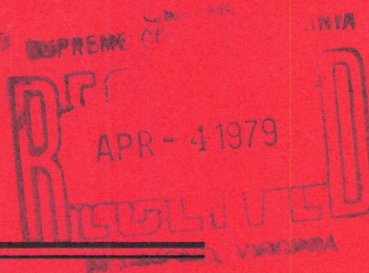


221VA638



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IN THE

# Supreme Court of Virginia

AT RICHMOND

---

RECORD No. 781513

---

NORFOLK AND WESTERN RAILWAY COMPANY,

*Appellant,*

v.

BAILEY LUMBER COMPANY,

*Appellee.*

---

APPENDIX

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PENN, STUART, ESKRIDGE & JONES  
208 East Main Street  
Abingdon, Virginia 24210

T. C. BOWEN, JR.  
Box 191  
Tazewell, Virginia 24651

*Counsel for Appellant*

G. R. C. STUART  
WADE W. MASSIE  
T. C. BOWEN, JR.

*Of Counsel*



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MOTION FOR JUDGMENT

[filed December 22, 1976]

The plaintiff hereby moves the Court for judgment against the defendants, jointly and severally, for the following reasons:

(1) The plaintiff, Bailey Lumber Company, a West Virginia corporation authorized to do business in the Commonwealth of Virginia, hereinafter called "Bailey", is the owner of certain real estate situate on the west side of Virginia State Route 61, and south of the tracks of the defendant, Norfolk & Western Railway Company, hereinafter called "Norfolk & Western," in the Four-Way section of the Town of Tazewell, Virginia. This real estate and the improvements situate thereon were conveyed to Bailey by Builders Mart, Inc. by deed dated June 8th, 1976, of record in the Clerk's Office of Tazewell County, Virginia, in Deed Book 415, at page 822, said real estate being therein described as Lots Two (2), Three (3) and Four (4), together with the western portion of Lot No. One (1), as the same are shown on a certain plat, with certificate of C. Henry Harman attached, entitled "Lands of C. Henry Harman, Divided," of record in said Clerk's Office in Deed Book 160, at page 18. A building, of the approximate dimensions of 61 feet by 150 feet, of cinder block and frame construction covered with aluminum siding, together with certain out-buildings, was located on said real estate.

(2) On July 9th, 1976, Bailey was engaged in the business of selling building supplies and materials at retail and

wholesale on the above-described premises. Such building supplies and materials were displayed and stored on said premises and in the main building and out-buildings situate thereon.

(3) Just north and east of the Bailey property, Route 61 crosses the Norfolk & Western Railway tracks at a grade crossing. Several other stores and businesses, including a grocery and farm supply store operated by Tazewell Farm Bureau, an alcoholic beverage store of the Commonwealth of Virginia, a second farm supply outlet, and a restaurant are situate in the vicinity of this grade crossing. A shopping center is located on Route 61 north and west of said crossing. The Norfolk & Western maintains a red wig-wag warning signal with bell at this crossing to warn the heavy volume of traffic on Route 61 of approaching trains. This warning signal is activated by trains approaching said crossing from either the east or west, or by other means exclusively under the control of the Norfolk & Western.

(4) During the early morning of July 9th, 1976, said warning signals were activated by some means other than a train approaching on the Norfolk & Western tracks and continued in operation for a long period of time. Servants and employees of the Norfolk & Western were working at or near said crossing and, therefore, knew, or should have known, that said warning devices and signals had been activated. Due to the length of time said signals remained in operation without the approach of any rail traffic at said crossing, motor vehicles approaching said crossing from either north or south entered the crossing while said signals were in operation. While said warning signals were

activated, the employees of the Norfolk & Western working in the vicinity of said crossing gave indication to the drivers of some approaching motor vehicles, by hand signal or otherwise, that passage over said crossing was safe.

(5) Shortly after 10:00 a.m. on July 9th, 1976, a locomotive of the Norfolk & Western operated by Virgil O. Nester, an employee of said Railway, approached said crossing from the east at a speed substantially in excess of the limits prescribed by §16-30 of the Ordinance of the Town of Tazewell, Virginia, without sounding an audible warning device as required by law.

(6) At the same time and place a loaded gasoline tanker motor vehicle, being operated by a servant and employee of the defendant, Dayton Transport Corporation, hereinafter called "Dayton," and/or the defendant, Hahn Transportation, Inc. of Virginia, hereinafter called "Hahn," was traveling in a northerly direction on said State Route 61 and approached said grade crossing at its south side. At said time and place, the driver of said gasoline transport tanker was within the scope of his employment with said defendants.

(7) Said gasoline tanker transport was driven upon the Norfolk & Western tracks in the path of the approaching locomotive, and the resulting collision caused an explosion and fire which destroyed the main structure, out-buildings, and sheds on plaintiff's property, together with all of their contents.

