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Record No. 5857

In the
Supreme Court of Appeals of Virginia
at Richmond

**SOUTHERN STATES GRAIN
MARKETING COOPERATIVE,
INCORPORATED, ET AL.**

v.

CHARLES S. GARBER

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

RULE 5:12 BRIEFS

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5857

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 4th day of March, 1964.

SOUTHERN STATES GRAIN MARKETING
COOPERATIVE, INCORPORATED, AND

O. R. PUCCINELLI, JR.,

Plaintiffs in error,

against

CHARLES S. GARBER,

Defendant in error.

From the Hustings Court of the City of Richmond, Part II
M. Ray Doubles, Judge

Upon the petition of Southern States Grain Marketing Cooperative, Incorporated, and O. R. Puccinelli, Jr., a writ of error and *supersedeas* is awarded them to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 7th day of October, 1963, in a certain motion for judgment then therein depending wherein Charles S. Garber was plaintiff and Cooperative Mills, Incorporated, and the petitioners were defendants.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of twelve thousand five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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INSTRUCTION NO. 1

The Court instructs the Jury:

That a verdict must not be based upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the court.

The term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of the evidence or that degree of proof which the jury finds more convincing and worthy of belief. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses. And in ascertaining the preponderance of the evidence and the credibility of the witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

M. R. D.

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INSTRUCTION NO. 2

The Court instructs the Jury:

"Negligence" is a failure to exercise reasonable care under the circumstances.

"Reasonable care" is that care which a reasonably prudent person would have exercised under the same or similar circumstances.

A "proximate cause" of an event is a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred; it is an act or omission which

immediately causes or fails to cause the event; an act or omission occurring or concurring with another act, where, had it not happened, the event would not have occurred.

M. R. D.

page 13] INSTRUCTION NO. 3

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant, Puccinelli, told the plaintiff, Garber, to hold on to the cable by which the truck driven by Garber was to be raised for the purpose of unloading its contents; that Puccinelli, then, activated the hoist mechanism; that as a proximate result of such action on the part of Puccinelli, Garber's hand was caught and crushed in the pulley; and that Puccinelli under the circumstances then and there existing was negligent in acting as he did and that such negligence was the sole proximate cause of Garber's injury, then you should return your verdict in favor of the plaintiff, Garber, against the defendant, Puccinelli, and also against his employer, the defendant, Southern States Grain Marketing Cooperative, Inc.

M. R. D.

page 14] INSTRUCTION NO. 4

The Court instructs the Jury:

That this action is based on negligence and the mere fact that there has been an accident and that as a result thereof, the plaintiff has been injured, does not of itself entitle the plaintiff to recover. In order to recover against the defendants, the burden is upon the plaintiff to prove by a preponderance of the evidence that Puccinelli was negligent and that any such negligence was a proximate cause of the accident in question.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that Puccinelli was not guilty of any such negligence as that he was, then you shall return your verdict in favor of the defendant.

M. R. D.

page 15]

INSTRUCTION NO. 5

The Court instructs the Jury:

That if you believe from the evidence that *the* Puccinelli was negligent and that such negligence was a proximate cause of the accident in question, and if you further believe from the evidence that the plaintiff was also negligent and that such negligence on the part of the plaintiff efficiently contributed to cause the accident in question, then your verdict shall be in favor of the defendants.

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

M. R. D.

page 16]

INSTRUCTION NO. 6

Where the defendant relies upon contributory negligence of the plaintiff as a defense, the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of such negligence and that any such negligence was an efficient contributing cause of the accident; and unless the defendant thus proves the existence of such negligence or unless any such negligence appears from the plaintiff's own evidence or can fairly be inferred from all the circumstances of the case, then you cannot find the plaintiff guilty of contributory negligence.

And if the jury are uncertain as to whether the plaintiff was guilty of contributory negligence, or if you believe that it is just as probable that the plaintiff was not guilty of any such negligence as it is that he was, then you cannot find the plaintiff guilty of contributory negligence.

M. R. D.

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INSTRUCTION NO. 7

If from the evidence and the other instructions of the court you find your verdict in favor of the plaintiff, Garber, then in assessing the damages to which he is entitled you may take into consideration any of the following which you believe from the evidence to have resulted from the accident.

1. Any bodily injuries sustained and the extent and duration thereof;
2. Any effect of any such injuries upon his health according to its degree and probable duration;
3. Any physical pain and mental anguish suffered by him in the past, and any which may be reasonably expected to be suffered by him in the future;
4. Any disfigurement or deformity resulting to him and any humiliation or embarrassment associated therewith;
5. Any doctors, hospital, nursing and medical expenses incurred;

and from these as proven by the evidence your verdict should be for such sum as will fully and fairly compensate Charles S. Garber for the damages sustained by him as a result of the accident, not to exceed the sum sued for in the Motion for Judgment.

M. R. D.

page 18] INSTRUCTION NO. 8

Damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is upon the plaintiff to prove by a preponderance of the evidence each item and element of damages claimed, and unless such item or element of damage is proven by a preponderance of the evidence, then the plaintiff cannot recover for such item.

And if the jury are uncertain as to whether any particular item of damage claimed was caused by the accident, or if it appears just as probable that any injury or element of damage complained of resulted from a cause other than the accident as that it did, then the plaintiff cannot recover for such injury or element of damage.

M. R. D.

page 19] PLAINTIFF'S IV

The court instructs the jury that even though you may believe from a preponderance of the evidence that Garber when he placed his hand on the rope placed himself in a dangerous position, if you also believe that Puccinelli, at the time he activated the hoist, could not see whether a person was standing at the left front side of the truck operated by

Garber, and that in the exercise of reasonable care, under the circumstances then existing, Puccinelli, should have made sure, before activating the hoist, that no one was in a position of danger at the front of the truck, and that Puccinelli failed to do this, and that his failure so to do was the sole proximate cause of the injury to Garber, then you should find your verdict for the plaintiff, Garber, against the defendants, Puccinelli and Southern States Grain Marketing Cooperative, Incorporated.

Refused

M. R. D.

page 20] DEFENDANT'S INSTRUCTION NO. A

The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff knew or in the exercise of ordinary care should have known that the pulley on the cable to the hoist moved up the cable when the hoist was in operation, then he was placed on notice that it would be dangerous for him to hold the cable with his hand after the hoist was activated, and he was under a duty to keep a proper lookout for his own safety and if you believe from a preponderance of the evidence that the plaintiff failed to keep a proper lookout under the circumstances of this case, then the Court instructs you that he was guilty of negligence and if you further believe from a preponderance of the evidence that such negligence was the sole proximate cause or an efficient contributing cause of the accident, then you must find your verdict for the defendants.

Refused

M. R. D.

page 21] DEFENDANT'S INSTRUCTION NO. B

The Court instructs the jury that the defendant Puccinelli was a mere employee and that as an employee he, the defendant Puccinelli, owed no duty to the plaintiff to keep the premises in a reasonably safe condition.

The Court further instructs the jury that if you believe from a preponderance of the evidence that the defendant Puccinelli was not guilty of any negligence in the mere operation of the lift or that if he was guilty of negligence while

operating the life, such negligence was not the proximate or an efficient contributing cause of the accident, then you must find your verdict for the defendant Puccinelli.

Refused

M. R. D.

page 22] DEFENDANT'S INSTRUCTION NO. C

The duty to exercise reasonable care to keep a proper look-out involves not only the duty to look but the duty to see what a reasonable prudent person exercising reasonable care would have seen under the circumstances then and there existing; and a person who keeps a lookout but fails to take advantage of what it reasonably discloses is as negligent as one who fails to keep a lookout.

Refused.

M. R. D.

page 23] DEFENDANT'S INSTRUCTION NO. D

The Court instructs the jury that the defendants were not insurers of the plaintiff's safety when he was invited into the defendant's premises but the owner or lessee was under a duty to exercise ordinary care to keep the premises in a reasonably safe condition.

Refused.

M. R. D.

page 24] DEFENDANT'S INSTRUCTION NO. E

If the jury believes from the evidence that the defendants were negligent and that such negligence was a proximate cause of the accident, and if you further believe from the evidence that the plaintiff was also negligent and that such negligence efficiently contributed to cause the accident, then your verdict shall be in favor of the defendants.

The law does not undertake to apportion or balance the negligence of the parties where both are at fault in order to ascertain which one is most at fault, but the plaintiff is

barred from recovery if he committed any act of negligence which efficiently contributed to cause the accident.

Refused

M. R. D.

page 25] DEFENDANT'S INSTRUCTION NO. F

The mere fact that there has been an accident and that as a result thereof the plaintiff has been injured, does not of itself entitle the plaintiff to recover. In order to recover against the defendants, the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were negligent and that any such negligence was a proximate cause of the accident.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendants were not guilty of any such negligence as it is that they were, then you shall return your verdict in favor of the defendants.

Refused

M. R. D.

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ORDER

This day came the plaintiff, in person, and by counsel, and also came Cooperative Mills, Incorporated and Southern States Grain Marketing Cooperative, Incorporated, each by representative and by counsel, and also came the defendant, O. R. Puccinelli, Jr., in person and by his guardian *ad litem* and by counsel.

Thereupon, came a jury, to-wit: Allen P. Anderson, Parks P. Duffey, John P. Melton, James D. Paitsel, Ralph E. Ransome, Richard G. Register and Samuel T. Tweedy, who were

duly sworn to well and truly try the issues joined in this case.

At the conclusion of introduction of evidence on behalf of the plaintiff, counsel for the defendants, Cooperative Mills, Inc., and Southern States Grain Marketing Cooperative, Inc., moved the Court to strike the plaintiff's evidence with respect to the allegations of the Motion for Judgment alleging unsafe premises, which motion the Court granted, and it appearing that the said allegation is the only one directed against the defendant, Cooperative Mills, Inc., the Court both enter Summary Judgment in favor of the defendant, Cooperative Mills, Inc.; to all of which action of the Court, counsel for the plaintiff objected and excepted.

page 28] The defendants, Southern States Grain Marketing Cooperative, Inc. and O. R. Puccinelli, Jr., moved the Court to strike the plaintiff's evidence on the grounds that the evidence fails to show any primary negligence on the part of said defendants and does show contributory negligence on the part of the plaintiff as a matter of law, which motion the Court overruled, and to which ruling of the Court, counsel for the defendants objected and excepted.

At the conclusion of all of the evidence, counsel for the defendants, Southern States Grain Marketing Cooperative, Inc. and O. R. Puccinelli, Jr., renewed their motion to strike the evidence on the grounds previously assigned, which motion the Court overruled, and to which ruling of the Court, said defendants, by counsel, objected and excepted.

Whereupon, the jury, having been instructed by the Court, and having heard argument of counsel, was sent to its room to consult of a verdict, and after some time, returned into Court with the following verdict, to-wit: "We, the Jury, on the issue joined find for the plaintiff in the amount of \$10,400."

