1991 standards --

8 MS. SNEE: Objection, Your Honor, as to  
9 speculating what a bicyclist, as he comes down,  
10 would have seen or not. And she can testify to the  
11 standards, but she can't make this ultimate leap  
12 again.

13 THE COURT: Mr. Vaughn?

14 MR. VAUGHN: Your Honor, I think she's

Direct examination of Jennifer Toole

15 simply giving a description of why the standard is  
16 in place and how it applies to this particular  
17 location.

18 She's not talking about Mr. Halfmann, per  
19 se. She's talking about what the standards are  
20 vis-a-vis given -- it's like giving an analogy or an  
21 example.

22 MS. SNEE: I have no objection to her  
23 giving the standards. The objection is that she

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1 started to say a bicyclist coming down would have  
2 been whatever. And that's the objection. That goes  
3 to the ultimate question in regards to this  
4 particular case.

5 THE COURT: Sustained as to the latter  
6 part of the answer.

7 MR. VAUGHN: I'll try to rephrase the  
8 question.

9 BY MR. VAUGHN:

10 Q In what form or fashion does this trail  
11 not meet the standards in determining where a  
12 cut-out should be?

13 A The 1991 standards state that approach  
14 grade should be as flat as possible; it doesn't meet  
15 them there. They also state that sight lines should  
16 be maintained for the bicyclist, between the  
17 bicyclist and the motorist; it doesn't meet the

Direct examination of Jennifer Toole

18 standards there; and that crosswalks should be  
19 provided at those locations. So it doesn't meet the  
20 standards there as well.

21 Q I want to go back very quickly just for  
22 one question to the 19 -- well, utilizing -- I guess  
23 you've got Number 1 there. How much analysis does

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1 it take for you to -- for one in your -- well, I'm  
2 trying to be very careful with my question.

3 Looking at Exhibit Number 1, in order to  
4 make an analysis as to whether or not there are  
5 adequate sight lines, what do you have to do?

6 A You have to determine what the speed of  
7 the bicyclist would be and what the speed of the  
8 motorist is likely to be and make sure that both of  
9 those users would have adequate time to stop prior  
10 to the intersection if they detected each other.

11 Q Okay. Assume if you will that the  
12 transformers that you see in Exhibit Number 1 were  
13 in place at the time that this particular trail was  
14 being constructed.

15 Do you have an opinion as to whether or  
16 not that would -- that would -- whether the sight  
17 lines would be adequate at the time, as it was being  
18 constructed, if those were already there at the  
19 time?

20 A The, sight lines would clearly not be

Direct examination of Jennifer Toole

21     adequate.

22           Q       And how much would it take for the one  
23     installing the bike path or the construction to be

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1     aware of the fact that the sight lines -- what would  
2     one have to do to make that determination? If I was  
3     going out there installing the pathway --

4           A       Well --

5           Q       -- how much effort would it take for me  
6     to be aware of that problem?

7           A       Not much effort at all. I mean, it's --  
8     when you're out there on site, they are very  
9     obviously visually blocking the view of the street  
10    and the view of the path. It's clearly a sight  
11    distance problem.

12          Q       Okay. I want you, if you can, tell us in  
13    the 1995 time frame -- let's use the 1971 standards.  
14    Utilizing -- and accept if you will for me that the  
15    common area here extends from somewhere to the right  
16    of the box (indicating) over to -- let's use the  
17    one -- Exhibit Number 1 is the one Ms. Waters  
18    referred to.

19                   If you will accept -- I'm sorry, Your  
20    Honor. I probably should have asked.

21                   THE COURT: That's fine.

22                   BY MR. VAUGHN:

23          Q       If we accept that these boxes are here in

1 this photograph, that the common ground has been  
2 identified as starting somewhere to the right of  
3 these boxes and extending over here to this fence  
4 line (indicating), which would be on the other side  
5 of what's been described as the grassy knoll in your  
6 photograph -- are you with me?

7 A Uh-huh.

8 Q And you've been out to the site and  
9 you've seen that expanse of common area, correct?

10 A Yes.

11 Q Can you tell me in the 1971 time frame  
12 what would have been required in order for this  
13 trail to be compliant with the standards?

14 A Well, to comply with the 1971 standards,  
15 a walk sign and crosswalks would first be required.  
16 And also to improve sight distances, either the  
17 boxes would have to be moved or the trail would have  
18 to be relocated.

19 Q And from your view of both the  
20 photographs and on site, is there sufficient room in  
21 that common area for that to be done in the 1971  
22 time frame?

23 A Yeah. The path could be moved further

1 away from this particular location, further to the  
2 south.

3 Q And if it were done so, would the sight



Direct examination of Jennifer Toole

4 lines be adequate at that point?

5 A They would be better. I haven't done an  
6 analysis to determine if they would be completely  
7 perfect, but they would be better.

8 Q I understand.

9 That's all the questions I have. I'm  
10 sure counsel will have some cross-examination.

11 THE COURT: Cross-examine, Ms. Snee?

12 MS. SNEE: I do.

13 MR. VAUGHN: Your Honor, I'm sorry. I  
14 would like to move Ms. Toole's CV into evidence.

15 THE COURT: That's Plaintiffs' 5 for  
16 identification.

17 (Whereupon, a discussion took place off  
18 the record.)

19 THE COURT: I'm sorry; Plaintiffs' Number  
20 15 for identification. Is that what you moved  
21 further at this time?

22 MR. VAUGHN: Yes, Your Honor.

23 THE COURT: Any objection?

1 MR. ROBEY: None other than those already  
2 voiced, Judge.

3 THE COURT: All right. Without object --  
4 well, overruling the objections, Plaintiffs' Number  
5 15.

6 (Plaintiffs' Exhibit No. 15  
7 was received in evidence.)

8 THE COURT: Cross-examine, Ms. Snee.

9 MS. SNEE: Thank you.

10 CROSS-EXAMINATION

11 BY MS. SNEE:

12 Q Ms. Toole, in regards to these  
13 guidelines, it appears that most of them are  
14 designed for the motor vehicle drivers to be able to  
15 see either pedestrians or bicyclists. Is that  
16 correct?

17 A The 1971 guidelines are. And the 1991  
18 guidelines are designed for the bicyclist.

19 Q But you had talked about warning signs  
20 put on the street. And this street is where one  
21 would assume the cars are going; is that right?

22 A That's right.

23 Q And one would assume that those signs are

1 being placed on the street to warn the motor vehicle  
2 of what might be ahead. Is that right?

3 A That's right.

Cross examination of Jennifer Toole

4 Q And the guidelines are designed because  
5 you want to be able to give the motorist a warning  
6 of what is going to be ahead; is that right?

7 A That's correct.

8 Q Okay. So one would say at least that the  
9 sign guidelines are for the motorist to know that  
10 there might be bicyclists ahead; is that right?

11 A That's right. However, in the 1991  
12 guidelines, there are signage recommendations for  
13 the trail, as well, to warn path users of upcoming  
14 intersections or other kinds of hazards.

15 Q All right. Well, we'll walk through them  
16 if we can. So one is the signs on the road; is that  
17 right?

18 A Uh-huh.

19 Q You have to say "yes" for us.

20 A Yes.

21 Q Um-hums we can't figure out.

22 A Sorry.

23 Q Next you talked about that there should

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1 be a crosswalk; is that right?

2 A That's right.

3 Q And are those those white hash marks that  
4 we see go across the street?

5 A Yes. There are several different designs  
6 for crosswalks.

7 Q I'm sure there are.

Cross examination of Jennifer Toole

8                   In regards to those crosswalk markings,  
9   are those, too, for the motor vehicle as he  
10 approaches to see those markings on the road and  
11 know that there may be pedestrians and bicyclists  
12 crossing ahead?

13         A       There are -- they have two purposes.  
14 They're both for the motor vehicle to warn the motor  
15 vehicle of the -- that they will potentially  
16 encounter pedestrians, and also to guide pedestrians  
17 in where it's appropriate to cross roads.

18         Q       And you had said that in this particular  
19 case, the fact that the bike path intersected at the  
20 mid-block location was important; is that right?

21         A       I don't remember if I said it was  
22 important, but yes, it is.

23         Q       And why it's important is because, as

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1   opposed to an intersection with a road, it's less  
2 likely for a motorist coming along to know a bike  
3 path would be intersecting; is that right?

4         A       That's correct.

5         Q       And so that's why it is actually, I  
6 guess -- I thought the phrase you were saying it's  
7 more important to have these hash marks across the  
8 road, more important to have these road signs ahead,  
9 because it's not likely that a motorist is going to  
10 guess that there might be a bike path halfway

Cross examination of Jennifer Toole

11 through a street?

12 A That's right. And also, they're not  
13 intending to slow down at that location.

14 Q The motor vehicle is not intending to; is  
15 that right?

16 A Right, right.

17 Q Do you drive? Are you a licensed driver  
18 as well --

19 A Yes.

20 Q -- instead of just a bicyclist? I assume  
21 you're a bicyclist?

22 A Yes.

23 Q And you would agree that there aren't

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1 supposed to be any cars on the bicycle path; is that  
2 right?

3 A Right.

4 Q And you would agree that the bike path is  
5 a private road; is that right; or bike path -- I  
6 guess private roadway?

7 A No, I wouldn't agree.

8 Q What would you call it?

9 A It's -- it's in the public right of way.

10 Q It's not a public road, is it?

11 A It's not a public road, but it's a public  
12 path.

13 Q Okay.

Cross examination of Jennifer Toole

14           A       So it's a transportation facility. It's  
15 not a road.

16           Q       Well, what do you want to call it?

17           A       Public pathway, public bike trail.

18           Q       Would you agree that Sugarland Run Drive  
19 is a public road?

20           A       Yes.

21           Q       In regards to visual access, you said  
22 that you want to make sure that there is visual  
23 access for the motor vehicles as they're approaching

328

1 so that they would have the opportunity and the  
2 requisite time to be able to stop that vehicle; is  
3 that right?

4           A       That's right.

5           Q       Because you have to be able to see and  
6 then have some time period after seeing for your  
7 body to acknowledge it and react by bringing the  
8 vehicle to a stop; is that right?

9           A       That's right.

10           Q       In fact, as you know from sight lines,  
11 the minute you see something, your body does not  
12 react, does it?

13           A       It takes about two and a half seconds,  
14 usually.

15           Q       There's a range, isn't there?

16           A       Right, yes.

Cross examination of Jennifer Toole

17 Q And if you're younger, your range is a  
18 little faster; is that right?

19 A Yes.

20 Q So reaction time; is that what it's  
21 called?

22 A Uh-huh, yes.

23 Q And there can be other factors that

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1 determine how long your reaction time is; is that  
2 right?

3 A Yes.

4 Q Okay. Now, you had said, I believe, that  
5 there was not adequate sight distance for vehicles  
6 going which direction on Sugarland Run Drive?

7 A Traveling -- traveling southbound -- I  
8 need to --

9 Q I can't figure it out, either, so I'm  
10 going to show you Plaintiffs' Exhibit 3. And I'm  
11 going to hold it up so that the jury can see it as  
12 well. Are you saying that there is restricted sight  
13 distance for vehicles going into the picture?

14 A That's correct.

15 Q Okay. And that's on Plaintiffs' Exhibit  
16 3; is that right?

17 A Yes.

18 Q All right. And what you're saying is  
19 that vehicles coming in the opposite direction, out

Cross examination of Jennifer Toole

20 of the picture on Plaintiffs' Exhibit 3, do have  
21 adequate sight distance, by your standards?

22 A Yes, for the pathway on this side  
23 (indicating), they do.

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1 Q When you say "this side," we're still  
2 referring to the path that runs beside these big  
3 green boxes?

4 A That's right.

5 Q So coming in the opposite direction you  
6 have a better ability to see this bike path than  
7 people who are going into the picture; isn't that  
8 right?

9 A That's correct.

10 Q Now, when you went out and determined  
11 that this sight -- what do you call it, sight line?  
12 The sight line -- when you went out to determine the  
13 sight line for vehicles going into this picture, did  
14 you take into account parked vehicles?

15 A Yes, I did.

16 Q Were there parked vehicles the day you  
17 went?

18 A I actually parked my car there.

19 Q Where did you park your car? Is it shown  
20 in Plaintiffs' Exhibit 3 at all?

21 A I think I parked it right there  
22 (indicating), if that's the driveway coming out --



Cross examination of Jennifer Toole

23    yeah, about right where that car is.

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1           Q       Was there another car, when you went out,  
2    parked behind this one?

3           A       No, there wasn't.

4           Q       And when you were determining the sight  
5    line after you parked your car, were you driving  
6    another vehicle down this same roadway?

7           A       I was not driving another vehicle.

8           Q       You only took one with you.

9           A       I only took one. I did -- I did ride in  
10   another vehicle and go past there.

11          Q       After you parked yours?

12          A       Right.

13          Q       And then you were a passenger; is that  
14   right?

15          A       Right.

16          Q       And you were also -- whose car were you  
17   in?

18          A       Mr. Vaughn's.

19          Q       Okay. What type of car does Mr. Vaughn  
20   have?

21          A       I think --

22                   MR. VAUGHN: I will stipulate for the  
23   record, it's a 1994 Oldsmobile, in great shape and

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1    available for sale.

2                   BY MS. SNEE:

Cross examination of Jennifer Toole

3 Q All right. In regards to the Oldsmobile,  
4 do you know if it's the same height as a Cherokee  
5 Pioneer Jeep?

6 A No, it's not.

7 Q That you know.

8 A Yes.

9 Q Do you know whether it's lower or higher?

10 A It's lower.

11 Q And when you were riding as a passenger,  
12 were you in charge of steering?

13 A No.

14 Q Were you in charge of the brake or the  
15 gas?

16 A No.

17 Q Were you in charge of keeping a lookout?  
18 Could you have closed your eyes as the passenger in  
19 that vehicle yesterday?

20 A Yes.

21 Q In other words, you didn't have any of  
22 the responsibilities of the driver, did you?

23 A That's correct.

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1 Q And in regards to yesterday when you were  
2 riding as the passenger, you also knew that you were  
3 looking for the sight lines; is that right?

4 A Yes. It was the day before yesterday.

5 Q All right. Mr. Vaughn was with us

Cross examination of Jennifer Toole

6 yesterday. That's true.

7 But that was your sole purpose of driving  
8 down that road, was actually to try and look out the  
9 window to the front right as you went along; is that  
10 right?

11 A That's right.

12 Q And you determined that the view was  
13 obstructed and did not meet your standards of '71, I  
14 think you were using, and '91?

15 A Right.

16 Q And that's with and without cars it  
17 doesn't meet the guidelines; is that right?

18 THE COURT: With or without what?

19 MS. SNEE: I'm sorry.

20 BY MS. SNEE:

21 Q If there were no cars parked there, it  
22 still doesn't meet the guidelines, does it?

23 A That's true.

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1 Q In regards to whether there's a car  
2 parked in this driveway (indicating), at the time of  
3 the accident, that doesn't make -- you didn't  
4 determine that -- I'm sorry. It must be getting  
5 late.

6 You did not -- if this car was not there  
7 in this driveway (indicating), it still doesn't meet  
8 the guidelines, does it?

9 A No, it still would not meet the

Cross examination of Jennifer Toole

10 guidelines.

11 Q The fact that there's a house right here  
12 that's not shown in the picture to the right  
13 (indicating), even if that house wasn't there, it  
14 still wouldn't meet guidelines, would it?

15 A No, it would not.

16 Q These green boxes (indicating), if they  
17 weren't there, would it meet guidelines?

18 A Yes, it would.

19 Q Only if the boxes were gone; is that  
20 right?

21 A It would meet the guidelines for sight  
22 distance.

23 Q Sight lines?

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1 A Sight lines, sight distance, whatever,  
2 same thing.

3 Q When you went out two days ago, what was  
4 the weather?

5 A It was sunny.

6 Q Were the roads wet?

7 A No. They were dry.

8 Q You had mentioned, I think, that you  
9 thought there was about 15 feet -- or did you give  
10 us a measurement of how much distance is between  
11 these green boxes and the roadway?

12 A I didn't give a measurement.

Cross examination of Jennifer Toole

13 Q Did you measure it?

14 A I paced it off. It would be someplace  
15 between ten and fifteen feet.

16 Q I think you have a photo up here, don't  
17 you?

18 A Yes.

19 Q When we talked about these -- what's your  
20 number on it?

21 A Number 2.

22 Q Okay. In that photograph, Number 2, up  
23 on the bike path, you can see it looks like what?

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1 A Looks like some children.

2 Q Okay. In regards to looking down from  
3 the direction of the children out of the photo, is  
4 it clear that you can see Sugarland Run Drive up  
5 ahead?

6 MR. VAUGHN: I am confused by the  
7 question, Your Honor. I also don't think it's  
8 relevant. I think it's beyond the scope of the  
9 direct. But primarily, it may be because I don't  
10 understand the question.

11 BY MS. SNEE:

12 Q Do you understand my question?

13 A No, not really.

14 Q Then I better do it again. If you are up  
15 where the children are (indicating) as shown in

Cross examination of Jennifer Toole

16 Plaintiffs' Exhibit 2 and you're looking down the  
17 bike path and out of the picture, can you see  
18 Sugarland Run Drive?

19 A Yes, you can.

20 Q Okay. And you had indicated that part of  
21 the sight lines was what the bicyclist could see; is  
22 that right?

23 A Right.

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1 Q And if you're a bicyclist up where those  
2 children are, looking down in the direction you're  
3 going, you can see you're going to come up on  
4 Sugarland Run Drive, can't you?

5 A You can see the road in front of you,  
6 immediately in front of you.

7 Q And that road is what?

8 A Sugarland Run Drive.

9 Q Sugarland Run Drive; is that right?

10 A Right.

11 Q A busy road?

12 A Yes, it's rather busy.

13 Q Marked by a double yellow line? Do you  
14 need another picture?

15 A No. There's a double yellow line here.

16 Q With a 30-mile-an-hour speed limit?

17 A As I understand it, that was the speed  
18 limit at the time of the crash.

19 Q So when you're a bicyclist on that path

Cross examination of Jennifer Toole

20 up where those children are in Plaintiffs' Exhibit  
21 2, you know that at the bottom of the hill, you are  
22 going into a busy road, double yellow line,  
23 30-mile-an hour speed limit; is that right?

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1 A That's correct.

2 MS. SNEE: No other questions.

3 THE COURT: Cross-examine, Mr. Robey?

4 MR. ROBEY: Yes, ma'am. Thank you.

5 Judge, I don't know who these photos belong to. I  
6 suspect the clerk (tendering documents).

7 CROSS-EXAMINATION

8 BY MR. ROBEY:

Cross examination of Jennifer Toole

9 Q You mentioned two specific sources that  
10 you called your industry standards. One was "The  
11 Manual of Uniform Traffic Devices"; is that right?

12 A Uniform Traffic Control Devices.

13 Q All right. And there was, you say, a  
14 1971 and a 1994 version of that?

15 A No. There was a 1971 version and a 1988  
16 version.

17 Q Then the other one, you started talking  
18 about the American Association of something, and I  
19 just can't write that fast. What was that?

20 A State Highway and Transportation  
21 Officials, AASHTO.

22 Q State Highway and Transportation --

23 A Officials.

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1 Q Now, I'm sure you can anticipate my next  
2 question, because I asked you yesterday and you've  
3 had a full day to look it up, I'm sure. Can you  
4 give us the Virginia cites on these things? In  
5 other words, where are these things adopted into  
6 Virginia law?

7 A They're not a matter of law. They're a  
8 matter of professional design practice.

9 Q Landscape architectural special design  
10 practices?

11 A And engineering.

12 Q Are you an engineer --



Cross examination of Jennifer Toole

13           A       No, I'm not.

14           Q       -- a licensed engineer?

15           A       No.

16           Q       You don't have a degree in engineering?

17           A       No.

18           Q       What's your degree in?

19           A       Landscape architecture.

20           Q       And I'm sure you have professional

21 licenses. Where are you licensed?

22           A       I am registered by the American Institute

23 of Certified Planners. And I don't remember the

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1       certificate number.

2           Q       And do you have to be an engineer to be

3 registered by them?

4           A       No, I don't.

5           Q       You can be a landscape architect and have

6 that registration?

7           A       Right.

8           Q       What are the educational requirements to

9 be registered by them?

10          A       A degree either in landscape architecture

11 or certified planning, and -- I can't recall -- it's

12 like four years experience in the field.

13          Q       Is this a governmental agency?

14          A       No, it's not. It's a professional

15 organization.

Cross examination of Jennifer Toole

16 Q It's an organization?  
17 A (Witness moved head up and down.)  
18 Q But it's not sponsored or required by any  
19 government: State, local, or federal?  
20 A In some cases, sometimes it is required  
21 in order to do planning in a jurisdiction, but --  
22 Q Is it in Virginia?  
23 A I don't believe so.

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1 Q Let's go back to January 19, 1995.  
2 That's the day of this accident, okay? January 19,  
3 1995. Now, you've already told us on direct  
4 examination when you were asked -- now, first of  
5 all, how did this area where this accident occurred,  
6 as of January 19, 1995, how did it not comply with  
7 standards? Do you remember that line of questioning  
8 on direct examination?  
9 A Yes.  
10 Q Now, the first thing you said is it  
11 should have had yellow warning signs, right?  
12 A That's right.  
13 Q As of January 1995, no warning signs?  
14 A That is correct.  
15 Q Now, who would have been responsible for  
16 putting up those warning signs?  
17 A Whoever owned the bike path.  
18 Q Now, these are warning -- these are these  
19 big, yellow highway signs, right?

Cross examination of Jennifer Toole

20           A       That's right.

21           Q       VDOT is responsible for putting those up,  
22 isn't it? Isn't that a Virginia Department of  
23 Transportation responsibility?

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1           A       Sometimes VDOT puts them up. Sometimes  
2 local governments put them up. Sometimes  
3 communities put them up. It's --

4           Q       Communities. Where do they buy these big  
5 signs, these big, yellow, triangular signs? Where  
6 do they buy them?

7           A       From sign manufacturers.

8           Q       In the state of Virginia, these are  
9 controlled and placed by the Commonwealth of  
10 Virginia Department of Transportation; isn't that  
11 true?

12          A       Yes, they are placed by VDOT, and they're  
13 placed by other entities as well.

14          Q       If I hauled a sign out to Sugarland Run  
15 Drive and put it in the ground, I'd be fined and  
16 cited for that, wouldn't I? I don't have the right  
17 to do that; isn't that true?

18          A       I don't know.

19          Q       You don't know?

20          A       No.

21          Q       You said something about pedestrian  
22 signs, right, that there should have been pedestrian

Cross examination of Jennifer Toole

23 signs at this scene?

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1 A In lieu of bike signs; if there was no  
2 bike crossing signs, yes.

3 Q So there could have been a bike sign, one  
4 of those big, triangular signs, yellow --

5 A Uh-huh.

6 Q -- with a bike on it or something of that  
7 sort, right?

8 A Uh-huh.

9 Q Could have been a pedestrian sign, right?

10 A Uh-huh.

11 Q And neither of those existed? Again, on  
12 January 19, 1995, none of that stuff existed, right?

13 A From what I've seen, they did not exist.

14 Q Now, you also mentioned crosswalks could  
15 have been painted, or a crosswalk across the road,  
16 right?

17 A That's right.

18 Q And that wasn't?

19 A That's right.

20 Q Would you agree with me that that's also  
21 within the exclusive province of the Virginia  
22 Department of Transportation to paint crosswalks on  
23 a public street?

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1 A No, I would not agree.

2 Q So you'd say I could go out and paint

Cross examination of Jennifer Toole

3 something on the street and I'm not going to get a  
4 visit from the local authorities? Is that your  
5 testimony?

6 MR. VAUGHN: That's not her --

7 THE WITNESS: On that --

8 MR. VAUGHN: I'm sorry. Go ahead.

9 BY MR. ROBEY:

10 Q Is that your testimony, that I can go  
11 paint lines on streets?

12 A No, but -- but most -- in most  
13 communities where trails were built, the  
14 responsibility for making an intersection safe  
15 doesn't end right at the curb and then pick up again  
16 on the other side. And certainly, the community --  
17 it's within the community's purview, if they wish to  
18 work with VDOT, to install safety measures at  
19 intersections.

20 Q Let me flip this around a little bit.  
21 January 19, '95, we've got this intersection where a  
22 bike path intersects Sugarland Run Drive, right?

23 A Right.

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1 Q Busy road, double solid line, right?

2 A Uh-huh.

3 Q Bike path intersects it?

4 A Uh-huh.

5 Q Same bike path that's been there since  
6 1974, correct?

Cross examination of Jennifer Toole

7           A       That's correct.

8           Q       Now, your testimony is that you know of  
9       these certain standards that would have required or  
10      expected a bike sign on the road, a pedestrian sign  
11      on the road, or crosswalks painted on the road, or  
12      all of the above, right?

13          A       That's correct.

14          Q       Okay. Do you suppose that the Virginia  
15      Department of Transportation knew about these  
16      standards? Do you think they knew about these  
17      standards?

18          A       Yes, I would assume that they did.

19          Q       Why do you suppose it is, then, that they  
20      didn't take it upon themselves, the people who own  
21      and maintain the highways and the public roads --  
22      why do you suppose they didn't take it upon  
23      themselves to put up a bike sign or a pedestrian

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1      sign or paint a crosswalk across Sugarland Run  
2      Drive? Why do you suppose?

3                   MR. VAUGHN: Your Honor, I will object to  
4      the speculation called for by the question. I  
5      appreciate Mr. Robey's offer that we ought to be  
6      suing VDOT. That is another case for another day.  
7      And I think this question is beyond the scope. It's  
8      argumentative and calls for speculation.

9                   MR ROBEY: Judge, the witness has

Cross examination of Jennifer Toole

10 testified that she has knowledge of these very  
11 well-known and well-established standards that  
12 apparently either VDOT doesn't know about or doesn't  
13 abide by. And I think I have the right to question  
14 her on that.

15 THE COURT: But the question was  
16 speculative to the witness, and I sustain the  
17 objection.

18 MR. ROBEY: May I ask it another way,  
19 Judge?

20 THE COURT: You may ask the next question  
21 and determine whether there's an objection.

22 BY MR. ROBEY:

23 Q Do you yourself have any idea why VDOT

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1 didn't follow the standards that you say are well  
2 recognized as of January 1995?

3 MR. VAUGHN: If the question is does she  
4 know in this instance, then that's knowledge. Then  
5 I have no objection to it. If the question is does  
6 she know in general -- and the question also  
7 presumes that it's VDOT's responsibility to bring  
8 the trail into compliance, or the pathway, as  
9 opposed to the association which owns the property.  
10 So there's a predicate missing. It's the  
11 association's property. What has VDOT got to do  
12 with bringing it into compliance?

Cross examination of Jennifer Toole

13 MR. ROBEY: She told us that she knows it  
14 is VDOT's responsibility.

15 MR. VAUGHN: The witness did not so  
16 testify, Your Honor. There is nothing in the record  
17 that says responsibility for installation and  
18 maintenance of private -- or pathways on common  
19 ground is VDOT's responsibility.

20 THE COURT: The witness was asked the  
21 question about yellow warning signs. She's  
22 responded, responsibility of the landowner. She  
23 also then said, sometimes, however, VDOT does it,

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1 government does it, or landowners do it. Overrule  
2 the objection.