(8) The proximate cause of said collision, and the resulting damages, was the negligence of the employee of Hahn and/or Dayton driving said gasoline tanker, or the negligence of

the employees of the Norfolk & Western, or the concurring negligence of both. The driver of said gasoline tanker was negligent in that he failed to keep a proper lookout, or failed to heed what a proper lookout might disclose, and entered said crossing while said warning signals of the Norfolk & Western were activated and in operation. The Norfolk & Western and its servants and employees, all of whom were acting within the scope of their employment, were negligent in the following particulars:

(a) The employees of the Norfolk & Western either knew, or should have known, that the warning signals at said crossing had been activated by some means other than an approaching train for a period of time prior to said collision, and, therefore, knew, or should have known, that said warning signals were not serving the purpose for which they were installed, that is, to warn motorists of the danger of such approaching train. The servants and employees of the Norfolk & Western, therefore, had a duty to warn motorists of approaching rail traffic.

(b) The servants and employees of the Norfolk & Western failed to exercise reasonable care, under the situation then existing, to so warn said motorists of the approach of the locomotive operated by the said Virgil O. Nester.

(c) The locomotive of the Norfolk & Western operated by the said Virgil O. Nester approached said crossing at a speed in excess of the limits prescribed under the Ordinances of the Town of Tazewell and in excess of a reasonable and safe speed under the circumstances then and there existing.

(d) The locomotive operated by the said Virgil O. Nester failed to give an audible warning signal as required by law as it approached said crossing.

(e) The said Virgil O. Nester failed to keep a proper lookout for motor vehicular traffic at said crossing and failed to bring said locomotive under proper control when said vehicular traffic became obvious and apparent.

(9) As a direct and proximate result of the negligence of the defendant, Norfolk & Western, and the negligence of the defendants, Dayton and Hahn, or the concurring negligence of all such defendants, the plaintiff sustained a loss of Eighty-Five Thousand Dollars (\$85,000.00) due to the destruction of its building and other permanent improvements; a further loss of Fifty-Two Thousand Dollars (\$52,000.00) due to the destruction of its stock in trade; a further loss of Four Thousand Dollars (\$4,000.00) due to the destruction of cash and unposted sales tickets, a further loss of Nineteen Thousand Seven Hundred Fifty Dollars (\$19,750.00) due to the interruption of its business and loss of profits therefrom; and a further loss of Twenty-Two Thousand Five Hundred Dollars (\$22,500.00) in unrecoverable operating expenses during such business interruption.

WHEREFORE, the plaintiff moves the Court for judgment against the defendants, jointly and severally in the amount of One Hundred Eighty-Three Thousand Two Hundred Fifty Dollars (\$183,250.00) with interest from July 9th, 1976, and its costs herein expended.

BAILEY LUMBER COMPANY

GROUND OF DEFENSE

[filed January 10, 1977]

Defendant, Norfolk & Western Railway Company, by its attorney, says that for its defense in the trial of this case, it will rely upon the following grounds:

1. It admits the allegations of Paragraph 1 of the motion for Judgment.

2. It admits the allegations of Paragraph 2 of the motion for judgment.

3. It admits the allegations of Paragraph 3 of the motion for judgment.

4. It denies the allegations of Paragraph 4 of the motion for judgment that this defendant's warning signals were operated for a long period of time prior to the collision.

This defendant states that it caused said signals to be inspected by two of its signal men at 9:00 AM of said day. That said signal men were at said crossing approximately 10 minutes, during which time the signals were activated about five minutes and that while said signals were operating, some motor vehicles were waved across the tracks. That at 10:00 AM of said day, a five-member work crew arrived at said crossing and did track maintenance and right-of-way work until just before the collision during which time said signals were not activated and no one was waved across the tracks.

5. It admits that its employee, Virgil O. Nester, was operating a westbound locomotive but denies that this defendant's



locomotive was operated at a speed substantially in excess of the ordinance of the Town of Tazewell and that it failed to sound an audible warning device in the manner prescribed by law.

6. It admits the allegations of Paragraph 6 of the motion for judgment.

7. It admits the allegation of Paragraph 7 concerning the collision and destruction of the main structure on plaintiff's property but denies that the shed and its contents were burned.

8. It denies the allegations of Paragraph 8 of the motion for judgment that said collision was caused by any negligence of employees of this defendant.

(a) It denies that said warning signals had been activated by means other than the approaching train for any period of time immediately preceding the collision. This defendant states that said signals were inspected by two of its signal men at 9:00 AM of said day. That the approach of the locomotive involved in the collision activated the crossing signals. That said collision occurred sometime between 10:20 and 10:30 of said day and that the operation of said signals for inspection purposes between 9:00 AM and 9:10 AM of said day had no causal connection with said accident and that there is no duty upon this defendant's servants and employees to give additional warning to motorists of the approach of said locomotive. This defendant states that said wig-wag signals and the sounding of the whistle and bell of the approaching locomotive gave reasonable and adequate warning of the approach of said

locomotive and complied with all duties imposed upon this defendant by ordinance or law.

This defendant states that said locomotive was going 30 miles per hour and admits that the ordinance of the Town of Tazewell is 25 miles per hour, but this defendant states that the same did not cause nor contribute to the collision, but that said collision was caused by the failure of the driver of the trailer tanker to stop, look and listen before going upon said railroad crossing and not to proceed until he could do so safely and his failure to obey a clearly visible and audible crossing signals. That the driver of said trailer tanker in going upon the railroad track of this defendant from a safe place immediately in front of a moving train, after having had timely warning of the approach of said train which was then so close as to make a collision inevitable, was the sole proximate cause of said accident.