Whereupon, counsel for the defendants, Southern States Grain Marketing Cooperative, Inc. and O. R. Puccinelli, Jr., moved the Court to set aside the verdict of the jury and enter Summary Judgment on their behalf, or in lieu thereof, to award a new trial on all issues, or in lieu thereof, to award a new trial on the issue of damages on the grounds that the verdict was contrary to the law and evidence, that the Court erred in admitting and refusing certain testimony, that the Court erred in admitting and refusing certain instructions and that the Court erred in failing to sustain the motion of the defendants that judgment be entered on their behalf,

which motions the Court continued with leave to the defendants to file the same in further detail within 15 days after a transcript of the record has been prepared.

Enter

4/16/63

M. R. D.

page 29]

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ORDER

The Court, heretofore having heard the argument of counsel upon the defendants, Southern States Grain Marketing Cooperative, Incorporated, etc., and O. R. Puccinelli, Jr., Motion to Set Aside the Verdict, and having taken the same under advisement, and now being of opinion that the same be overruled,

Therefore, the Court doth overrule the defendant's Motion to Set Aside the Verdict of the jury.

It is, therefore, ordered that the plaintiff, Charles S. Garber, do recover of the defendants, Southern States Grain Marketing Cooperative, Incorporated, and O. R. Puccinelli, Jr., the sum of \$10,400.00 with interest thereon at 6% per annum from the 16th day of April, 1963, until paid, and all costs by him expended incident to this proceeding.

To all of which action of the Court, the defendants, Southern States Grain Marketing Cooperative, Incorporated, and O. R. Puccinelli, Jr.; object and except.

Enter

10/7/63

M. R. D.

page 30]

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ORDER

The defendants, Southern States Grain Marketing Cooperative, Incorporated, and O. R. Puccinelli, Jr., having advised

the Court that they intend to appeal from the Court's order of October 7, 1963, execution of the judgment against the said defendants is suspended for a period of four months from October 7, 1963, and if a petition for a writ of error from and *supersedeas* to the aforesaid judgment is presented to the Supreme Court of Appeals of Virginia, or one of the justices thereof, within the said four months, then the operation of the aforesaid judgment is suspended thereafter until the said Court or justice thereof shall have acted upon the said petition; all of the foregoing suspension of execution of judgment is upon the condition that the said defendants, or someone for them, on or before the 1st day of November, 1963, shall enter into a suspending and *supersedeas* bond in the penalty of \$12,500.00 with surety to be approved by the Clerk of this Court conditioned and payable as the law applicable thereto directs.

Enter

10/24/63

M. R. D.

page 31]

Filed:
October 28, 1963.

Teste:

CHAS. R. PURDY, Clerk
By IRA R. PURDY, D.C.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Hustings Court of the City of Richmond,
Part II

Notice is hereby given of an appeal to the Supreme Court of Appeals of Virginia by the defendants, Southern States Grain Marketing Cooperative, Incorporated, and O. R. Pucinelli, an infant, from the final judgment in favor of the plaintiff, Charles S. Garber, entered in this action on the

7th day of October, 1963, against these defendants.

The said defendants make the following assignments of error:

1. The Court erred in overruling the defendants' motion to strike the plaintiff's evidence at the conclusion thereof.

2. The Court erred in overruling the defendants' motion to strike the plaintiff's evidence at the conclusion of all the evidence in the case.

3. The Court erred in overruling the defendants' motion to set aside the verdict of the jury as contrary to the law and the evidence and without evidence to support it.

4. The Court erred in giving any finding instruction for the plaintiff.

5. The Court erred in giving any instructions for the plaintiff.

6. The Court erred in giving instruction No. 3 for the plaintiff.

7. The Court erred in refusing to grant defendants' instruction A.

8. The Court erred in refusing to grant defendants' instruction B.

9. The Court erred in refusing to grant defendants' instruction C.

page 32] 10. The Court erred in refusing to grant defendants' instruction D.

11. The Court erred in refusing to grant defendants' instruction E.

12. The Court erred in refusing to grant defendants' instruction F.

SOUTHERN STATES GRAIN MARKETING
COOPERATIVE, INCORPORATED,

By JACK B. RUSSELL

Attorney for Southern States Grain
Marketing Cooperative, Incorporated

Jack B. Russell

Browder, Russell and Morris

909 State Planters Bank Building

Richmond 19, Virginia

O. R. PUCCINELLI, JR.

By TRAVIS W. POOLE

601 Mutual Building

Richmond, Virginia

Counsel

Charles S. Garber

I hereby certify that a copy of the foregoing Notice of Appeal and Assignments of Error of the defendants Southern States Grain Marketing Cooperative, Incorporated, and O. R. Puccinelli, Jr., was this day served upon John Paul Causey, Esq., of Sutton and Causey, West Point, Virginia, counsel of record for the plaintiff, Charles S. Garber, by mailing a copy thereof to him at his respective address above set forth, pursuant to rule 3:15 of the Rules of Practice and Procedure in actions at law.

Given under our hands this 25th day of October, 1963.

JACK B. RUSSELL
Attorney for Southern States
Grain Marketing Cooperative,
Incorporated

O. R. PUCCINELLI, JR.,
By TRAVIS W. POOLE
601 Mutual Building
Richmond, Virginia
Counsel

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page 3]

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CHARLES S. GARBER,
the plaintiff, first being duly sworn, testified in his own
behalf as follows:

DIRECT EXAMINATION

By Mr. Causey:

Q. Please state your name.

A. Charles S. Garber.

Q. How old are you, Mr. Garber?

A. Forty-four.

Charles S. Garber

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page 4]

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Q. Upon your return from service, Mr. Garber, what occupation did you go into?

A. Well, at first I went into plumbing under the G. I. Bill of Rights for about six months.

page 5] Q. Yes, sir?

A. Then I came home and studied agriculture under the G. I. Bill.

Q. What has been your occupation since that time, up to the time of this accident?

A. Farming.

Q. Were you farming your own property, sir?

A. Sir?

Q. Were you farming your own property?

A. Yes, sir.

Q. Did you also rent land from other people?

A. I did, yes, sir.

Q. Do you do the farming which you do yourself, or do you employ persons to help you, and if so to what extent?

A. I do it myself.

Q. Prior to July, 1960, were you farming by yourself?

A. At the time I was, yes.

Q. On or about the 7th day of July, 1960, did you bring in a truck loaded with grain to the grain elevator at the foot of Mayo Bridge?

A. Yes, I did.

Q. Whose truck was it, sir?

A. Lipscomb Brothers.

page 6] Q. How did you happen to be driving Lipscomb Brothers' truck at that time?

A. Well, we made an agreement that, he borrowed my truck when he was harvesting wheat, and when we harvested mine, he loaned me his truck so we could use two trucks.

Q. This was your wheat and his truck.

A. Yes, sir.

Q. Was anybody with you at the time when you brought the wheat in?

A. No, sir.

Q. Did you bring it in by yourself?

Charles S. Garber

A. Brought it in by myself.

Q. What kind of a truck were you driving, Mr. Garber?

A. 1955 GMC.

Q. What was the nature of the body?

A. It was a solid body, board. Tongue and groove boards on each side and the rear.

Q. Did it have a tail-gate, or what was the situation so far as the gate?

A. It had a tail-gate. I think you pull it and it would open.

Q. About how high were the sides of the truck, sir?

A. I would say they were around four feet.

page 7] Q. That is four feet from the bed of the body?

A. That's right.

Q. Was the truck loaded so that it was even with the height of the wall when you —

A. No, I don't think it was.

Q. It was partially loaded?

A. I'd say it's somewhere around six or eight inches.

Q. All right, sir. Now about what time did you arrive there, sir?

A. I'd say I arrived there around 7:30, 7:00 to 7:30.

Q. That is in the morning.

A. In the morning.

Q. Were there other trucks there waiting to be unloaded?

A. Yes, sir.

Q. Did your truck eventually come to the unloading zone?

A. It did.

Q. Mr. Garber, are there two places there where you can unload?

A. Yes, sir.

The Court: I think from now on you had better not lead.
Mr. Causey: All right, sir.

page 8] Q. What is the relation of those two places, one to another.

A. Well, the one that I went into is on the river side and the other one is on the right of that. And this other lift, you drive into it and it tilts the whole truck.

Q. Now, how does the lift into which you drove operate?

A. Well, you drive into a cradle and it's worked by electricity and lifts the front end of the truck.

Q. Had you unloaded there before, sir?

Charles S. Garber

A. Yes, sir.

Q. How recently before?

A. Well, I unloaded there the day before.

Q. Did you unload at the same lift?

A. Yes, sir. I unloaded in the same lift.

Q. Who was operating the lift at the time, sir?

A. I'm quite positive Mr. Puccinelli was.

By The Court:

Q. On which occasion is this?

A. This was on the day before. The 6th of July.

The Court: All right.

By Mr. Causey: (Continuing)

Q. What, if anything, was done on the day before, what was done, Mr. Garber, with respect to the tail-gate?
page 9] A. Well, after they weigh the truck, I always

go to the back of the truck and lift — before they lift it, I always go to the back and help to open the tailgate.

Q. You did that on the day before?

A. That's right.

Q. All right, sir. Now, Mr. Garber, will you describe to the Court and the jury exactly what you did on this day in question? You said you had driven the front wheels of the truck into the cradle, would you pick it up from there, please, sir.

A. When I drove the front wheels in this cradle, this cradle slid forward. More or less to one side. Couldn't get the wheels in. Finally I backed it up and eventually got them in. Had some trouble getting it in.

Q. All right, sir.

A. And after the truck was weighed, I came around and I asked Puccinelli should I back the truck a little, thinking that the truck had gone forward too far to dump it in the pit. And he said, No, hold the cable. And my interpretation was to keep the cable from hitting the side of the truck, and pull back when the truck rolled back.

Q. So that you can be more specific, sir, you drove the truck on to the cradle —

page 10] A. Yes, sir, I drove on the cradle.

Q. Which door of the truck did you get out of?

A. I got out on the driver's side.

Q. Where did you go from there, sir.

Charles S. Garber

A. Went around and weighed.

Q. All right, sir. Did you go around the front or the back of the truck?

A. Went around the front.

Q. Where is the weighing scale?

A. The weighing scale, you drive on the cradle, then they weigh it.

Q. I mean the actual scale?

A. That's to the right of the truck.

Q. Did you observe the weight on the scale?

A. It was somewhere around nineteen thousand pounds gross weight. I don't exactly remember.

Q. After the truck was weighed, where did you go?

A. We came back around and I asked Puccinelli —

Q. You say you came back around, in which direction?

A. The driver's side of the truck.

Q. All right, sir. Both of you?

A. Yes, sir.

Q. All right, sir. And continue.

A. And then I asked him should I back the truck, thinking
page 11] that the truck had gone too far ahead. In quite a
few lifts I have been in, they ask you when you
drive in the cradle —

Mr. Russell: If Your Honor please, I object to what he may have been told at any other lift.

The Court: Objection sustained. Tell what happened in this case.

Mr. Causey: Yes, sir.