3 BY MR. ROBEY:

4 Q Do you want me to ask the question again?

5 A If you would, please.

6 Q Let's start from 1974, January 1, and  
7 move forward 21 years, from 1974 through January 19,  
8 1995. Would you agree with me that VDOT could have  
9 complied with all of the standards that you've  
10 described to us: Signs, crosswalk? They could have  
11 done that, couldn't they?

12 A Certainly. Anyone could have.

13 Q They didn't, did they?

14 A No one did, no.

15 Q And you don't know whether VDOT's aware



Cross examination of Jennifer Toole

16 of your standards or not; was that your testimony?  
17 The standards you described, you don't know whether  
18 VDOT knows anything about them or not?

19 A Well, I don't know everybody in VDOT, but  
20 I think that most of them know about "The Manual of  
21 Uniform Traffic Control Devices" and AASHTO.

22 Q Okay. But yet they didn't use or comply  
23 with them for 21 years, from 1974 through January

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1 19, 1995; would you agree with that? Would you  
2 agree with that?

3 A Yes.

4 Q Okay. You mentioned also that -- moving  
5 up the bike path, you say that this bike path  
6 violates what you believe the standards are, because  
7 it's up to fifteen percent grade instead of the five  
8 to eight percent, I think you mentioned. Do you  
9 remember that testimony?

10 A Yes.

11 Q Is that a correct recitation of what you  
12 said, that the bike path in question, as it moves up  
13 the hill, because its grade is up to fifteen  
14 percent, that's in violation of the standards that  
15 you believe apply?

16 A That's correct.

17 Q How many times have you ridden the bike  
18 paths, the C&O and the other bike paths that are

Cross examination of Jennifer Toole

19 owned by the Commonwealth of Virginia in this area,  
20 in this Loudoun County area? Have you ever been on  
21 any of those?

22 MR. VAUGHN: I'm going to object.

23 Mr. Robey made very rigorous objection any time we

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1 strayed within four feet of this particular pathway.  
2 And now if he's going to ask this witness about  
3 something totally different and a different pathway  
4 and how that relates to this, it's clearly beyond  
5 the scope. I never asked any questions about the  
6 C&O trail or any of those issues, and it certainly  
7 has nothing to do with this particular trail as to  
8 whether or not it is or is not in compliance.

9 MR. ROBEY: Judge, she's testified as  
10 to -- this witness has testified as to what she  
11 believes the standards are, and I'm simply exploring  
12 her basis for those standards.

13 I think we can establish that the bike  
14 paths owned and operated by the Commonwealth of  
15 Virginia in Loudoun County have more serious --

16 MR. VAUGHN: Your Honor, I object.

17 THE COURT: Sustained. Stricken.

18 MR. VAUGHN: Mr. Robey knows better.

19 THE COURT: Facts not in evidence,  
20 irrelevant.

21 MR. ROBEY: That's what I'd like to

Cross examination of Jennifer Toole

22 explore with the witness.

23 THE COURT: Sustained. Stricken.

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1 BY MR. ROBEY:

2 Q Let me ask you this, ma'am: Do you  
3 believe that the Commonwealth of Virginia, with the  
4 bike paths that it itself owns and operates here in  
5 Loudoun County, maintains the same standards, no  
6 grade above eight percent?

7 MR. VAUGHN: Your Honor, again, I object.  
8 We're talking about whether this trail is in  
9 compliance, not whether some other trail -- if we  
10 want to go and make an analysis of other trails, we  
11 can do that as well. It's this particular one  
12 that's in controversy.

13 MR. ROBEY: The point of the question,  
14 Judge, is to establish whether or not this really is  
15 a standard recognized by anybody in Virginia.  
16 That's the point of the question.

17 THE COURT: Sustained. There's no  
18 foundation in the evidence for this question.

19 BY MR. ROBEY:

20 Q You told us that you were charging \$100  
21 an hour for your work in this case?

22 A That's true.

23 Q What's your total bill going to be?

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1 A I don't know yet.

Cross examination of Jennifer Toole

2 Q What is it so far?

3 A I don't know. I haven't figured it out.

4 Q How many hours had you invested so far?

5 A About into the thirties, I would think.

6 Q Into the thirties of hours?

7 A Yes, thirty, prior to my testimony now.

8 Q Okay. Times \$100 an hour?

9 A That's right.

10 Q Let me finish by asking you this: You  
11 testified that you went out during your  
12 investigation on the day before yesterday, and I  
13 guess you got out of your car and walked the scene  
14 of this incident?

15 A Yes, I did.

16 Q Walked down the same path that, in this  
17 case, Walter Halfmann rode his bike down; is that  
18 right?

19 A Yes. I walked up to the school, walked  
20 down the path. I drove back and forth down the  
21 road.

22 Q Okay. If you stop right at the point  
23 where Walter Halfmann's bike entered the road and

1 look down Sugarland Run Drive, you can see a long  
2 way, can't you? Do you understand my question?

3 A (Moved head up and down.)

4 Q If you walk down the path, stop at  
5 exactly the point where Walter Halfmann's bike

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Cross examination of Jennifer Toole

6 entered Sugarland Run Drive, but instead of getting  
7 in the road, you stop and look to your left, you're  
8 going to see a long, long way down the road, aren't  
9 you?

10 A You can see quite a distance down the  
11 road, but you have to assume that some trail users  
12 are not going to stop.

13 Q The law requires them to stop, doesn't  
14 it?

15 A There's no stop sign there.

16 Q The law requires everyone to stop before  
17 they enter a public highway; isn't that true?

18 A I'm not -- I don't know --

19 Q You don't know that standard?

20 A -- I don't know that law.

21 Q If you stop, you can see anything coming  
22 for several blocks away; isn't that true?

23 A If you stop.

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1 Q If you stop, you can see things like cars  
2 coming for several blocks away?

3 A Right.

4 MR. ROBEY: Thank you.

10           Q       I want to follow up on the last question,  
11   really, that Mr. Robey asked you.  The requirement  
12   for sight distances that are included within the  
13   standards to make sure that the pathway is safe,  
14   does that, in fact -- or is, in part, the purpose of  
15   that to take into consideration that people do not  
16   stop?

17           A       Yes.

2           Q       How would you describe the type of boy  
3       Robbie was?

4           A       He was fond of physical activity. He had  
5       a wonderful sense of humor. He was not  
6       introspective, particularly. But he's the type of  
7       boy -- I guess a lot of them are -- if you told him  
8       to do something, he'd just smile and do something  
9       else. But chiefly, though, I remember his  
10      enthusiasms about different things and the wonderful  
11      humor that he had.

12 Q Did Robbie go to kindergarten?  
13 A He did.  
14 Q Where did he attend kindergarten?  
15 A At Meadowland School.  
16 Q Meadowland Elementary School?  
17 A Yes, uh-huh.  
18 Q About how far is that from your house?  
19 A It would be a little bit short of one  
20 mile.  
21 Q And did he ride the bus or what kind of  
22 transportation was provided?  
23 A He was bused one way. Either I would

1 take them or, at that point, I think he was -- he  
2 would get a ride from another neighbor, and the bus  
3 would bring him home.  
4 Q That's the kindergarten year?  
5 A Yes.  
6 Q Did Mandy go to that same school?  
7 A She did.  
8 Q After kindergarten, what was the  
9 situation in coming and going to school?  
10 A After kindergarten, the two children  
11 would walk to school together, unless for some  
12 reason I took them or picked them up.  
13 Q Was bus transportation provided to the



Cross Examination of Barbara Halfmann

14 older children?

15 A No.

16 Q And I take it Mandy and Robbie were three  
17 years apart?

18 A Uh-huh.

19 Q So when he was in first grade, she was in  
20 the fourth grade?

21 A Uh-huh.

22 Q So he went first, second -- well, where  
23 does Meadowland end?

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1 A The fifth grade's the last grade.

2 Q So they were together in his first and  
3 second grade years.

4 A Uh-huh.

5 Q And after his second grade year, Mandy's  
6 fifth grade year, did she go to a different school?

7 A She did then, yes.

8 Q Okay. How did most kids in your  
9 neighborhood up through the January '95 time frame  
10 get to school?

11 MS. SNEE: Objection as irrelevant.

12 THE COURT: Mr. Vaughn?

13 MR. VAUGHN: One of the issues I think

14 Ms. Snee wishes to raise is what was the  
15 reasonableness of the mode of transportation, and I  
16 think that's a fair question to elicit that type of

Cross Examination of Barbara Halfmann

17 information from this witness's knowledge and  
18 experience.

19 MS. SNEE: Your Honor, the question is  
20 whether it was reasonable for that boy to do what he  
21 did, not what other children did.

22 THE COURT: Sustain the objections.  
23

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1 BY MR. VAUGHN:

2 Q First and second grade, he and Mandy  
3 walked together?

4 A Uh-huh.

5 Q In the beginning of the third grade, when  
6 Mandy -- the school that Mandy went, where was it?

7 A Excuse me?

8 Q Where physically was the school that --

9 A It was in Ashburn.

10 Q I assume most people in Loudoun know the  
11 geography in this particular area, but is Ashburn a  
12 considerable distance from Sugarland Run?

13 A I think it's about ten miles away.

14 Q Not something that's walkable?

15 A No, no.

16 Q And did it work out that she could  
17 continue to walk with Robbie to school?

18 A No, not at all.

19 Q Okay. How did you work out the comings

Cross Examination of Barbara Halfmann

20 and goings to school with Robbie starting in the  
21 third grade?

22 A We let Robbie ride his bike. He rode --  
23 unless there was a reason for me to take him or pick

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1 him up, he rode his bike.

2 Q And what caused you to decide that way as  
3 opposed to some other way, carpooling or walking?

4 A He did occasionally ride with a carpool.  
5 However, he loved his bike. And then it came down  
6 to a question of riding the bike or walking.

7 And at this point, Walt and I felt he  
8 would actually be able to get to school on the bike  
9 more safely. He'd have, I think, less distractions.

10 Q Up to that point in time, what had been  
11 his experience in riding outside of the Brookfield  
12 Circle area?

13 A We'd ridden somewhat outside the circle  
14 as a family unit. He'd ride up -- rode up  
15 Meadowland with his sister occasionally.

16 Q Up to that point, his experience had been  
17 in that vicinity of your house?

18 A Uh-huh, that's right.

19 Q And in part of the process of him riding  
20 his bicycle to school, what, if any, steps did you  
21 take in preparation for that?

22 A One thing we did was go on the route that

Cross Examination of Barbara Halfmann

23 I expected him to take to school. We have sidewalks

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1 and paths that the kids can all use to get to school  
2 safely. So I accompanied him on that a few times  
3 and we talked about the route.

4 Q Can you describe how that -- it's not the  
5 route where this transpired; is that correct?

6 A It's not the route.

7 Q How did that route go? Can you describe  
8 the route that you had worked out or walked out?

9 A When Robbie would leave the house, he  
10 would turn left and go up Brookfield Circle. He --  
11 this is on the sidewalk. He'd make another left  
12 onto a pathway that would parallel Meadowland  
13 Lane -- excuse me -- Sugarland Run Drive. He'd stay  
14 on that path until he reached a crossing guard in  
15 front of Meadowland School.

16 Q And what happened at that point?

17 A So -- and basically, the crossing guard  
18 takes the children across the street there.

19 Q And did you have any discussions with him  
20 as to what he was supposed to do at Sugarland Run  
21 Drive or any rules or regulations? I mean, parents  
22 don't have regulations, but did you have any rules  
23 in terms of crossing Sugarland Run Drive?

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1 A I wanted him to cross at the crossing  
2 guard. I explained that, and that's why we took him

Cross Examination of Barbara Halfmann

3 on that particular route.

4 Q And the crossing guards, then, are they  
5 there in the morning and the afternoon?

6 A They are.

7 Q When it commences and lets out?

8 A Uh-huh.

9 Q And do you know about how many kids  
10 attend Meadowland?

11 A I would think it's 500 or so.

12 Q And did they all start and end at the  
13 same time of the day?

14 A The first through fifth do. I know that.

15 Q Kindergarteners may have a different  
16 schedule?

17 A Uh-huh.

18 Q Did the school itself also have some sort  
19 of lecture or talk on bike safety?

20 A They actually had bike fairs, bike safety  
21 fairs, that both children attended. And in fact, in  
22 his grade, there was a discussion about bike safety  
23 just a little while before his death.

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1 Q The pathway on which this incident  
2 happened, prior to this, were you familiar with it?

3 A Yes.

4 Q Where does it end up, or begin, I guess,  
5 depending on whether you're coming or going, in

Cross Examination of Barbara Halfmann

6 relation to Meadowland School?

7 A That path leads out from the back door of  
8 Meadowland School. It would take a right turn to  
9 lead into the back of Meadowland Lane, or it would  
10 veer right to allow someone to go down toward  
11 Sugarland Run Drive.

12 Q And the right is what was involved in  
13 this particular instance?

14 A Uh-huh.

15 Q In the third grade, where was Robbie's  
16 classroom vis-a-vis where this back door was?

17 A It was right near the back door.

18 Q Where was the bike rack vis-a-vis the  
19 back door?

20 A It was right outside that door. The bike  
21 rack is right at the back door of Meadowland.

22 Q To go the route that you had mapped out  
23 for him, would that require you to go down in front

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1 of the school and cross in front of the school?

2 A Yes, it would.

3 Q So it's a different direction than where  
4 this path would lead you?

5 A Yes.

6 Q Going back to that day, how did you first  
7 learn that this happened?

8 A I got a call as I came in the door from

Cross Examination of Barbara Halfmann

9 work. It was from someone on the emergency squad.  
10 And they said that Robbie had been involved --  
11 MS. SNEE: Objection to hearsay.  
12 MR. VAUGHN: It's not being offered for  
13 the truth. It's simply being offered as to how she  
14 became aware of it.  
15 MS. SNEE: I think she's answered that.  
16 She got a phone call.  
17 THE COURT: Sustained as to what she may

Direct examination of Barbara Halfmann

18 have been told.

19 BY MR. VAUGHN:

20 Q You received a phone call. What happened  
21 after that?

22 A I told my daughter to go across to a  
23 neighbor's house.

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1 Q Was she there at the time you got home?

2 A She was -- she was, for some reason.

3 Yes, she was. I went out for -- I think she came  
4 home, actually, as I went out the door. I went out  
5 and stood by the curb and waited for a ride to the  
6 hospital.

7 Q You weren't going to drive yourself?

8 A I was instructed to not drive myself.

9 Q Was your husband home at the time?

10 A He was not.

11 Q Did you make contact with him or were you  
12 able to make contact with him before you left?

13 A I did call. I called him before I left.

14 Q Did you speak to him?

15 A I did.

16 Q And what did you relate to him?

17 A I told him that Rob had been in an  
18 accident and he needed to get home as quickly as  
19 possible.

20 Q When you reached him, was he in the  
21 District in his office?



Direct examination of Barbara Halfmann

22           A       He was.

23           Q       And did you then, in fact, go to the  
401  
1   hospital?

2           A       I did.

3           Q       How did you physically get there?

4           A       There's a chaplain service, I think a  
5   volunteer service, that's attached to the emergency  
6   squad, and I was driven there by that chaplain.

7           Q       And which hospital did you go to?

8           A       It was Reston Hospital.

9           Q       Reston Hospital. And when you got there,  
10   was your husband there?

11          A       He was not.

12          Q       When you got to the hospital, what did  
13   you do?

14          A       I rushed to the counter at the emergency  
15   entrance. And someone was coming out the door at  
16   the same time. And I said, I'm Barbara Halfmann.  
17   And they said, yes, yes, come right back in.

18          Q       Did you?

19          A       Yes.

20          Q       What happened after that?

21          A       I was taken to a small waiting room and a  
22   nurse was there. And she -- she spoke to me for a  
23   minute. She just kept saying, he is very badly

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Direct examination of Barbara Halfmann

1 hurt. He's very badly hurt. And I was -- I managed  
2 to put in a call to my pastor. I was still waiting  
3 for Walt, though. I knew it would be a while.

4 After a little period of time had passed,  
5 the nurse came in and said that if I wanted to go  
6 into the emergency room, that -- that she -- she  
7 thought I could, if I wanted to be with him.

8 And unfortunately, I said to her, no,  
9 that I'd want to wait for my husband. And then it  
10 was just a few minutes later that Dr. Lisse came out  
11 to tell me he was gone.



Cross Examination of Barbara Halfmann

5

10 Q. When Robbie died, he was eight years

11 old; is that right?

12 A. He was.

13 Q. And from the time he was born until he

14 died, he lived with you; is that right?

15 A. Yes, Ms. Snee.

14 Q. And did you hear that he actually did  
15 listen to the teachers in an age-appropriate  
16 manner at age five?

17 A. I actually heard the opposite until I  
18 worked with him. It took a lot of hard work, I  
19 will admit to you.

20 Q. Okay.

21 A. As a matter of fact, he did not have an  
22 absolutely wonderful kindergarten year.

23 Q. All right. Well, what they were

1 telling you was what?

2 A. That he didn't have a long attention  
3 span and was somewhat immature for his age at the  
4 age of five.

5 Q. And so you, as the parent, recognized  
6 that; is that right?

7 A. Yes.

8 Q. The teachers told you you needed to  
9 work with him on this?

10 A. Yes, they did.

11 Q. And what did you do as a parent?

12 A. As a parent, I talked to him about --  
13 about how important school was and about listening  
14 to the teacher, but Ms. Snee, what I actually  
15 found was that it -- there wasn't a lot I could do  
16 because children do grow at somewhat different

Cross Examination of Barbara Halfmann

17 rates and some things you have to wait out.

3           Q.     But you had the belief at about six,  
4     seven, and eight that he understood at least the  
5     rules of the household?

6           A.     Yes, I did.

7           Q.     And if he didn't follow them, that he  
8     would be disciplined for that; is that right?

9           A.     Yes.

10          Q.     That he knew the consequences,  
11     something different, if he did not follow those  
12     rules? In other words, he knew by six or seven  
13     that, if you put your hand on the hot stove, the  
14     consequence is you're going to get burned; is that  
15     right?

16          A.     I think he did not really understand  
17     the consequences of most of the things that I made  
18     the rules about.

6           Q.     In regards to this time frame, did you  
7     start to impose chores at the house?

8           A.     Yes.

9           Q.     What were his chores?

10          A.     Basically, he was to keep his bed  
11     made -- made and his room tidy.

12          Q.     And one would suspect that he didn't do  
13     that all the time?

14          A.     He almost did it never. It was a  
15     constant battle.



3           Q.     What instructions did you give the  
4 children in regards to Sugarland Run Drive?

5           A.     I instructed them that they needed to  
6 cross at the crossing guard in front of Meadowland  
7 School.

18           Q.     And when again as a -- when he was  
19     being coached, when he was distracted such as the  
20     excitement of running and trying to get the ball,  
21     he might not listen as well; is that fair to say?

22           A.     He didn't, no.

23           Q.     Okay. You consider that age

1     appropriate, don't you?

2           A.     I did.

3           Q.     But as a child, if you told him  
4     something without distraction and as long as he  
5     wasn't in a bad mood and willful misconduct, he  
6     would follow that, wouldn't he?

7           A.     Actually, he would not always follow  
8     even then, I'm sorry to say.

Cross Examination of Barbara Halfmann

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17 Q. You did not see the accident, did you?

18 A. I did not.

19 Q. But you were familiar with the scene;

20 is that right?

21 A. Yes, the scene I was. Knew the -- the

22 location where the accident happened?

23 Q. Yes.

1           A.     Yes.

2           Q.     Because you yourself had been on  
3     Sugarland Run Drive; is that right?

4           A.     Many times.

5           Q.     And you have indicated in your Answers  
6     to Interrogatories that you knew that there were  
7     Virginia Power devices that blocked the view of  
8     vehicles coming in the direction of Ms. Kabiri; is  
9     that right?

10          A.     Yes, I did.

11          Q.     And you further knew that there was  
12     parking allowed -- parking was allowed along the  
13     sides of Sugarland Run Drive in the direction she  
14     was coming that would also block her view?

15          A.     Yes.

16          Q.     And you also knew that there is a house  
17     that sits by the pathway that actually blocks the  
18     view as well; is that right?

19          A.     Yes.

20          Q.     And that house actually has a driveway  
21     right in front; is that right?

22          A.     Yes, it does.

23          Q.     And if there is a car parked in that

1 driveway, that also can block your view?

2 A. Yes.

3 Q. And there's bushes on that that lead up  
4 that driveway; is that right?

5 A. Yes, there are.

6 Q. And those too block your view of the  
7 path coming in the direction Ms. Kabiri was; is  
8 that right?

9 A. They block a lot of the view. Yes.

10 Q. Okay. So you have all of those things  
11 that block the view of Ms. Kabiri as she's coming  
12 in that direction; is that right?

13 A. Yes.

14 MS. SNEE: No other questions.

15 THE COURT: Cross-examine, Mr. Robey?

16 MR. ROBEY: Yes, ma'am. Thank you.

17 BY MR. ROBEY:

18 Q. Good morning, Ms. Halfmann.

19 A. Yes, Mr. Robey.

20 Q. You and your family live on Brookfield  
21 Circle; is that correct?

22 A. Yes, sir.

23 Q. You always have as long as you've lived

Cross Examination of Barbara Halfmann

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20 Q. You and your family live on Brookfield

21 Circle; is that correct?

22 A. Yes, sir.

23 Q. You always have as long as you've lived

45

1 in Sugarland --

2 A. Yes, sir.

3 Q. -- Sugarland Run?

4 A. Yes.

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6 Q. As I understand it, you and your

7 husband and your family moved in to Brookfield

8 Circle in July of 1981; correct?

9 A. We did, yes.

10 Q. And from July 1981 up until the

11 present, you've always lived in the same house?

12 A. We have.

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19 Q. And then there came a time -- and I  
20 know there were a number of decisions in between.  
21 Certainly, in the summer of -- of 1994, the school  
22 year for '94, you've already told us that there  
23 were times when Robbie was allowed to walk to the

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1 elementary school by himself; right?

2 A. Yes.

3 Q. And he --

4 A. Or actually he went with others during  
5 that summer, but yes.

6 Q. But there were times when he went by  
7 himself and crossed Sugarland Run Drive by himself  
8 during that summer?

9 A. I don't know if he did go alone during  
10 that summer. There would have been really no  
11 purpose in it because there was no school, and the  
12 idea that the -- the idea is that the kids would  
13 be doing something together. So I don't believe  
14 he went alone during that summer.

1           Q.     Okay. And I think you told us earlier  
2     that there were times when -- when he -- he'd walk  
3     by himself to school for those functions. Do you  
4     remember saying that?

5           A.     If I did say it, let me qualify it. He  
6     had to go with other kids. I mean, not that I  
7     made him go, but that they would all be going to  
8     the same thing at the same time.



9           Q.     Prior to his death, did you ever as a  
10   family allow Robbie to cross Sugarland Run Drive  
11   without either being with a group of other people,  
12   with older kids, or some supervision such as the  
13   crossing guard?

14           A.     I don't believe he ever did.  No.

15           Q.     And why did you not allow that to  
16   happen?

17           A.     Let me think for just a minute.  If  
18   school was out during the summer, number one,  
19   there would have been no crossing guard; number  
20   two, he would have been more isolated and not near  
21   any other children or anything.  And I think I  
22   would have been as nervous about that as anything  
23   else.  He would simply have been alone up there.

1                   So in the summer of '94 -- and I  
2   honestly can't remember what they all did at the  
3   school -- but a group of them would go.  And they  
4   would cross Sugarland Run actually right pretty  
5   much at the end of our own part at Meadowland Lane  
6   to get across the street and walk over.

7           Q.     And there was a group of children?

8           A.     Yeah.

9           Q.     Some of them were quite older than  
10   Robbie?

11          A.     Yes.

Redirect Examination of Barbara Halfmann

12           Q.     You mentioned in response to one of  
13     Ms. Snee's questions that you weren't getting  
14     complaints about discipline in the third grade by  
15     his teachers. Were you getting complaints about  
16     other things about Robbie?

17           A.     Mostly a lack of seriousness and a lack  
18     of effort. He simply -- if he was not interested  
19     in something, he simply didn't want to pursue it.

20           Q.     Was he a receptive student? Is that a  
21     fair description?

22           A.     He was often a bored student, receptive  
23     to some things that he was interested in, but I

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1     think he did stop working and stop paying  
2     attention to the things that he was not interested  
3     in.

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16           Q.     And these same objects that you've  
17     described, the box -- Ms. Snee asked you about the  
18     boxes and the parked cars and the house. Do they  
19     likewise block the view of people coming down that  
20     pathway of oncoming traffic?

21                 MS. SNEE:  Until she testifies that  
22     she's ever done that --

23                 THE WITNESS:  I have done it.  I've

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1     been down --

2                 THE COURT:  Overruled.

3                 THE WITNESS:  I've been down that path.  
4     I've lived in that community.  I know that you  
5     have to look.  I know those boxes are there.  It's  
6     a tough corner.

16           Q.     Did you ever have a discussion with  
17     Robbie about the long-term effects of some of the  
18     things he did or concerns you had?

19           A.     Yes. One time -- well, a couple of  
20     times in particular, but especially with the  
21     sticks. The sticks are forever something that a  
22     boy is interested in. They seem to insist on  
23     playing with them. But waving them around right

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1     in front of the faces is something else.

2                   I'm trying to explain to him that  
3     either his eye or somebody else's eye could be  
4     poked out by that stick and they'd be blind and  
5     couldn't really use that eye or maybe both of them  
6     for the rest of their life. It just did not  
7     really sink in. There was not that -- that  
8     concept there.

9                   One time, he was roughhousing with some  
10    of the other boys in the development, and his --  
11    one of his teeth got pushed back in -- in his  
12    mouth. Luckily, it was still a baby tooth, but  
13    the dentist was able to straighten it out so it  
14    would continue for the time being. But again,  
15    it's you get hurt, you scream a lot and cry,  
16    someone comforts you, you see the doctor, and it  
17    all gets better in a day or two. And that's kind  
18    of the way he -- he saw things. I don't think

Direct Examination of Walter Halfmann

19 that's that different from any of his friends

20 really. When they --

4 Q. We've talked a lot about this area. I  
5 understand the house that you live in is about a  
6 mile from Meadowland Elementary School?

7 A. Yes, just about a mile.

8 Q. And I understand as well, at least  
9 after the kindergarten age, there is not  
10 transportation provided by the county? It's up to  
11 the parents to get them there and come home?

12 A. That's correct.

13 Q. And without rehashing it, the first  
14 couple of years, he walked with Mandy; is that  
15 right? First and second grade?

16 A. Correct.

17 Q. And he was, what, six in the first  
18 grade, and Mandy was nine at that point?

19 A. He would be about that, yes. I'm not  
20 sure of the exact age.

21 Q. The first two years, though, they  
22 walked to school together?

23 A. Yes.

1 Q. Did they walk the same general route, I  
2 guess is the right word, that Robbie road his  
3 bicycle on, or was it a different route?