This defendant denies that said locomotive failed to give an audible warning signal as required by law. This defendant denies that Virgil O. Nester failed to keep a proper lookout for motor vehicle traffic at said crossing or failed to bring said locomotive under proper control when said traffic became obvious and apparent.

9. This defendant is not advised concerning plaintiff's loss as alleged in Paragraph 9 of the motion for judgment and denies that it is indebted to plaintiff in the sum of One Hundred Eighty-Three Thousand Two Hundred Fifty Dollars (\$183,250.00) or in any amount in any event. Any allegation

contained in the motion for judgment, not hereby expressly admitted, is denied.

NORFOLK & WESTERN RAILWAY COMPANY

GROUND OF DEFENSE

[filed February 11, 1977]

Comes now the defendant, Dayton Transport Corporation, by counsel, and files this its Grounds of Defense to the Motion for Judgment heretofore filed against it and another in this action.

1. This defendant denies that it is liable to the plaintiff for the amount alleged in the Motion for Judgment or for any other sum whatever.

2. This defendant admits that a collision occurred on July 9, 1976, involving a locomotive or train owned by Norfolk & Western Railway Company and operated by Virgil O. Nester while in the course and scope of his employment with said Norfolk & Western Railway Company and a tractor-tanker leased by Dayton Transport Corporation and operated by Douglas L. Schaeffer while in the course and scope of his employment with said Dayton Transport Corporation.

3. This defendant is not advised as to the allegations contained in paragraph 1 of the Motion for Judgment and neither

admits nor denies said allegations.

4. The allegations contained in paragraphs 2, 3, 4, 5 and 6 of the Motion for Judgment are admitted.

5. For answer to paragraph 7 of the Motion for Judgment, it is admitted that the collision caused an explosion and that damages were sustained by the plaintiff, the extent of which are unknown to this defendant at this time.

6. For answer to paragraph 8 of the Motion for Judgment, it is denied that the employee of Dayton Transport Corporation was guilty of any act of negligence or breached any legal duty owed to plaintiff which proximately caused the damages alleged by plaintiff. This defendant alleges that the sole proximate cause of the accident in question was the negligence of Virgil O. Nester in the operation of the Norfolk & Western locomotive or train or the concurring negligence of Virgil O. Nester and other Norfolk & Western employees who were working in the vicinity of the accident.

7. Sub-sections (a), (b), (c), (d) and (e) of paragraph 8 are admitted.

8. This defendant alleges that Norfolk & Western Railway Company was guilty of negligence for not establishing, maintaining or enforcing proper rules or procedures in connection with the signals located at the railroad crossing where the accident occurred. Norfolk & Western Railway Company was negligent in not providing appropriate signals at the crossing in question, for not advising its employee and engineer of the speed limit for trains through the Town of Tazewell, and for not

establishing reasonable and appropriate procedures for its employees to follow in the operation of its locomotives or trains.

9. This defendant is not advised as to the damages alleged by the plaintiff in paragraph 9 of the Motion for Judgment and calls upon the plaintiff for strict proof of each and every item of alleged damages.

10. All allegations contained in the Motion for Judgment relating to this defendant which are not expressly admitted herein, are denied.

DAYTON TRANSPORT CORPORATION

[AGREEMENT OF July 13, 1977]

It is agreed between Bailey Lumber Company, Norfolk & Western Railway Company and Dayton Transport Corporation that Bailey is entitled to recover judgment in its pending suit in the sum of \$170,000.00 plus 8% from July 22, 1977, until paid, for damages which resulted from the accident between N & W's engine consist and Dayton's tractor tanker on July 9, 1976, at Four-Way, in Tazewell, Virginia. Said amount shall be stipulated in the pending suit at the time of trial and the case shall be continued generally. The question of whether liability for payment of said amount rests with N & W or Dayton, or both N & W and Dayton, is reserved for trial.



If the stipulated amount is not paid within sixty (60) days following either a final judgment in the Sparks case, or following the decision of the Supreme Court of Virginia on any appeal from the trial had in the Sparks case in June, 1977, whichever shall first occur, the parties hereto agree to obtain a trial date as soon thereafter as possible.

In addition, Firemans Fund Insurance Company agrees with Bailey that it will guarantee to have available to pay and will pay on behalf of Dayton any final judgment which may be entered against Dayton.

This is not a settlement agreement. It is a stipulation of Bailey's damages and an agreement by the defendants that Bailey is entitled to judgment against one or both defendants at trial. This agreement may be used in the pending suit for the purposes herein stated and for no other purposes.

Given under our hands, this 18th day of July, 1977.

BAILEY LUMBER COMPANY

By /s/ Harris Hart  
Of Counsel

NORFOLK & WESTERN RAILWAY COMPANY

By /s/ T.C. Bowen, Jr.  
Of Counsel

DAYTON TRANSPORT CORPORATION and  
FIREMANS FUND INSURANCE COMPANY

By /s/ William R. Rakes  
Of Counsel

SPECIAL PLEA OF ESTOPPEL BY JUDGMENT OR RES JUDICATA

[filed June 26, 1978]

Comes now Bailey Lumber Company and Dayton Transport Corporation, by counsel, and file this their Special Plea of Estoppel by Judgment or Res Judicata and in support thereof states as follows:

1. That on or about July 9, 1976, a Norfolk & Western consist of diesel locomotives struck a gasoline laden tractor-tanker owned and operated by Dayton Transport Corporation at the Burkes Garden grade crossing causing substantial property damage, bodily injury and loss of life.