Q. You asked Mr. Puccinelli — What did you ask him, sir?

A. I asked him should I back the truck.

Q. All right, sir.

A. He said, no, hold the cable.

Q. Then what did he do?

A. He went on to the back, to the lift, I guess.

Q. When did you last see him before you were injured?

A. I didn't see him anymore.

Q. You mean after he went back there?

A. After he went back, no, sir, I didn't see him anymore until I was injured.

Q. What then did you do?

A. I yelled.

Charles S. Garber

Q. No, but prior to the time that you yelled, sir, after he went —

A. Well, I pulled on the cable to keep it from
page 12] hitting the side of the truck, and pulled back on it, thinking the truck would roll to the rear.

Q. What happened then?

A. Well, I was pulling on the cable, looking to the rear, and the cable caught my hand between the cable and the pulley, not looking. I didn't see that.

Q. Do you know how long you may have had your hand on the cable before it was caught, sir.

A. It couldn't have been long.

Q. When your hand was caught, what did you do?

A. I yelled.

Q. What happened then, sir.

A. He stopped it and dropped it.

Q. Did that release your hand?

A. Yes, sir.

Q. What was the condition of your hand, Mr. Garber, when it was released?

A. Well, *they* were badly crushed, inside. It was just the mark of the cable dented way in, and sort of pulley marks on the outside.

Q. Was your hand bleeding?

A. Very little.

Q. What was done then, sir.

A. Went around to the Southern States office where they
test the grain, and they called the city ambulance.
page 13] Q. Where were you taken, sir?

A. Medical College of Virginia.

Q. Who has treated you for the injury which you sustained?

A. Well, Dr. Hoover and Dr. Dalton operated. Dr. Dalton treated me afterwards.

Q. How long were you in the hospital?

A. I'd say eight days.

Q. Did you continue under or were you under Dr. Dalton's treatment after you got out of the hospital?

A. Yes, sir.

Q. For what period of time, would you say, sir?

A. He released me in May. I can't say May the first; he released me in May, 1961.

Q. That was about ten months after the accident?

A. Yes, sir.

Q. Were you given any treatment with respect to the hand,

Charles S. Garber

and, if so, what.

A. I was given therapy treatment.

Q. Where were those taken, do you know, sir?

A. They were taken on Kensington Avenue. I don't know the address.

Q. Mr. Garber, will you describe to the jury what you were able to do with the hand after you were page 14] released from the hospital?

A. Well, it was very little I could do. The hand was very tender. I'd say it took four to six weeks to heal completely. Then it was very tender. I couldn't use it very well. And when cold weather came, I couldn't stand the cold. And it's hard to handle machinery with it at that time; of course, it's a little better now.

Q. After you were discharged from Dr. Dalton, what was the condition of the hand?

A. Well, it was still tender. I managed to do my work.

Q. Did you go back and see him?

A. Yes, sir.

Q. When, sir?

A. I'd say I went back sometime in December.

Q. What was the result of that visit, sir?

A. I went back — My little finger, in fact this finger too, they were bothering me so much in cold.

Q. All right?

A. And he told me to come back in the last of December, I don't exactly remember the date, and he would amputate the little finger.

Q. Was that done, sir?

A. Yes, sir.

Q. Whereabouts, sir?

page 15] A. Medical College.

Q. Were you in the hospital again at that time, sir?

A. Not after that, no, sir.

Q. No, sir, but at the time of the amputation.

A. Yes, sir.

Q. Do you recall how long you may have been in the hospital at that time?

A. I was there about six days.

Q. What is the present condition of the hand? What are you able to do with it, sir?

A. Well, it's awkward handling machinery. I don't have

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too much grip.

Q. Will you show the jury — First, will you show them the hand. Just hold it up straight.

A. (Doing so)

Q. All right. Now with respect to the fourth finger, how far can you bend that, sir?

A. You mean all of them?

Q. No, thinking particularly of the fourth finger, at the present, how far can you bend it?

A. That far.

Q. Is that as far as you can bend it?

A. Yes, sir.

Q. Go to the next finger.

page 16] A. All right.

Q. Can you touch your thumb with your third finger?

A. Just barely.

Q. What discomfort, if any, does the hand still give you?

A. This finger gets very, very cold. (Indicating fourth finger) When it's real cold, I haven't found any remedy yet to keep it warm, unless I stay in the house.

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page 17]

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Q. What acreage were you farming in 1959, approximately?

A. I was farming about two hundred acres.

Q. What acreage were you farming in 1961 and 1962?

A. I was just farming my farm, one hundred twenty five acres under cultivation.

Q. Why were you not farming the amount of acreage in these two years which you did in 1959?

A. Well, personally I couldn't do the work, if I would have had the land.

Q. Why couldn't you do the work, sir?

A. It's just been too much to do, instead of hiring a lot of labor.

Q. Did you make any attempt to get other employment other than farming after this accident?

A. Yes. At the time I was working at B & W Ford part-time.

Charles S. Garber

Q. What kind of work were you doing there,
page 18] sir?

A. Selling cars. Wasn't profitable.

Q. All right, sir.

A. And then in 1961 I went down to Newport News to
apply for a job.

Q. Whereabouts in Newport News?

A. Shipyard.

Q. Were they taking on people at that time?

A. Yes, sir.

Q. You applied for a job; what happened, sir?

A. Well, they couldn't give me a job on account of my hand.
I had a little experience in plumbing, and they wouldn't give
me a job as pipefitter, or helper. Of course I would have had
to have went in as helper. On account of my hand they said
it would be too dangerous.

Q. Let me ask you this question: What kind of machinery
do you have so far as farming is concerned, sir?

A. Well, I have International equipment, some John Deere.
I say generally mixed up.

Q. What do you have? Do you have a tractor?

A. Yes, sir.

Q. What other type of equipment do you have?

A. We have a combine, corn picker.

Q. What do you do so far as the repair of those are con-
cerned? Do you repair them yourself?

page 19] A. Lot of work, I do. I mean if it's a big job I
can't, because it's hard to do. I mean those places,
using my left hand, it's very hard to do.

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page 22]

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BEFORE THE JURY

Mr. Causey: May it please the Court, by agreement of
counsel we would like to offer in evidence at this time the
doctors and hospital bills which Mr. Garber has incurred by
reasons of this injury. They are in the gross amount of six
hundred forty-nine dollars and eighty-two cents.

Dr. James B. Dalton, Jr.

The Court: All right. That will be Plaintiff's Exhibit No. 1.

Note: The above medical bills are now marked and filed as *Plaintiff's Exhibit No. 1*

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page 33]

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DR. JAMES B. DALTON, JR.

first being duly sworn, introduced in behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

By Mr. Causey:

Q. Please state your name, sir?

A. Dr. James B. Dalton, Jr.

Q. What is your occupation or profession?

A. I do orthopedic surgery, sir.

Q. In the city of Richmond?

A. Yes, sir.

Mr. Russell: If it please the Court, I am sure that I can speak for Mr. Poole, we are more than willing to concede or agree that Dr. Dalton is a well qualified orthopedic surgeon in the city, to save some time.

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page 34] Q. Dr. Dalton, did you have occasion to treat Mr. Charles S. Garber with respect to an injury he sustained on or about the 7th of July, 1960?

A. Yes, sir.

Q. When did you first see him, sir?

A. In the emergency room at the Medical College of Virginia, sir.

Q. Was that on that day, sir.

A. Yes, sir.

Q. What treatment was given at that time?

A. Well, the patient was prepared and taken to the operating room very shortly after his admission.

Dr. James B. Dalton, Jr.

In the operating room we debrided or tried to remove the dead tissue and devitalized tissue from his third, fourth and fifth fingers, and this was a rope-type of burn injury. It had burned down to the tendons on the fourth finger, he had lacerated the tendon on the third finger, and almost amputated the fifth finger. We debrided all these wounds, repaired his tendons, and put him in splints for his injuries.

Q. What was his condition at that time?

A. He had suffered a very bad injury to his left hand, with multiple laceration, compound fractures, and injury to his tendons.

Q. Did you continue to follow him, so far as
page 35] treatment was concerned, after this operative
procedure?

A. Yes, sir.

Q. Was he hospitalized for a period of time, sir?

A. Yes, sir. I don't recall exactly how long he was in the hospital. I'd say at least one to two weeks after his injury, and then he was given considerable amount of physical therapy to try to help rehabilitate his hand.

Q. Did you continue to treat him or observe him, so far as office visits were concerned, during the *succeeding* months?

A. Oh, yes, sir.

Q. Do you recall when you initially discharged him?

A. I believe around June, 1962.

Q. During the time that you continued to treat him, Dr. Dalton, what was the condition of the hand? Would you describe how it progressed after the operative procedures, and development, so far as that is concerned.

A. Well, we knew the gentleman sustained bad injuries to all these fingers, and at the time, scarring, resultant scarring that we anticipated was going to give him considerable stiffness of his hand. For the first week or so, or actually longer than that, we were very much concerned about the circulation, whether it would allow survival of his
page 36] fourth and fifth fingers. There were several doctors who saw him during this time who did not think there was going to be enough circulation to sustain the fourth and fifth finger. As it turned out, he did maintain these fingers, although there was marked limitation of use of these fingers, with gross angulation and deformity of the fifth finger; and subsequently, during the course of following Mr. Garber and waiting a considerable length of time to see

Dr. James B. Dalton, Jr.

what we considered his maximum improvement was going to be, he had so much extreme sensitivity to cold, and with obvious damage to the nerve fibers and circulation to the finger, with the deformity of his fifth finger. We decided to remove part of the fifth finger. This was done around December of 1961, I believe.

Q. You have referred to the question of circulation; what effect would that have so far as the feeling or condition of the hand?

A. Well, it gives them a sense of numbness and tingling constantly to their hand, and in cold weather they are extremely sensitive. It is an almost unbearable sort of discomfort.

Q. That affected which finger, sir; the loss of circulation.

A. Predominantly the fourth and fifth finger.

Q. The fifth finger was finally amputated?

page 37] A. Yes, sir.

Q. What is the present condition of his hand, sir, or when you discharged him what was the condition of his hand?

A. He still has considerable scarring around his smaller joints of his fingers, with inability to make a fist, or a real strong grasp, bringing his fingers down into his palm. We felt that he had sustained —

Mr. Russell: If Your Honor please, we object to the Doctor estimating any percentage of disability in the hand. I think that certainly without any further foundation than that, it is the province of the jury to determine how much disability the man has suffered, not the Doctor. I think the Doctor can testify as to what he can and cannot do, and what his finger can and cannot be used for, but we object to an arbitrary percentage.

Dr. Dalton: I would rather do that, as a matter of fact.

Q. Dr. Dalton, state the kind of things that he is disabled from doing as a farmer.

A. This man has marked weakness in his hand. He has inability to make a firm grasp on either large or small objects.

I believe he will still have difficulty in cold
page 38] weather with sensitivity to his hand. He will feel that he has got to wear a glove more than the average person would in extremely cold weather. Fortunately, he has a good thumb. This has saved him a useless hand. I don't know if I know all the duties and requirements of a

Charles S. Garber

farmer or not, but he will definitely have limitation in the use of his hand for grasping, doing heavy manual work.