4 A. The way the kids walked to school was  
5 the way he was supposed to ride his bike also.  
6 There were a couple of variations from our house

Direct Examination of Walter Halfmann

7 at the end of Brookfield whether he would cross  
8 Meadowland and took a path or whether he went down  
9 the sidewalk of Meadowland.

10 Meadowland is another one that's a  
11 circle. It crosses Sugarland Run Drive. So you  
12 can come out and go the long way around, and you  
13 didn't have to cross that road. And then there  
14 was a path that went down parallel from Sugarland  
15 Run Drive behind the houses.

16 There's a weeping willow tree there  
17 they always try to pull the branches off of as  
18 they went by. That was fun for him. And after it  
19 got down a certain ways, there was a cut-off path  
20 coming up that went to the school, and that's  
21 where the crossing guard was.

22 Q. From your house, that path, literally  
23 the only road -- once you got to the other side,

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1 the only road you'd have to cross is Sugarland Run  
2 Drive to get to Meadowland, isn't it?

3 A. If you use the sidewalk of Meadowland,  
4 yes.

5 Q. And that was the route that was mapped  
6 out, so to speak, for the bicycle ride?

7 A. Yes. And I believe when they were  
8 walking, they occasionally took the other one.  
9 Since it went behind the houses, it was a little  
10 bit different.

Direct Examination of Walter Halfmann

11 Q. Still across Sugarland Run Drive down  
12 by the crossing guard?

13 A. As far as I know, yes.

14 Q. Do you know of any occasion prior to  
15 Robbie's death in which he crossed Sugarland Run  
16 Drive without the assistance of either a crossing  
17 guard or a parent or someone such as his sister or  
18 an older individual?

19 A. Not that I know of. At one of the  
20 block parties, he started walking up to the end of  
21 the block on his own, and I caught up with him.  
22 And he grabbed hold of my finger and started  
23 leading me.

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1 We went down another path, and the next  
2 thing I know is we were crossing Sugarland Run  
3 Drive. And we were there, and he was waiting for  
4 me to cross him across the road. Then we went up  
5 the path the other way and then wanted to come  
6 back across because he'd missed -- he didn't  
7 really remember where the playground was that he  
8 was trying to get to.

9 Q. How old was he at that point?

10 A. That was the summer before the accident  
11 I would say.

12 Q. Was that the summer of '94 for --  
13 between second and third grade?

14 A. I believe so.



Direct Examination of Walter Halfmann

15 Q. And I -- I take it that you and your  
16 wife had some conversation at least or discussion  
17 about how -- which Mandy was going to a different  
18 school and how Robbie would be back and forth in  
19 the third grade?

20 A. Yes.

21 Q. And did you discuss whether it would be  
22 appropriate for him to ride his bicycle or not?

23 A. Yes, we did.

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1 Q. And what are your recollections of  
2 those discussions?

3 A. The main concern was walking. What I  
4 remember is that he would be going past the houses  
5 slowly and would be tempted to go on in and play  
6 with somebody or something else and not make it  
7 all the way home.

8 He had, even on Meadowland, been in  
9 somebody's house one day, and we couldn't figure  
10 out where he was. It turned out to be one of his  
11 classmates, but we didn't know where all his  
12 classmates lived then. It's perfectly fine,  
13 somebody he knew. To us, it's parents that we  
14 knew nothing about. We didn't know where the  
15 house was. Again, on the bike, he -- because he  
16 did enjoy bike riding, he would tend to come  
17 straight home.

18 Q. Somewhat of a factor that you thought

Direct Examination of Walter Halfmann

19 that would minimize the risk, as opposed to the  
20 walks?

21 A. Yes. The crossing at the crossing  
22 guard, I don't think walking or riding with a bike  
23 is really any significant difference, the risk.

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1 Q. And did you concur with that mode of  
2 transportation for the third grade?

3 A. Yes, I did.

4 Q. And why did you concur?

5 A. I very much agreed with what my wife  
6 had said, what she thought.

7 Q. And did you, as a family as you recall,  
8 have limitations at all in what Robbie was to do  
9 when he was riding his bike to and from school?

10 A. As far as crossing Sugarland Run Drive,  
11 it was supposed to be with the crossing guard. My  
12 recollection is that he really -- up to the end,  
13 unless it was with a -- the crossing guard or with  
14 an adult or somebody responsible, he was not  
15 supposed to cross Sugarland Run Drive at all.

16 Q. Why did you have that rule?

17 A. That was a road that carries a lot of  
18 traffic, and people do tend to drive fast on it.  
19 We felt that it was too dangerous to have him --  
20 to count on him. He did not have the ability  
21 really to judge if it was safe to cross that road  
22 or not.

Direct Examination of Walter Halfmann

23 Q. You didn't feel that he had that?

1 A. No, I did not. Sometimes, depending  
2 upon on how you look at the road, you can be  
3 surprised yourself even as an adult. Sometimes  
4 you might think someone is further away than they  
5 really are.

6 Q. Obviously, Robbie had never driven a  
7 car before?

8 A. Yes.

9 Q. What was your experience in how  
10 Robbie -- how receptive he was to being corrected  
11 or -- or disciplined?

12 A. He would generally, if we caught him on  
13 something and you made the point, you know, that  
14 it was something that was important, would, at  
15 least initially, mend his ways. The next time you  
16 weren't looking, though, it would be what was  
17 going on. His consequences, I guess, for  
18 disobeying that was that he might get in trouble  
19 with his parents. And if someone is not watching  
20 to tell on him, then that would versus -- that  
21 would weigh in his consideration versus what he  
22 wanted to do. It was not a -- the concept never  
23 got to him that it could be a permanent, serious

1 injury that resulted or death from that.

2 Q. Did you have some frustrations then in

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Direct Examination of Walter Halfmann

3    trying to discipline Robbie?

4           A.    Along those lines, yes, because there

5    just seemed to be no way to -- to get that to sink

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20 Q. How did you first learn about what  
21 ultimately happened to Robbie?

22 A. When I got back -- I had at the time  
23 stepped away from my desk. When I got back, I saw

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1 the light on on the phone for a voice mail  
2 message, and I picked up that message. And it  
3 turned out to be from the principal, Mr. Young,  
4 who did not give any great urgency to it. It  
5 seemed to be just that he'd been involved in  
6 something with a car on Meadowland Lane which was  
7 actually said at the time, which was not the same  
8 as Sugarland Run Drive. So I feared he -- at that  
9 point, that there had some injury, that maybe he  
10 broke a leg or something. I had no concept that  
11 it was anything as serious as this.

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23 Q. When you arrived at the hospital, who  
1 was there?

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2 A. Well, when I got in, I barged through  
3 the doors in the emergency room and saw nobody I  
4 recognized in the waiting room there. I went up  
5 to the counter and told them who I was and tried  
6 to tell them why I was there.

7 And they immediately said, "Come on  
8 in," and opened the doors.

9 I was kind of disoriented at that  
10 point, I guess, but there were people standing

Direct examination of Walter Halfmann

11 around outside. I later realized one of them  
12 was -- on the other side of those doors was  
13 Mr. Young, the principal. And when I saw him  
14 later, he just looked so old and hurt. I had  
15 trouble recognizing him.

16 But they brought me across the hall to  
17 a room, opened the door there. And I saw my wife  
18 in there, and I saw the pastor in there. It was  
19 just when I knew something terrible was wrong at  
20 that point when I saw that set up. I stepped into  
21 the room, and Barb came over to me and just said  
22 that he was dead. She kind of had to blurt it out  
23 to get it out.

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13 Q. So the last time you saw him alive was  
14 the Wednesday night before?

15 A. It would be the night before, yes.

10           Q.     You were concerned about him crossing  
11     Sugarland Run Drive because you did not believe he  
12     had the ability to gauge the distance and speed of  
13     a car; is that right?

14           A.     There is more traffic. It is moving  
15     faster than on our street. So that's part of  
16     gauging distance and whatever. There's also just  
17     a much higher volume of traffic on that road.

18           Q.     So your concerns were whether his  
19     ability after he stopped to gauge whether he can  
20     safely cross; is that right?

21           A.     Correct.

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18           Q.     At any time prior to January 19, 1995  
19     did you believe that Robbie was sufficiently  
20     mature enough to cross Sugarland Run Drive without  
21     some kind of assistance?

22           A.     I'm trying to make sure I answer it  
23     within the right -- right phrase. I did not think

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1     he was mature enough during that time frame to  
2     cross that -- cross the road without proper  
3     supervision.



5                   MR. ROBEY: Very basically, the most  
6   significant argument I have for you in support of  
7   the Motion to Strike is that the condition that  
8   we're talking about in this case was open and  
9   obvious. The case I'm going to hand you, if I  
10  might, Judge, is Aragona Enterprises v. Miller.  
11  It's reported at 213 Va. 298, 191 S.E.2d at 804,  
12  page 804, decided October 9, 1972.

13                  Your Honor, the reason why I bring this  
14  motion is that this area is open and obvious, and  
15  the homeowners association has no duty to do  
16  anything about an open and obvious condition. And  
17  the Aragona case I selected because it's -- it's  
18  almost identical to the case that we have here  
19  with a couple of exceptions, and all of those  
20  exceptions are stronger in this case than they are  
21  in the Aragona case.

22                  The Aragona case facts are basically  
23  these. At an apartment project you had a tenant

1   of an apartment project who had a  
2   20-month-year-old child. Now, already we have  
3   facts stronger on behalf of the plaintiffs in  
4   Aragona than they are here because the tenant to  
5   the apartment was an invitee to the owner, the  
6   highest position that a -- that a -- someone on  
7   the property can hold, the highest duty an owner

Motions to strike of SRHOA

8 or occupant owes to the person on property. So we  
9 already have that.

10 In our case, we don't have an invitee.  
11 Robbie Halfmann and the Halfmanns are licensees on  
12 the property, but even if they were invitees, it  
13 wouldn't matter because the Supreme Court ruled on  
14 a case involving invitees. So as I said, number  
15 one, we're talking about people who are invitees  
16 on the premises. Number two, we're talking about  
17 a 20 month old. They never got in to the issue of  
18 rebuttable presumptions. This child was  
19 irrebuttably presumed to be incapable of negligenc  
20 herself. So that wasn't in the case either. So  
21 we have that in our case. They didn't even have  
22 that there.

23 What happened in the case is this

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1 20-month-year-old child wandered out of the  
2 apartment. Now, this apartment was down in the  
3 Virginia Beach area, and apparently you have an  
4 apartment building or several of them, green space  
5 behind them, the grassy areas. And directly  
6 behind the green space was a big canal. Now, the  
7 canal was owned -- at least to the center line, it  
8 was owned by the owner of the apartment, which we  
9 don't have here. We didn't owned the highway. We  
10 didn't own Sugarland Run Drive. VDOT owns that.  
11 So you actually had an ownership rights for the

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12 owner into the canal, although they had given up  
13 those rights with an exclusive easement back to  
14 Virginia Beach. And this canal apparently was  
15 operated as some kind of a -- a sewer, a run-off,  
16 that -- that ran off from someplace to someplace  
17 else irrelevant to this case.

18 Now, what you had in the canal was a  
19 canal that varied in depths. So it was not quite  
20 as open and obvious as -- as a public road would  
21 be, as we have in our case here. The problem with  
22 the canal was it might be six inches deep in one  
23 place and six feet deep in another place. It

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1 varied. Those were the basic facts setting up the  
2 case.

3 Now, this 20-month-year-old child  
4 wandered away from an apartment and into the  
5 canal. Now, the plaintiffs sued the owner of the  
6 apartment project, claiming that the -- that the  
7 owner of the apartment project should have done  
8 something to prevent or avoid this situation.  
9 They talked about warning signs. They talked  
10 about barriers, walls, or other things that would  
11 prevent people from wandering into the canal.

12 The Virginia Supreme Court made it  
13 crystal clear that this is an open and obvious  
14 condition and the owner of property has absolutely

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15 no duty whatsoever to take any affirmative action  
16 at all in an open and obvious situation. And  
17 that's the case we have here.

18 As I say, the -- the facts of this case  
19 are probably stronger for the defendant than the  
20 facts in the -- in the Aragona case because you  
21 could -- you could probably argue that, well,  
22 it's -- you know, but it's a canal and you don't  
23 necessarily know that it's -- it's particularly

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1 deep. Nobody can doubt that a road is a dangerous  
2 place.

3 Now, if -- if the Court will bear with  
4 me, I'd like to just point out some of the  
5 statements made, some of the language in the case  
6 itself started at Page 299. The Court said, "The  
7 manager of the apartment complex testified that  
8 tenants were neither permitted nor denied the use  
9 of the area between the apartments and the canal,  
10 but he was aware that they did in fact use the  
11 area."

12 You can also find in the case, Judge,  
13 that there had been numerous complaints about the  
14 canal, another fact we don't have in our case.  
15 There's not one -- one bit of evidence to suggest  
16 there had ever been a complaint or a problem.  
17 Quite the contrary, in our case. In Aragona, this  
18 landlord/owner had actually received numerous

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19 complaints about this potentially dangerous  
20 condition. The Supreme Court said that doesn't  
21 matter either. If it's open and obvious, that's  
22 the end of the case.

23 The Court said at the bottom of Page

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1 299, "A landlord is not liable to a tenant or to  
2 members of his family, whether an adult or infant,  
3 resulting from an open and obvious condition  
4 existing at the inception of the tenancy and of  
5 which the tenant knew or had means of knowing  
6 equal to the landlord."

7 The Court may have wondered during the  
8 plaintiffs' case why I made a point to -- to prove  
9 through cross-examination that this -- this area  
10 was built and acquired in the 1973-74 time frame.  
11 Whether it was '73 or '74 doesn't matter. The  
12 evidence was conclusive that, certainly by the  
13 summer of '74, this bike path, the power  
14 transformers, the road, the house, the bushes,  
15 this area was the same as it was on the day of the  
16 accident. The reason I did that and then asked  
17 the Halfmanns when did you move into your house,  
18 1981, is you now have the evidence to prove that  
19 this condition existed at the inception of the  
20 Halfmann's tenancy. So that piece of the puzzle  
21 is together also.

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22                   The Court went on to say -- and this is  
23   in -- in describing its -- it's finding, "Dangers  
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1   constantly beset unattended small children, and  
2   the defendants cannot be held responsible for the  
3   happening of an accident from a possible danger  
4   the existence of which was disclosed to the  
5   parents and natural guardians of the infant  
6   plaintiff and of which the defendants had given  
7   sufficient warning."

8                   Now, that by itself might be confusing,  
9   but then we -- moving down to the bottom of the  
10   page, Page 300. "Such an area is not a hidden  
11   trap, but a perfectly obvious bit of irregular  
12   terrain. The duty of an owner of land under Code  
13   105-104 is not to ensure the safety of invitees."  
14   And again, that -- that establishes the Court  
15   recognized this plaintiff as an invitee, again,  
16   the highest status that a person can hold on a  
17   premises. The highest duty owed by an owner or an  
18   occupant is to an invitee. They were an invitee  
19   here. So we start with the highest duty owed, and  
20   the Court still said that. "The duty of an owner  
21   of land . . ." "is not to ensure the safety of  
22   invitees, but to exercise ordinary care to see the  
23   premises are safe."

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1                   In Jones v. the United States, the

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2 landlord was the Federal Public Housing  
3 Administration. The apartment involved adjoined  
4 the main line of the Pennsylvania Railroad. Now,  
5 here's a case where they talk about -- it's not  
6 a -- it's not a highway like Sugarland Run, but  
7 it's a railroad.

8           The 23-month-year-old son of a tenant,  
9 temporarily unattended by his mother, wandered  
10 into the railroad tracks and was severely injured.  
11 The danger here was open, obvious, natural, and  
12 common to all. In such a situation, the primary  
13 duty to inform, advise, and protect a child with  
14 tender years must rest with the parents or others  
15 in loco parentis. To require a landlord to erect  
16 a fence or a barricade along a railroad track or a  
17 highway in order that adventurous children may not  
18 enter would impose such a burden that it may  
19 unduly interfere with the lawful use of -- of the  
20 property.

21           Finishing with this case, Judge, at  
22 Page 303, here is the Court's finding. Here is  
23 where it talks about its conclusion. "Obviously,

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1 the canal located to the rear of the apartments  
2 constituted a potential danger for an unattended  
3 20-month-year-old infant," just like a highway and  
4 a bike path connecting represent a possible danger

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5 to anybody using it, any biker using it.

6 We had a potential juror in this case  
7 who himself had been struck as an adult by a bike.  
8 There was the potential danger. The Court said  
9 here, you know, "Obviously a canal located in the  
10 rear of the apartments constituted a potential  
11 danger for an unattended 20-month-old infant." So  
12 the ravine -- and this is -- this is where the  
13 Court is going to bring it all together and  
14 actually mention roads.

15 "So the ravine, a deep gully, a river,  
16 a branch, a railroad, a highway, a parking lot or  
17 a busy alley located the same distance from the  
18 apartment -- had Aragona's apartment been located  
19 adjoining the beach, the Atlantic Ocean would have  
20 been a likely hazard for an unattended infant  
21 of -- of a tenant. If the lack of a barrier  
22 constitutes a defect in the premises, it was one  
23 which was open, obvious, apparent, and common to

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1 all at the time the rental agreement was entered  
2 into between Aragona, the parents of the  
3 plaintiff's estate, and it so remained. It was  
4 not hidden or latent, and it was not created by  
5 the landlord."

6 Judge, in this particular case, the  
7 Court ended up saying the -- the area where this  
8 accident occurred was open and obvious. Anybody



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9     there would see that it occurred. Now, you'll  
10    notice they don't say it has to be open and  
11    obvious to the victim. They didn't say that at  
12    all. Open and obvious is a general condition.

13               Clearly, this highway was here,  
14    Sugarland Run Drive. Clearly, the bike path was  
15    here. The sight lines, whether you noticed them  
16    or not -- and again, the Court doesn't talk about  
17    did you notice the canal was there. Whether  
18    they're noticed or not, the sight line problems,  
19    in other words, the green boxes, trees, houses,  
20    driveways, parked cars, were all there to be seen.  
21    They were open and obvious. And the Supreme Court  
22    has made it clear, if the condition is open and  
23    obvious, then the landlord has no duty to take any

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1    action. For that reason, this case has to be  
2    struck against Sugarland Run Homeowners  
3    Association.

4               I'm going to hand you one other case,  
5    Judge, which follows this same line, and it's the  
6    Washabaugh v. Northern Virginia Construction  
7    Company. Judge, this is a rock quarry case where  
8    the construction company had a construction site.  
9    The construction site had a rock quarry. A child  
10   of nine wanders into the rock -- he was similar in  
11   age to -- to the case here. He wanders into the

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12 rock quarry and -- and drowns. Again, uneven  
13 depths of water and so on and so forth.

14 The defendant concedes that, yes, I  
15 knew the rock quarry was there and, yes, I did  
16 know that children frequent this area. And they  
17 had done nothing about it. The Virginia Supreme  
18 Court at the end of the decision, the very end of  
19 the decision when it affirmed the trial court's  
20 strike of the plaintiff's case -- the trial court  
21 granted the Motion to Strike -- said, "Whether the  
22 law imposes a duty upon a defendant to take  
23 precautions for the safety of children" -- and

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1 this was a broad-brush situation. In other words,  
2 this is where the Court said signs, barriers, and  
3 whatever. It dealt with everything. "Whether the  
4 law imposes a duty upon a defendant to take  
5 precautions" -- and that means any precautions --  
6 "for the safety of children depends upon whether  
7 the danger to which they are exposed is open,  
8 obvious, natural, and common to all, whether it's  
9 hidden" -- "whether it is hidden and latent. This  
10 is in the line with the demarcation approved by  
11 the majority of decided cases, many of which are  
12 annotated."

13 And that's the general principle of  
14 law, Judge. If it's an open and obvious

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15 condition, we have no duty to children or -- or  
16 other people using this particular area, and I --  
17 I don't see how the Court could find that this  
18 wasn't open and obvious. There's nothing that's  
19 not open and obvious about it.

20 Now, that's my argument for my second  
21 grounds for the Motion to Strike. Do you want me  
22 to continue with my third?

23 THE COURT: Yes.

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1 MR. ROBEY: I'm sure you'll hear with  
2 some relief that my third Motion to Strike is  
3 really incorporating most of what I've argued  
4 before in terms of the expert because, in arguing  
5 why the expert wasn't relevant in this case, I  
6 have argued most of these things already. And  
7 what I'd simply like to do, so I won't bore you  
8 any further, is I'm going to incorporate by  
9 reference the arguments that I previously made in  
10 opposition to the plaintiffs' expert, Jennifer  
11 Toole. So I'll just incorporate those by  
12 reference. I know you've already heard them, and  
13 you understand them. Let me be brief.

14 The plaintiffs in this case charged us  
15 with actual knowledge of a dangerous condition for  
16 which we did nothing about. I have said that over  
17 and over and over again.

18 Now, Judge, you haven't heard one word

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19 of testimony that we knew anything dangerous about  
20 this particular area, not one word, and that's  
21 from the plaintiffs' case. They haven't proved or  
22 introduced one piece of evidence, not one syllable  
23 of testimony, not one piece of paper to suggest

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1 that we had any knowledge that this was a  
2 dangerous area.

3 Now, we are only required to defend  
4 what we're sued for. And I said it before, and  
5 I'll say it again. That's what we should have  
6 been sued for because that's the only thing a  
7 licensee has the right to demand of us because, if  
8 you know of a danger, we should do something about  
9 it. And that's what they pled. They said you  
10 knew and you did nothing about it. They have not  
11 proved that, Judge. They have not proved the  
12 claim against us, and the case should be dismissed  
13 against us because they didn't prove what they --  
14 what they charged us with.

15 Counsel, in -- in argument in my  
16 motions, started bringing in these what he calls  
17 constructive knowledge, and I mentioned and I'll  
18 mention it again, we've heard that phrase, "knew  
19 or should have known." They didn't plead that,  
20 number one. They didn't charge us with  
21 constructive knowledge. If they did, they should

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22 have said they knew or should have known. We have  
23 a right to know what we're being charged with.

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1 They did not do that, and they have no right to  
2 argue that because that's not what they sued us  
3 for. Number two, that's not our duty. We have no  
4 duty. We have no duty to inspect. We have no  
5 duty along those lines.

6 But even if the Court found that it was  
7 going to allow this -- this plaintiff to put on  
8 a -- pursue and prosecute a case against us for a  
9 claim that it never made in its Motion for  
10 Judgment, they haven't proved that either.

11 Constructive knowledge would mean they  
12 would have to prove that we had a reason to  
13 believe or to know that this area was dangerous.  
14 First of all, no incidents, no reports, no claims,  
15 none of that has ever occurred. The only thing  
16 they have is the testimony of Jennifer Toole.  
17 That's 100 percent of what they could use to try  
18 to argue that we should have known. And I go  
19 right back to the beginning. They have no right  
20 to argue that. They have no right to -- to pursue  
21 a judgment against us for that because they didn't  
22 sue us for that. They sued us for actual  
23 knowledge. You knew, and you did nothing about  
1 it.

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2 But now, Judge, Jennifer Toole

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3 testified as to her standards, what she believed  
4 should have been done. Now, she testified that  
5 signs could have been put up, that a crosswalk  
6 could have been painted, because the sight lines  
7 were bad, you needed to warn people, you needed to  
8 warn people on the path that -- that this -- that  
9 this road was there. I don't think there can be  
10 any question about it that that could not, as a  
11 matter of law, be considered a cause -- a  
12 proximate cause for this accident.

13               There is no question that everybody  
14 knew about this area. Ms. Kabiri testified that  
15 she knew that -- that this area was here, the path  
16 was here. She had known about it before. The  
17 Halfmanns testified to the same thing. They were  
18 aware of it. They were familiar with the area.  
19 There can't be any question. The witnesses  
20 testified. Ms. Toole testified that it had to be  
21 clear to anybody on the bike path that the road  
22 was there. And it would be nonsense to suggest  
23 otherwise.

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1               So we know that Robbie Halfmann knew  
2 that that road was down there. It was clear. The  
3 photographs introduced as evidence make it clear.  
4 That road is there to be seen. Ms. Kabiri knew  
5 the area. She knew the bike path was there. So  
6 there was no question that everybody knew the area

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7     existed. So there couldn't be any causation. The  
8     jury could not find that the lack of signs, the  
9     lack of warnings, because of a -- the problem with  
10    sight lines was a proximate cause of the accident.  
11    They simply couldn't do it because everybody knew  
12    that this situation was here.

13               What you heard now from the plaintiffs'  
14    best, their expert witness, she listed the  
15    standards that she said we -- we failed to comply  
16    with, but now the best evidence the plaintiff can  
17    offer shows that VDOT didn't either. Now, the  
18    plaintiff is going to ask this Court to find as a  
19    matter of law that we're held to the standards  
20    described by that expert witness when you know  
21    that VDOT didn't comply with those.

22               And let me fall back, and I promise you  
23    I'll do it just in about two sentences. They have  
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1    not proved the duty owed by a homeowners  
2    association. This isn't a suit about landscaped  
3    architect. This is a suit about a homeowners  
4    association.

5               Now, they have to prove what our duty  
6    is. They have to prove that there is an  
7    enforceable duty. Now, their witness admitted  
8    that all of her standards are not reduced to  
9    Virginia law. There is no Virginia law that

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10 requires us to abide by standards, and if a  
11 government expert -- a government official came  
12 out from Loudoun County in the State of Virginia  
13 and said I've got this list of things you've got  
14 to do, we could tell them no. And we have a right  
15 to do that. Now, how can we be held to a  
16 negligence standard for not doing something that  
17 the law can't require us to do in the first place?  
18 So they simply haven't proved what the homeowners  
19 association's standard of care is if there is one.  
20 Thank you, Judge.

21 THE COURT: Mr. Vaughn?

22 MR. VAUGHN: Your Honor, to precisely  
23 respond to that half hour of arguing, your Honor,

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1 I'll pull out one thing and use that. I want to  
2 start in reverse order. That would be the easiest  
3 way to do it because there's nothing else I  
4 remember more than what was just said from what



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5 was said earlier.

6 In terms of the issue of notice, we'll  
7 go back to that. I did at random again because I  
8 think it's the best way to get some sense -- I've  
9 got four cases, and I'm trying to give it as an  
10 example. And I can give you the citations of  
11 those cases, but in each instance when it talks  
12 about notice, you've got language to the effect --  
13 this is a case involving White v. Pleasants, 227  
14 Va. 508, a 1984 case. It's a landlord/tenant  
15 matter, and it was a issue of whether or not a  
16 tenant had the right to remove certain  
17 improvements. And somehow or another it got down  
18 to the issue of notice. I don't recall  
19 specifically the facts that led to it, but my  
20 purpose for citing the case is the language  
21 contained in the case.

22 First it said, The issue is related to  
23 whether White had notice of someone's outstanding  
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1 interest. A person with notice, actually or  
2 constructive or an infirmity in title, etc. And  
3 my point being we talked about -- the Court talks  
4 about notice and refers to notice again, it breaks  
5 it down in to two types of notice. The word  
6 "notice" does not mean actual notice. It means  
7 actual or constructive notice.