2. That a bystander, Jesse Lawrence Sparks, was killed by the explosion and fire that followed the collision.

3. That a cause of action was instituted by Thelma Ruth Sparks, Executrix of the Estate of Jesse Lawrence Sparks, in the Circuit Court of Tazewell County against the two defendants herein and styled: THELMA RUTH SPARKS, Executrix U/W OF JESSE LAWRENCE SPARKS, Deceased, v. NORFOLK & WESTERN RAILWAY COMPANY and DAYTON TRANSPORT CORPORATION.

4. That the Motion for Judgment filed by Thelma Ruth Sparks, Executrix U/W of Jesse Lawrence Sparks alleged that she was entitled to a judgment against the Norfolk & Western Railway Co. (hereinafter referred to as "N & W") and the Dayton Transportation Corporation (hereinafter referred to as "Dayton"), based on the negligence of their servants and employees. (See copy of Motion for Judgment attached and marked Exhibit A; see

also Grounds of Defense filed by both defendants marked Exhibit A1 and A2.)

5. That on June 22, 1977, a jury in the Circuit Court of Tazewell County, Virginia, returned a verdict in favor of the Sparks' estate against N & W and Dayton. (See copy of the transcript of the testimony in the trial between Sparks and the defendants herein attached and marked Exhibit B.)

6. That a Notice of Appeal was filed by N & W following the trial on the merits of the action brought by Thelma Ruth Sparks, Executrix, and that no reversable [sic] error was found by the Supreme Court of Virginia. (See Exhibit C attached hereto which includes Judgment Order of the trial court, Notice of Appeal, Petition for Appeal, Brief in Opposition and Final Order of the Supreme Court of Virginia.)

7. That the plaintiff herein, Bailey Lumber Company, suffered property damage due to the same explosion and fire which followed the collision on July 9, 1976, at the Burkes Garden grade crossing.

8. That the Bailey Lumber Company alleges that it is entitled to judgment against N & W and Dayton based on the concurring negligence of the servants and employees of each of the defendants.

9. That on July 13, 1977, the plaintiff, Bailey Lumber Company, and the defendants, N & W and Dayton, entered into an agreement to stipulate damages in the action now pending before this Court and further agreed that all parties would obtain a trial date as soon as possible following either a final judgment

in the Sparks case, or following the decision of the Supreme Court of Virginia on any appeal from the trial had in the Sparks case. (See Exhibit D attached hereto.)

10. That the issues of negligence as to and between the defendants, N & W and Dayton, have been fully and completely litigated. The judgment in the Sparks case should once and for all resolve the question of negligence as to and between each of the defendants with regard to the collision and subsequent damage occurring at the Burkes Garden grade crossing on July 9, 1976.

WHEREFORE, Bailey Lumber Company and Dayton Transport Corporation move the Court to sustain its Plea of Estoppel by Judgment or Res Judicata and in light of the stipulation of damages hereinabove referenced, find that there remains no triable question of fact.

BAILEY LUMBER COMPANY

DAYTON TRANSPORT CORPORATION

EXHIBIT A TO SPECIAL PLEA  
[MOTION FOR JUDGMENT IN SPARKS CASE]  
[this Motion for Judgment originally  
filed on August 30, 1976]

Plaintiff seeks judgment against the defendants upon the following grounds:

1. July 9, 1976, plaintiff's husband, Jesse Lawrence

Sparks, now deceased, was lawfully standing near the railway of the defendant Norfolk & Western Railway Company (hereinafter called N & W) where the same crosses State Route 61 in the Town of Tazewell in the area known as Four-Way, Tazewell County, Virginia.

2. On said day and while plaintiff's decedent was so standing, Virgil O. Nester was acting as the servant and employee of the N & W within the scope of his employment, and while so acting operated a westbound locomotive of the N & W upon the tracks of the N & W toward and near said crossing at a speed substantially in excess of the limits prescribed by §16-30 of the General Ordinances of the Town of Tazewell, Virginia, and failed to sound an audible warning device in the manner prescribed by law.

3. On said day and while plaintiff's decedent was so standing, and for more than one-half hour prior thereto, N & W continuously maintained in operation its warning signals and devices at said crossing, thereby obstructing free passage of highway motor vehicles. Said warning signals and devices were caused to be operated by someone or something unknown to plaintiff but here alleged to have been within the control of N & W, and were activated by such someone or something other than the approach of the locomotive mentioned in paragraph 2 above. During the time said warning signals and devices were in operation and while no locomotive was approaching said crossing in dangerous proximity, servants and employees of N & W within