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CHARLES S. GARBER,
the plaintiff, resumed the stand for further cross examination by Mr. Russell, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION

By Mr. Russell: (Continuing)

Q. Mr. Garber, I believe we have asked you
page 39] just how many years you have been bringing your
grain to this particular elevator; let me be a little
more specific and ask you: have you been bringing it here
since around July, 1956?

A. I'd say, yes.

Q. Did you sell your wheat, your corn, and your beans to —

A. Yes, sir. I sold right much wheat.

Q. — to the Co-op?

A. I mean beans and corn to the Cooperative Mills.

Q. So that each season or each year then you would be up
here several times —

A. That's right.

Q. — bringing trucks of grain of one kind or another?

A. Yes, sir.

Q. Did you come with the same general type of truck each
time? That is, a flat bed truck that cannot be dumped by it-
self?

A. Yes, sir.

Q. On prior years, had you had occasion to come in and
bring your truck into this same ramp and have it elevated?

A. I'd say I have been in it several times, yes.

page 40] Q. You have seen it operate, then; you know
how it operates?

A. I never paid too much notice.

Q. You work on a farm, you have used pulleys before, have
you not?

A. I drive in it and always go to — The first thing I do is
go to the back and help to lift the tailgate, you know, how the
thing lifts the front of the truck, the wheat comes out the back,

Charles S. Garber

or whatever is in the truck.

Q. What I mean, though, you have seen the freight elevator?

A. Yes, sir. It lifts the front end of the truck.

Q. You were familiar with the looks of the thing, were you not?

A. I'd say I was familiar with the looks but I had never examined it, or anything.

Q. It struck you as being a rather simple type piece of machinery, and you never bothered to look at it much then?

A. I was in a hurry when I got there. I was in a hurry to get on back home and do some other work.

Q. You drove your truck through the shed where the pit was, you drove right across the top of the pit, did page 41] you not?

A. Yes, sir.

Q. And ran the front wheels into the cradle —

A. Yes, sir.

Q. — got out so the truck could be unloaded, is that right?

A. It was weighed. I mean the truck was weighed.

Q. I say, you got off so it could be weighed and unloaded?

A. Yes.

Q. After it was unloaded it had to be reweighed, did it not?

A. Yes, sir.

Q. You were aware of the fact, from prior experience, that the controls that operate this thing were back in the little shed there where the grating was over the floor, were you not?

A. I knew the controls were back there, yes.

Q. You also were aware of the fact that the person that was back there operating this control could not see you up at the left front corner of the truck, too, were you not?

A. No, I can't say I did.

Q. You couldn't see the operator, could you?

A. I wasn't personally — I never particularly page 42] noticed where it was. I knew it was — I knew it was back in the back.

Q. On the day that you got there in 1960 with your truck load of wheat, did you have to wait in line for awhile?

A. Yes, sir.

Q. Did you go up and walk around the premises while you were waiting in line, to kill time?

A. No. Stayed right around the truck and talked to the other farmers.

Q. When your truck was next in line, you were right behind the grate, were you not?

Charles S. Garber

A. Sir?

Q. (Handing photograph to witness) Can you tell us what that is a picture of, Mr. Garber?

A. That's a picture of the grain elevator, the lift and the pit you drive over.

The Court: That will be Corporate Defendants' Exhibit No. 1.

Note: The above identified photograph is now marked and filed as *Corporate Defendants' Exhibit No. 1*.

Q. You say that this is a picture of the lift and the pit?

A. Yes, sir.

page 43] Q. This area right in here, can you tell us what that is?

A. That's where you are when you lift the truck. That's where your grain dumps. When you lift the truck, that's where your grain dumps.

Q. Three is a grating, iron slats with holes in it, and the grain is dumped between those holes into the ground?

A. Yes, sir.

Q. The cradle is over here that you were talking about?

A. Yes, sir.

Q. Can you point out the controls, or do you know where they are that operate this thing?

A. The controls are here, I think.

Q. All right, sir. When you were in line, you were the next truck in line, you were stopped in the foreground of this picture about where the man with the camera would have been?

A. I'd say so.

Q. You could see the truck ahead of you unloading then, could you not?

A. What is that?

Q. You could see the truck ahead of you unloading?

A. Oh, sure.

page 44] Q. You knew exactly what was going to happen then, did you not?

A. What do you mean?

Q. You knew that the man that was going to unload the truck would come back here to the controls, with the truck sitting here in the middle, did you not?

A. Oh, yes. Now, the truck before that had bags on it. They

Charles S. Garber

was unloading bags on that truck.

Q. You had seen trucks unloaded in there, had you not?

A. Yes, sir. I had seen trucks unloaded.

Q. In your experience, you are familiar with how a pulley works, are you not?

A. Yes, sir.

Q. When you saw this particular pulley there with the cable going through it, you knew that in order to lift the front of that truck off the ground that the cable had to pass through the pulley, did you not?

A. I didn't realize it.

Q. You knew how pulleys worked before, though.

A. Yes.

Q. If you had stopped to think about it a minute you would have realized you could not have gotten the truck up without running the cable through the pulley, would you
page 45] not?

A. I didn't give it that thought.

Q. Isn't that what a pulley is for, though, Mr. Garber?

A. Usually I'd say yes.

By The Court:

Q. Let me ask you this question: Was your hand injured while the wire was coming down with your hand, or while the wire was going up with it?

A. Going up.

Q. Was the wire, though, on which you had your hand, was it going up or down?

A. Personally I don't know.

The Court: All right.

By Mr. Russell: (Continuing)

Q. In any event, Mr. Garber, you had your hand wrapped all the way around that cable, did you not?

A. Yes.

Q. And the pulley came up and caught your fingers between the pulley, between the cable and the pulley itself, all of them?

A. All of them, except the thumb.

Q. When you drove your truck up into this thing, into the cradle —

Charles S. Garber

A. Yes, sir.

Q. — the truck wasn't touching the cable any-
page 46] where, was it?

A. The cable was loose.

Q. That's right. It wasn't touching the truck, though, was it? It wasn't touching the truck, was it?

A. Frankly I don't know.

Q. In any event if it was hanging there loose, when the motor was started and the thing straightened up tight, it certainly wouldn't have touched the truck, would it?

A. Not after it straightened out; though sometimes it hit the side view mirror of the truck when it's loose.

Q. Hits what now?

A. Hits the side view mirror of the truck. Side view mirror of the truck.

Q. When you are driving the truck off; it doesn't hit the side of the truck while you are sitting there perfectly still, does it?

A. When it's loose it will sometimes hit it.

Q. Let me ask you a question about this: Where is the side view mirror, on the edge of the door?

A. No.

Q. Where is it?

A. Yes. It's on the end of the door. Yes.

Q. On the end of the door?

A. That's right.

page 47] Q. This arrangement, this cradle, though, is
up by the front wheels, is it not?

A. It extends to the back and to the front.

Q. Just about the width of the wheels, though, is it not? Isn't that about all?

A. It's a little bit. I'd say, a little bit wider than that.

Q. Well, if it is wider than the wheels, wouldn't the wheels drop all the way through it?

A. No. It can't drop through it.

Q. Why can't it?

A. Because it's sort of a concern that has slats. When you pull on it, it sort of doubles up.

Q. In any event, it never gets wide enough for a wheel to go through it, does it? Your wheel just rests in between two iron bars, does it not?

A. A wheel can't go through it; no.

Q. If the mirror is back here at the door, and the cable is

Charles S. Garber

up here at the front wheel, and you elevate the front of the truck, it is going to get further from the mirror, is it not?

A. Yes, sir, it will.

Q. So the mirror is not going to hit, is it, once this thing gets started?

A. No, not unless you drive — When you drive
page 48] it out it may.

Q. When you drive it out it may get hit, is that right?

A. Yes.

Q. You couldn't drive out and hold the cable, too, could you?

A. No.

Q. When this piece of machinery starts to moving upward and picks up this truck loaded with grain, it makes enough noise you can hear it start up, can you not? You could tell it was moving, could you not?

A. Yes, you could tell it was moving.

Q. From the very first time that thing began to move off the ground you knew it was moving, did you not?

A. I knew it was moving, yes, and I was pulling on the cable thinking that the truck would roll back.

The Court: I think the jury and certainly the Court would like to know from this picture here where he was standing.

Mr. Russell: Just a minute, Your Honor, let me get you another picture.

The Court: Well, all right.

Q. Can you tell us what that is, Mr. Garber?

A. This is the lift.

Q. Is that it, looking at it from the other
page 49] direction from the first picture you were shown?

A. No.

Q. In the other picture you were looking at it from the back end, the way the truck came through, was it not?

A. That's right.

Q. You were looking through the shed.

A. Yes.

Q. In this case you are looking from where the front end, the way the truck was sitting, is that right?

A. Yes, sir.

Mr. Russell: May we have this marked, please, Your Honor?

Charles S. Garber

The Court: This will be *Corporate Defendant's Exhibit No. 2.*

Note: The above photograph is now marked and filed as *Corporate Defendants' Exhibit No. 2.*

The Court: If I understand, the camera would be facing the front of the truck?

Mr. Russell: That is right, sir.

Q. Mr. Garber, when this picture was taken —

A. Yes, sir. The camera would be facing the truck.

Q. — where would the front wheels of your truck have been in the picture if the truck had been there?

A. In there.

page 50] Mr. Russell: Let the record show that he pointed to the cradle that is on the scales.

Q. Let me ask you this: Can you say what this right on here is, this platform?

A. I think it's the scales.

Q. All right. And the cradle is sitting right on top of the scales, is that right?

A. Yes, sir.

Q. The front of your truck would have been, the front wheels would have been inside the cradle?

A. That's right.

Q. And the back of the truck would have been back underneath the shed you can see in the background?

A. Yes, sir.

Q. Where were you standing at the time this thing happened?

A. I was standing right here, sir.

Mr. Russell: Let the record show he is pointing to the right-hand side of the picture as you face the picture.

A. This is the river side.

Q. On the river side. And what were you doing?

By The Court:

Q. Where with reference to the cradle?

Charles S. Garber

A. This cradle, sir?

page 51] By Mr. Russell: (Continuing)

Q. Where were you standing with respect to the cradle?

The Court: Or to your truck.

A. I was standing on the side, sort of on the side, pulling the cable with my left hand.

By The Court:

Q. Where were you standing with reference to the axle or hub — I don't know whether trucks have hub caps or not, but where were you standing with reference to the hub cap of the front wheel?

A. I'd say it would be between the cable and the, probably the door, I'd say, of the truck towards the, sort of to the rear of it.

By Mr. Russell: (Continuing)

Q. Were you ahead of the cradle or was it behind you?

A. No, I was —

The Court: That would be ambiguous. It would depend on which way he was facing.

A. I was facing toward the back end of the truck. I was facing to the back of the truck.

By Mr. Russell: (Continuing)

Q. You were facing the back of the truck?

A. Pulling the cable, looking to the back wheels.

page 52] Q. Was your arm out beside you, behind you, or in front of you? Your left arm.