8 Again, in the City of Virginia Beach v.

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9 Roman, this was a municipality case where someone  
10 stepped into a -- a hole and broke her ankle or  
11 her leg, 201 Va. 879, a 1960 case. Again, when  
12 we're talking about an action against a municipal  
13 corporation for the injuries resulting from its  
14 negligence in the management of its property,  
15 notice -- it's a separate word -- notice, either  
16 express or implied must be shown. And they define  
17 the term notice. It goes on further in the case,  
18 and again, it talks about notice, actual or  
19 constructive, actual notice, constructive notice.  
20 The use of the word "notice" does not connote nor  
21 was it ever intended to connote solely actual  
22 notice.

23 The next case, Richmond v. Hood Rubber  
214  
1 Products Company, 168 Va. 11, a 1937 case, I just  
2 tried to get something that was even a little bit  
3 older. And this was a municipality case talking  
4 about whether in fact there was liability for a  
5 defective water meter, I believe, in this case.  
6 Again, it talked about knowledge. There must be  
7 knowledge. And then it goes on to define  
8 knowledge is either actual or constructive,  
9 breaking it down in to two separate things.

10 Also a 1932 case, 158 Va. 129, again on  
11 a landlord -- a landowner-type case. And it cites  
12 on page 129, I believe it is -- no. That's the

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13 first page. The way this is set up, I can't tell  
14 you precisely what page it is. Page 134, I  
15 believe. A person with notice, actual or  
16 constructive -- again, using the term "notice" and  
17 then breaking it down in to two types of notice.

18 And lastly in terms of this particular  
19 case and perhaps the most significant, I want to  
20 refer the Court to the discovery provided to  
21 Sugarland Run Homeowners Association during the  
22 course --

23 MR. ROBEY: Judge, I'm going to object 215

1 if he's going to start bringing in something that  
2 wasn't in the evidence. He can't do that. He's  
3 had his shot, and if -- and if counsel is starting  
4 to argue -- he's got to argue what was in the  
5 evidence because the Court has to base its -- its  
6 decision on the evidence, not what was in a  
7 discovery response. Unless it was introduced into  
8 evidence, he can't argue this.

9 MR. VAUGHN: I'm not talking about  
10 evidence, your Honor. I'm talking about what the  
11 definition of notice is and what Sugarland Run had  
12 a reasonable expectation to believe what we meant  
13 by the term "notice," and I'm referring to --

14 MR. ROBEY: Judge, I object to that.  
15 You can base your opinion, your decision, on the

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16 Motion for Judgment because that's part of the  
17 record of the case, but what counsel is doing is  
18 pulling something out of his file now. And the  
19 Court should base its decision on the record of  
20 this case which you have and the evidence that's  
21 been heard.

22 THE COURT: I agree with you. I  
23 sustain the objection.

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1 MR. VAUGHN: Your Honor, it's not  
2 related to that issue. Mr. Robey, in his argument  
3 yesterday and again today, related to the Court  
4 that we have no idea, we assume in effect or we  
5 take the position that notice meant actual notice  
6 and nothing else, and we've never had any reason  
7 to believe that it's anything other than that.

8 THE COURT: And that's an argument he  
9 may make.

10 MR. VAUGHN: And that's the argument I  
11 wish to make by referring exactly to what we told  
12 them that we intended to prove in our discovery.

13 THE COURT: Sustained. I have to base  
14 a ruling on this motion on the basis of the  
15 evidence. You are about to argue something that  
16 is not in the evidence.

17 MR. VAUGHN: No. With all sincerity,  
18 your Honor, I'm not. I absolutely, positively am  
19 not getting in to the evidentiary issue. I'm

20 getting in to a pleading issue as to whether or  
21 not Sugarland Run had any reason to believe that  
22 when we used the term "notice," it meant anything  
23 other than the full definition of notice being

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1 actual and constructive. That's all that I mean.

2 THE COURT: Sustained. I do not  
3 believe that that is an appropriate argument.

4 MR. VAUGHN: When Mr. Robey says to the  
5 Court we had no reason to believe that they were  
6 going to rely on the issue of constructive notice  
7 and I told him in discovery that's exactly what we  
8 were doing?

9 THE COURT: Mr. Robey is arguing it,  
10 and the only basis upon which I would consider it  
11 is whether it is in the pleadings which allege a  
12 cause of action against them. I read the  
13 pleadings. He can interpret it. You can  
14 interpret it. And I will eventually decide.

15 MR. VAUGHN: I understand. I don't  
16 disagree.

17 THE COURT: But --

18 MR. VAUGHN: But it's not fair.

19 THE COURT: But the other issues, sir,  
20 are not in evidence, and they are not part of the  
21 allegation against the defendants in this case.  
22 And you may have your exception to that ruling.

23 MR. VAUGHN: If I could make a proffer

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1 on the record then, your Honor, because I think  
2 this is the most important issue. If the Court is  
3 inclined to accept Mr. Robey's argument that  
4 notice means only actual notice and therefore he's  
5 prejudiced if we're going to talk about  
6 constructive notice, I'd like to make a proffer.  
7 That way, the Court --

8 THE COURT: Well, you may certainly  
9 make your proffer on the record at a recess.

10 MR. VAUGHN: As far as the last part of  
11 part number three, it seems to me that was --  
12 again, was an issue of open and obvious, and I may  
13 have misunderstood what Mr. Robey's argument was  
14 in so far as the matter was concerned. He has  
15 recited several times that the issue that the road  
16 is straight ahead, everybody could see it, it's  
17 right there, and a sign wouldn't have made a  
18 difference or something. I don't quite follow  
19 what that related to as the way he referred to his  
20 issue number three other than to say -- well, I'll  
21 respond to it, but I don't see how that relates  
22 directly to what his argument was.

23 He said the issue is not that the road

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1 was straight ahead. The issue is not as to  
2 whether or not there were signs. The issue is  
3 whether or not this pathway was constructed in

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4    such is a fashion that it created an unreasonably  
5    dangerous condition, and the unreasonably  
6    dangerous condition which has been testified to,  
7    and I think is exemplified by the fact this  
8    happened, is that there were transformer boxes at  
9    the bottom portion of the road that inhibited  
10   one's ability to see, either users over the  
11   pathway or persons coming down the highway. And I  
12   used "inhibited." I don't use the word  
13   "impossible." I used the word "inhibited." That  
14   is the issue.

15                   The second part of what Ms. Toole  
16   related to in terms of the dangers that were  
17   created by this pathway is the slope. We have a  
18   slope going down the roadway, down towards the  
19   roadway, a -- a slope which she testified at  
20   points is almost twice as steep as what would be  
21   acceptable within the standards and so, therefore,  
22   created a double whammy, down the hill, limited  
23   sight lines, and onto a roadway.

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1                   And then we go to the third part. We  
2   had the curb cutouts that took place sometime  
3   prior to the time this incident happened, despite  
4   what Ms. Waters said earlier and testified to.  
5   The pictures demonstrate that, and she volunteered  
6   and let us know that, in fact, now she recalled  
7   there were discussions amongst the board members

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8     about those cutouts prior to the time that they  
9     were put in. So there was actual discussion among  
10    the board members about curb cutouts at this  
11    particular location.

12                   And Ms. Toole testified -- I believe  
13    that was part of the testimony. It certainly was  
14    a part that I recall related to the fact that, in  
15    the course of doing curb cutouts, what that  
16    effectively means is that increases, invites,  
17    encourages, compels, whatever word you want to  
18    use, people coming down the pathway to come across  
19    that pathway. It gives them absolute, unfettered  
20    ability to come off the pathway into the roadway.  
21    It further enhances the problems, the unreasonable  
22    danger of this particular pathway.

23                   And that certainly is actual notice

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1    prior to the time that this incident happened that  
2    somebody better take a look at that pathway and  
3    make sure that putting those curb cutouts there is  
4    safe and sufficient. It's got to be done, and I  
5    think Ms. Toole made specific reference to that at  
6    the time. You do this, you need to make an  
7    analysis. Is that a safe place to do it? They  
8    didn't do anything other than discuss it. We'll  
9    plop it down there. So I think that's certainly  
10   actual notice. I think it's constructive notice.



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11                   In terms of the time frame and the  
12     pathway was in place, constructed, the evidence as  
13     I believe it is is that, in 1973, Sugarland became  
14     the owner of this property and, in 1974 while they  
15     were the owners of this property, a bike path was  
16     constructed upon it.

17                   And I don't care if it was the Pope  
18     himself who made the construction. It's property  
19     that they own, have complete and exclusive control  
20     over as any landlord or municipality has over  
21     their common areas, and because they had exclusive  
22     control over it, they're the only ones who could  
23     do anything within that territory. And in 1974,

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1     because they allowed it to take place regardless  
2     of who did it, but it -- it was in effect their  
3     agent -- not in effect. It was their agent who  
4     constructed a pathway, and in the course of laying  
5     down the asphalt for that pathway, whoever did it,  
6     took it right on down and right beside these  
7     transformer boxes which were there because the  
8     evidence is by stipulation that these boxes were  
9     put in place in 1973. They became the owner in  
10    1973, and they built a path in 1974.

11                   So again, that is notice to Sugarland  
12    Run Homeowners Association. We put it there. We  
13    knew the boxes were there. The boxes, by  
14    Mr. Robey's own acknowledgment, create a problem

Response of counsel for Halfmann to motions to strike

15 with sight lines. It's very clear, if you look at  
16 the photographs, it creates a problem with the  
17 sight line. As Ms. Toole said, you can't be out  
18 there and do it without knowing that it inhibits  
19 the sight line.

20 The association has an obligation to  
21 maintain and improve the common ground. That's in  
22 the declaration. It's in the articles of  
23 incorporation. So they had a duty to maintain

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1 that area.

2 Ms. Waters referred to the fact that,  
3 in the 1995 time frame, they had a subcontractor  
4 doing work on the pathways. So they were actively  
5 engaged in maintaining the pathway. They again,  
6 with all of those factors, had notice, actual  
7 notice, hey, this pathway is something we ought to  
8 look at. To say just because we didn't and we  
9 didn't put it in the board minutes, it never  
10 happened, that doesn't mean it isn't so. The fact  
11 that they took these steps along the way charged  
12 them with that notice.

13 If somebody hits you in -- in the face  
14 and you simply say pretend it didn't happen  
15 doesn't make it any different. It still happens.  
16 So they clearly had notice. It was an actual  
17 notice. And I certainly say, if we don't consider

Response of counsel for Halfmann to motions to strike

18 it actual, we consider it constructive because the  
19 danger as -- the one instruction I didn't have  
20 yesterday that I wanted to give to you related to  
21 if the defect exists long enough that it would  
22 have been discovered in the use of ordinary care,  
23 then in fact they are charged with notice of that  
1 defect. 224

2 So we have, I believe, demonstrated on  
3 this record that the association maintained an  
4 unreasonably dangerous condition on which Robbie  
5 Halfmann who had every right to use was -- did in  
6 fact use. And it owed a ordinary care to make  
7 sure they don't put him in a perilous situation,  
8 and they did just that.

9 And I want to address the second issue  
10 because I think it's -- it's intertwined with that  
11 at least at some level, and that's the -- the open  
12 and obvious argument. Just go back to the cases  
13 themselves, the criteria for open and obvious, the  
14 cases that Mr. Robey cited to you was open,  
15 obvious, natural, and common to all -- open,  
16 obvious, natural, and common to all.

17 Last I looked, your Honor, a pathway  
18 that's constructed by the association and Virginia  
19 Power switch boxes which are put in place by  
20 Virginia Power are not natural objects. They  
21 don't naturally occur. It was a combination of

22 putting the path where it was placed which created  
23 the danger, a pathway on a slope beside these 225

1 boxes along a collector road which, by everyone's  
2 account, is a heavily traveled road, a very wide  
3 road, one immediately adjacent to a school which  
4 they knew was a school. Certainly at some point  
5 in time, they became aware there was a school  
6 there. In fact when it was platted, that's on the  
7 platted -- the plat as well. It says, "School  
8 site." So they knew there was going to be a  
9 school there at the time they did it. We add all  
10 those factors together, do we have something that  
11 is a open, obvious, natural, and common to all?  
12 And of course we don't. Of course we don't have  
13 something that's a natural condition. We have a  
14 condition that's artificially made by the  
15 association.

16 And the issue that Mr. Robey -- I think  
17 a road -- a road is open and obvious, you know,  
18 but the issue isn't the road, your Honor. The  
19 issue is the pathway and the inhibited sight lines  
20 because of the manner and place in which the  
21 pathway was constructed, the curb cutouts which  
22 allow people to come right on down and right into  
23 traffic without slowing down and without stopping 226  
1 and lack of any warnings which are referenced in

Response of counsel for Halfmann to motions to strike

2 these open and obvious cases.

3           If there were, in fact, warnings, well,  
4 the issue of warnings is part and parcel of the  
5 deficiency, but in an open and obvious case,  
6 that's irrelevant. Well, we have expert testimony  
7 that, in fact in order to even comply with the  
8 basic standards, we need warnings. So how is it  
9 open and obvious that there's limited sight lines,  
10 that there's a problem here, without some kind of  
11 warning?

12           So I simply think that the cases that  
13 Mr. Robey has cited, specifically the Aragona case  
14 and the Washabaugh case, they don't deal with  
15 anything even remotely related to the situation  
16 that we have here. We have a construction of  
17 something, a pathway, in a fashion which created  
18 an unreasonably dangerous condition for the users  
19 of that pathway because it reduced the sight  
20 lines.

21           We have no evidence that the Halfmann  
22 child had ever ridden that pathway before. We  
23 have no evidence to know that he had any reason to  
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1 believe that there were limited sight lines, that  
2 if somebody were coming down the road, whether he  
3 stopped or not, that somebody would see him. We  
4 have no evidence at all that says he should have  
5 known that, that it was open, obvious, natural,

Response of counsel for Halfmann to motions to strike

6 and common to all. As he's coming down that  
7 pathway. Everyone that comes down that pathway  
8 knows somebody coming from the left doesn't have  
9 good visibility. How is that child to know that?  
10 How does anyone know that? You don't know it  
11 until something tragic like this happens, the  
12 individual user of the pathway. The association  
13 certainly was put on notice that it was a problem  
14 from day one.

15 As far as the contrib., it's the same  
16 argument. I don't want to restate over and over  
17 the same thing other than I want to emphasize  
18 again Mr. Robey picks up on the same point that I  
19 believe Ms. Snee focuses on and inappropriately  
20 so.

21 The issue is not capability. The issue  
22 is whether or not the child has sufficient age,  
23 experience, whatever the other parameters were, to  
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1 appreciate the danger. I think the evidence in  
2 this case is absolutely replete that he did not  
3 appreciate the danger. The parents have never  
4 testified that they believed he had the sufficient  
5 maturity to cross that road unassisted. They  
6 specifically said they didn't think he had it  
7 because it was too dangerous. How is that a  
8 Massie v. Firmstone issue? They've never said,  
9 yeah, we sent him up there because we thought he

Response of counsel for Halfmann to motions to strike

10     could handle it. We were very comfortable that he  
11     had the sufficient age and maturity to cross that  
12     roadway by himself and that he could appreciate  
13     the dangers of an oncoming car.

14                 Mr. Halfmann himself said -- it's  
15     obvious, but I asked him the question. He's never  
16     driven a car? No. And he said himself, I don't  
17     think and believe that he had the ability to  
18     appreciate the danger. He gave us examples of the  
19     sticks in the eyes and the concept that nothing is  
20     ever permanent. You get hurt, you put a little  
21     ointment on it, and you go on about your way, and  
22     you're good to go.

23                 Certainly, Mrs. Halfmann never said

1 anything but just the opposite, that she was never  
2 comfortable and never felt that he had sufficient  
3 maturity and understanding to be able to cross  
4 that road on his own. The reason he didn't is  
5 because they didn't let him do it. I mean, the  
6 evidence is clear they never let him do it. So  
7 how does that rise to the level that, in fact, the  
8 child had the capability to do so? Knowing the  
9 rules or being aware of the rules as an  
10 eight-year-old boy is not equivalent to having the  
11 capability to understand the danger, which is the  
12 criteria.

13 And I think and believe that responds  
14 to what Mr. Robey has raised. If there is  
15 something I've missed, I'd like the opportunity to  
16 go back and restate it again.

17 THE COURT: Thank you.

18 And rebuttal?

19 MR. ROBEY: Very briefly, Judge.

20 Counsel referred to the duty to maintain. I  
21 wonder how the jury would decide how we -- how we  
22 as a homeowners association would be required  
23 to -- to fulfill that duty. There is no evidence

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1 to that effect. They'd have to speculate. What  
2 does that mean? Does that now mean they mow the  
3 grass, or does mean -- mean they have to rebuild



4 the paths? And that is the -- the plaintiffs'  
5 burden. It's not our burden.

6 So to the extent that counsel argues,  
7 well, they have a duty to maintain and that  
8 somehow makes my case for me, that's wrong.  
9 That's not our duty. That's not our duty.

10 We've already discussed the duty or the  
11 lack thereof, the lack of proof as to what a  
12 homeowners' duty is, but even if the Court found  
13 that it was the duty to maintain the premises, how  
14 could you go beyond that? How could the jury go  
15 beyond that, but for speculation? And that's why  
16 I say a landscape architect was not the right  
17 expert to have if there was an expert to have. We  
18 don't know what duty to maintain means.

19 Counsel talks about the notice being  
20 the defect, there was a defect in the property and  
21 we were on notice of that defect. That's not what  
22 they sued us for, Judge. What they said in the  
23 Motion for Judgment is that SRHO, they had notice

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1 and knowledge of the unreasonably dangerous  
2 condition of the location. That's what they sued  
3 us for, that we had knowledge of the unreasonably  
4 dangerous condition when there's absolutely no  
5 evidence to support that.

6 Now the argument is, well, they had  
7 notice of defect. And why? Because it had been

Rebuttal argument of counsel for SRHOA regarding motions to strike

8     there, and it had been there since 1974. And  
9     counsel, I think unwittingly, is actually arguing  
10    open and obvious and basically saying this is open  
11    and obvious, they had notice of it, everybody had  
12    notice of it. That's why the Virginia Supreme  
13    Court specifically says, with an open and obvious  
14    condition, that plaintiff can't recover. We have  
15    no duty.

16                 Now, Judge, let me finish with this  
17    concept of only natural areas where -- where  
18    counsel says that, that this only applies to  
19    something that's natural like a -- like a canal.  
20    Well, a canal is not natural. A canal is dug.  
21    All right?

22                 In the case of Washabaugh v. Northern  
23    Virginia Construction Company where the Court

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1    said, "Whether the law imposes a duty upon a  
2    defendant to take precautions for the safety of  
3    children depends upon whether the danger to which  
4    they are exposed is open, obvious, natural, and  
5    common to all, whether it is hidden or latent,"  
6    now, that's true. That's what the Court said.

7                 But this was a quarry case. This was a  
8    quarry case. The was a case of a man or a  
9    human-dug trench, and when they say "natural,"  
10   they don't mean that it has to be a -- a river as  
11   opposed to anything else. And the Supreme

12 Court -- and of course, Washabaugh is a 1948 case.

13           The Supreme Court in Aragona in 1972  
14 said, "Obviously, the canal located to the rear of  
15 the apartments constituted a potential danger for  
16 an unattended 20-month-old infant. So would a  
17 ravine, a deep gully, a river, a branch, a  
18 railroad, a highway, a parking lot, or a busy  
19 alley." And in fact, the Court recites in the  
20 Aragona case, and they talk about a federal case.  
21 And I read you briefly a part of that. They talk  
22 about a federal case that was, in fact, a railroad  
23 case. In the Aragona case, the Supreme Court

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1 references Jones v. the United States, and I read  
2 you a part of that where a small child wandered  
3 out into a railroad track. This is not confined  
4 to rivers and streams, Judge. If it's a condition  
5 that's an open and obvious condition, then the  
6 plaintiff cannot recover against us.

7           THE COURT: I will consider these  
8 motions while we take a luncheon recess. Take  
9 until a quarter of two, and I'll ask the bailiff

Further argument of counsel for Halfmann on motions to strike

10 to advise the jury upon their return that the  
11 Court will be required to take an extended period  
12 before they're needed to return.

13 THE BAILIFF: I'm sorry. I couldn't  
14 hear.

15 THE COURT: Advise the jury it will be  
16 approximately a quarter to two before they're  
17 expected to be needed to return. We'll be in  
18 recess.

19 (Whereupon, a brief recess was taken,  
20 during which the following record was made:)

21 MR. VAUGHN: The proffer I'd like to  
22 make is that, in the course of discovery,  
23 Sugarland Run Homeowners Association propounded

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1 interrogatories, number five of which is, "Please  
2 set forth the facts upon which you base your  
3 allegation that Sugarland Run Homeowners  
4 Association had notice and knowledge of the  
5 unreasonably dangerous condition of the location  
6 and area where the incident which is the subject  
7 of this action occurred."

8 In response, omitting the irrelevant  
9 points being the objection, "Plaintiff would state  
10 that the association is charged with maintaining  
11 all of the common areas which in the community  
12 which includes the subject bike path area. The  
13 association is charged with both actual and

Further argument of counsel for Halfmann on motions to strike

14 constructive knowledge as to the condition of all

Further argument of counsel for Halfmann  
Ruling of trial court

15 such common elements." And I went on further to  
16 say that, "Referring specifically to the Virginia  
17 Power electrical switches, such structures having  
18 been in existence many years, the existence of all  
19 of which was open and obvious and well known  
20 within the community, including the association,  
21 is best exhibited by the remedial measures taken  
22 after the tragedy." And that's essentially what  
23 the response is. So the interrogatory answer

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1 clearly informed the association that, when we  
2 were using the term "notice," we were using it in  
3 its context in being both actual and constructive  
4 knowledge.

5 I'm looking for the date of this  
6 discovery response. It would have been sometime  
7 in 1998, I believe. That response is about a year  
8 old. July 17, 1998 is when that discovery was  
9 supplied to counsel. Well over a year ago.  
10 That's it.

11 Thank you.

12 (Whereupon, a lunch recess was taken.)

13 THE COURT: I have reviewed the Motions  
14 to Strike of each defendant, the arguments of  
15 counsel thereon. At this time, each motion is  
16 overruled.

17 Do Ms. Snee or Mr. Robey wish to make

Further argument of counsel for Halfmann  
Ruling of trial court

18 any objections for the record?

19 MS. SNEE: The defendant Kabiri notes  
20 the objections and exceptions to the ruling and  
21 that indeed there has been no evidence to show the  
22 defendant Kabiri was negligent and that the minor  
23 decedent was contributorily negligent as a matter  
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1 of law.

2 MR. ROBEY: Judge, I'm simply going to  
3 incorporate my prior arguments.

4 THE COURT: So noted. Are we ready to  
5 have the jury return?

6 MS. SNEE: Yes, ma'am.

7 MR. ROBEY: Yes, ma'am.

8 MR. VAUGHN: Yes, your Honor.

9 THE COURT: The jury may return.

Direct Examination of Francis Warren

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3 Q. Would you state your full name for the  
4 record, sir?



15           Q.     And do you remember what the weather

16     was like that day?

17           A.     It was a nice day.  I don't mean

18     exactly if it was sunny or cloudy or what.

6 Q. As you were coming down the road, what  
7 did you see?

8 A. As I was coming down the road going  
9 home, I had two children with me. And one said  
10 something, and I just glimpsed real quickly. When  
11 I looked back, I seen the vehicle, and then I seen  
12 a bicycle in front of the -- the vehicle that was  
13 coming towards me. And then it hit -- hit the  
14 bicycle, the child.

15 Q. The first time you saw the bicycle,  
16 where was it?

17 A. It was going -- the vehicle was going  
18 this way, and bicycle like this.

19 Q. Was the bicycle crossing Sugarland Run  
20 Drive?

21 A. Yes, it was.

22 Q. Was it at an --

23 A. It was out in front.

1 Q. Was it at an intersection that it was  
2 doing that?

3 A. It -- approaching an intersection, but  
4 it wasn't at the intersection.

5 Q. And could you tell from your  
6 observations where that bicycle was coming from  
7 when you first saw it?

8 A. Well, I'm not exactly sure where.

Direct Examination of Francis Warren

9     There's a path that comes down a hill off the side  
10    of the road which -- which had an electrical box.  
11    I didn't see anything before that. So I can't say  
12    that's where the -- where the vehicle -- I just  
13    seen coming from the front of the vehicle and --  
14    and hit.

15           Q.     When you say you first saw him in front  
16    of the vehicle, had part of his bicycle actually  
17    overlapped in front of that vehicle, or was it  
18    still off to the --

19           A.     It was in front of the vehicle.

20           Q.     How far in front of it was it?

21           A.     The vehicle here, and it was right  
22    there before -- before -- before it hit.

14                   Did you actually see the Jeep and the  
15 bicycle contact each other?

16           A.     Yes, I did.

17           Q.     Did you see what part of the Jeep  
18 contacted with the bicycle?

19           A.     Well, the Jeep I said was coming this  
20 way and the bicycle this way. It hit the right --  
21 left -- it would be the left, front.

22           Q.     It would be the driver's side of the  
23 Jeep?

1           A.     Yes.

13           Q.     Do you know what the speed limit was in  
14     that area?

15           A.     At that time it was, I believe, 30  
16     miles an hour.

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15           Q.     Now, you indicated it -- and this is  
16     hard to do with you and have these fine folks take  
17     a look at it too. Let's see if I can sort of  
18     share that with you. This is the area that the  
19     vehicle was coming from that struck the boy on the  
20     bicycle; right?

21           A.     Yes.

22           Q.     At the edge of the picture, to use  
23     Ms. Snee's phraseology. Are these the transformer

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1     boxes you referred to earlier?

2           A.     Right.

3           Q.     And then there's a cutout --

4           A.     Cutout.

5           Q.     And there's a cutout there at the road?

5           Q.     Prior to the point of impact, did you  
6     observe anything, any change in direction of the  
7     Jeep?

8           A.     No, I did not.

9           Q.     Did you observe anything that indicated  
10    to you the Jeep was braking?

11          A.     No, I did not.

10 JOHN W. SHIELDS,  
11 a witness, was called for examination by counsel  
12 on behalf of the defendant Sugarland Run  
13 Homeowners Association, and after having been duly  
14 sworn, was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. ROBEY:

17 Q. Would you please state your full name,  
18 sir.

19 A. John William Shields.

20 Q. Mr. Shields, what is your profession?

21 A. I'm a property manager by profession.

22 Q. Does that include managing property  
23 owned or operated by homeowners associations in

1 Virginia?

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2 A. Yes, sir.

3 Q. How long have you been a -- a property  
4 manager?

5 A. Nine to 9 1/2 years.

6 Q. Do you have any kind of education or  
7 certification to be a property manager for  
8 homeowners associations in Virginia?

9 A. Yes. I have community association's  
10 highest credential in the Professional Community  
11 Association of Managers, a certificate, as well as  
12 the National Board of Accredited Managers, a CMCA



Direct examination of John Shields

13 certification.

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10 Q. Mr. Shields, let's go back to my -- my  
11 last question. You gave us some information, and  
12 let's break it down. What's the first  
13 certification or qualification you described to  
14 us?

15 A. I'll attempt to simplify this. I have  
16 accreditation with two community association  
17 nationally recognized groups. One is with the  
18 Community Association Institute based in  
19 Washington, D.C. Another is a national board. I  
20 don't know where their headquarters are at. It  
21 gives you the qualification of having conducted a  
22 field of study, certain tests, a written term  
23 paper, the type of things to enhance your

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1 education and knowledge of the profession in  
2 both -- both of those cases.