the scope of their employment were engaged in work on or near said crossing, and by hand signals indicated to motorists on said Route 61 that, despite the operating warning signals and devices, safe passage across N & W tracks was possible. Plaintiff alleges that said N & W servants and employees on or near said crossing knew that said warning signals and devices had been operating for a long period of time, and that such signals and devices for a long period of time had been communicating to motorists on Route 61 warning of an approaching locomotive when in fact no locomotive was approaching so near as to constitute a hazard. Plaintiff alleges that said N & W servants and employees on or near said crossing knew that operators of motor vehicles on Route 61 had been crossing the N & W tracks while said warning signals and devices were in operation, because said warning signals and devices were being activated by something or someone within the control of N & W other than the approach of a locomotive or railroad car. Plaintiff alleges that said N & W servants and employees knew, or should have known, the time, or approximate time, of the approach of said locomotive operated by Virgil O. Nester, and also knew that the motoring public was accustomed to the sight and sound of active crossing signals without the approach of any railway vehicle. Plaintiff alleges that said N & W servants and employees, in the exercise of ordinary care, should have, by hand signal or otherwise, stopped motor vehicles approaching the crossing when the railway locomotive was scheduled to arrive at said crossing, because said N & W servants

and employees had been allowing highway motor vehicle traffic to cross while the crossing signals were operating and had even indicated to some that passage across the tracks was safe. Further, said warning signals and devices were not activated by an approaching train as required by §56-406 of the Code of Virginia, but were activated long before the approach of any such train and allowed to continue in an activated state.

4. On said day and while plaintiff's decedent was so standing, a northbound gasoline-laden highway tractor-tanker motor vehicle, driven by a servant and employee of defendant Dayton Transport Corporation (hereinafter called Dayton) and/or defendant Hahn Transportation, Inc. of Virginia (hereinafter called Hahn) within the scope of his employment, approached said highway-railway crossing. Said servant and employee of Dayton and/or Hahn failed to keep a proper lookout, or failed to heed what a proper lookout disclosed, and drove said motor vehicle upon the N & W tracks in the path of said N & W locomotive approaching dangerously near at an excessive speed.

5. The acts and omissions of Virgil O. Nester, the other servants and employees of N & W, and the servant and employee of Dayton and/or Hahn, as hereinbefore set forth, constitute negligence attributable to their respective employers. Such negligence was the proximate cause of a collision between said N & W locomotive and said tractor-tanker which was then leased to Dayton and/or Hahn. Said collision caused an explosion and fire which engulfed plaintiff's decedent, burning 90 percent

of his body and burning him beyond recognition. Plaintiff's decedent died July 10, 1976 as a result of said burns, and his death was proximately caused by the negligence of the defendants as aforesaid.

6. Plaintiff's decedent was survived by Thelma Ruth Sparks, who is his sole heir-at-law and distributee and sole beneficiary under his Will. Plaintiff was appointed by the Clerk of the aforesaid Court as Executrix under the Will of Jesse Lawrence Sparks, and qualified as such personal representative, on July 15, 1976. The negligence of the defendants as aforesaid has proximately caused Thelma Ruth Sparks the loss of a beloved husband, the loss of his support and care, sorrow, mental, physical and emotional distress and anguish, and expense in connection with treatment for the aforesaid injuries and for the funeral and burial of said decedent.

WHEREFORE, plaintiff asks that she be granted judgment against the defendants, jointly and severally, in the amount of one million dollars with interest from July 10, 1976 and her costs herein expended.

THELMA RUTH SPARKS, Executrix  
U/W of Jesse Lawrence Sparks,  
deceased

EXHIBIT A1 TO SPECIAL PLEA  
[GROUNDS OF DEFENSE OF  
NORFOLK AND WESTERN IN SPARKS CASE]  
[this Grounds of Defense originally  
filed on September 22, 1976]

Defendant, Norfolk and Western Railway Company, by its attorney, says that for its defense in the trial of this case, it will rely upon the following grounds:

1. It admits the allegations of Paragraph 1 of the motion for judgment.

2. It admits that its employee, Virgil O. Nester, was operating a westbound locomotive but denies that this defendant's locomotive was operated at a speed substantially in excess of the ordinance of the Town of Tazewell and that it failed to sound an audible warning device in the manner prescribed by law. This defendant states that said locomotive was going 30 m.p.h. and admits that the ordinance of the Town of Tazewell is 25 m.p.h., but this defendant states that the same did not cause nor contribute to the collision, but that said collision was caused by the failure of the driver of the trailer tanker to stop, look and listen before going upon said railroad crossing and not to proceed until he could do so safely and his failure to obey a clearly visible and audible crossing signals. That the driver of said trailer tanker in going upon the railroad track of this defendant from a safe place immediately in front of a moving train, after having had timely warning of the approach of said train which was then so close as to make a collision inevitable, was the sole proximate cause of said accident.

3. It denies the allegations of Paragraph 3 of the motion for judgment that this defendant's warning signals were operating for more than one-half hour prior to said collision or that this defendant's employee, by hand signals, indicated to motorists to cross said crossing during said period of time or allowed motor vehicle traffic to cross while said signals were operating and denies that said warning signals were not activated by the approaching train.

This defendant states that it caused said signals to be inspected by two of its signal men at 9:00 AM of said day. That said signal men were at said crossing approximately 10 minutes, during which time the signals were activated about five minutes and that while said signals were operating, some motor vehicles were waved across the tracks. That at 10:00 AM of said day, a five-member work crew arrived at said crossing and did track maintenance and right-of-way work until just before the collision during which time said signals were not activated and no one was waved across the tracks. That the approach of the locomotive involved in the collision activated the crossing signals.

4. It denies the allegations of Paragraph 4 of the motion for judgment that this defendant's locomotive was operating at an excessive speed and states that the speed of the same was not excessive under the circumstances and that the speed of the same was not a proximate cause of the accident. It admits the remainder of the allegations contained in said paragraph.