A. I had hold of it like this, pulling.

Q. Pulling to the side, or pulling to the back?

A. Pulling to the back.

Q. So then your arm would have been behind you, then?

A. No, I was facing the truck like this. (Demonstrating)

Q. You were facing the truck?

A. Facing the truck like this; pulling; looking toward the rear wheels.

Q. You mean you were facing the side of your truck?

Charles S. Garber

A. Facing the side of the truck; yes. Facing the side of the truck.

Q. All right, Pulling; looking to the rear wheels, and you had your left hand on this cable?

A. That's right.

Q. Looking over toward the right and you knew the thing was moving.

A. I was looking toward the rear of the wheels.

Q. You knew the thing was moving and in operation, you could tell it was going up, could you not, Mr. Garber?

A. I can't say I knew it was moving or not. I
page 53] knew he had lifted it some.

Q. Couldn't you feel it in your hand?

A. I can't say.

By The Court:

Q. Was the truck going up?

A. Yes.

By Mr. Russell: (Continuing)

Q. Was the truck going up? You could see the truck, could you not?

A. Yes.

Q. Was it moving up?

A. I'd say the truck was moving up.

Q. So you were aware of the fact that this thing was moving.

A. Yes, I knew it was moving.

Q. You had been in there and had seen this pulley arrangement before, had you not?

A. I never had paid any attention to it.

Q. You had seen it before, had you not?

A. I had seen it; yes.

Q. You said awhile ago you were aware of how pulleys operate.

A. Yes, I know how pulleys operate. Sure.

Q. You continued to stand there and look to the rear while
this thing was going, all the time with your hand
page 54] on the cable?

A. Yes, sir.

Q. Did the truck move any?

A. You mean back?

Q. Yes.

Charles S. Garber

A. I think it moved a few inches, but it wasn't moving much.

Q. So that your holding it didn't do any good, one way or the other, did it?

A. I thought it was helping, when I did it, when I pulled on it.

Q. At any time after you put your hand on the cable did you ever watch it while it was in operation, watch your hand?

A. No, I didn't watch my hand.

Q. If you were standing there facing the truck, you had this big truck in front of you, right in front of you; you were standing right along side of it, within a foot or two of it, were you not, within a couple of feet of the truck?

A. I was right close to the truck.

Q. You could have touched it with your right hand, could you not?

A. Yes, I could have touched the truck with my
page 55] right-hand.

Q. You could not see the operator of this machinery, could you?

A. No, I couldn't see him.

Q. You knew he could not see you, too, did you not?

A. Well, I didn't realize at the time; no.

Q. If you couldn't see him, how could he possibly have seen you?

A. I don't guess he could see me.

Q. So there wasn't anybody around to watch your hand for you while you were looking to the rear, was there?

A. No, sir.

Q. Had the wheat begun to come out of the back of the truck as soon as it was elevated a little bit?

A. (Shaking head indicating no) No. I don't think the tailgate — I know the tailgate wasn't opened. I could see the wheat if it was coming out the back of the truck.

Q. As far as you could tell, though, the truck was situated so that the wheat, if the tailgate had been open, would have dropped right in the pit under it?

A. No, I didn't think it would.

page 56] Q. You did not think it would?

A. No, sir.

Q. You don't know how the truck was unloaded, do you, after this happened?

A. After this happened?

Q. Yes.

Charles S. Garber

A. No, I don't.

By The Court:

Q. Was the cable taut or loose at the time you grabbed it? Had it drawn tight?

A. It was loose when I grabbed it; yes.

Q. Loose?

A. Yes, sir.

Q. And how long from the time you grabbed it, would you say it was until the injury occurred?

A. I'd say it couldn't be — I'd say between thirty seconds and a minute. I mean roughly. I can't say exact.

Q. I was just wondering whether it was four or five seconds, or whether it was —

A. He had to walk around to the back after he left me. From the time that —

Q. Maybe I haven't put the question to you
page 57] correctly, in light of that statement that you
just made. From the time that the machinery
started up until the time you were injured, can you give us
that?

A. I'd say it would only be a matter of a few seconds.

Q. I thought that is what you said on direct testimony. I wonder if you would like to try to estimate it closer than that?

A. Well, I'd say between, probably, between five and ten seconds.

Q. Between five and ten seconds?

A. I'd say that.

The Court: All right. Excuse me, Mr. Russell. Go ahead.
Mr. Russell: I believe that is all.

CROSS EXAMINATION

By Mr. Poole:

Q. Mr. Garber, you have been taking trucks into this establishment since 1956, I believe?

A. Yes, sir.

Q. You have had numbers of trucks unloaded in the same

Charles S. Garber

manner, with the same equipment that this truck was being unloaded?

page 58] A. At different places; yes, sir.

Q. Is that correct, yes?

A. Yes, sir.

Q. You never before caught hold of any cable over there, have you?

A. No, sir. They usually ask you to drive up or back up. Sometimes a short wheel base truck or a pickup will come up, come in before you, and they will ask you before you get out of the truck.

Q. But you never have caught hold of the cable before.

A. No, sir.

Q. What were you trying to do when you had your hand on the cable? Were you trying to pull the truck backward, or move the truck, or what were you trying to do?

A. That was my — my interpretation was to keep from hitting the side of the truck and pull back on the cable, and the truck would roll back.

Q. Mr. Garber, you could very easily have caught hold the side of the truck if you were trying to move it, could you not? Wouldn't you have more opportunity to move the truck if you had hold of the truck rather than the cable?

A. Well, I only interpreted what Puccinelli said.

page 59] Q. I am asking you, Mr. Garber, if you were going to move the truck, wouldn't it be easier to push the truck than to try to move the truck by holding on to the cable?

Mr. Causey: I think that is a hypothetical question, which the witness has already answered. He has testified to the circumstances under which he had his hand on the cable. I think his testimony is apparent.

The Court: If he knows the answer to the question he can answer; if he doesn't, why — Answer the question, if you know the answer.

Q. If you wanted to move the truck, you could have put your hand on the truck as well as on the cable, could you not, Mr. Garber?

A. I think it would probably move easier by putting it on the cable.

Q. Why?

A. Well, the further you would be up front, I think the

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easier it would move.

Q. Mr. Garber, when you were out here in the line of trucks, and there was a truck in front of you; when it cleared the scales Mr. Puccinelli motioned for you to come on through, did he not?

A. Yes, sir.

page 60] Q. Wasn't he standing in front of your truck when you were coming up on the lift? He was standing in front of your truck, was he not? Wasn't he standing there, holding up his hand, saying come this way, or giving you signals?

A. Usually; yes.

Q. Wasn't he giving you signals then?

A. Usually they do. Sometimes this —

Q. I am asking you on this occasion, do you remember, Mr. Garber? Wasn't Mr. Puccinelli standing in front of the truck, saying this or this, giving you signals as to how to move your truck? Wasn't he standing there?

A. I'd say, yes.

Q. He was.

A. Yes.

Q. All right, sir. After you got the front wheels into the cradle there, you immediately got out of the truck, did you not?

A. We had right much trouble getting in it. The thing slid to one side. It didn't stay stationary.

Q. I am talking about when you moved your wheels into the cradle; the cradle was still on the scales, was it not?

page 61]

A. Yes.

Q. You immediately got out of your truck then, right?

A. Yes, sir.

Q. You went into the weigh house with Mr. Puccinelli?

A. Yes.

Q. You saw him weigh the grain?

A. Yes, sir.

Q. I believe you said you had nineteen thousand gross pounds on there?

A. Yes, sir. Nineteen thousand some pounds.

Q. He stamped a little ticket.

A. That's right.

Q. After he stamped the ticket, didn't he say to you, wait, or wait here a minute?

A. (Shaking head indicating no) I asked him did he want

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me to back the truck, and he said, put your hand on the cable.

Q. Did he give you any reason as to why he wanted you to put your hand on the cable?

A. No.

Q. Mr. Puccinelli said something to you about wait here, or wait a minute before he left to go to the switch, page 62] did he not?

A. (Shaking head indicating no) No, sir.

Q. When he left to go back to the switch — You know where the switch is, do you not?

A. Yes, sir.

Q. When he left you to go back to the switch, weren't you then in the weigh house?

A. No. Not when he went back to the switch I wasn't in the weigh house.

Q. You were not in the weigh house?

A. No. In the what house?

Q. The little house where you weigh.

A. No. I wasn't in the weigh house. No, sir.

Q. Where were you then?

A. I was around at the cable, I mean around where they lift it, when he went back to pull the switch.

Q. You mean that he didn't go directly from the weigh house to the switch?

A. No. He went around the truck.

Q. You have been in there before, have you not, Mr. Garber?

A. Yes, sir.

Q. Isn't it customary that as soon as he weighs you and gives you the tickets, he immediately walks out of page 63] the weigh house to the switch?

A. I never have noticed, personally.

Q. You never have noticed that?

A. No, sir.

Q. Did Mr. Puccinelli tell you to stand clear?

A. No.

Q. He did not?

A. No.

Q. You deny that.

A. Yes, sir.

Q. Do you remember his conversation with you?

A. He said, pull on the cable. I asked him, and that was what he said.

Q. When Mr. Puccinelli went back to the switch to activate the switch, you were holding the cable; how long did you hold

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the cable, Mr. Garber?

A. Well, I held it until it caught my hand. I mean it started, I pulled on it —

Q. How long a period of time? Can you estimate the period of time you had your hand on the cable?

A. It's pretty hard to do. I mean it's pretty hard to estimate.

Q. Awhile ago you estimated an interval of time.

A. Well, I'd say, I did say from the time he
page 64] left the side of the truck and walked around to the
rear and pushed the button, I'd say thirty seconds.
I did say that.

Q. Were you holding the cable all those thirty seconds?

A. Yes, sir.

Q. You were standing there holding the cable for thirty seconds.

A. (Nodding head indicating yes)

Q. Even though the truck had not moved up at all while it was still on the scales.

A. Yes, sir.

Q. Did you see the truck when it first started to move?

A. I could tell when it started moving up; yes.

Q. When it started moving up, you could hear the noise of the pulley on the cable, could you not, Mr. Garber?

A. Personally I don't remember.

Q. I mean you could hear it, could you not?

A. I guess you could hear it.

Q. You were cognizant of the fact that the truck was moving, is that not right?

A. I knew it was lifting. The truck was lifting.

page 65] Q. You knew it was lifting.

A. Yes.

Q. Yet you still held the cable.

A. It moves mighty slow. I was thinking he was going to lift it a little. I was going to pull back. I didn't know he was going to continue to move. In fact, I didn't realize your hand would get caught in it.

Q. While you saw the truck coming up and you heard the noise of the cable going through the pulley, you still held your hand on that cable?

A. I can't say that you can hear the noise of the pulley.

Q. Did you at any time see Mr. Puccinelli when he went back to activate the switch? To activate the lift?

A. You mean see him afterwards?

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Q. Yes, sir.

A. After I caught my hand?

Q. No, while you were standing there with your hand on the cable.

A. No, I didn't see him after he left.

Q. You did not see him after he left?

A. No, sir.

Q. Where were you looking, Mr. Garber?

A. I was looking toward the rear of the truck.

page 66] Q. Didn't you glance back to see what was happening to your hand on the cable?