3 Q. And the profession is what?

4 A. Property management and community  
5 association management.

6 Q. Such as the Sugarland Run Homeowners  
7 Association?

8 A. Such as Sugarland Run Homeowners  
9 Association, which is an HOA, or condominium  
10 associations or even cooperatives.

11 Q. All right. Mr. Shields, the jury knows

Direct examination of John Shields

12 that -- that this case is about an accident that  
13 occurred on January 19, 1995. Were you employed  
14 on that date?

15 A. Yes. I was employed by the Sugarland  
16 Run Homeowners Association.

17 Q. And what was your job title with  
18 Sugarland Run Homeowners Association?

19 A. Exact title was executive director.

20 Q. And what did you do for the Sugarland  
21 Run Homeowners Association as of that time?

22 A. I was in charge of their day-to-day  
23 operational activities. It was a self-managed

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1 organization. I reported to the board of  
2 directors, and basically, all their day-to-day  
3 business was conducted through me and inspected.  
4 I assembled -- and I reported to the board of  
5 directors -- the staff for such operations.

6 Q. Were you really the -- you were the man  
7 in charge?

8 A. Yes.

9 Q. Would that include the bike paths and  
10 the roads to the extent that you could control  
11 them?

12 A. To the extent that it was within  
13 association's common grounds or property that they  
14 owned and controlled, yes.

15 Q. Was there anybody else as of January

Direct examination of John Shields

16 1995 who was over you other than the -- I  
17 understand you reported to the board, but on a  
18 day-to-day basis, was there anybody else who had  
19 more authority for the operation of the common  
20 areas as of January 1995?

21 A. No.

22 Q. When did you first start working for  
23 Sugarland Run Homeowners Association?

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1 A. In April 1990.

2 Q. When did you stop working for the  
3 Sugarland Run Homeowners Association?

4 A. It was sometime in late September 1995.

5 Q. Now, I think you told us you now work  
6 for CFM Management Services?

7 A. That's correct.

8 Q. Are you still managing properties?

9 A. Yes. I'm a multisite manager in three  
10 different jurisdictions in this area.

11 Q. Do you have any affiliations today with  
12 Sugarland Run Homeowners Association?

13 A. No.

14 Q. Let's go back to your time with the  
15 Sugarland Run Homeowners Association as executive  
16 director. From day one up until January 1995 --  
17 1995, had you ever heard of the Uniform Traffic  
18 Control Devices Manual?

19 A. No.

Direct examination of John Shields

20 Q. All right. Let's go from January 19,  
21 1995 up to the present. Have you ever heard of  
22 the Uniform Traffic Control Devices Manual?

23 A. No.

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1 Q. Have you ever heard of the American  
2 Association of State Highway Officials manual or  
3 brochures?

4 A. No.

5 Q. How about up to -- from the time you  
6 started working for Sugarland Run up to January  
7 19, 1995, had you ever heard of that American  
8 Association of State Highway Officials?

9 A. No, sir.

10 Q. All right. Mr. Shields, the evidence  
11 has been clear that there were no -- there were no  
12 signs immediately around the area of this  
13 accident. Do you remember this accident? I mean,  
14 you were there?

15 A. Yes, I was on duty the day it happened.

16 Q. All right. But you didn't see the  
17 accident?

18 A. No, sir.

19 Q. But you remember the incident?

20 A. Yes. Yes.

21 Q. All right. Now, you know the area,  
22 the -- the place where -- where Sugarland Run  
23 Drive and this bike path meet? Are you .

1 familiar --

2 A. Yes.

3 Q. -- with that area?

4 A. Yes, I am.

5 Q. Now, we've heard that there were no  
6 signs, yield signs or pedestrian or bike signs, on  
7 the road itself; is that true?

8 A. As I recall, yes.

9 Q. Was there a crosswalk painted across  
10 Sugarland Run Drive where this accident occurred?

11 A. No.

12 Q. Why not?

13 A. That's --

14 MR. VAUGHN: Your Honor, again, this is  
15 calling for an opinion from this witness as to the  
16 various dichotomies between jurisdictions and  
17 whatever it may happen to be. I don't know what  
18 his answer is going to be, but he had not been  
19 qualified as an expert. And he's been brought  
20 here as a fact witness, and now he's being asked  
21 to express an opinion on the particular issue. It  
22 wasn't there. He's told us there wasn't one. The  
23 evidence is clear from the photographs there

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1 wasn't one. He cannot go beyond that and express  
2 an opinion.

3 MR. ROBEY: This isn't opinion at all,

Direct examination of John Shields

4 Judge. He's the guy that's going to know why  
5 those signs weren't there from his personal  
6 knowledge. We're not asking him to express an  
7 opinion as to the -- the law surrounding these  
8 kinds of signs or when they get placed. I'm  
9 asking him why they were or were not in this  
10 location on this date, and he's the one person who  
11 knows the answer to that question as a matter of  
12 fact.

13 THE COURT: Mr. Vaughn?

14 MR. VAUGHN: And it's irrelevant as to  
15 why are they not. That is not a fact. That is  
16 asking this gentleman -- and I know exactly what  
17 Mr. Robey wants him to say. It is an opinion as  
18 to the applicability or authority of certain  
19 entities. And he's not entitled to express an  
20 opinion about what that is.

21 THE COURT: To the question as asked, I  
22 sustain the objection.

23 BY MR. ROBEY:

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1 Q. As of the -- the time that you were at  
2 the Sugarland Run Homeowners Association as  
3 executive director, did you ever make any attempt  
4 to paint a crosswalk on any part of Sugarland Run?

5 A. No.

6 Q. Why did you not do that?

7 MR. VAUGHN: Again, it's the same, just

Direct examination of John Shields

8 going through the back door and try and elicit the  
9 same information he can't get through the front  
10 door. It's again asking this gentleman to express  
11 an opinion.

12 He didn't do it, and that's the fact.  
13 And that's the fact that he's been put forth to  
14 put into evidence, not the whys, not the opinions  
15 as to why he didn't do it, but the fact that it  
16 wasn't done.

17 THE COURT: Mr. Robey?

18 MR. ROBEY: Judge, this is not an  
19 opinion at all. I mean, based upon counsel's  
20 parameters, when I walk in tonight and I'm asked  
21 why I'm home so late, I can't answer why because  
22 it's an opinion. I suggest that that's  
23 ridiculous. This witness knows why something did  
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1 or did not happen when he was there because he was  
2 there. It's a matter of fact.

3 THE COURT: Mr. Vaughn?

4 MR. VAUGHN: It's not a matter of fact  
5 in the text that this gentleman is being asked to  
6 answer this question. Mr. Robey and I will both  
7 get home very late tonight, and we'll have an  
8 explanation that we were in court, not that we  
9 won't be able to say why the court ruled how it  
10 did or what it did or what jurisdiction we were in

Direct examination of John Shields

11 and why we were in that jurisdiction.

12 And this witness is going to be asked  
13 indirectly what he couldn't ask before. He's  
14 going to try and get him to express an opinion not  
15 as to there weren't any there because we didn't  
16 have any paint, but he's going to ask questions  
17 that go way beyond that. He's eliciting a  
18 response that goes way, way beyond that into  
19 matters which are clearly opinion and  
20 interpretations of authorities and otherwise.

21 THE COURT: Sustained to the form of  
22 the question.

23 BY MR. ROBEY:

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1 Q. Mr. Shields, was there an occasion  
2 where you wanted during your tenure -- and let's  
3 start with the -- the date you started working for  
4 the homeowners association and up to January 19,  
5 1995. Was there ever an occasion where you wanted  
6 to do something, erect a sign or a barrier on --  
7 on a bike path?

8 MR. VAUGHN: I'm going to object unless  
9 it's related to this particular path. That's the  
10 request that the defendants have had all along.  
11 We can't talk about anything but this path.

12 MR. ROBEY: What the association could  
13 or could not do on the bike paths is in issue.  
14 The plaintiffs want it to be in issue. Now, we're



Direct examination of John Shields

15 eliciting evidence. Whether it's exactly on this  
16 spot or not, if it -- if it applies to the bike  
17 paths, then it's admissible testimony as to what  
18 we could and could not do on those bike paths.

19 THE COURT: Mr. Vaughn?

20 MR. VAUGHN: What they did on the  
21 paths -- I have no objection to what he did on the  
22 paths. If he's going to express opinions about  
23 other areas, that's the problem. That's exactly  
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1 again what he's trying to do, get this witness to  
2 state an opinion about something else, not the  
3 paths. I guarantee his answer isn't going to  
4 relate to the pathways or the common ground. I  
5 guarantee you.

6 THE COURT: That was the question  
7 however. Overruled.

8 MR. ROBEY: Thank you.

9 BY MR. ROBEY:

10 Q. Do you remember my question?

11 A. Please restate it.

12 Q. Was there ever a time when you wanted  
13 to, you know, put -- erect a sign or create a  
14 barrier or do anything on the bike paths?

15 A. At least one time, yes.

16 Q. And what was that one time?

17 A. There was some people taking  
18 motorcycles on to the Sugarland Run Drive roadway

Direct examination of John Shields

19 from a pathway or common area, and I didn't want  
20 them doing that for a number of reasons. And I  
21 solicited a Loudoun County Sheriff's deputy in  
22 hopes of, when these people left the common area  
23 pathway into the roadway, they could be cited or

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1 warned. And I was told that --

2 MR. VAUGHN: Your Honor, I object to  
3 the hearsay.

4 THE COURT: Sustained. Sustained.

5 BY MR. ROBEY:

6 Q. Let me ask you this. Was it your  
7 intent, when this incident came up, that you might  
8 want to post a sign or put a barrier up or  
9 anything of that sort?

10 A. Yes.

11 Q. Were you permitted to do that?

12 A. No. I --

13 MR. VAUGHN: That is to direct hearsay.  
14 That's a --

15 THE COURT: Sustained.

16 BY MR. ROBEY:

17 Q. Did you end up doing that?

18 A. I couldn't do anything.

19 Q. You wanted to, but you didn't? Isn't  
20 that true?

21 MR. VAUGHN: Your Honor, now it's  
22 being -- he's answering what he couldn't answer by

Direct examination of John Shields

23 saying what the results of it were. I'd ask that  
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1 that be stricken and the prior response which I  
2 think he made while we were speaking be stricken.

3 THE COURT: Overruled.

4 MR. ROBEY: Thank you. I know what  
5 he's answered.

6 BY MR. ROBEY:

7 Q. Curb cuts -- do you recall at -- at the  
8 site where this accident occurred that there is a  
9 handicapped curb cut? Let's go back to January  
10 19, 1995, the day of this accident. There was a  
11 path leading right down to Sugarland Run; is that  
12 correct?

13 A. Yes.

14 Q. And then right where the path and the  
15 road meet, there is this concrete sewer storm  
16 drain with a manhole cover?

17 A. Yes.

18 Q. To the side is -- is a curb cut, one of  
19 those, like, handicapped curb cuts in the road?

20 A. Okay.

21 Q. How did that come about?

22 A. I think, starting in the spring of  
23 1994, VDOT community wide, in the areas at their  
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1 selection, started putting in handicapped ramps  
2 where regular, square-bump curbs existed along the

Direct examination of John Shields

3 roadway.

4 Q. VDOT?

5 A. VDOT, yes.

6 Q. Did they ask you, or did they just  
7 start doing it?

8 MR. VAUGHN: Again, we're eliciting  
9 hearsay, rank hearsay, and the prior answer was  
10 rank hearsay. He has no way of knowing that  
11 except through hearsay.

12 THE COURT: Mr. Robey?

13 MR. VAUGHN: And I move to strike the  
14 prior and object to that question.

15 MR. ROBEY: Well, Judge, let me  
16 rephrase the question.

17 BY MR. ROBEY:

18 Q. Mr. Shields, did you receive any kind  
19 of request from -- from VDOT to seek your  
20 permission before they started changing these curb  
21 cuts?

22 MR. VAUGHN: This is the same thing.  
23 He keeps asking this witness to get in what

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1 somebody else supposedly said. That person isn't  
2 here to demonstrate what this gentleman says he  
3 understood is what somebody told him. Try or not,  
4 that's the whole purpose of the hearsay rule.  
5 That's the whole purpose of having the person who  
6 has actual knowledge here to do it, not the person

Direct examination of John Shields

7     who says, well, I learned because somebody else  
8     related it to me or in some other fashion. But  
9     that's exactly what Mr. Robey is asking this  
10    witness to do, and I don't have somebody here that  
11    supposedly said that he could -- that related to  
12    him what he says in order to cross-examine it and  
13    ascertain whether or not that's true. I think the  
14    reason is obvious.

15               MR. ROBEY: Let me rephrase the  
16    question, Judge.

17               BY MR. ROBEY:

18           Q.    Mr. Shields, did you or anybody on  
19    behalf of the association give VDOT permission to  
20    make those -- those changes to the curb cuts?

21           A.    No.

22           Q.    And is this something that VDOT did  
23    throughout the entire Sugarland Run subdivision?

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1               MR. VAUGHN: I believe that's the same  
2    hearsay. There's no way that he answers that  
3    without hearsay information.

4               MR. ROBEY: How about if he just looks,  
5    Judge? I think he can --

6               THE COURT: Sustained without a  
7    foundation.

8               BY MR. ROBEY:

9           Q.    You were the manager of the community

Direct examination of John Shields

10 at the time; is that correct? Starting in --  
11 well, this -- this project starts in '94; is that  
12 right?

13 A. As I recall.

14 Q. You're the manager of the community at  
15 the time?

16 A. That's correct.

17 Q. And one of your functions is to inspect  
18 the community?

19 A. Yes.

20 Q. Did you inspect these curb cuts that --  
21 or at least -- and I don't mean by inspect that  
22 you were looking over the shoulder of them. Did  
23 you drive around to see what work was done?

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1 A. Yes. It had impact on our lighting  
2 facilities.

3 Q. Okay. Within your observation, did  
4 VDOT change all the curb cuts in the entire  
5 neighborhood?

6 A. Yes.

7 Q. Let me finish by asking you this,  
8 Mr. Shields. From the first day that you took  
9 your job at Sugarland Run up until January 19,  
10 1995, the day of this accident, did you ever  
11 receive or hear of one complaint, problem,  
12 incident, or anything to lead you to believe that  
13 this particular area might be a problem or danger?

Direct examination of John Shields

14

A. No.

2 A. Good afternoon.

3 Q. You indicated that one of your duties  
4 is as the -- I think Mr. Robey in fact indicated  
5 one of your duties as the executive director is to  
6 inspect the property, go out and check it out, and  
7 make sure everything is okay?

8 A. The appropriateness.

9 Q. And you, I assume, for the period of,  
10 what, the five years you were there, the 4 1/2  
11 years, you did that?

12 A. Five and half, yes.

13 Q. Five and a half. And you went out  
14 almost on a daily basis, and you inspected around  
15 the area to make sure everything was okay?

16 A. Either that or staff members assigned  
17 to specific areas.

18 Q. So you had a number of, I believe,  
19 land -- land people? I forget how Ms. Waters  
20 referred to it.

21 A. Land service.

22 Q. Land service. You mean the land. You  
23 had a staff of people that took care of specific

1 common ground; that was their function, caretakers  
2 of common ground?

3 A. Yes.

4 Q. You had a paid staff of what, three,



Cross Examination of John Shields

5 four, five people that did that?

6 A. In the five years, it varied between

7 three and five, depending upon full-time personnel

8 and part-time personnel and budget.

21 Q. Understood. And in the course of this  
22 process, one of the things you also did was, I  
23 believe, in that time frame you were upgrading and

1 repaving the pathways; is that right?

2 A. There was a pathway pavement program.  
3 We tried to pave a mile per year.

4 Q. So that was in existence sometime prior  
5 to January of '95, I take it?

6 A. Yes, sir.

7 Q. And that was ongoing through January  
8 1995?

9 A. Yeah. It was a historic program that  
10 they said they wanted continued.

11 Q. Well, one of the functions, though,  
12 that the association had on behalf of its  
13 homeowners is maintenance and improvement of the  
14 common areas; correct?

15 A. No. Just maintenance. There is no  
16 task that the homeowners association will provide  
17 beyond the maintenance aspect of the facility.

18 Q. I take it you're familiar with the  
19 declaration of the association? I know it's been  
20 a while.

21 A. Yeah.

22 Q. Maybe that's an unfair question. Let  
23 me draw your attention to a provision in that

1 declaration.

2 MR. ROBEY: Judge, could we find this  
3 in the evidence? I know there has been something  
4 introduced into the evidence.

5 MR. VAUGHN: Well, I forget which  
6 exhibit the declaration is, your Honor.

7 MR. ROBEY: It's 20, I believe, Judge.

8 BY MR. VAUGHN:

9 Q. Referring specifically to Article 5,  
10 Section 2 --

11 MR. VAUGHN: Oh, I'm sorry. Thank you.  
12 I'm looking for a number here.

13 BY MR. VAUGHN:

14 Q. Plaintiff's Exhibit No. 20, Article 5,  
15 Section 2, "The assessments that are levied by the  
16 association may be used exclusively for the  
17 purposes of promoting recreation, health, safety,  
18 and welfare of the residents and, in particular,  
19 for the improvement and maintenance of  
20 properties." Do you recall that provision?

21 A. I'll take it for granted it's in there.  
22 But yes, I do.

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20 Q. When did they build their new offices?

21 A. The office was constructed in 1990

22 through '91.

23 Q. That was an improvement, wasn't it? A

292

1 brand new office space?

2 A. Well, it was supposed to replace the

3 old community center which they never, in fact,

4 tore down, to my knowledge.

5 Q. The community center is still there

6 with the pool; correct? At least the last time

7 you were there?

8 A. Yeah. The last time I was there, yes.

9 Q. And across the parking lot, they built  
10 a whole new building, didn't they?

11 A. That's correct.

12 Q. Now, you also mentioned that --

13 Mr. Robey asked you some questions about these

14 curb cutouts I understand. When the curb cutouts

15 were being done, you went out and made some

16 inspections about what pathways curb cutouts were

17 being put in?

18 A. The first indication I had on

19 inspecting the curbs was when we started losing

20 street lights, operational street lights, in

21 certain areas. The street light cables run all

22 over the place, and on occasion, it was against

Cross Examination of John Shields

23 the curb. And when they would do a curb

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1 replacement, they would cut the wire, and that's  
2 how I got my first notification and then began  
3 looking for them.

4 Q. And so, from that point forward, you  
5 made observation inspections of where these  
6 cutouts were going to be?

7 A. Yes.

20 Q. And the purpose of putting those in  
21 there is so that people could come off the  
22 pathways, onto the roadway, without having to bump  
23 down onto the curb; right? To facilitate access

1 onto the roadway or from the roadway onto the  
2 pathway?

3 A. To assist the access of handicapped,  
4 yes.

5 Q. And you inspected the pathways and  
6 observed where this increased ease of access was  
7 being made; right?

8 A. In most cases. Sugarland Run has 14  
9 miles of pathways, and I wouldn't care to even  
10 count the number of intersections.

11 Q. But that was part of your job?

12 A. And overview of that. Yes.

13 Q. And I assume, at least as far as you  
14 know, you think you did a pretty good job?

15 A. Oh, absolutely.

16 Q. Did you voluntarily leave service at  
17 Sugarland Run?

18 A. I had an employment agreement which had  
19 a 60-day notification either by myself or by the  
20 association, and they engaged -- engaged the  
21 60-day portion on their side.

22 Q. So they terminated the contract?

Cross Examination of John Shields

23           A.    Correct.

Renewed motions to strike at conclusion of all evidence

11 MR. ROBEY: Judge, on behalf of  
12 Sugarland Run Homeowners Association, I'd like to  
13 renew our Motions to Strike. I'm not going to  
14 reargue them again. I just want to make sure it's  
15 clear for the record.

16 Judge, we brought a Motion to Strike  
17 the plaintiffs' evidence and enter judgment on  
18 behalf of the defendant Sugarland Run Homeowners  
19 Association upon the grounds that this area that's  
20 being argued as the -- and claimed as the defect  
21 was an open and obvious condition. I simply  
22 incorporate by reference the arguments I made to  
23 you before when I brought the Motion to Strike.

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1 We bring the same Motion to Strike the  
2 evidence and enter judgment on behalf of Sugarland  
3 Run Homeowners Association, again, upon the  
4 grounds that the plaintiffs' decedent was guilty  
5 of contributory negligence as a matter of law and  
6 that the presumption, the rebuttable presumption,  
7 that he was incapable of negligence has been  
8 overcome as a matter of law. I won't reargue  
9 those. Once again, I'll simply incorporate by  
10 reference my -- my prior arguments.

11 Third, Judge, we brought a Motion to  
12 Strike the evidence and enter judgment on  
13 behalf -- on behalf of the defendant upon the  
14 argument that the plaintiff sued us for knowing of



Renewed motions to strike at conclusion of all evidence

15 a dangerous condition and failing to do anything  
16 about it, and there -- there was no proof of that.  
17 And I renew that motion and, once again,  
18 incorporate by reference my prior arguments.

19 I also argued that the plaintiff is  
20 attempting to argue constructive knowledge, that  
21 we knew or we should have known, which I continue  
22 to object to that. But I also want to point out  
23 that the only evidence the plaintiff had was

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1 Jennifer Toole, the landscape architect who I've  
2 vigorously objected to her testifying at all. And  
3 I, once again, incorporate all of the arguments  
4 I've -- I've already given you on her testimony.

5 But I want to point out that John  
6 Shields has now testified. Now, he's not a  
7 landscape architect. He's a certified property  
8 manager. That's what he does for a living, and  
9 he's never even heard of the standards that  
10 Jennifer Toole used to base her opinion. So the  
11 Court now has more evidence that Jennifer Toole's  
12 alleged standards do apply to homeowners'  
13 associations in Virginia. That's the only  
14 additional information you have now that you  
15 didn't have before. So once again, I incorporate  
16 my prior arguments, and I renew that Motion to  
17 Strike as well.

Renewed motions to strike at conclusion of all evidence

18                   And I'd be happy to go in more detail,

19   Judge, but I -- I assume that you still recall

20 my -- my former arguments.

21 THE COURT: I do. Thank you.

22 Mr. Vaughn?

23 MR. VAUGHN: Rebutting, very briefly, 312

1 Mr. Robey, if anything, what Mr. Shields did was  
2 strengthen the plaintiffs' case. He stated very  
3 specifically that there was, in fact, an  
4 inspection program in effect and loose as it may  
5 happen to be, but he and members of his staff  
6 regularly went out and looked at the area. And he  
7 used -- he himself used the word "inspected," and  
8 he also talked about the curb cutouts. And he  
9 said they inspected it because of the impact it  
10 had on their -- I think he used the word  
11 "riding" -- riding, R-I-D-I-N-G, facilities which  
12 is the bike path.

13 So in direct testimony, Mr. Shields  
14 himself related exactly what we've said all along,  
15 that the association was charged with a duty of  
16 maintenance and improvement by its own documents  
17 of those common areas, and it's charged with that  
18 duty.

19 In fact, he carried out, unfortunately  
20 not as well as he should have which may be the  
21 reason Mr. Shields was fired -- but in fact, they  
22 did carry it out to the extent that they did  
23 inspect the common grounds. They specifically

Response of counsel for Halfmann to renewed motions to strike

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1 inspected the pathways, and they had a program for

Response of counsel for Halfmann to renewed motions to strike  
Rebuttal of counsel for SRHOA

2 maintenance of the pathways that continued  
3 throughout, as far as he knew, the entire  
4 existence of the subdivision, but certainly  
5 included his 5 1/2 years, which included the date  
6 that this incident transpired. As far as that is  
7 concerned, I think, if anything, again by putting  
8 notice -- I've argued that. I certainly don't  
9 restrict the definition of that to Mr. Robey's  
10 definition. And now we have affirmative evidence  
11 from a person that they went out and they did the  
12 inspection, and that certainly puts them on  
13 notice.

14 And if they choose to ignore the  
15 problem, that's not something plaintiffs have  
16 control over, but it's something that they do at  
17 their own peril. And that's what this case is  
18 ultimately about.

19 THE COURT: Mr. Robey?

20 MR. ROBEY: Judge, counsel misses the  
21 point. Sure, we went out and looked. There's  
22 never been any question about that. The question  
23 is whether we should have seen a problem with this  
314

1 area, and it would depend up whose standards we're  
2 governed by. They say Jennifer Toole, the  
3 landscape architect for Maryland standards apply.  
4 You have evidence now from somebody that's

Response of counsel for Halfmann to renewed motions to strike  
Rebuttal of counsel for SRHOA

5   certified and working in the business in Virginia

6   who says, you know, we've never heard of this

Rebuttal of counsel for SRHOA  
Ruling of trial court

7 standard. Everything was fine. We never had any  
8 reason whatsoever to believe there was a problem  
9 with this area. That's the evidence you've got.

10 THE COURT: The Court will take a brief  
11 recess to consider these motions further.

12 (Whereupon, a brief recess was taken.)

13 THE COURT: The Court has considered  
14 further the motions of the defendants to strike  
15 and for entry of judgment, and each motion is  
16 denied.

Granting of Instruction 10

324

2                    Proposed Instruction No. 10?  
3                    MS. SNEE: No objection.  
4                    MR. ROBEY: No objection..  
5                    THE COURT: Without objection, it will  
6                    be given.



8 Proposed Instruction 18?

9 MS. SNEE: In regards that we believe  
10 the decedent was found -- is contributorily  
11 negligent as a matter of law, we would object to  
12 this instruction.

13 MR. ROBEY: And we have the same  
14 objection, Judge.

15 THE COURT: The instruction will be  
16 given.

Granting of Instruction 25

340

- 14 Proposed Instruction No. 25?
- 15 MS. SNEE: No objection.
- 16 MR. ROBEY: No objection.

3 Proposed Instruction 28?

4 MS. SNEE: The defendant does object to  
5 this. There has been no testimony that the child  
6 was not aware of the danger of crossing the street  
7 without stopping, and therefore, we would object  
8 to that. And there has been no evidence contrary  
9 for the jury to make a consideration of this  
10 instruction.

11 MR. ROBEY: I join in that objection,  
12 Judge, just incorporating the arguments that I  
13 made in our Motions to Strike.

14 I also want to point out that I object  
15 to the form. The instruction, as you have it --  
16 and I think we're at 28. I hope.

17 THE COURT: Yes.

18 MR. ROBEY: It says, "A child between  
19 the ages of seven and 14 years is presumed  
20 incapable of being negligent." Then it goes on to  
21 say, "This is a rebuttable presumption, and you  
22 may find the plaintiff negligent." Now, they may  
23 find the plaintiffs negligent, but that's a

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1 different issue. This is the plaintiffs' decedent  
2 is -- is who this should be.

3 And it should go on to say, "if you  
4 find by the greater weight of the evidence  
5 considering the plaintiffs' decedent's age." Or I

Granting of Instruction 28

6 have no objection because I don't like to use the  
7 word "plaintiffs' decedent." That just seems kind  
8 of cold. If you want to use Walter Halfmann, his  
9 name, either way, I don't care. But the point is  
10 this instruction talks about the negligence of the  
11 bike rider and not the plaintiffs. The plaintiffs  
12 are the administrators. And that appears three  
13 times.