5. It denies the allegations of Paragraph 5 of the



motion for judgment that said collision was the direct or proximate result of any negligence of this defendant, its employees or agents and denies that this defendant was negligent in any way or that any acts of this defendant were a proximate cause of the death of plaintiff's decedent. It admits the remainder of the allegations contained in said paragraph.

6. It denies the allegations of Paragraph 6 of the motion for judgment that any negligence of this defendant was the proximate cause of plaintiff's loss. It admits the remainder of the allegations contained in said paragraph.

7. It denies that this defendant is indebted to plaintiff in the amount of one million dollars or in any amount in any event. Any allegation contained in the motion for judgment and not hereby expressly admitted, is hereby denied.

NORFOLK & WESTERN RAILWAY COMPANY

EXHIBIT A2 TO SPECIAL PLEA  
[GROUNDS OF DEFENSE OF DAYTON IN SPARKS CASE]  
[This Grounds of Defense originally  
filed on September 22, 1976]

Comes now the defendant, Dayton Transport Corporation, by counsel, and files this its Grounds of Defense to the Motion for Judgment heretofore filed against it and another in this action.

1. This defendant denies that it is liable to the

plaintiff for the amount alleged in the Motion for Judgment or for any other sum whatever.

2. This defendant admits that a collision occurred on July 9, 1976, involving a locomotive or train owned by Norfolk & Western Railway Company and operated by Virgil O. Nester while in the course and scope of his employment with said Norfolk & Western Railway Company and a tractor tanker leased by Dayton Transport Corporation and operated by Douglas L. Schaeffer while in the course and scope of his employment with said Dayton Transport Corporation.

3. The allegations contained in paragraphs 2 and 3 of the Motion for Judgment are admitted.

4. For answer to paragraph 4 of the Motion for Judgment, it is admitted that Schaeffer was in the scope of his employment with Dayton Transport Corporation, but it is denied that Schaeffer was guilty of failing to keep a proper lookout as alleged therein.

5. This defendant denies that Schaeffer was guilty of any act of negligence which proximately caused the collision and resulting death of plaintiff's decedent.

6. This defendant denies that Schaeffer breached any legal duty which was owed to the plaintiff's decedent.

7. This defendant alleges that the sole proximate cause of the accident in question was the negligence of Virgil O. Nester in the operation of the N & W locomotive or train or the concurring negligence of Virgil O. Nester and other N & W employees who were working in the vicinity of the accident.

8. This defendant alleges that Norfolk & Western Railway Company was guilty of negligence for not establishing, maintaining or enforcing proper rules or procedures in connection with the signals located at the railroad crossing where the accident in question occurred.

9. It is admitted that plaintiff's decedent died as a result of the injuries sustained in the accident in question.

10. This defendant is not advised as to the allegations contained in paragraph 6 with reference to the qualification of plaintiff as Executrix or the identity of the statutory beneficiaries of plaintiff's decedent.

11. All allegations contained in the Motion for Judgment relating to this defendant which not expressly admitted herein are denied.

DAYTON TRANSPORT CORPORATION

EXHIBIT C TO SPECIAL PLEA  
[FINAL ORDER IN SPARKS CASE]  
[originally entered September 15, 1977]

This action came on this August 11, 1977 to be heard upon the Order entered herein on July 8, 1977; upon the written motion of defendant Norfolk and Western Railway Company to set aside the jury verdict filed herein on July 22, 1977; and upon the written response of plaintiff to said motion.

Upon consideration of the motion to set aside the jury verdict, the Court is of the opinion that the same should be, and

the same hereby is, overruled. To this ruling the defendant Norfolk and Western Railway Company excepts.

It is therefore ADJUDGED, CONSIDERED and ORDERED that the plaintiff have and recover of the defendants Norfolk and Western Railway Company and Dayton Transport Corporation the sum of One Hundred Seventy-five Thousand Dollars (\$175,000.00) with interest thereon from June 23, 1977 and her costs herein expended.

Thereupon the defendant Norfolk and Western Railway Company announced its intention of applying to the Supreme Court of Virginia for a writ of error and upon motion of defendant Norfolk and Western Railway Company, execution upon the judgment against defendant Norfolk and Western Railway Company is hereby suspended for three months from the date of entry of this Final Order, and if such application be filed within said three months, thereafter until the Supreme Court of Virginia grants or refuses an appeal herein. There being no objection by plaintiff, no suspending bond shall be required.

Enter this Order this 15th day of September, 1977.

/s/ Robert L. Powell, Judge  
Robert L. Powell, Judge

EXHIBIT C TO SPECIAL PLEA  
[FINAL ORDER OF SUPREME COURT OF  
VIRGINIA IN SPARKS CASE  
[originally entered March 30, 1978]]

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the

above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Richard R. Buirl  
Deputy Clerk

ORDER

[entered July 22, 1978]

On June 29, 1978 came the parties to this action, by counsel, for argument of the Special Plea of Estoppel by Judgment or Res Judicata heretofore filed by Bailey Lumber Company and Dayton Transport Corporation. The Court having heard the argument of counsel and considered the briefs and record herein is of the opinion that the Special Plea of Estoppel by Judgment or Res Judicata should be sustained for the reasons set forth in the Court's opinion of this date. Accordingly, plaintiff is entitled to recover judgment against both defendants and the damages having been contractually agreed upon by the parties, it is ORDERED that the plaintiff recover \$183,600.00 from Norfolk & Western Railway Company and Dayton Transport Corporation.