A. (Shaking head indicating no)

Q. You did not?

A. No, sir. I didn't look back.

Q. You did not once look back to see what was happening to your hand?

A. No, sir, I did not.

Q. How high had the front end of the truck been lifted off the scales when you actually felt something on your hand, or felt the cable catching your hand, Mr. Garber?

A. Well, the truck wasn't far off—I wouldn't say it was very far, I don't believe.

Q. How far would you say, sir?

A. I don't think it was over a foot.

Q. Over a foot off the ground?

A. Yes, sir.

Q. Off the —

A. Off the cement.

Q. Off the scales.

A. Yes, sir.

Q. In other words, the front end of the truck had only moved a foot?

A. I'd say a foot or so. I mean —

page 67] Q. And your hand had come down in the pulley.

A. Yes, sir.

Q. But you never did look back to see what was happening.

A. No, sir. I didn't look back to see what was happening to my hand. I didn't look.

Mr. Poole: We have no further questions.

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Mr. Russell: I have a couple more questions, Your Honor, if Mr. Causy doesn't have any.

CROSS EXAMINATION

By Mr. Russell: (Continuing)

Q. You made some reference to the fact that when you tried to drive into this thing, the cradle slid sideways. You say one side went —

A. Sort of slid forward, sort of one-sided, I'd say. Yes.

Q. You finally got both wheels in it, did you not?

A. Yes.

Q. When you got both wheels in, it was perfectly straight then, was it not?

A. Yes, sir.

Q. It had straightened up when you drove into it then?

A. He worked on it some to straighten it up there. He tried to get it chocked up, to get it straight, so we could
page 68] get both wheels in there.

Q. It had straightened up before you got out of the truck?

A. Yes, sir.

Q. There wasn't anything wrong with that then, was there?

A. No. It wasn't anything wrong after he got them in.

Q. You made some reference to the fact that when you got out of the truck, or before you got out you asked him if he wanted you to back up, is that right?

A. After we weighed it and come around, I asked him did he want me to back it.

Q. Have you ever seen a truck moved with this thing after it was already partly elevated up?

A. I never have seen one moved. I thought probably it would.

Q. Did you think that you could elevate the thing three or four inches off the ground and back the truck up gradually and pull the whole works back a little bit?

A. Yes, sir.

Q. Is that what you meant when you said, do you want me to back it up?

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A. That's right.

page 69] Q. You meant back it up with the wheels still in the cradle.

A. That's right.

Q. Look at that Exhibit No. 2, Mr. Garber, you said that you got out of the truck and walked around the front of the truck to go into the scale house?

A. Yes, sir.

Q. Do you know how many doors there are to that scale house?

A. As much as I see it's one.

Q. Isn't the door to the scale house at the end of the scale house next to the shed where the controls are?

A. No, the scale house is not next to the controls.

Q. You did not understand my question. I said is not the door to the scale house at the end of the scale house nearest the shed where the unloading grates are?

A. I don't remember, personally.

Q. Well, if your truck had been —

A. I'd say, the door, I believe, is back here.

Q. Let me come around there and see what you are pointing to. Let's turn it around so the jury can see. Where did you say the door was, which end?

A. Back here. I don't know.

Q. You are pointing to the rear of the picture;
page 70] that is back at the end next to where the unloading grates are, is it not? Isn't this the shed right here where the grates are?

A. Yes, sir.

Q. You think the door is at this end of the scale house here?

A. I think it is. I'm not sure.

Q. All right sir. If you had to you couldn't walk between the edge of this building and the end of that pulley, could you?

A. No, I was on this side. I got out on —

Q. I know that, but you said you walked around the front of the truck to go into the scale house; you couldn't walk down between that pulley there and that building, could you?

A. Well, I could have gone around the back. I mean it has been a long time.

Q. Then you might have gone around the back of the truck to get into the scale house?

A. I could have gone around the other way.

Q. Which other way.

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A. This way.

Q. All the way around the building, you mean?

A. Personally, I don't know how I went in. I know I went in the office.

Witness stood aside.

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IN CHAMBERS

Mr. Russell: If it please the Court, the corporate defendants move the Court to strike the plaintiff's evidence in this case on the ground that there has been no showing of any actionable negligence on the part of either of them.

I will take this up in two steps. As has been stated, there are two allegations in the Motion for Judgment. One is that the equipment has been negligently maintained, or that there has been failure to have proper safeguards or precautions taken with respect to the equipment.

With respect to that particular allegation — and that is the only allegation, as I recall it, in the motion for Judgment that would go against the Corporate defendants without including the operation — we move the Court to strike the evidence as to those allegations on the ground that there has been no showing at all that there was anything wrong with

this equipment; there has been no showing about
page 72] equipment one way or the other. As a matter of fact, other than the plaintiff himself testifying that he has been in there many times before — I think he said one time he had unloaded trucks at other places that had the same kind of equipment before, I am not real sure — I think he said that in answer to one of the questions asked him by Mr. Poole. He said he had been there before, and he had unloaded trucks at other places like this before, I'm not real sure as to the exact words used. In any event, he had been in there many times before.

The burden of proof here is on the plaintiff. He has to show that there was something wrong with this equipment, or that it wasn't the customary standard type of equipment used in the industry, and that proper precautions were not taken. So

far there has been no showing what duty, if any, was owed with respect to this equipment. For that reason we move that the evidence with respect to that allegation be stricken from the case.

On the other count, that is on the theory *respondeat superior*, as far as the Cooperative Mills is concerned we filed an affidavit of non-agency as to them. We move the evidence be stricken as to Cooperative Mills. There has page 73] been no showing Puccinelli in any way was employed by them; rather, he was the employee of Southern States Grain Marketing Cooperative.

Thirdly, there is no showing of any negligence on the part of Puccinelli himself. I take the position, Your Honor, that for the sake of this motion at this time that even if Puccinelli told this man to hold that cable that the man himself was guilty of negligence which would bar any recovery on his part. It is inconceivable to me that any person would grab ahold of a cable with a pulley attached to it, all in perfectly plain sight, which he had seen many times before, then turn his head in the opposite direction and continue to hold the cable long enough for his hand to get caught, knowing it was in operation. That is the first thing.

The second thing is that even if Puccinelli did tell him to hold it, that is not negligence. The man has to show that there was a breach of some duty owed him by Puccinelli, and the only evidence that we have is the fact that he said that he was told to hold the cable.

If you go into the premises of someone and somebody there says you do so and so, that does not in any way page 74.] relieve you of your own obligation to look after yourself, certainly within the realm of ordinary care for your own safety.

By the same token, the only way you can contend that it was any responsibility of Puccinelli's would have been on the ground that putting his hand on there might expose him to danger. If that is true, then you also have to assume that danger was open and obvious to anybody standing there. In either event if it wasn't open and obvious then there wasn't negligence on Puccinelli's part to tell him to do it. If it was open and obvious then it may have been negligence on Puccinelli's part. In any event, there was certainly negligence on the Plaintiff's part for not watching out for himself.

We feel that the evidence is not sufficient to go to the jury.

Mr. Poole: May it please the Court, on behalf of Puccinelli,

it was stated that he is a mere employee and he owed no duty as to the condition of the premises or the equipment as far as Garber was concerned. I join in Mr. Russell's motion that the plaintiff has failed to show any negligence of any type or any unsafe condition of the premises or of the equipment, including the lift. I join in this motion to strike for the reasons as he has stated.

In regards to Mr. Puccinelli, I move the Court to strike the evidence as to him because the plaintiff has failed to prove any negligence on Puccinelli. If there is any negligence, there has been no proof that it was an efficient proximate cause of this accident. The most that the plaintiff has proved is that — on evidence as introduced at this time — Puccinelli told him to hold the cable. There is no evidence in the record that Puccinelli told him to hold the cable for any given period of time. The evidence as shown here is that he stood there for thirty seconds holding that cable, and he saw the truck moving up, and he heard the noise.

Mr. Causey: He didn't testify that he heard the noise, but that is all right. He said he maybe could have heard it.

Mr. Poole: I state the evidence as I understand it, Mr. Causey. That he was looking at the rear of the truck, that he never once looked back to the cable as to what was happening to his hand, and the reason that he had hold of the cable was to move to truck. He testified that he could have moved the truck by pushing on the truck rather than handling the cable. I submit to Your Honor that there is not a scintilla of evidence of negligence on the part of Puccinelli.

I realize that the plaintiff is entitled to all inferences from the evidence as it now stands. I don't believe there could be any inference of any negligence.

Further, if Your Honor please, we move to strike on the grounds that Mr. Garber is guilty of contributory negligence here as a matter of law. Mr. Garber stated his age, but he is an adult. He stated he had been in there many times before, that he had never had any occasion to hold the cable before, but he had seen it in operation. He testified that he knew what cables and pulleys did, and the wire moved through the cable. Why he held his hand there and paid no attention to his own safety, in violation of his duty to keep a proper lookout and exercise ordinary care for his own safety, is beyond me.

For the reasons as stated before, we move to strike the evidence as to Puccinelli in this case.

The Court: Let me ask you this question, going page 77] back to Mr. Russell's sort of triple-fold motion, one phase of it was that one of the corporations was not the employer of Puccinelli.

Mr. Russell: That is correct.

Mr. Poole: That is admitted, sir.

Mr. Causey: We would concede that Cooperative Mills cannot be held on the agency theory. We would concede that, sir.

The Court: Let me hear you first, Mr. Causey, on the question of defective premises, if that is true, if that is an allegation.

Note: At this point colloquy between Court and counsel is had which the reporter records but does not here incorporate into this transcript in the interest of brevity, following which the Court states as follows:

The Court: I am going to think about this. However, the motion is overruled as to the rest, as to Puccinelli, the agency and *respondeat superior* business.

Mr. Russell: May I make a couple of remarks to the Court so the Court can think about it at lunch time?

page 78] Note: At this point further discussion is had hereon which the reporter records but does not here incorporate into this transcript in the interest of brevity, following which Mr. Poole states as follows:

Mr. Poole: The defendant Puccinelli objects and excepts to the Court's ruling on the above stated motions.

Mr. Russell: The Corporate defendants also would like to except to the ruling of the Court.

Note: At this point luncheon recess is had until 2:00 o'clock P. M. at which time Court and counsel meet in Chambers as follows:

The Court: The Court is of the opinion that in the absence of a request by an employee of the defendant to grasp hold of the cable, the plaintiff would, if acting on his own initiative, assume the risk of any injury occurring or intermittent

O. Ralph Puccinelli, Jr.

with the machinery on the premises of the defendant, and therefore, would not be able to recover in any event under the facts of this case on the ground of dangerous condition of the premises. But the Court is of the further opinion, that, as such, no ground work has been laid to show that the premises are dangerous, and therefore, doth sustain
page 79] the motion of the defendant that the defendants were not negligent in maintaining a dangerous premises.

Mr. Causey: We would except to the ruling of the Court on that motion on the grounds which have been stated in argument.