14 MR. VAUGHN: I don't have any problem  
15 with making it clear that we're talking about  
16 Robbie when we use the name or a term. It doesn't  
17 matter to me.

18 MR. ROBEY: We may just want to --  
19 perhaps to make it easy for editing purpose,  
20 instead of saying "plaintiffs" say "plaintiffs',"  
21 "s" apostrophe, "decedent." That would probably  
22 make it easier rather than rewrite the whole  
23 thing.

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1 THE COURT: I'm changing the word  
2 "plaintiffs" to "plaintiffs' decedent" or  
3 "plaintiffs' decedent's age." Did you say that  
4 there were any other objections other than the  
5 ones in support of your earlier motions?

6 MR. ROBEY: Judge, next to the  
7 bottom -- the bottom line where it says  
8 "intelligence, maturity, and experience that the  
9 plaintiffs' decedent could understand the

Granting of Instruction 28

10 danger" --

11 THE COURT: Yes.

12 MR. ROBEY: So there's a third one.

13 THE COURT: I'm sorry. I didn't make

14 that clear. Other than that, any other

15 objections?

16 MR. ROBEY: Well, I object to it being

17 given at all --

18 THE COURT: I understand.

19 MR. ROBEY: -- to be consistent with

20 the Motions to Strike.

21 MS. SNEE: The same for the defendant

22 Kabiri.

23 THE COURT: It will be given with those

361

1 modifications.

2 Proposed Instruction No. 29?

362

15                   MR. ROBEY: We owe no duty, Judge. And  
16 I want to point out this accident happened not on  
17 the common ground. This accident happened in the  
18 street, and we don't own the street. There's no  
19 evidence to suggest we do. That is VDOT's  
20 responsibility.

21                   So we don't owe a duty of any sort in  
22 the street, and frankly, we don't owe a duty of  
23 ordinary care. We don't owe a duty to keep the

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1 common areas reasonably safe for the use by the  
2 members. And it says "those entitled to use the  
3 common areas." That would be the members.

4                   We don't owe that duty. We have no  
5 duty. That's been my point throughout this trial.  
6 There is no legal duty imposed upon us.

7                   Now, there might be a contractual duty.  
8 In other words, if we weren't maintaining the area  
9 properly, the homeowners association -- actually,  
10 they have a statutory way to sue the -- the  
11 association itself to enforce the covenants and  
12 restrictions. But that's a different ball game.  
13 That's a statutory right that looks more like a  
14 contract, but that's not where we -- where we are  
15 here.

16                   We're in a tort case, and we have no  
17 tort duty. We have no duty, and that's why I

Argument on Instructions 29, 30

18 object to this instruction. Plus, this duty is  
19 taken from the duties owed to an invitee, and  
20 these plaintiffs and the decedent were not  
21 invitees. They are licensees. This wouldn't be  
22 correct even if we owed a duty. It would be a  
23 duty to a licensee and not to an invitee. So it's

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1 wrong there also.

2 THE COURT: Address for me first from  
3 this proposed instruction the word "members."  
4 What is the evidence of this case that the  
5 plaintiffs' decedent was a member of a homeowners  
6 association?

7 MR. VAUGHN: I'm sorry, your Honor.  
8 Was that addressed to me?

9 THE COURT: Well, any of you, because I  
10 think there are several parts of this instruction  
11 that I need to work through. That's the first  
12 one. What evidence is there that the decedent was  
13 a member of the homeowners association?

14 MR. VAUGHN: We've established that the  
15 Halfmanns live at 21 -- or 16 Brookfield Circle.  
16 We have put into evidence the articles and the  
17 declaration of the homeowners association that  
18 says that all owners of property in Sugarland Run  
19 Subdivision are members of the association, and I  
20 think it also talks about members of their  
21 families. So I think there's direct evidence of

Argument on Instructions 29, 30

22 that.

23 MR. ROBEY: Judge, I believe -- was the  
365  
1 declaration Exhibit 20? If I can refer you to  
2 that, Judge --

3 THE COURT: I have it.

4 MR. ROBEY: Judge, I think Page 3,  
5 assuming that your copy and my copy are  
6 identical -- and you're looking at Exhibit 20, I  
7 understand --

8 THE COURT: Yes.

9 MR. ROBEY: -- that's entitled  
10 "Declarations." Page 3 at the bottom -- near the  
11 bottom should read "Article 2, Membership" --

12 THE COURT: Yes.

13 MR. ROBEY: -- "and Voting Rights."

14 THE COURT: Yes.

15 MR. ROBEY: And then it says, "Every  
16 owner of a lot or multifamily structure which is  
17 subject to assessment shall be a member of the  
18 association." Now, Robbie Halfmann wasn't an  
19 owner. So he's not a member of the association.

20 THE COURT: Well, that was not the real  
21 reason that I asked the question. The real reason  
22 I asked the question is: Where is there in the  
23 evidence that the address that the Halfmanns live

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1 makes them members of the Sugarland Run Homeowners



Argument on Instructions 29, 30

2 Association? I mean, we're talking -- we've used  
3 the word "Sugarland," but what -- what tells me or  
4 the jury that?

5 MR. VAUGHN: We asked specifically, Is  
6 that in Sugarland Run? I know I did.

7 THE COURT: Can I conclude from that  
8 that that makes them a member of the association?  
9 In other words --

10 MR. VAUGHN: I'm at a loss to maybe  
11 following your Honor's question.

12 THE COURT: Well, for instance, are you  
13 saying that everything that's defined as, quote,  
14 in Sugarland Run is part of the Sugarland Run  
15 Homeowners Association?

16 MR. VAUGHN: The evidence at this point  
17 is that they live at 21 Brookfield Circle in -- 16  
18 Brookfield Circle -- 21 is Ms. Kabiri's address.  
19 I keep repeating it too -- in Sugarland Run.

20 THE COURT: Yes.

21 MR. VAUGHN: And we've established that  
22 that is a block off of Sugarland Run Drive. We've  
23 talked about it being in Section 6 of Sugarland

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1 Run and -- and bordering between Section 2 and  
2 Section 6 specifically. I asked to put in the  
3 plat that your Honor, in your discretion, didn't  
4 allow in, but I also believe there were earlier  
5 descriptions of where the area is. I don't think  
6 that's in context.

Argument on Instructions 29, 30

7 THE COURT: All right. Well, I just  
8 want to be certain.

9 MR. ROBEY: I think it's not a  
10 question -- I think, at this point, it's a  
11 question of what the evidence is. I think the  
12 only evidence is Section 6 is where the bike path  
13 was, not where the --

14 MS. SNEE: I think they said they lived  
15 there. I'm not sure there was evidence about all  
16 of it. You can't say, well, it's completely hard  
17 on that.

18 MR. VAUGHN: My recollection is that we  
19 talked about they moved in there in 1981. Why did  
20 they select Sugarland Run? They talked about the  
21 amenities, including the bike paths. There was  
22 a -- a fair amount of discussion about that.

23 MR. ROBEY: That could make them

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1 renters, Judge.

2 MR. VAUGHN: I think they specifically  
3 made reference to the fact that they bought their  
4 house there. They talked about they built rooms  
5 on to their house and put up a fence.  
6 Mr. Halfmann himself -- I don't know if there was  
7 specific reference. I think there was -- at one  
8 time was a member of the board.

9 MS. WATERS: You do not have to be a  
10 member of the association.

Argument on Instructions 29, 30

11 THE COURT: Ma'am, you are not to  
12 comment upon the evidence.

13 MS. WATERS: I'm sorry.

14 THE COURT: Assume for the moment that  
15 the plaintiffs' decedent lived in the property  
16 that was part of Sugarland Homeowners Association.  
17 Is he a member?

18 MR. VAUGHN: Your Honor, I'll address  
19 that specifically. His parents are members, and  
20 as members, they have the right under Article 3 --  
21 no. It was four, I guess. It is Section 3.

22 THE COURT: Article 3? I'm sorry.

23 MR. VAUGHN: Article 4, Section 3 to

1 allow members of the family to use the common 369  
2 areas. I believe there's also --

3 THE COURT: I see it.

4 MR. VAUGHN: -- substantive proof from  
5 Ms. Waters that I asked her whether there was any  
6 limitation on the use of the pathway.

7 THE COURT: I just wanted to be certain  
8 about the words.

9 MR. ROBEY: I have some additional  
10 arguments on this instruction.

11 THE COURT: All right. Go to the  
12 fundamental issue of the alleged duty of the  
13 homeowners association, if that's what you're  
14 planning to address.

Argument on Instructions 29, 30

15                   MR. ROBEY: Yes, ma'am. The  
16    plaintiffs' case in the evidence did not attempt  
17    to prove that we have a duty to use ordinary care  
18    to keep the common areas in a reasonably safe  
19    condition. The only evidence before the Court is  
20    that we had a duty to comply with the Uniform  
21    Traffic Control Devices Manual and the American  
22    Association of State Highway Officials. That's  
23    the evidence that the plaintiff offered to the

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1    Court and to the jury.

2                   In their evidence, the plaintiffs  
3    didn't attempt to suggest that we owed a duty of  
4    ordinary care. So what's going to have to happen,  
5    Judge, is the Court is going to either have to  
6    make a legal determination that we have this duty  
7    on the homeowners associations -- not just us, but  
8    the homeowners associations of Virginia have the  
9    duty to use ordinary care to keep common areas in  
10   a reasonably safe condition for use by its members  
11   and those entitled to use the common areas.

12                  I don't know what you would use, what  
13    authority you would use to make that  
14    determination. There is none because that's not  
15    our duty.

16                  Number two, the plaintiffs' case is to  
17    try to argue that we had a duty to abide by this  
18    Uniform Traffic Control Devices Manual and the

Argument on Instructions 29, 30

19 American Association of State Highway Officials  
20 and we failed to do that, and that was our -- and  
21 actually, it's more convoluted than that because  
22 they basically say you should have known that this  
23 was a problem because you didn't follow the

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1 Uniform Traffic Control Devices and etc. because  
2 in their Motion for Judgment, Judge, they're  
3 not -- they never claimed that we failed to use  
4 ordinary care to keep the common areas in a  
5 reasonably safe condition. And this is what I've  
6 argued from the very beginning of this case.

7           We've gone from the pleadings that  
8 charges us with knowing of a dangerous area and  
9 failing to do anything about it to arguing in  
10 Motions to Strike on -- on the part of the  
11 plaintiffs that we had a constructive knowledge of  
12 a dangerous condition to this where we've now gone  
13 well beyond the pleadings. And now they want us  
14 held to the duty to use ordinary care, and they  
15 want that to be their cause of action.

16           It's just as if you found these words  
17 in the Motion for Judgment, you know, the  
18 plaintiffs allege that the homeowners association  
19 had a duty to use ordinary care and failed to do  
20 that. That's not in the Motion for Judgment, and  
21 that's well, well beyond this constructive  
22 knowledge.

23                    Their theory of this case, according to

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1    the Motion for Judgment, is that we knew of a  
2    dangerous condition and failed to do anything  
3    about it. It's not this. This is a brand new,  
4    separate, and distinct cause of action that we're  
5    getting here at the instruction phase of the case.

6                    THE COURT: Mr. Vaughn?

7                    MR. VAUGHN: I would go back to one of  
8    the questions your Honor asked Mr. Robey just a  
9    few moments ago. Well, what is it -- what duty  
10   does the association have to its members? And he  
11   keeps saying none.

12                   MR. ROBEY: That's right. No tort  
13   duty. We have a contract duty, but that's not why  
14   we're here.

15                   MR. VAUGHN: The association is under a  
16   duty to maintain the common areas owned by the  
17   Articles of Incorporation which is article --

18                   MR. ROBEY: But there's a statutory  
19   process to enforce the articles or the  
20   declarations or the covenants if those --

21                   MR. VAUGHN: This is not a contract  
22   claim.

23                   MR. ROBEY: Precisely.

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1                   MR. VAUGHN: It's a tort claim.

2                   MR. ROBEY: And there is no tort duty.

3                   THE COURT: All right. Just a minute.

Argument on Instructions 29, 30

4 MR. VAUGHN: "Article 6, The Powers and  
5 Duties of the Board of Directors. The board of  
6 directors shall have the power and duty to adopt  
7 and publish rules and regulations governing the  
8 use of common areas and facilities and the  
9 personal conduct of members and their guests  
10 thereon; to employ a manager, an independent  
11 contractor, or such other employees as they deem  
12 necessary; to prescribe their duties; and (g) to  
13 cause the common area to be maintained."

14 In this instance, we have the testimony  
15 of Mr. Shields and Ms. Waters, but certainly  
16 Mr. Shields who said, in this time frame, there  
17 was a board of directors and himself and, amongst  
18 himself a grounds crew and other officers of the  
19 paid staff, had the duty to maintain the common  
20 areas and inspect the common areas. He backed off  
21 on the word "inspection" a little bit on  
22 cross-examination, but he certainly used the word  
23 in direct. And he acknowledged that in cross.

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1 In the declaration itself -- again,  
2 making sure I get the right one -- Article 5,  
3 Section 2 which I referred to in my examination of  
4 Mr. Shields, "The assessments that are levied by  
5 the association are to be used exclusively for the  
6 purpose of promoting the recreation, health,  
7 safety, and welfare of the residence" -- I'm

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8 speaking wrong -- "residents in the property and  
9 in the particular" -- "and in particular for the  
10 improvement and maintenance of properties,  
11 services, and facilities that are related to the  
12 use and enjoyment of the common areas, including  
13 but not limited to repair, replacement, and  
14 additions thereto and for the cost of labor and  
15 equipment, materials, management, and supervision  
16 thereof."

17 So the association has a very explicit  
18 duty to maintain the common areas for the health  
19 and safety, barring some of the domestic cases,  
20 for the general health, safety, and welfare of the  
21 persons using those which, in this instance, is  
22 Robbie Halfmann.

23 Now, if they have the duty to maintain,

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1 that is the duty, and if they violate that duty,  
2 going back to something Mr. Robey said in the very  
3 beginning, the basis for a tort claim is a duty, a  
4 breach thereof or a violation thereof. The duty  
5 is to maintain. The violation thereof in this  
6 instance is they did not maintain the common  
7 ground, this particular area, in such a condition  
8 that it was a safe area.

9 Now, whatever word you use -- I'm not  
10 wedded to words, but I think this instruction is  
11 clear, and it's based primarily -- it's a



Argument on Instructions 29, 30

12 combination of the instructions from  
13 landlord/tenant and from the municipality. The  
14 next instruction, as well, is a --

15 MR. ROBEY: There is not another one.  
16 There is no next instruction. Twenty-nine and 30  
17 are identical.

18 THE COURT: I'm on 31.

19 MR. VAUGHN: Thirty-one.

20 MR. ROBEY: I have no 30. Mine stops  
21 at 29 and 30.

22 MR. VAUGHN: I laid on your table this  
23 morning two additional instructions.

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1 MR. ROBEY: I've never seen them.

2 MS. SNEE: Defendant Kabiri doesn't  
3 have them either.

4 MR. ROBEY: I've never seen them.

5 MR. VAUGHN: I'm going to show you my  
6 copy in just a second.

7 The association has the duty to do what  
8 it's required to do just as a landlord in  
9 maintaining the common areas has a duty to  
10 maintain those common areas so that they don't  
11 create an unreasonable danger for the occupants,  
12 just like a municipality has the obligation to  
13 maintain an area with which it has exclusive  
14 control. And in this particular instance, the

Argument on Instructions 29, 30

15 association, in our contention, did not maintain  
16 the common area, this specific common area, in  
17 accordance with its obligations. As a result  
18 thereof, what they did was maintain an  
19 unreasonably safe common area, and my client was  
20 injured as a result thereof.

21 MR. ROBEY: Judge --

22 MR. VAUGHN: If I can -- just a second  
23 and you can talk.

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1 MR. ROBEY: I thought you had finished.

2 MR. VAUGHN: I'm referring -- if you  
3 take Instruction 24.010 which is landlord's duty  
4 to maintain common areas, "The landlord has a duty  
5 to a tenant to use ordinary care to keep common  
6 areas safe." Common areas are -- they define what  
7 common areas are. "If the landlord fails to  
8 perform this duty, then he is negligent."

9 And I've said no more there. The  
10 association has a duty to use ordinary care to  
11 keep the common areas in a reasonably safe  
12 condition for use by its member and those entitled  
13 to use the common area. If you want to take out  
14 the word and put in Robbie Halfmann, I don't care.  
15 But that is a paraphrase of 24.010 which is a  
16 landlord's duty to maintain the common areas.  
17 It's also a paraphrase of the criteria for a  
18 municipality to maintain streets and sidewalks

Argument on Instructions 29, 30

19    which are their areas. "32.040, A municipality  
20    has a duty to use ordinary care to repair a  
21    defect within a reasonable time after it has  
22    notice of the defect." And that's really the next  
23    instruction, 31, but it's a combination of that.

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1               I mean, if they have an obligation, if  
2    they have a duty and they breach it, there is a  
3    tort liability. That's been pled. That has  
4    withstood a legal challenge as to the sufficiency  
5    of the pleading up to this point. It's not the  
6    law of the case. I know that phrase is way  
7    overused, but we have stated a cause of action.  
8    The Court has already made that determination  
9    through the pleading stage. We are now in the  
10   evidentiary stage. We put on our evidence  
11   relating to that. There's got to be something  
12   that instructs the jury based on the claim that's  
13   been pled here that has passed muster in terms of  
14   its legal sufficiency that, if that standard is  
15   not met, there is a resulting damage claim.

16              THE COURT: I think in part that, for  
17   the Court to be able to give this instruction, the  
18   Court has to know what do you plan to argue to the  
19   jury, because the evidence, based on some of the  
20   arguments that I've heard to this point, I think  
21   would sustain an objection from the Court as not  
22   being in accord with the instruction. For

Argument on Instructions 29, 30

23 instance, if you were to argue to the jury that

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1 the homeowners association did not put a crosswalk  
2 in Sugarland -- in Sugarland Run Drive --

3 MR. VAUGHN: Right. I'm not going  
4 to --

5 THE COURT: -- that could not be argued  
6 on the evidence of the case and this proposed  
7 instruction.

8 MR. VAUGHN: I'm not going to make that  
9 argument.

10 THE COURT: If you would argue that  
11 they had a duty as to any area other than what is  
12 owned or controlled by them, I believe that that  
13 cannot be sustained under the evidence in this  
14 case.

15 MR. VAUGHN: I'm not going to make that  
16 argument.

17 THE COURT: That might be affected by  
18 any public sidewalks or curbs, or it may be  
19 affected by any property that is within a public  
20 right-of-way. So I think we're down to the point  
21 where we have the Court being -- before the Court  
22 can determine whether this is an appropriate  
23 instruction, to know what you plan -- what you

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1 think the evidence is that you could argue to the

Argument on Instructions 29, 30

2 jury was an unreasonably safe condition which they  
3 knew or should have known of and had a duty to  
4 remedy.

5 MR. VAUGHN: Without my notes, I will  
6 try to do it off the top of my head. That is  
7 that, in 1973, they became the owners of a parcel  
8 of common ground located between these two  
9 streets, which common ground had on it these two  
10 Virginia Power switch boxes, for lack of a better  
11 way of expressing it; and I believe the evidence  
12 shows that sometime thereafter, the summer or fall  
13 of 1994, that they commenced to construct a  
14 pathway on that common ground. And in the  
15 commencement and continuation of construction of  
16 that pathway, they made two mistakes that  
17 specifically -- that relate to this case.

18 Mistake number one is that they put it  
19 on a slope that was too steep, and mistake number  
20 two is that they put it right beside these two  
21 switch boxes which prohibited -- which diminished  
22 the sight lines of both users of the pathway and  
23 drivers coming from the direction that Ms. Kabiri

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1 came and limited -- if that's the right word,  
2 inhibited, whatever is the better phraseology --  
3 persons coming from that direction.

4 At the time they did it, it was -- it  
5 was a defect that was observable by the simple

Argument on Instructions 29, 30

6 fact of having put the trail beside those boxes.  
7 That through the course of the next several years  
8 in their normal inspection and maintenance  
9 routine, they certainly should have become aware  
10 that there was a condition here that was  
11 unreasonably dangerous. In sometime between the  
12 date of the installation of the path and the date  
13 of the installation -- excuse me -- and the  
14 incident, there were curb cutouts put in to the  
15 area where this is located. And as Mr. Fisher  
16 who -- not Mr. Fisher -- Mr. Shields themselves  
17 made reference to, that they did, in fact, inspect  
18 and make a view of where these were being placed  
19 and again had reason to know that this was an  
20 unreasonably dangerous condition, the slope of the  
21 pathway, the reduced visibility from the power  
22 boxes, and that not only from just the simple fact  
23 that putting the cuts there caused them to make

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1 this review, but also from the fact that, at that  
2 point, they were aware of the fact that that  
3 expedited -- if that's a good word -- if not  
4 compelled egress and ingress from that pathway  
5 into the roadway.

6 Now, those are the two times which I  
7 believe, in effect, constitute actual notice. The  
8 worst case scenario --

9 THE COURT: I really didn't intend to

Argument on Instructions 29, 30

10 ask you to argue the entire case.

11 MR. VAUGHN: I'm sorry.

12 THE COURT: I asked you try to tell me  
13 in probably a one sentence what -- like failed to  
14 keep a proper lookout, failed to pay full time and  
15 attention. Can you tell me they failed -- they  
16 put an improper slope? They put --

17 MR. VAUGHN: Yes. An improper --

18 THE COURT: -- a pathway next to boxes  
19 which obstructed the view?

20 MR. VAUGHN: Yes.

21 THE COURT: What else?

22 MR. VAUGHN: They failed to remedy  
23 that.

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1 THE COURT: All right. Are there any  
2 other allegations because, if you argue crosswalk,  
3 if you argue --

4 MR. VAUGHN: I'm not going to argue  
5 that.

6 THE COURT: -- curbs which were put in  
7 by someone else, if you argue boxes and there's an  
8 objection to your closing argument, I'm going to  
9 sustain it and tell the jury it's stricken and  
10 it's improper. That's my concern here. This is  
11 open-ended. I think you need to say what the duty  
12 is. We said what Ms. Kabiri's duty is.

13 MR. VAUGHN: I don't know that in a

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14 jury instruction comes down -- again, your Honor,  
15 if discretion controls, I read the general  
16 instruction that's used in landlord/tenant cases  
17 and in municipality cases, and it talks about a  
18 duty to repair and keep common areas safe. It  
19 doesn't go into detail as to what common areas or  
20 what specifically they're to do with a particular  
21 common area. It's simply the facts of the case  
22 that determine what the jury can consider as to  
23 whether in fact that duty was breached.

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1                   And in this case, I agree that the  
2 duties that we make reference to relate to the  
3 slope, the inhibited visibility because of the  
4 switch boxes. And also I'm not arguing that they  
5 had any responsibility, although I think the  
6 evidence is clear that they had just as much  
7 ability to deal with the cutouts as anybody else.  
8 It's not the installation of them by somebody.  
9 It's their existence and the fact that they did a  
10 survey -- strike that. The fact that they  
11 conducted an inspection specifically, to use  
12 Mr. Shields' words, again, if I can put my hand on  
13 them, what they did caused them to do an  
14 inspection of the impact on their riding  
15 facilities or whatever was the buzz word he used  
16 there, pathway facilities. I thought he said



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17 riding facilities.

18                   And at that point again -- maybe I'm  
19 getting back into too much of the argument, but  
20 those are the three factors that come to mind.  
21 I'm not arguing crosswalks. I'm not arguing signs  
22 with the exception. Now, there are -- I don't  
23 think -- I don't intend to argue it per se. I

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1 can't think of a reason that I would. But up on  
2 the common ground, they certainly could have done  
3 whatever they could have done. And I again say  
4 Ms. Toole did speak of what remedies could have  
5 been made to rectify and -- and do a better job  
6 for this path, not just moving it so that it  
7 wasn't -- moving either the switch boxes or the  
8 path -- and there's evidence that there was enough  
9 room to do that -- but also changing the slope and  
10 putting potential warning signs along the pathway  
11 which would be within the common ground of  
12 Sugarland Run, putting rumble strips or some sort  
13 of inhibitor towards the end of the pathway to  
14 slow down or stop them. So those are all things  
15 that I think I can point to as to what they could  
16 have done to remedy the situation. So I think the  
17 jury needs to know that it wasn't that big a deal  
18 to rectify.

18                   THE COURT: You indicated you had some  
19 authority for this series of proposed instructions  
20 on what constitutes the duty in this case of the  
21 homeowners association. I would like to know that  
22 authority.

23                   MR. VAUGHN: Let me refer to the cases

1 that deal specifically with owner liability, that  
2 deal with municipality liability, and that deal  
3 with landlord liability which all focus on -- all  
4 the result of which --

5                   THE COURT: Just don't argue --

6                   MR. VAUGHN: I'm sorry.

7                   THE COURT: -- further. If you've got  
8 the authority --

9                   MR. VAUGHN: Oh, sorry.

10                  THE COURT: -- let me have it.

11                  MR. VAUGHN: Okay. I apologize.

12                  THE COURT: That's all right --

13                  MR. VAUGHN: I wasn't sure exactly what  
14 the Court was asking.

15                  THE COURT: -- because I'm going to  
16 pass these instructions and try to work through  
17 the remainder and settle this issue in the  
18 morning.

19                  MS. ROBEY: Does counsel have a  
20 homeowners -- he's arguing landlord/tenant and

Argument on Instructions

21 municipality cases which are invitee cases. Does  
22 he have a homeowners association case?

23 MR. VAUGHN: Those are owner cases.

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1 THE COURT: Do you have copies of these  
2 to give to --

3 MR. VAUGHN: No. I don't even have  
4 them for myself.

5 THE COURT: All right. Please advise  
6 him of these citations, if you will, and I  
7 consider then that those apply to the instructions  
8 which I show as Nos. 29 and 31.

6                   MR. ROBEY: Judge, "H" and "I" would be  
7   two instructions that instruct the jury on the  
8   nature of and the duties of a licensee, and I feel  
9   that I have to withdraw because these, of  
10  course -- we handed up the instructions, I think,  
11  yesterday morning or a week ago it feels like now,  
12  but before we completed the case and had argued  
13  Motions to Strike and such.

14                   That is an accurate statement right out  
15  of the model as to the nature of or the definition  
16  of and the duties of a licensee. I don't think I  
17  can offer these instructions without being deemed  
18  to have waived my Motion to Strike. So I have to  
19  withdraw them.

20                   THE COURT: "H" and "I" --

21                   MR. ROBEY: Yes, ma'am. "H" is the --

22                   THE COURT: -- are withdrawn?

23                   MR. ROBEY: -- is the one sentence --

1 THE COURT: The licensee who -- who is  
2 the one who --

3 MR. ROBEY: Yes, ma'am.

4 THE COURT: All right. Withdrawn.

5 "I"? Did you say that was withdrawn?

6 MR. ROBEY: Yes, ma'am. I think I have  
7 to.

8 THE COURT: All right. Withdrawn.

9 MR. ROBEY: "M" I can withdraw because  
10 the plaintiff has -- I think it's the same as  
11 plaintiffs' 3.

12 THE COURT: All right. "M" will be  
13 withdrawn.

14 "O"?