And this action is dismissed from the docket.

ENTER this 22nd day of July, 1978.

/s/ Robert L. Powell

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Judge



OPINION  
[dated July 22, 1978]

This case is before the Court on a Special Plea of Estoppel by Judgment or Res Judicata filed jointly by Bailey Lumber Company (hereinafter referred to as "Bailey") and Dayton Transport Corporation (hereinafter referred to as "Dayton").

The facts pertinent to the estoppel by judgment issue are as follows: On July 9, 1976, a Norfolk & Western Company (hereinafter referred to as "N & W") diesel locomotive consist struck a gasoline laden tractor-tanker owned and operated by Dayton at the Burkes Garden grade crossing in Tazewell County, causing substantial property damage, bodily injury and loss of life. A bystander, Jesse Lawrence Sparks, was killed, and a cause of action was subsequently instituted by Thelma Ruth Sparks, Executrix of the Estate of Jesse Lawrence Sparks, in the Circuit Court of Tazewell County styled, THELMA RUTH SPARKS, EXECUTRIX U/W OF JESSE LAWRENCE SPARKS, DECEASED V.

NORFOLK & WESTERN RAILWAY COMPANY AND DAYTON TRANSPORT

CORPORATION. On June 22, 1977, a jury in the Circuit Court of Tazewell County returned a verdict in favor of the Sparks estate against N & W and Dayton. Judgment was entered on the verdict and N & W filed its Petition for Appeal with the Supreme Court of Virginia. The Supreme Court of Virginia found no reversible error and denied N & W's Petition for Appeal.

Bailey suffered property damage due to the explosion and fire which followed the collision on July 9, 1976, and instituted the present action alleging that it is entitled to

judgment against N & W and Dayton based on the alleged concurring negligence of the servants and employees of each of the defendants. On July 13, 1977, Bailey and the defendants, N & W and Dayton, entered into an agreement to continue the case until the Sparks case was concluded and to stipulate the amount of damages to which Bailey is entitled at the time of trial of the present action. A copy of the agreement is attached to this opinion and made a part hereof.

In the Special Plea of Estoppel by Judgment or Res Judicata now under consideration, Bailey and Dayton contend that the issues of negligence as to and between N & W and Dayton have been fully and completely litigated in the Sparks case, in that the final judgment in the Sparks case should once and for all resolve the question of negligence as to and between N & W and Dayton with regard to the collision and subsequent damage occurring at the Burkes Garden grade crossing on July 9, 1976.

N & W contends that the judgment in the Sparks case has no estoppel by judgment or res judicata effect in the instant case, relying upon the following arguments:

1. Bailey and Dayton are estopped to raise the estoppel by judgment or res judicata issue because of the agreement entered into by Bailey, N & W and Dayton agreeing to continue the case and to stipulate the damages to which Bailey is entitled. The Court, however, has carefully reviewed the agreement and finds nothing to evidence any intention by any of the parties to waive the right to assert the preclusive effect of the prior judgment. The parties state that it is "an agreement

by the defendants that Bailey is entitled to judgment against one or both defendants at trial." Accordingly, the Court rules that Bailey and Dayton are not estopped to raise by pretrial motion or plea the issue of the preclusive effect of the prior judgment because of the agreement.

2. Dayton has no standing to assert the preclusive effect of the prior judgment because Dayton is not in an adverse relationship to N & W in the instant case. The Court need not decide the standing issue as to Dayton, since the Special Plea of Estoppel by Judgment or Res Judicata is filed jointly by Bailey and by Dayton, and Bailey is adverse to N & W in the present case and accordingly, clearly has standing to raise the issue.

3. Since Bailey was not a party to the prior adjudication there can be no estoppel by judgment or res judicata in the instant case because there is no identity of parties, or as it is usually expressed, there is no "mutuality" of estoppel. See, Aetna v. Czoka, 200 Va. 385.

There is no sound public policy reason to require the party who is asserting the plea of res judicata to have been a party, or in privity with a party, to the prior litigation when the party against whom the plea is asserted has already fully and fairly litigated the issue in question. Public policy is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity. The public policy underlying the concept of res judicata, that of bringing an end to redundant litigation and establishing certainty in

legal relations, militates against a mechanistic application of the mutuality doctrine. See, 31 A.L.R. 3d. 144; Eagle, Star & British Dom. Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927); Bernhard v. Bank of America Nat. Trust & Savings Ass'n., 19 Cal. 2d. 807, 122 P.2d. 892 (1942); Lober v. Moore, 417 F.2d. 714 (1969); Graves v. Associated Transport, 334 F.2d. 894 (4th Cir. 1965).

In Bates v. Devers, 214 Va. 667, 202 S.E.2d. 917 (1974), the Court made the following observation:

The policy underlying mutuality is to insure a litigant that he will have a full and fair day in court on any issue essential to an action in which he is a party. But as is the case with any other judicial doctrine grounded in public policy, the mutuality doctrine should not be mechanistically applied when it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue of fact which was essential to the prior judgment. 214 Va. 667, 671, n.7.