Mr. Russell: What is the Court's position with respect to Cooperative Mills and the employment of Puccinelli?

Mr. Causey: That was conceded.

Mr. Russell: That is conceded; that is out of the question.

Mr. Causey: Yes.

Mr. Russell: That leaves in the case then, from the Corporate defendants point of view, only Southern States Grain Cooperative on the theory of *respondeat superior*, is that right, sir?

The Court: That is my understanding. It is further ordered at this time then that summary judgment be entered on behalf of the defendant Cooperative Mills, Incorporated.

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BEFORE THE JURY

Mr. Russell: If it please the Court, the defendant Southern States Grain Marketing Cooperative, Incorporated has no evidence to offer at this time.

page 82] The Court: All right, sir.

Mr. Poole: If Your Honor please; may we call Mr. Puccinelli.

The Court: All right. Come around.

O. RALPH PUCCINELLI, JR.

*a*defendant, first being duly sworn, testified in his own behalf as follows:

O. Ralph Puccinelli, Jr.

DIRECT EXAMINATION

By Mr. Poole:

Q. Will you state your name?

A. O. Ralph Puccinelli, Jr.

Q. How old are you, Mr. Puccinelli?

A. Twenty years old.

Q. You are twenty years of age?

A. Yes, sir.

Q. What is your occupation, sir?

A. I am a student at Richmond Professional Institute.

Q. Were you employed with Southern States on or about July 7, 1960?

A. Yes, sir.

Q. What was your job?

A. I was the lift operator in the weighing house.

Q. Were you working at the time of the accident
page 83] to Mr. Garber?

A. Yes, sir.

Q. Will you tell the gentlemen of the jury here what happened. Just tell them briefly as to what happened.

A. I finished unloading the truck ahead of Mr. Garber, and I motioned for him to come into the weigh house, and I guided him back into the cradle. When he got his front wheels in the cradle, I got the ticket from him and he followed me into the weighing house to weigh the truck. After I weighed it, I stamped it and gave him the ticket. I said, wait here a minute, or wait a minute in the weighing house. And I walked to the back of the truck to lift up the tailgate, and as — after I lifted the tailgate to let the grain out, I was walking to the controls that lift the front end of the truck, and I saw him up front. He was off the scales, but he was up by the front wheels. And I told him to move back, that I was going, you know, I was going to start the lift.

So I walked around back to the controls, and I turned the handle to the right, which lifts the cradle, and it rises kind of slowly. And it got up around three or four feet off the ground, and I heard him yell. So I stopped it. And I went back around and saw that he had his hand, his left hand was caught in the pulley. And I went back to the controls and lowered the truck down to the ground.

O. Ralph Puccinelli, Jr.

And he went down to the —where the Super-
page 84] visor's place is, and they called the ambulance
from there, the Rescue Squad.

Q. Mr. Puccinelli, did you ask or tell Mr. Garber to catch
hold of the cable?

A. No, sir.

Mr. Poole: We have no further questions at this time. Your
witness.

CROSS EXAMINATION

By Mr. Causey:

Q. Mr. Puccinelli, where were you when the truck came into
the area?

A. I was right in front of the truck as it came in.

Q. Do you remember the truck which unloaded prior to
Mr. Garber's?

A. I just remember—I don't remember exactly. I remember
it was a truck —

Q. Do you remember how it was loaded, sir?

A. Well, Mr. Garber said it had bags. I don't remember
exactly.

Q. You do not recall; it could have had bags?

A. Yes, sir.

Q. If it had had bags, how would you have unloaded that,
sir?

A. You wouldn't bothered to get the car into the cradle,
because you aren't going to lift it. You just—you
page 85] pull the bags, then you rip it with a knife, letting
the grain fall into the pit. The only difference you
don't have to operate the lift.

Q. Mr. Puccinelli, I show you Defendants Exhibit No. 2,
and pointing to the rails at the top ask you what those are
for?

A. The rails—These rails?

Q. Yes, sir.

A. I imagine it's support for the lift.

Q. At the top of this picture it shows two cross bars.

A. Yes.

Q. And two girders which extend parallel to the direction
of the truck.

A. Yes, sir.

Q. What is the purpose of those, sir?

A. Well, that's where the apparatus goes through for the
cable in between here.

O. Ralph Puccinelli, Jr.

Q. Do these two cross bars move? In other words, does this apparatus, which is at the top, travel on these girders?

A. No, sir. I don't think so.

Q. You do not know?

A. To the best of my recollection, I don't know.

Q. In other words, Mr. Puccinelli, the cradle is
page 86] suspended from that cross bar at the top and is
always in the same position?

A. Well, I have never looked up at the top when I was unloading the truck. I was mainly interested in checking the wheat flowing out. It would seem to me that the only thing that might —

The truck would drive into that cradle and it would just pull it straight up. I wouldn't know of any reason. I mean I have never had it to, I mean for a truck to roll back or move forward. I mean sometimes when you get the truck up off the ground, it might move a couple inches back or forward. The back wheels being, you know, still on the ground.

Q. Do you not, Mr. Puccinelli, get trucks of differing lengths in there to unload?

A. Yes, sir.

Q. What do you do when there is a short truck in there?

A. Well, if it's real short, you send it to the other side.

Q. You send it to the other side if it's real short?

A. Yes, sir.

Q. What do you mean by real short?

A. Well, I'd say like a truck that just had a
page 87] little —

Q. You mean like a pickup truck?

A. Pickup truck, sort of.

Q. Suppose it is a longer truck, sir, would there not be differing lengths of those trucks?

A. It won't affect it that much, because a truck, I don't think, has ever gotten that far away from the pit. I mean, like you can see in that picture. But the pit that they dump the grain in isn't that far away from the scales.

Q. You do not have to make any adjustments, so far as the position of the cradle, to compensate for the differing lengths of trucks?

A. I never did.

Q. You never did?

A. No, sir.

Q. The cradle was, so far as dropping from the upper part, always in the same position?

A. After the truck — After one truck left, if it moved the

O. Ralph Puccinelli, Jr.

cradle any way from where it was, you always straighten it up before the other truck came in. I say I guided him up. That's what I meant. I was there. I had straightened out the cradle. I had guided him onto the cradle where it was supposed to be.

Q. When you tighten the cables on that cradle
page 88 } so that it will lift, it is going to lift in a direct
line, is it not?

A. Yes, sir.

Q. And the wheels of the truck, the front wheels of the truck are in the cradle?

A. Yes, sir.

Q. The cradle goes ahead and lifts in a direct line?

A. Yes, sir.

Q. What is going to happen to the back wheels of that truck when it is lifted?

A. It might move a couple inches.

Q. It will move, will it not?

A. A couple of inches. But that is just when the truck is going back, I mean when it is going up. It might go back a couple inches, but it doesn't — I mean it doesn't hinder any part of the operation.

Q. All right sir. When a truck has come and the unloading process is completed, then that truck drives forward, does it not, to go on the scales?

A. Yes, sir.

Q. Which means that the wheels of the truck have to come out of that cradle —

A. (Nodding head indicating yes)

Q. — and also the back wheels of the truck go over the cradle —

page 89 } A. Yes, sir.

Q. — before the succeeding truck is in position to be lifted?

A. Yes, sir.

Q. All right, sir. After this last truck, the one which was unloaded immediately prior to Mr. Garber's, before you motioned him on there, what, if anything, did you do with respect to the cradle?

A. Well, if it was out of line with where it should be, I would have straightened it, and as I was motioning him up, I would guide him to where it was directly underneath those two rafters up there.

Q. Did you do that in this case?

O. Ralph Puccinelli, Jr.

A. While I was guiding him in, if — To the best of my recollection, I don't remember as it was necessary. I remember it might have been a little moving; I might have kicked it or pushed it back a couple inches and it would be straight in line. And I got the front wheels in it, and after that the truck was ready to be unloaded.

Q. When the wheels come into that cradle, the cables are slack, are they not?

A. Slightly.

Q. Slightly?

A. Yes, sir.

page 90] Q. There is a slackness there, they are not taut?

A. Yes, sir.

Q. It is not until the hoist mechanism is activated that they become taut?

A. When the truck gets a little ways off the ground, as the cables are being, you know, as the cables are moving through the pulleys.

Q. Yes, sir. When the cable moves through the pulleys, does the cable move down or do the pulleys move up?

A. The cable comes down.

Q. The cable comes down?

A. Yes, sir.

Q. So that a person whose hand is on the cable, their hand would drop?

A. Yes, sir.

Q. The amount of the drop, so far as that hand is concerned, would be proportionate to the height to which the truck was raised?

A. I would say just about.

Q. All right. You came around the truck after you heard Mr. Garber call; would you demonstrate to the jury the position of his arm as it was caught in the cable? Would you mind standing and showing them the position of his
page 91] arm?

A. I was at the back, and I saw he was hurt bad, so I was in a hurry to get back. To the best of my recollection his hand, he was standing here, and it seemed it was about right — It seemed like it was in this position in the pulley. (Demonstrating)

Q. In that position in the pulley?

A. Yes, sir.

Q. You mean about waist high?

O. Ralph Puccinelli, Jr.

A. Just about, or maybe just around in here.

Q. And how high was the truck off the ground at that time?

A. I would have said about three to four feet.

Q. That is from the bottom of the wheels to the ground?

A. Yes, because the wheels, I mean bottom of the wheels in the cradle to the ground.

Q. Yes, sir. Now, the pulley that would be — From the bottom of the cradle to the ground would be three to four feet; the pulley is above the cradle, is it not?

A. Yes, sir.

Q. How far is it above the cradle?

A. I guess maybe one or two feet. I don't know.

Q. Is that the location of the pulley?

A. Yes, sir.

Q. This is with reference to Defendant's Ex-
page 92] hibit No. 1. With respect to that pulley and its
location, there is an appreciable length of chain
or cable between that and the cradle, is there not?

A. It's a couple of feet, sir, I imagine.

Q. So that if the truck, at the time which you saw Mr. Garber, was some three to four feet above the ground, the pulley would have had to be some four to five feet above the ground, would it not?

A. Yes, sir.

Q. That would require his hand to be where the pulley was.

A. Yes, sir.

Q. His hand would have come down from where he originally gripped the cable, because the cable comes down into the pulley.

A. Yes, sir.

Q. So that the hand would have had to be, when he originally gripped the cable, appreciably higher —

A. Yes, sir.

Q. — than where it was at the time that you saw him after he had caught it.

A. Well, if he was holding on to the cable, it would have gone down into the cable.

Q. Yes, sir.

O. Ralph Puccinelli, Jr.

A. Into the pulley, I mean.
page 93] Q. But at the time he originally gripped the cable, he would have had to grip it at an appreciably higher level above the ground than it was when you saw him with his hand caught in the pulley, is that not correct, sir?

A. I don't think I quite understand the question.

Q. You have testified, I think, sir, that the cable comes down into the pulley.

A. Yes, sir.

Q. So that, as he was holding the cable, as you raised the truck his hand would have dropped.

A. Yes, sir.

Q. If as you have testified, sir, that his hand at the time that you saw it caught in the pulley was four to five feet above the ground, at the time he originally grasped the cable, he must have grasped it at an appreciably higher elevation above the ground, because it had come down into the pulley.