15 MR. ROBEY: Judge, "O" is an open and  
16 obvious instruction instructing the jury that if  
17 this is an open and obvious condition that we --  
18 they should find their verdict in favor of the  
19 defendant homeowners association.

20 THE COURT: Any objection?

21 MR. VAUGHN: I would object, your  
22 Honor, and I would incorporate the argument that I  
23 made in response to the Motion to Strike at the

1 end of the evidence and at the end of plaintiffs'  
2 case.

3 This is not an open and obvious case.

Argument on Instruction O

4 This is a case in so far as Sugarland Run  
5 Homeowners Association is concerned in whether or  
6 not they had a pathway which was constructed and  
7 designed, however you want to put it, a  
8 combination thereof, in such a fashion as to  
9 constitute an unreasonably dangerous condition.  
10 It's not an open and obvious condition in which  
11 we're talking about an attractive nuisance or  
12 something along those lines.

13 The cases that Mr. Robey cited -- we  
14 already have argued the Aragona and Washabaugh  
15 cases. They're not even remotely similar to the  
16 facts that we have here. The fact that Robbie  
17 Halfmann was approaching a highway is not the  
18 issue.

19 The issue is he was approaching a  
20 highway on a bicycle path owned and maintained by  
21 the association which was designed -- which, in  
22 and of itself, created an unreasonably dangerous  
23 condition at least for two reasons because of the

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1 slope on the bicycle path and the limited  
2 visibility because of the transformers. That's  
3 the condition by which the path was unreasonably  
4 dangerous on this evidence. It's not an open  
5 and -- it's not a lake. It's not the ocean. It's  
6 not a canal. It's not a railroad track that he

Argument on Instruction O

7     crawled out on and -- and died on. This is a  
8     condition on a given pathway. I just don't see  
9     the applicability of these cases at all.

10           THE COURT: Mr. Robey?

11           MR. ROBEY: Well, Judge, I find it  
12     interesting that, when Mr. Vaughn is arguing that  
13     we had constructive knowledge, he always argues  
14     open and obvious. In other words, if you did a  
15     reasonable inspection, if you went up there, if  
16     you -- if you even looked at the site, it would be  
17     a -- you would be on notice that it was  
18     unreasonably dangerous because anybody ought to be  
19     able to see that. Now, that's open and obvious.

20           And then, when it comes to open and  
21     obvious, he says nobody could have seen this.  
22     This is an -- is an absolutely accurate statement  
23     of the law, Instruction "O." The law that would

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1     apply to this case is this area was, in fact, an  
2     open and obvious condition. I argued that, and I  
3     won't reargue my -- when I argued my Motion to  
4     Strike. And I continue to say that this is the  
5     law that applies to this case.

6           THE COURT: I deny the instruction.  
7           "P"?

8           MR. ROBEY: I'll withdraw "P," Judge.  
9     I think somebody else already gave it.

10          THE COURT: "P" will be withdrawn.

Argument on Instruction O

11 "R"?

12 MR. ROBEY: We offer "R," Judge. The  
13 fact of an accident of itself doesn't entitle the  
14 plaintiff to recover.

15 THE COURT: Any objection?

16 MR. VAUGHN: I object for the record,  
17 your Honor. I'm not going to argue with it.

18 THE COURT: Given.

19 Were there other instructions that you  
20 had, Mr. Robey?

21 MR. ROBEY: No, ma'am.

22 THE COURT: I believe that Court then  
23 has addressed -- although, we are considering



ORIGINAL <sup>1</sup>

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

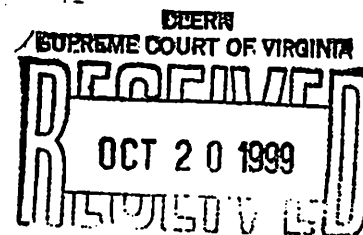
WALTER D. HALFMANN and  
BARBARA B. HALFMANN,  
Personal Representatives of  
the Estate of Walter R.  
Halfmann, Deceased,

Plaintiffs,

v.

TRINA KABIRI, et al.,

Defendants.



At Law No. 20521

DAY FOUR  
PAGES 1 - 181

Leesburg, Virginia

Friday, July 24, 1998

The proceedings commenced at 9:00 a.m.

BEFORE:

The Honorable Jean H. Clements and a jury

APPEARANCES:

ROBERT L. VAUGHN, JR., Esquire  
Glennon, Goodman & Lubeley, L.P.  
11480 Sunset Hills Road, Suite 200W  
Reston, Virginia 20190

COUNSEL FOR THE PLAINTIFFS

Reporter: Caren Bengé

13                   THE COURT: Yes. All objections are  
14 reserved. The record's very clear, I hope, on that  
15 matter.

16                   Now, the next ones to be considered  
17 are -- is -- I should say is 29 offered by the  
18 plaintiffs. I will give that in an amended form,  
19 and that is it is not, in my judgment, a proper  
20 instruction to say a homeowners association. It may  
21 say Sugarland Run Homeowners Association.

22                   MR. ROBEY: Judge, may I further argue on  
23 that point?

17

1                   THE COURT: All right.

2                   MR. ROBEY: Last night after we had this  
3 discussion, I went back to the books to try to find  
4 some case law, some guidance from the Virginia  
5 Supreme Court, or some statute that would apply to  
6 what standard is owed to a homeowners association.  
7 And I will tell you I found nothing whatsoever.

8                   From that point, I went to the  
9 Restatement, 2d, of Torts. The reason I did that is  
10 because the Virginia Supreme Court seems to favor  
11 that source in cases of first impression.

12                   If you go to the Restatement, 2d, of  
13 Torts, the 1965, which is the current, as amended,  
14 Section 342, it does talk about the possessor of  
15 land so that any possessor of land, in the very

Argument on Instruction I

16 generic sense, is going to have a duty, but that  
17 duty is exactly consistent with the duty owed to a  
18 licensee.

19 Now, counsel wants you to instruct this  
20 jury that the Halfmann boy was an invitee on this  
21 premises, and that's just plain wrong. And to  
22 instruct the jury on that standard of care is also,  
23 I submit to you in all due respect, plain wrong,

18

1 Judge.

2 We do not -- the Halfmann boy was not an  
3 invitee on our premises. If he had been in a  
4 grocery store and we were running a grocery store,  
5 he would be an invitee. But we're not running a  
6 grocery store.

7 We're a homeowners association managing  
8 common property, of which the Halfmann boy is, at  
9 the very most, a licensee. In fact, he is. He's a  
10 licensee.

11 And the Restatement of Torts seems to  
12 suggest that, that the possessor of land is going to  
13 have some responsibility, some duty of care, but  
14 that duty of care is consistent with the duty of  
15 care owed to a licensee.

16 Now, for that reason -- I know yesterday  
17 I withdrew my Instructions H and I, H being the  
18 definition of a licensee and I being the duty of  
19 care owed to a licensee.

Argument on Instruction I

20                   And after further consideration and  
21 research, I do not believe by offering those  
22 instructions, I waive any Motions to Strike. And I  
23 know the Court has told us over and over again that

19

1 we're not waiving our Motions to Strike, and I  
2 appreciate that.

3                   But at this point in time, I want to  
4 reoffer H and I, because to give this jury  
5 Instruction 29 and/or 31, which would be instructing  
6 this jury that we have the duty of care owed to an  
7 invitee, is not the law. I suggest that it's  
8 absolutely wrong.

9                   THE COURT: Do you want to speak about 31  
10 in the same argument?

11                  MR. ROBEY: Yes, ma'am, because 31 is,  
12 once again, a description of the duty owed to an  
13 invitee. Robbie Halfmann was not on invitee on this  
14 premises.

15                  An invitee is somebody that we offer into  
16 our premises for our purposes, like a grocery store:  
17 We want people to come in and buy our products.  
18 That's not the situation we have here.

19                  If you look at the definition of a  
20 licensee and invitee, Robbie Halfmann fits under the  
21 definition of a licensee. He was on that property  
22 for his purposes and not ours.

Argument on Instruction I

23 THE COURT: Which one are you reoffering?

20

1 MR. ROBEY: H and I, Judge, H as in  
2 hotel, I as in India.

3 You know, I also object to 31, because  
4 even as an invitee, this is not a proper statement  
5 of law. I'm not sure where this instruction came  
6 from. There's no cite on it.

7 And in fact, it's directing the jury to  
8 find a verdict is what it's doing. I have further  
9 argument when you're ready to focus on 31.

10 THE COURT: All right. We may focus on  
11 29 and 31.

12 MR. ROBEY: Judge, I've argued 29. 29 is  
13 telling the jury the duty that a homeowners  
14 association would owe to invitees on its premises.

15 And that doesn't apply in this case,  
16 because Rob Halfmann was a licensee. So it's an  
17 improper statement of law, because it's not the law  
18 that applies to this case.

19 31, and I -- counsel, do you have a cite  
20 for 31, where in the world that came from?

21 MR. VAUGHN: I mentioned it yesterday.  
22 It was a combination of 32.040 and 24.010 and the  
23 two cases that I had made reference to.

21

1 MR. ROBEY: Right. What the plaintiff

Argument on Instruction I

2 has done is kind of jerry-rigged several  
3 instructions and written what he believes the law  
4 is. It's not supported.

5 It's not a model instruction, and it's  
6 not an instruction taken word for word in haec verba  
7 out of a case. It's counsel rewriting the law, and  
8 I very much object to that.

9 THE COURT: All right. Mr. Vaughn, let  
10 us consider in response 29 and 31 and H and I.

11 MR. VAUGHN: I will incorporate what I've  
12 argued in response to the two Motions to Strike and  
13 what I said yesterday relative to those. I don't  
14 want to belabor the point.

15 I don't want to be presumptuous, but the  
16 Court has made a determination. I think the Court  
17 was right when it granted Instruction 29 with the  
18 addition of the homeowners association.

19 This is not a bare licensee issue. This  
20 is not someone who buys a ticket and comes in or is  
21 in some generalized posture. The covenants -- I  
22 should say the Declaration, the Articles give an  
23 absolute obligation to maintain for the benefit of

22

1 the members. It's a standard that is higher than  
2 that of a bare licensee.

3 And going back to Mr. Robey, with all due  
4 respect, there's no -- he's cited us nothing that

Argument on Instruction I

5 says the owner of property under these circumstances  
6 owes a lesser standard than all of the other owners  
7 of property. And it's just -- Sugarland Run stands  
8 in no different position than any other owner of  
9 property.

10 And they clearly, in the pragmatic sense  
11 and certainly in the legal sense, do invite people  
12 to use the common areas. It's set up for that  
13 purpose. That's why it's there.

14 I think that's clearly demonstrated by  
15 when it talks -- the cases for landlords, common  
16 areas, the standard is ordinary care, as expressed  
17 in 29.

18 In municipalities, where the public who  
19 is -- I think that's the best analogy -- utilizing  
20 areas; in effect, common areas, to which they're  
21 entitled to use, the standard is ordinary care, as  
22 reflected in 29.

23 I've seen nothing that would indicate

23

1 that a homeowners association's standard is less  
2 than that, and I think at a bare minimum, you start  
3 with what would be the normal expected care unless  
4 and until you see something that says it's a lower  
5 standard. And I've seen nothing and I've heard  
6 nothing that would imply that.

7 THE COURT: In rebuttal?

Argument on Instruction I

8 MR. ROBEY: Judge, we're not a landlord.

9 If I'm a landlord, I'm inviting people in to rent my  
10 property, because I want them to do that. They're  
11 paying me to rent my property. They're an invitee.

12 In a grocery store, I'm inviting them  
13 into my premises to buy my products. That's for my  
14 benefit, just like if I'm a landlord. If they don't  
15 rent my property, then I'm not generating money. So  
16 it's for my benefit that they're on my property.

17 That's not the case here. The homeowners  
18 association was established to maintain this  
19 property for the benefit of everyone in the area.

20 This property is really there for the  
21 benefit of people, not for the homeowners  
22 association. So the individual owners and tenants  
23 of Sugarland Run are on that property for their

24

1 benefit.

2 And it's our obligation -- and I say it's  
3 not a tort objection, but actually more of a  
4 contract under the land record documents -- to  
5 maintain it for them. But they clearly are not on  
6 that property for our benefit. They cannot be an  
7 invitee.

8 Now, to compare this to landlord-tenant  
9 or a municipality, we're not a municipality and  
10 we're not a landlord. These things simply do not



Argument on Instruction I

11     apply to us.

12                     And finally, let me point out, Judge,  
13     that they sued us as a licensee. If you go back to  
14     the Motion for Judgment, they never alleged that we  
15     violated the duty of ordinary care to keep the  
16     common areas in reasonably safe condition. You're  
17     not going to find that language in the Motion for  
18     Judgment.

19                     You're going to find licensee language:  
20     They knew of an unreasonably dangerous condition and  
21     did nothing about it. That's how they sued us in  
22     the first place and that's how we defended this  
23     case.

25

1                     THE COURT: Do you wish to argue this  
2     issue, Ms. Snee?

3                     MS. SNEE: No, I do not.

4                     THE COURT: In a civil case, I believe  
5     the Court has no duty to produce instructions. I  
6     believe the Court has a duty to ensure certain  
7     constitutional entitlements to a defendant in a  
8     criminal case.

9                     I agonized over 29 and 31. And I, too,  
10     did not believe that the nature of the duty alleged  
11     was the law that controlled this case.

12                     However, unlike the defendant Sugarland  
13     Run Homeowners Association, I believed and believe

Argument on Instruction I

14 that there was an allegation of duty alleged, while  
15 they continued to argue that there was no duty.

16 When Instructions H and I were withdrawn,  
17 the Court then was prepared to consider some  
18 statement to the jury about the duty of the  
19 defendant homeowners association.

20 However, I believe that H and I are the  
21 principles of law that apply to the Motion for  
22 Judgment as alleged and to the circumstances of this  
23 case. 29 and 31 are denied. The Court will give H

26

1 and I.

2 MR. VAUGHN: With all due respect, Your  
3 Honor, I've not looked at H and I since yesterday,  
4 because they were withdrawn.

5 THE COURT: Well, we just argued it.

6 MR. VAUGHN: I was not prepared to argue  
7 it today.

8 THE COURT: Well, I asked you to address  
9 29, 31, H, and I, and you argued. I didn't hear you  
10 say -- take a moment and look at them, please.

11 MR. VAUGHN: I would -- again, I don't  
12 have any authority beyond what I've tendered to the  
13 Court. I've not researched it, so I can't offer  
14 anything further to the Court.

15 I would say that if H and I are going to  
16 be -- certainly if I is going to be given, there's  
17 got to be something that tells the jury what the  
18 standard is of should know.

19 And 31 does just that, tells the jury  
20 why -- what the basis is upon which they can find a  
21 should know. I mean, in isolation, how is the jury  
22 possibly to determine what the standard is for  
23 should know? That's what Instruction I says, where

27

1 they know or should know. And I think --

2 THE COURT: Mr. Vaughn, I am sorry. The  
3 law -- 31 does not. I've ruled that the law of 31  
4 does not apply to this case. Now, there may be

Argument on Instructions H, I

5 elements of it for which there should be a further  
6 instruction, but I refuse 31.

7 MR. VAUGHN: I understand that, and  
8 that's not -- I've noted my exception to that and  
9 just stated for the record that since they were  
10 withdrawn yesterday, I had no opportunity to look at  
11 them further or to make an assessment of whether, in  
12 fact, Mr. Robey's position is correct. And I think  
13 the plaintiff is prejudiced by that.

14 But my point -- the Court having ruled,  
15 my point is there's got to be something that goes  
16 beyond I to tell the jury what should know is. And  
17 I think 31 -- at a minimum, the last -- the middle  
18 part of 31 has got to be given so that the jury can  
19 put I in context, if I is to be given.

20 MR. ROBEY: Your Honor, I would submit  
21 that whether or not Sugarland Run should have known  
22 is a matter of fact for the jury to decide, not a  
23 matter of law.

28

1 MR. VAUGHN: On what basis do they  
2 determine what the law says is the point at which  
3 you should have known?

4 THE COURT: I am dealing with the  
5 instructions that have been tendered to me.

6 MR. VAUGHN: I am now tendering, because  
7 I had no opportunity to respond to H and I, an  
8 amended 31 -- without waiving any objection to the

Argument on Instructions H, I

9     overruling of 29 and 31, an amended 31 that would  
10    have the middle two sentences in it, which says,  
11    knows would be defined as actual notice. Should  
12    have known would be defined as stated therein in  
13    constructive notice.

14               If we want to take the word know -- or  
15    actual notice to know, and should know for  
16    constructive notice, I don't have a problem with  
17    that. But there's got to be something that tells  
18    the jury what's the standard for knowing and what's  
19    the standard for should know.

20               MR. ROBEY: If I may point out, Judge,  
21    we've given instructions on the duty of the driver,  
22    that she either saw or should have seen. Now, we  
23    leave it up to the jury to decide, based upon the

29

1    evidence in the case, what that means. And the same  
2    thing is true here.

3               Counsel actually wants to create a  
4    closing argument, and it's up to the jury to decide  
5    what they should have known, just like it's up to  
6    the jury to decide whether or not Mrs. Kabiri should  
7    have seen. That's the nature of evidence.

8               THE COURT: I suggest to you that these  
9    instructions were exchanged, at least as I recall  
10   it, on the second day of this trial. Included in  
11   those were the proposed Instructions H and I.

12               And therefore, in the preparation of the

Argument on Instructions H, I

13 argument of all instructions, counsel for the  
14 plaintiffs had them a sufficient and reasonable  
15 period of time to be prepared to have argued in  
16 opposition to them. They will be given.

Instruction 31

30

21                   MR. VAUGHN: I'm assuming from Your  
22 Honor's ruling that you have implicitly denied my  
23 request to substitute an amended 31 without waiving

31

1 the objection.

2                   THE COURT: I have.

9 MR. VAUGHN: -- and it's grammatical, at  
10 least as I believe. Instruction I refers to  
11 occupant. I'm assuming that -- well, that should --  
12 we've not used that phrase at all in this trial, and  
13 I don't think the jury's going to have any idea who  
14 we mean when we refer to occupant. I think the  
15 grammar should be either "the association" or  
16 "Sugarland Run Homeowners Association."

17 It should say where -- it would have to  
18 sort of be changed to make the grammar work, but  
19 "occupant" has got to be "the association": Where  
20 "Sugarland Run Homeowners Association," by use of  
21 ordinary care, da, da, da, da, da; then "the  
22 association" has the duty to use ordinary care.

23 MR. ROBEY: I don't know that it matters,

1 Judge.

2 THE COURT: Well, it does, probably. We  
3 haven't used that word specifically with the jury  
4 before.

5 MR. ROBEY: Would you say "a homeowners  
6 association"?

7 THE COURT: Well, I think it should refer  
8 to the defendant. I'm not intending that this  
9 instruction give a -- state a generalized duty, but  
10 the duty that the Court is determining belongs to  
11 the defendant homeowners association in this case.



Argument on Instructions H, I

12 MR. VAUGHN: I would suggest we just  
13 strike the words "an occupant of premises" in the  
14 first line and put --

15 THE COURT: Where the defendant Sugarland  
16 Run Homeowners Association?

17 MR. VAUGHN: Yes, ma'am. By the use of  
18 ordinary care, and then down in the last line where  
19 it says --

20 THE COURT: Just a minute. They're going  
21 to have to be retyped, so I'm going to use some  
22 initials. Sugarland Run Homeowners Association.

23 All right. I'm sorry, then, Mr. Vaughn.

35

1 Continue.

2 MR. VAUGHN: In the last line where it  
3 says "an occupant," the last full sentence there --  
4 it's the second line from the bottom -- "an  
5 occupant" should be changed to "Sugarland Run  
6 Homeowners Association" or "the association,"  
7 whichever verbiage the Court likes better.

8 THE COURT: All right. Any other changes  
9 that counsel believe need to be made?

10 MR. ROBEY: The only other suggestion,  
11 Judge, if we're getting into the grammar of it,  
12 Instruction H, which says a licensee is one who  
13 enters the premises of another for his own  
14 convenience, benefit, or pleasure with the knowledge  
15 and express or implied consent of the occupant, I

Argument on Instructions H, I

16     suppose the Court could go on and say, the Court  
17     finds that you shall find that Walter Robert  
18     Halfmann was a licensee.

19                 THE COURT:  Yes.  Although plaintiffs  
20     object, I believe it should say that.

21                 MR. VAUGHN:  I don't follow what  
22     Mr. Robey was just saying.

23                 THE COURT:  Well, we haven't used the

36

1     words "licensee" before.

2                 MR. VAUGHN:  I guess H uses that word  
3     "occupant" again, too.

4                 THE COURT:  I'm going to leave H as it  
5     is.  I don't know if H -- leave H as it is.  There

7                   We know by stipulation that was agreed to  
8    by myself and Mr. Robey and read to you, or at least  
9    told to you by the Court, that the association  
10   became the owner of the property on which this  
11   particular pathway is located in 1973.

12                   We know by way of stipulation that these  
13   power boxes that we referred to over and over again  
14   (indicating) were in place where they are today in  
15   1973.

16                   The property, including the boxes, became  
17   the property of, the responsibility of, Sugarland  
18   Run Homeowners Association in 1973.

19                   The pathway -- ah, yes, the pathway --  
20   the pathway was constructed when? The pathway, on  
21   the evidence, was constructed sometime in the summer  
22   or fall of 1974.

23                   Now, I want to touch on it briefly,

1   because I think I would be remiss if I didn't, but  
2   you were here; you saw what Ms. Waters told us or  
3   attempted to tell us in terms of the date and time  
4   of the construction of the pathway.

5                   During the course of her deposition, not  
6   more than a week before, she testified -- she told  
7   us in no uncertain terms, without qualification,  
8   without hesitation, the path was constructed in the  
9   summer or fall of 1974.

Closing Argument of Halfmann

10                   I asked her, well, are there some  
11 documents by which we can garner or gather whether,  
12 in fact -- when and under what circumstances it was  
13 constructed? No, there's no documents.

14                   She hits the stand and all of a sudden,  
15 her memory's a little foggy. Well, you know, what I  
16 really meant to say was that sometime in the summer  
17 or fall of 1974 is when I really first saw it. I  
18 didn't mean to imply by that that's when it was  
19 built.

20                   And you know, by the way, I went back up  
21 into -- I think she referred to it as Room C, and I  
22 went through some documents and I found some  
23 documents that said something about it.

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1                   Told anybody about those documents?  
2 Anybody seen that document? Well, you know the  
3 funny thing about that? She apparently didn't even  
4 tell her own attorney that she had found those  
5 documents.

6                   I asked the court reporter just to give  
7 me a couple of lines from Mr. Robey's opening  
8 statement that was on Tuesday, July 20th. And I  
9 will read to you what Mr. Robey told you on July  
10 20th that his evidence -- his evidence -- would show  
11 as to when that path was constructed.

12                   "The evidence will show -- as we believe  
13 that the evidence will show, that this particular

Closing Argument of Halfmann

14 pathway was constructed sometime in the summer or  
15 fall of 1974."

16 Your collective wisdom controls as to  
17 what the facts are. The facts in this case, I  
18 submit to you, ladies and gentlemen, are abundantly  
19 clear that this pathway was constructed in 1974.

20 And why is that significant? Why did  
21 Ms. Waters go to so much trouble to try and change  
22 her testimony? Because the pathway was constructed  
23 after the boxes were there.

83

1 And why is that important? That's very  
2 important, because those boxes are the reason that  
3 this particular pathway posed an unreasonable danger  
4 to the people who were riding on that pathway.

5 Exhibit Number 3 shows -- and we have had  
6 several smaller photographs -- bicyclists coming  
7 down the pathway. Their view to the left is limited  
8 by these boxes.

9 People coming down the roadway, their  
10 view is limited by those boxes, not eliminated,  
11 which the defendants would want to substitute for.  
12 It's not eliminated. No one's testified you can't  
13 see. It is limited.

12                   And again, why does Ms. Waters want to  
13 reinvent the truth in terms of when the pathway was  
14 installed? Because at the time the pathway was  
15 installed, it was installed while Sugarland Run was  
16 the owner of this property, charged with its  
17 responsibility.

18                   And when they slapped that pavement down  
19 beside these transformer boxes or these switch  
20 boxes, they created a situation of which they knew  
21 or, using the words of the instruction, heaven's  
22 sakes, if they didn't know, they certainly should  
23 have known.

8                   The responsibility for maintaining the  
9   common areas so that persons using those pathways,  
10   the exclusive common areas of the association, lies  
11   solely within the province of that association.

12                  We go back to the instruction -- and it  
13   will be labeled "I" when you take it back to the  
14   jury room -- and we look at what the standards are.

15                  Did the association know or should it  
16   have known that there was an unsafe condition? I  
17   think the evidence is absolutely replete.

Closing argument of counsel for Halfmann

6                   The funny thing about the whole thing,  
7   however, is that it doesn't take a whole lot to  
8   figure out, if you go and look -- you can see it  
9   from a photograph -- that these transformers, coming  
10   down off a hill on a bicycle path, are going to  
11   create a problem.

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19                  Again, the expert came before us, told us  
20   what the parameters were, but also told us that it  
21   was there. You see it. Certainly as an adult, if  
22   it's your job to make sure that this area is  
23   properly maintained, that it's safe, it's for the

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1   health and welfare of the folks that are going to be  
2   using it, you look at it and see it. Instantly, you  
3   know there's a problem.



4                   And the problem relates to the fact that  
5   we're on a busy road, a wide road, thirty miles an  
6   hour at that point, two-tenths of a mile from an  
7   elementary school where there are lots of kids.

8                   And this particular portion of the road,  
9   as you can see from the evidence, is a pretty  
10   straight portion of the road, from Exhibit Number 8  
11   or just about any of them: Exhibit Number 8,  
12   Exhibit Number 9; it's a long straight stretch of  
13   highway. So prong number two is certainly there.

12                   The evidence is uncontradicted by  
13 everybody, from Ms. Waters, from Ms. Shields (sic),  
14 through Deputy Leonard, that there are no warning  
15 sign on this pathway whatsoever, none.

16                   There's no sign that says, look out,  
17 limited view or restricted view or anything of that  
18 nature, nothing to let somebody know coming down  
19 that pathway that, hey, there's a little problem up  
20 ahead. Be a little careful at this particular  
21 intersection, not one single sign.

22                   The association wanted to let us know  
23 loud and clear, we can't do anything other than if

1 it's on our ground. Well, ladies and gentlemen,  
2 this is their ground (indicating).

3                   Well, if they weren't going to take the  
4 cheap, simple step of putting up at least one lousy  
5 sign, then the alternative was to remedy the  
6 condition.

7                   And as Ms. Toole told us, what does it  
8 take to at least improve the situation? We can look  
9 at this path -- I mean, we can look at this picture  
10 (indicating). We see the vast expanse where this  
11 common -- of this common area where this path is  
12 located. We're not talking about a narrow window  
13 where we can't move the path more than two or three  
14 inches either way.

Closing Argument of Halfmann

15                   I asked again, in terms of photograph  
16   Number 9, the common ground goes from the other side  
17   of these all the way over to where that fence is.  
18   And again, you get a much better perspective here  
19   (indicating).