N & W does not contend that the issues as to N & W's alleged negligence are different in the instant case from what they were in the Sparks case -- to the contrary the issues are clearly identical. Nor does N & W suggest that it has available to it any factual evidence on the issues in question which was

not available to N & W at the time of the trial of the Sparks case.

The fundamental controversy in the Sparks case was the liability issue between the two defendants, N & W and Dayton. The jury in the Sparks case found that both defendants were guilty of negligence which concurred to cause the collision at the Burkes Garden crossing and the subsequent fire and explosion. Judgment was entered on the jury verdict, and all avenues of appeal were exhausted by N & W. The fundamental issue in the instant case is precisely identical to that in the Sparks case and this is particularly true in view of the fact that the parties in the instant case have entered into a contract agreeing that Bailey is entitled to recover an agreed amount in damages.

The Court is, accordingly, of the opinion that it is compellingly clear that N & W fully and fairly litigated and lost the issues pertaining to its alleged negligence in connection with the accident of July 9, 1976, issues which were essential to the prior adjudication, and that N & W is thereby precluded from again litigating those same issues in the instant case.

An order will be entered consistent with the Court's opinion.

/s/ Robert L. Powell

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Judge

Dated: July 22, 1978

### STATEMENT OF FACTS

[endorsed, approved and entered September 21, 1978]

On July 9, 1976 a consist of Norfolk and Western diesel locomotives collided with a Dayton tractor-tanker filled with gasoline near the "Four Way" intersection at the Burkes Garden grade crossing in Tazewell, Virginia. The collision resulted in an explosion taking the life of Jesse Lawrence Sparks, a bystander, and damaging the building and other property of Bailey Lumber Company, a nearby business.

On or about August 30, 1976, Thelma Sparks filed an action in the Circuit Court of Tazewell County for the wrongful death of her husband, Jesse Lawrence Sparks, against Norfolk and Western and Dayton. The Motion for Judgment alleged that the negligence of both Norfolk and Western and Dayton proximately caused the death of Sparks. The defendants filed grounds of defense, each denying that it was guilty of negligence proximately causing or contributing to the accident. No cross-pleadings were filed. A jury was selected and on June 22, 1977 it returned a verdict for the plaintiff against both defendants. The trial court entered judgment on the verdict and Norfolk and Western appealed to the Supreme Court of Virginia. The Supreme Court denied the Petition for Appeal.

On or about December 22, 1976, Bailey Lumber Company filed this action against Norfolk and Western and Dayton for property damages allegedly caused by the negligence of both defendants.

After judgment was entered on the verdict in the Sparks case, Bailey, Dayton and Norfolk and Western entered into the following agreement dated July 13, 1977:

"It is agreed between Bailey Lumber Company, Norfolk & Western Railway Company and Dayton Transport Corporation that Bailey is entitled to recover judgment in its pending suit in the sum of \$170,000.00 plus 8% from July 22, 1977, until paid, for damages which resulted from the accident between N & W's engine consist and Dayton's tractor-tanker on July 9, 1976, at Four Way, in Tazewell, Virginia. Said amount shall be stipulated in the pending suit at the time of trial and the case shall be continued generally. The question of whether liability for payment of said amount rests with N & W or Dayton, or both N & W and Dayton, is reserved for trial.

If the stipulated amount is not paid within sixty (60) days following either a final judgment in the Sparks case, or following the decision of the Supreme Court of Virginia on any appeal from the trial had in the Sparks case in June, 1977, whichever shall first occur, the parties hereto agree to obtain a trial date as soon thereafter as possible.

In addition, Firemans Fund Insurance Company agrees with Bailey that it will guarantee to have available to pay and will pay on behalf of Dayton any final judgment which may be entered against Dayton.

This is not a settlement agreement. It is a stipulation of Bailey's damages and an agreement by the defendants that Bailey is entitled to judgment against one or both defendants at trial. This agreement may be used in the pending suit for the purposes herein stated and for no other purposes.

Given under our hands, this 13th day of July,  
1977.

BAILEY LUMBER COMPANY

By /s/ Harris Hart, II  
Of Counsel

NORFOLK & WESTERN RAILWAY COMPANY

By /s/ T. C. Bowen, Jr.  
Of Counsel

DAYTON TRANSPORT CORPORATION and  
FIREMANS FUND INSURANCE COMPANY

By \_\_\_\_\_  
Of Counsel"

After the Supreme Court refused Norfolk and Western's appeal in the Sparks case, Bailey and Dayton joined in filing a "Special Plea of Estoppel by Judgment and Res Judicata." In that plea, Bailey and Dayton contended that the issue of liability for damages caused by the accident had been finally decided against both defendants in the Sparks case, that Norfolk and Western was estopped to deny its joint liability, and that the Court should enter judgment against both defendants in the amount stipulated in the agreement of July 13, 1977.

This case was scheduled for trial beginning on July 5, 1978. Oral argument was heard on June 29, 1978 and after considering arguments and briefs of counsel, the trial court sustained the special plea and entered judgment against both defendants on July 22, 1978. Norfolk and Western has noted this appeal.

#### ASSIGNMENT OF ERROR

1. The trial court erred in sustaining Bailey's plea of collateral estoppel.