20                   There are two alternatives: Either you  
21   get these relocated, these switch boxes, or you get  
22   this relocated, the path (indicating). It's that  
23   simple. Just don't sit there and do nothing. Do

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1   something.

5                   And Ms. Toepfer told you that she was the  
6 first car. She says, I am coming in the opposite  
7 direction. I have a clear view on the left. We all  
8 know Mrs. Kabiri did not. She said, I saw the boy.  
9 It was my belief that neither the boy or the car  
10 could see each other.

11                   She further said when she first saw the  
12 boy, a lady with a clear view, says, I can't tell  
13 you if it was up here by this little green missile  
14 thing or if he was already at this giant green box  
15 (indicating). That's her view. She says, I can't  
16 tell you. It was right around in there somewhere.

17                   Well, if he's up at the green missile  
18 box, Mrs. Kabiri's got a house in the way. So is  
19 she supposed to see through houses? No. Is she  
20 supposed to see through the giant green box? No.  
21 She is only supposed to be human. She is only  
22 supposed to use reasonable care.

9                   But you can ask Mr. Vaughn when he gets  
10 back: Mr. Vaughn, explain to me, where was  
11 Mrs. Kabiri supposed to see the boy? Was she  
12 supposed to see him when he's behind the green box?  
13 Was she supposed to see him when he's behind the  
14 house? Was she supposed to see him when he's behind  
15 the black car?

1                   Mr. Vaughn has built a case on the fact  
2   that you can't see. And you have all these pictures  
3   now. As you're coming up, there's houses  
4   (indicating). As you're coming up the direction  
5   Mrs. Kabiri was going, there's bushes (indicating).

6                   No garbage can, actually. We can take  
7   the garbage can out of there. Nobody's testified  
8   there was a garbage can. We have two parked cars  
9   with only a photo of one for you to see.

10                  But as she's coming along, there's a  
11   parked car before the driveway. There's a parked  
12   car after the driveway. There's two giant green  
13   boxes. Where is she supposed to see?

8                   And he argued it a few minutes ago:

9   Well, the curb cuts were there, and because the curb  
10 cuts were put in and because we inspected the curb  
11 cuts, we knew there was something dangerous about  
12 that.

13                   I don't know how you can the make the  
14 leap from a curb cut to us having some reason to  
15 believe that this area was dangerous. VDOT put  
16 those curb cuts in there. We didn't. VDOT did  
17 that.

18                   The only inspection that John Shields did  
19 was to drive around the neighborhood and watch them  
20 do it and see them do it, because he said nothing  
21 about riders. He said right-of-way: I had to see  
22 what they were doing in the right-of-way. It's not  
23 even our right-of-way.

1                   That's what he was doing. He was going  
2 around and watching them do it. How in the world  
3 does that put us on notice, as they have alleged,  
4 that this is a dangerous condition?

10                   Now, you're going to find that there's a  
11 house. We didn't build that house. And that house  
12 has a driveway. We didn't build the driveway. That  
13 house may have a car parked in the driveway. We  
14 didn't park the car there. That house has lamp  
15 poles.

16                   Beyond that, you've got a tree. Beyond  
17 that, you've got VEPCO's power boxes. We didn't put  
18 those there. That's VEPCO's territory and those are  
19 their boxes. We didn't do any of that.

20                   And on the day of this accident, there  
21 apparently were parked cars here as well  
22 (indicating). We didn't park those cars there.



9                   And it's suggested that we take that  
10 evidence as evidence of the fact, as Mr. Robey would  
11 have us say, that Sugarland Run, for some reason, is  
12 unique in the universe and it's totally free to do  
13 whatever it wants without regard to what the  
14 standards are to be safe.

15                   If Sugarland Run were a doctor, does that  
16 mean if you've got a gallbladder, they can start  
17 from the top of your head and go down? There are  
18 standards.

19                   Standards aren't necessarily in statutes.  
20 Standards come from professional practice.  
21 Professional practice in this area is what Ms. Toole  
22 does. How do we judge anybody in their area? It is  
23 by professional practice.

1                   If somebody is hurt in an accident, we  
2 don't go to the person driving the car to explain to  
3 us what their injuries are. We go to a  
4 professional. We go to the person who is the  
5 healing practitioner.

6                   If someone is charged with the  
7 responsibility for maintaining the common areas in a  
8 safe fashion for its users, we go to the  
9 professionals that tell us how we're supposed to do  
10 it.

11                   Supposedly Mr. Shields was a

Rebuttal Closing of Halfmann

12 professional, but maybe, you know, there's one  
13 telling thing. Maybe he wasn't quite professional  
14 enough. Maybe there's a reason that he doesn't know  
15 the standards, and maybe ultimately that's the  
16 reason that Sugarland Run decided, you've got to go.

17 MR. ROBEY: Judge, I have to object to  
18 counsel arguing the facts not in evidence.

19 THE COURT: Sustained.

20 MR. ROBEY: Thank you.

21 THE COURT: Stricken.

22 MR. VAUGHN: Mr. Shields was dismissed  
23 from his position in -- or he was not rehired in

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1 September of 1995.

2 I tell you, and I suggest to you that  
3 despite Mr. Robey's fine printing, excellent  
4 handwriting, that each these questions (indicating)  
5 have been -- the first and second have been answered  
6 in the positive, and they have fallen woefully short  
7 on the third.

8 You just can't have it both ways. If the  
9 association says, well, we acknowledge that there's  
10 a problem out there, we acknowledge that all these  
11 things are there, but it just isn't our fault --  
12 they keep pointing the finger.

13 I mean, it seems to be the practical way  
14 that people deal with everything these days. It's

Rebuttal Closing of Halfmann

15 not our fault. It's somebody else's fault.

16 We didn't have control over the roads.

17 We didn't have control over people parking cars. We

18 didn't have control over the trees. We didn't have

19 control where they built houses.

20 They had control of the most important

21 thing, and that's where they put that path. And

22 they put it where all of these obstacles became a

23 problem. And they left it there and they left it

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1 there.

2 The trees got bigger. The traffic got

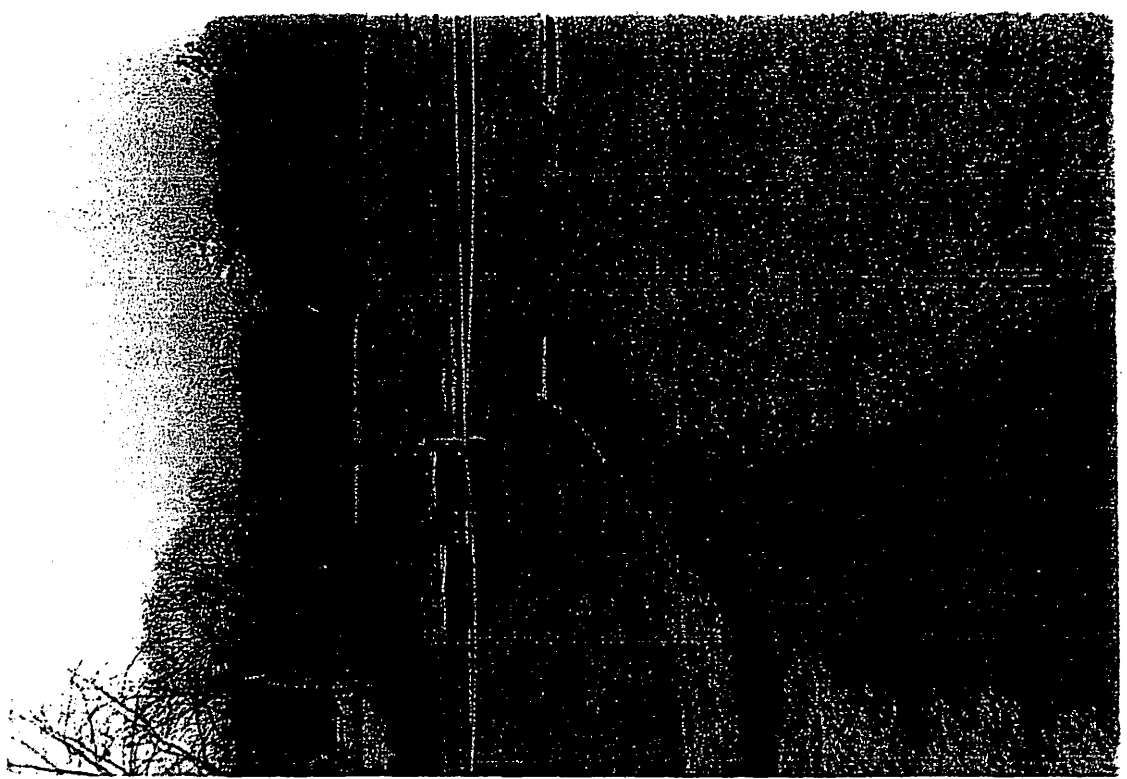
3 heavier. More and more people; the school is built.

4 They're using the pathway. And boom, the bomb went

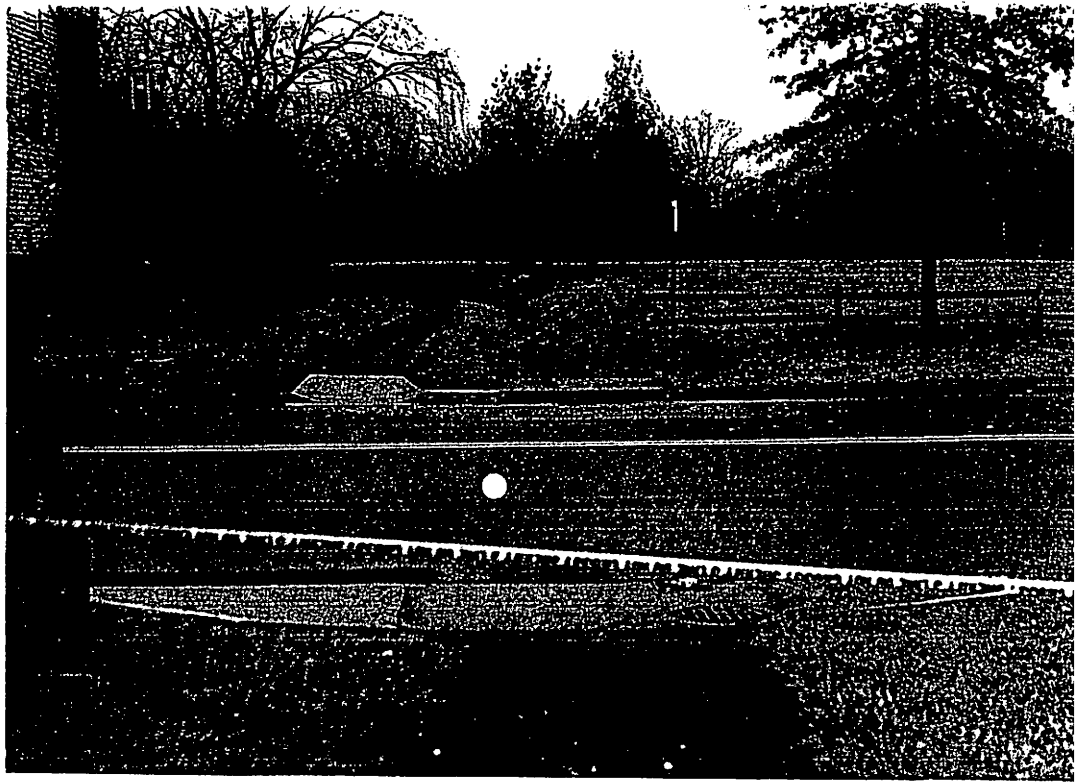
5 off.



Plaintiff's Exhibit No 9  
Case No 20521 Date 7/20/99  
Hcl



Plaintiff's Exhibit No 11 file  
Case No 20521 Date 7/20/99



Plaintiff's Exhibit No 12 *PHC*  
Case No 20521 Date 7/20/99

INSTRUCTION NO. I.

Where an occupant of premises by the use of ordinary care:

- (1) knows or should know of an unsafe condition on his premises; and,
- (2) knows or should know that it involves an unreasonable risk of harm to a licensee; and,
- (3) knows or should know that a licensee will not discover or realize the unsafe condition; and,
- (4) a licensee does not know or have reason to know of the unsafe condition and the risk involved;

then an occupant has the duty to use ordinary care either to make the condition reasonably safe or a duty to warn a licensee of the unsafe condition.

INSTRUCTION O.

The Defendant, Sugarland Run Homeowners Association, is not liable to the owners and members of the owners' families of the Sugarland Run community for injury or death resulting from an open and obvious condition of which the owners knew, or had means of knowing, equally to the Defendant. If you find from that the defect claimed by the Plaintiffs in this case was an open and obvious condition of which the Plaintiffs knew, or had means of knowing, equally to the Defendant, then you shall find your verdict for the Defendant, Sugarland Run Homeowners Association.



VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

WALTER D. HALFMANN AND  
BARBARA B. HALFMANN,  
PERSONAL REPRESENTATIVES OF  
THE ESTATE OF WALTER R.  
HALFMANN, DECEASED,

Plaintiffs,

v.

LAW NO. 20521

TRINA KABIRI, et al.

Defendants.

MOTION FOR REMITTITUR


COMES NOW the Defendant, Sugarland Run Homeowners Association, by counsel, and pursuant to 8.01-383.1 of the Code of Virginia, 1950 as amended, hereby moves this Court to require the Plaintiffs to remit part of their recovery in this action, and in support thereof states as follows:

1. The verdict of the jury in this action included an award of \$8,000.00 for medical expenses and \$4,000.00 for funeral expenses. However, the evidence presented by the Plaintiffs in this action proved total medical expenses of \$3,851.00 and total funeral expenses of \$3,469.49.

2. The award of the jury did not conform to the evidence presented, and demonstrated their inattention to the evidence and law presented during the trial. The award made by the jury for medical expenses and funeral expenses did not conform to the evidence, and their award was impossible as a matter of law.

WHEREFORE, having set forth the grounds for its Motion, the Defendant prays that the Plaintiffs be required to remit that part of the award for medical expenses and funeral expenses that exceeds the evidence actually presented at trial.

SUGARLAND RUN HOMEOWNERS ASSOCIATION  
By Counsel

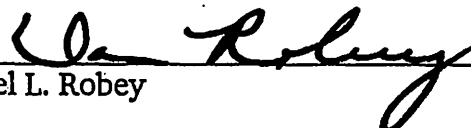
  
Daniel L. Robey, Esquire (VSB# 15331)  
ROBEY & TEUMER  
Counsel for Defendant/Sugarland Run Homeowners Association  
12500 Fair Lakes Circle, Suite 125  
Fairfax, Virginia 22033-3804  
(703) 449-0076  
(703) 449-7001 - FAX

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 1999 I mailed a true copy of the foregoing pleading, first class and postage prepaid to:

Robert L. Vaughn, Jr., Esquire  
GLENNON, GOODMAN, LUBELEY, VAUGHN & WALKER, LLP  
11480 Sunset Hills Road  
Reston, Virginia 20190  
Counsel for Plaintiffs

Tina L. Snee, Esquire  
BRANDT, JENNINGS, ROBERTS, DAVIS & SNEE, PLLC  
6565 Arlington Boulevard, Suite 200  
Falls Church, Virginia 22042  
Counsel for Defendant/Kabiri

  
Daniel L. Robey

## VIRGINIA:

**IN THE CIRCUIT COURT OF LOUDOUN COUNTY**

**WALTER D. HALFMANN AND  
BARBARA B. HALFMANN, Personal  
Representatives of the Estate of  
Walter R. Halfmann, Deceased.**

**Plaintiffs,**

**v.**

**TRINA KABIRI**

**and**

**SUGARLAND RUN HOMEOWNERS'  
ASSOCIATION,**

## Defendants.

**At Law No. 20521**

## FINAL ORDER

ON THE 20<sup>th</sup> day of July , 1999, came Walter D. Halfmann and Barbara B. Halfmann, Personal Representatives of the Estate of Walter R. Halfmann, Deceased, (hereinafter collectively referred to as "Plaintiffs") and Trina Kabiri (hereinafter referred to as "Kabiri"), and Sugarland Run Homeowners' Association (hereinafter referred to as "SRHOA"), in proper person and by counsel, on the issues joined;

WHEREUPON, the Plaintiffs moved this Court in accordance with their Motion for a jury view, previously filed, which Motion, after argument of counsel, the Court denied, the Plaintiffs preserving their exceptions; the Plaintiffs thereafter moving this Court in accordance with their Motion in Limine, previously filed, which Motion was agreed to by counsel for Kabiri and counsel for SRHOA;

WHEREUPON, Plaintiffs orally requested that they be allowed to make reference to specified jury instructions during the course of opening statements, which Motion, after argument, the Court denied, Plaintiffs' exceptions being preserved;

WHEREUPON, Defendant Kabiri, through counsel, orally moved this Court to exclude the *de bene esse* deposition of Dr. Darren Lisse based upon Kabiri stipulating as to the cause of Plaintiffs' decedent's death, counsel for SRHOA joining in said Motion which, after argument, the Court denied, the exceptions to the parties being preserved;

WHEREUPON, counsel for SRHOA orally moved this Court to prohibit any evidence of subsequent measures pursuant to Virginia Code §8.01-418.1, which Motion was agreed to by Plaintiffs and Kabiri;

THEREUPON, came a jury of thirty (30) *veniremen* who were duly sworn and examined on *voir dire*, five (5) of whom were stricken for cause, the remaining twenty-five (25) being found to be competent and qualified as jurors; the Court thereafter reducing the number of *veniremen* to thirteen (13) by way of lots drawn by the Clerk of the Court; seven (7) thereafter being duly selected by counsel for Plaintiffs and counsel for the Defendants, each side having exercised three (3) peremptory strikes;

THEREUPON, on the aforesaid 20<sup>th</sup> day of July, 1999, the jury heard the opening statements of counsel and on the 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, all of the evidence in this case; Defendant Kabiri and Defendant SRHOA moving this Court to strike Plaintiffs' evidence and enter judgment on its behalf at the conclusion of the Plaintiffs' evidence, which Motion, after argument and due consideration by the Court, was denied, the Defendants preserving their

exceptions thereto; Defendant Kabiri and Defendant SRHOA thereafter presenting their evidence, at the conclusion of which, Kabiri and SRHOA again moved this Court to strike the Plaintiffs' evidence and enter judgment on their behalf, which Motions, after argument of counsel and due consideration by the Court, were denied, Defendants preserving their exceptions thereto;

THEREUPON, on the 22<sup>nd</sup> and 23<sup>rd</sup> day of July, 1999, the Court considered the instructions to the jury proposed by the respective parties, and the objections of the parties thereto, the parties preserving their exceptions thereto, after which the jury received the instructions which had been granted by the Court, and on the 23<sup>rd</sup> day of July, 1999, counsel for the parties gave their closing arguments to the jury.

WHEREUPON, the jury retired to consider their verdict and, after said deliberations, returned into open court on July 23, 1999, and rendered their unanimous verdict in favor of the Plaintiffs and against the Defendant SRHOA, and in favor of Defendant Kabiri and against Plaintiffs, as set out in the forms of verdict filed in the record of this case;

WHEREUPON, at the request of counsel for Defendant SRHOA, the jury was polled and stated unanimously that the aforesaid verdict was their verdict and, after rendering the aforesaid verdict, the jury was discharged by the Court;

THEREAFTER, Defendant, SRHOA moved this Court to remit part of Plaintiffs' recovery in this action, Plaintiffs, by counsel, accepting the same; and its Motion to Set Aside the Jury Verdict, which Motion, after due consideration and oral argument thereon on August 16, 1999, the Court denied.

IN CONSIDERATION WHEREOF, it is

ADJUDGED and ORDERED that the Plaintiffs, Walter D. Halfmann and Barbara B. Halfmann, Personal Representatives of the Estate of Walter R. Halfmann, Deceased, be, and hereby are, awarded judgment against the Defendant, Sugarland Run Homeowners' Association, as follows:

- (1) Three Thousand Eight Hundred Fifty-one Dollars (\$3,851.00) for expenses for the care, treatment, and hospitalization of Robbie Halfmann incident to the injury resulting in his death;
- (2) Three Thousand Five Hundred Nineteen and 49/100ths Dollars (\$3,519.49) for funeral expenses;
- (3) Sixty-six Thousand Six Hundred Sixty-six Dollars (\$66,666.00) for Walter D. Halfmann;
- (4) Sixty-six Thousand Six Hundred Sixty-Six Dollars (\$66,666.00) for Barbara B. Halfmann;
- (5) Sixty-six Thousand Six Hundred Sixty-Six Dollars (\$66,666.00) for Amanda M. Halfmann.

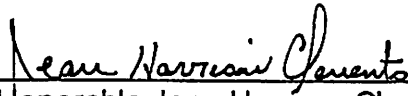
The aforesaid sums to bear interest at the judgment rate from July 23, 1999, until paid, and Plaintiffs' costs in this behalf expended; and it is further

ADJUDGED and ORDERED that the Defendant, Trina Kabiri, be and hereby is, awarded judgment against the Plaintiffs, Walter D. Halfmann and Barbara B. Halfmann, Personal Representatives of the Estate of Walter R. Halfmann, Deceased, and that the Motion for Judgment herein as it relates to her be, and hereby is, DISMISSED WITH PREJUDICE; and it is further

ADJUDGED and ORDERED that the Motion of the Defendant, SRHOA, to set aside the jury verdict be, and hereby is, DENIED.

AND THIS ORDER IS FINAL.

ENTERED THIS 16th day of August, 1999.

  
\_\_\_\_\_  
The Honorable Jean Harrison Clements

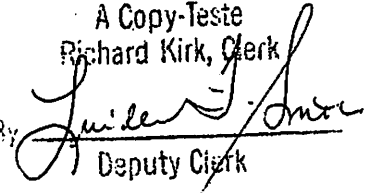
SEEN AND EXCEPTIONS PRESERVED as to the Court's Ruling on Plaintiffs' Motion for a Jury View; their request to reference specific jury instructions during the course of opening argument; the refusal to admit portions of Dr. Lisse's testimony; the denial of Plaintiffs' Motion to Strike certain jurors for cause; the Court's ruling as to the admissibility of certain photographic exhibits; the Court's denial of Plaintiffs' tendered impeachment of Defendant Kabiri; the Court's initial denial to qualify Jennifer Toole as an expert witness in these proceedings; the Court's refusal to admit Exhibit No. 22; the denial of certain tendered jury instructions; excepted to as to the jury's finding in favor of Defendant, Trina Kabiri; Plaintiffs expressly preserve such other objections as were raised during the course of these proceedings, and hereby expressly reserve any and all exceptions, the grounds therefore enunciated during the course of the trial being incorporated herein as though fully set forth.

GLENNON, GOODMAN, LUBELEY,  
VAUGHN & WALKER, L.L.P.  
11480 Sunset Hills Road  
Reston, Virginia 20190  
(703) 689-2100

By \_\_\_\_\_

Robert L. Vaughn, Jr.  
Counsel for Plaintiffs  
VSB No. 20633

A Copy-Teste  
Richard Kirk, Clerk

By   
Deputy Clerk

RECORD NOTED

SEEN ~~AND~~

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VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

WALTER D. HALFMANN AND  
BARBARA B. HALFMANN,  
PERSONAL REPRESENTATIVES OF  
THE ESTATE OF WALTER R.  
HALFMANN, DECEASED,

Plaintiffs,

v.

TRINA KABIRI, et al.

Defendants.

LAW NO. 20521

FILED  
1999 AUG 17 PM 1:37  
CIRCUIT COURT  
CLERKS OFFICE  
LOUDOUN COUNTY, VA  
TESTE: D.C.

NOTICE OF APPEAL

COMES NOW the Defendant, Sugarland Run Homeowners Association, by counsel, and pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, hereby gives notice of appeal from the Final Order entered on August 16, 1999; and

FURTHER the Defendant gives notice that the trial transcript covering the trial testimony and other incidents of trial will be filed in compliance with the said Rules, and that the said transcript has been ordered from the court reporter who reported the case.

SUGARLAND RUN HOMEOWNERS ASSOCIATION  
By Counsel

  
Daniel L. Robey, Esquire (VSB# 15531)

ROBEY &amp; TEUMER

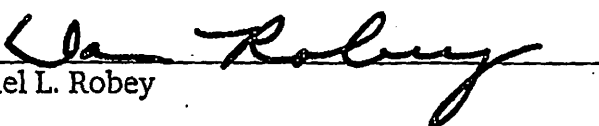
Counsel for Defendant/Sugarland Run Homeowners Association  
12500 Fair Lakes Circle, Suite 125  
Fairfax, Virginia 22033-3804  
(703) 449-0076

CERTIFICATE

I hereby certify that I am counsel of record for the Appellant; that the Appellant is Sugarland Run Homeowners Association, Inc., 200 Greenfield Court, Sterling, Virginia 20164; that the Appellees are Walter D. Halfmann and Barbara B. Halfmann, Personal Representatives of the Estate of Walter R. Halfmann, 16 Brookfield Circle, Sterling, Virginia 20164; that counsel for the Appellees is Robert L. Vaughn, Jr.; and that on this 16th day of August, 1999 I mailed a true copy of the foregoing Notice Of Appeal, first class and postage prepaid to:

Robert L. Vaughn, Jr., Esquire  
GLENNON, GOODMAN, LUBELEY, VAUGHN & WALKER, LLP  
11480 Sunset Hills Road  
Reston, Virginia 20190  
Counsel for Plaintiffs

Tina L. Snee, Esquire  
BRANDT, JENNINGS, ROBERTS, DAVIS & SNEE, PLLC  
6565 Arlington Boulevard, Suite 200  
Falls Church, Virginia 22042  
Counsel for Defendant/Kabiri

  
Daniel L. Robey

## ASSIGNMENTS OF ERROR

I. The Circuit Court erred in denying the motion of SRHOA to strike the evidence of Halfmann and enter summary judgment brought upon the grounds that the defect which was claimed by Halfmann was an open and obvious condition.

II. The Circuit Court abused its discretion in admitting into evidence the testimony of Jennifer Toole as an expert witness on behalf of Halfmann to testify that SRHOA violated the standard of care set by two private organizations, when Halfmann offered no evidence that SRHOA knew of, or had a duty to follow those standards.

III. The Circuit Court erred in refusing Instruction O. offered by SRHOA on the principle of law regarding an open and obvious condition.

IV. The Circuit Court erred in denying the motion of SRHOA to strike the evidence of Halfmann and enter summary judgment brought upon the grounds that Halfmann failed to prove a prima facie case that the area where the accident occurred was unreasonably dangerous, and that SRHOA knew, or should have known of the alleged dangerous condition.

V. The Circuit Court erred in denying the motion of SRHOA to strike the evidence of Halfmann and enter summary judgment brought upon the grounds that the alleged defect upon which Halfmanns' case against SRHOA was based was not a proximate cause of the subject traffic accident.

VI. The Circuit Court erred in admitting the testimony of Dr. Darren S. Lisse into evidence at the trial of this action over the objections of SRHOA and Kabiri and after their stipulations that the traffic accident which was the subject of this action was the proximate cause of the death of the Decedent, and that the medical expenses claimed by Halfmann were necessary and reasonable.