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir.

Q. All right, sir. Do you recall which side of the truck Mr. Garber had hold of?

A. Pardon?

Q. Do you recall which side of the truck he got out of, sir?

page 94] A. Driver's side.

Q. Driver's side of the truck?

A. Yes, sir.

Q. You were at that time, where, sir?

A. I was right there at the door to get the ticket from him.

Q. You had been originally in front of the truck?

A. Yes, sir. Until he got up into the cradle.

Q. So far as that cradle is concerned, it does not go into any recess in the scale, does it? It sits just on top of the scale?

A. Yes, sir.

Q. After Mr. Garber got out of the truck, where did he go?

A. Into the weighing house.

Q. You then weighed the truck?

A. Yes, sir.

Q. You gave him the ticket?

A. Yes, sir.

Q. As I understand it, you said you told him to wait there?

O. Ralph Puccinelli, Jr.

A. Yes, sir.

Q. You went back and activated or prepared to activate the machinery?

A. I went back to raise the tailgate.

page 95] Q. Yes, sir. And then to activate the machinery —

A. I looked to see if Mr. Garber was in front of the weighing house, and he wasn't there. And I went back around. I looked around to the front — I mean to the right, and I went back around to the left, and he was up back around the left front.

Q. When you had told him to wait, was he inside the weighing shed or outside the weighing shed?

A. I would say he was right at the doorway.

Q. Right at the doorway of the weighing shed?

A. Yes, sir.

Q. As those pictures show, and as I think has been indicated before, there is a relatively narrow space, is there not, between the weighing shed and the side of the truck?

A. The right side; yes, sir.

Q. So that if he were between the weighing shed and the truck, he would have been in a relatively narrow space.

A. Yes, sir.

Q. That is where you expected to see him, sir?

A. Well, that's where I expect to see any of the farmers who came in. I'm going to come back there. That's where I'm going to come back after we unload the truck. We have to weigh it again.

page 96] Q. You weigh the truck again?

A. Yes, sir, and stamp it.

Q. You don't give him the ticket?

A. I give him the ticket to hold after weighing it.

Q. You weigh it and give him the ticket to hold?

A. Stamp it and give it to him to hold.

Q. You get the tare weight by subtracting the empty weight.

A. Yes, sir.

Q. But you expected to see him standing in that relatively narrow *space* between the weighing shed and the truck?

A. Yes, sir.

Q. And that is where you told him to wait?

A. Yes, sir.

Q. When you came out, you did not see him there?

A. When I came out?

O. Ralph Puccinelli, Jr.

Q. When you looked for him, I mean, before you activated the hoist.

A. Yes, sir.

Q. You did not see him there?

A. No, sir.

Q. So you went over where?

A. I looked around in front of the weigh house, and there is nowhere else for him to go unless he goes on the other lift. I didn't see him. I went on the other side
page 97] of the truck, and I saw him up there.

Q. Did you go around the front of the truck or the back?

A. The back.

Q. You went around the back of the truck.

A. Yes, sir.

Q. You saw him where?

A. At the time I saw him he was at the left front. He was off the scales. He was up around by the door.

Q. Then you went back and started the machine?

A. Yes, sir.

Q. Before you started the machinery, did you look any further to see where he might be?

A. No, sir.

Q. Could you have seen him if you had looked?

A. No, sir.

Q. The truck was between you and him, was it not?

A. Yes, sir.

Q. Could you have seen his feet, sir, if you had looked?

A. No, sir.

Q. Why not?

A. I wasn't bending down to look for his feet. I was standing up to operate the controls.

Q. You were standing up to operate the controls?
page 98]

A. Yes, sir.

Q. You did not bend down to see where his feet were there?

A. No, sir.

Q. You went ahead and activated —

A. This is after I told him to move back, when he was over there.

Q. Yes, sir. I understand that testimony in that respect. Did you see him move back?

A. I think he might have moved back a couple of feet.

Q. Are you sure?

O. Ralph Puccinelli, Jr.

A. No, sir, I am not sure.

Q. All right. So that when you went back to start the machinery, you knew that he was on the left front side of the truck?

A. Yes, sir.

Q. You were not sure whether he had moved back as you told him?

A. Well, if he — I'd say, I understood in my mind that he should have moved back.

Q. You were not sure, as a matter of fact.

A. He was, you see — He was off the scale, and he was back far enough if —

Q. If he was back far enough, why did you tell page 99] him to move back?

A. Because I didn't want him to — I don't know. Just to make him stay clear.

Q. In other words, you thought that where he was that he might have been in a position where there could be some danger, that's why you told him to move back, was it not?

A. You would tell any of them to get back away from the truck.

Q. All right, sir, and you told him to move back.

Q. Yes, sir.

Q. You are not sure whether he did or did not?

A. No, sir.

Q. You went back then and started the hoist?

A. Yes, sir.

Q. And you gave no further warning?

A. No, sir.

Q. You did not shout or anything before you started the machinery?

A. You can hear the thing start.

Q. I understand that.

A. Yes, sir.

Q. You gave no further warning. You just went ahead and started the hoist.

A. Yes, sir.

page 100] Q. The next thing you knew—How long a period of time would that be after you started the hoist before you heard him yell?

A. I'd say it was around twenty to forty seconds.

Q. A relatively brief period of time?

A. Relatively. If you are sitting there thinking about it, it's not too brief.

O. Ralph Puccinelli, Jr.

Q. I appreciate you didn't anticipate that this was going to happen, sir.

A. No, sir.

By The Court:

Q. How long does it take to get a truck, from the time you push the lever to activate the hoist, how long between that moment and the time you heard him scream, was it?

A. Around thirty or forty seconds.

The Court: All right.

By Mr. Causey: (Continuing)

Q. After you had heard him holler, then you went back and lowered the truck?

A. Yes, sir.

Mr. Causey: I have no further questions.

By The Court:

Q. Let me ask a question that has not been asked: What type of a pulley was this?

A. You mean how many wheels in the cable goes page 101] through the pulley, sir.

Q. Is it just one pulley?

A. Yes, sir.

Q. How many times does this cable go through these wheels on this pulley?

A. I don't know for sure.

Mr. Causey: I think that will show from the pictures, possibly, Your Honor. I think what you are asking is whether it is a double pulley, or a triple pulley, or a single pulley.

The Court: Yes, sir.

By Mr. Causey: (continuing)

Q. I think I can explain that, Your Honor. I show you Exhibit No. 2; that shows the way the cable is in the pulley, does it not?

A. Yes, sir.

Q. Is that a single strand, double strand, or triple strand pulley? Does the cable go through once, twice, or —

A. Once.

The Court: Once?

Mr. Causey: Yes, sir.

O. Ralph Puccinelli, Jr.

RE-DIRECT EXAMINATION

By Mr. Poole:

Q. Mr. Puccinelli, when you went back to where
page 102] Mr. Garber was, did you say anything to him after
the accident?

A. After the accident?

Q. Yes, sir.

A. No, sir. I felt badly about what happened, but I felt kind
of angry because if he had done what I said, I don't see why
it should have happened. But I didn't say anything. I called
Mr. Harrell, the supervisor. He was upstairs.

Mr. Poole: I have no further questions.

RE-CROSS EXAMINATION

By Mr. Russell:

Q. Mr. Puccinelli, how long had you been operating this
equipment?

A. Three or four weeks.

Q. Give us a rough estimate of how many trucks you unload
in a day's time with it?

A. Well, around that time of the year somewhere between
seventy to one hundred or maybe more.

Q. How many days a week?

A. Six days a week.

Q. During the three or four weeks you had been operating
this thing, had you experienced any difficulty with anybody
else on this thing.

A. No, sir.

page 103] Mr. Causey: If Your Honor please, I object
to the question. I do not think it is material, Sir.

The Court: It is immaterial.

Q. You said you were expecting to find Mr. Garber standing
between the truck and the scale house, did you mean between
the side of his truck and the scale house, or did you mean in
the open space between the scale house and the shed where
the dumps are?

A. I sort of expected him to be right in front of the doorway
of the weighing house. Most of them come in, just wait inside
the weighing house while you unload the grain.

O. Ralph Puccinelli, Jr.

By The Court:

Q. Does the door of that face the truck or is it clear of the truck?

A. No, it faces the pit.

By Mr. Russell: (Continuing)

Q. Look at Defendant's Exhibit No. 1 and tell me whether you can see the door in the picture to the scale house. Does any part of that picture show any part of the door?

A. You can see the door right here.

Q. Is that on the right hand side of the picture between these, what appears to be three columns, the open black space, is that the doorway?

page 104] A. Yes, sir.

Q. Where did you expect to find him standing, looking at this picture, when you looked for him?

A. Right out there.

Q. Did you by any chance expect to see him between the side of his truck and the side of the scale house?

A. It would be right hard to get there because the truck sort of comes up, and with the pulley here, you know, it's right close. You wouldn't expect to see anyone there.

Q. Can you tell us about what size that grated area is there?

A. I'd say between ten by eight feet, I imagine.

Q. You mean eight feet wide and ten feet across, the width of the truck?

A. Yes, sir.

Q. Is it wider than the scales?

A. Yes, sir.

By The Court:

Q. I am particularly thinking about the length.

A. Of the pit?

Q. Yes, is the pit about a square or —

A. It's just about, but it's a little bit wider than it is long.

By Mr. Russell: (Continuing)

page 105] Q. You think it is about eight feet across it up there, the way the truck would go across it?

A. Yes, sir. You can see, see here are the scales. It's wider than the scales. The scales are right here, and the grate is about two feet wide.

O. Ralph Puccinelli, Jr.

By The Court:

Q. Did any part of this grain drop before he screamed, or do you recall?

A. I think just a little bit started to trickle out, see, because sometimes when the trucks come in loaded up so high, you have to sort of take it up higher than it was. It wasn't up high enough for actually too much of it to come out.

Q. Where was his tailgate with respect to the grating?

A. To the best of my recollection it was, say, over top maybe two—The pit's got these grates go up like this. It was over top about two, going up like this. When you get up higher, see, it kind of —

Q. In regard to this eight foot length, you estimated the pit to be eight feet in length, the truck is up this way, I want to know where was the tailgate with reference to the beginning of the eight foot pit?

A. It was over top the pit, I mean, because I had to walk back around it and on top—I had to walk—after
page 106] the control—after I went—after I heard him yell,
I had to walk, you know, around the truck, and it was over top of the pit.

Q. How far would you say it was, where would you say it was with regard to the eight foot length of that pit.

A. I would say maybe a couple feet back on the pit.

The Court: All right.

By Mr. Russell: (Continuing)

Q. Mr. Puccinelli, after this truck was stopped, in order to get into the scale house from the front of the truck, where you were directing him onto the cradle, how did you go?

A. Well, I went around the back of the truck.

Q. Did you go around the scale house or around the back of the truck?

A. The truck.

Q. You went down the left hand side of the truck then by the driver's door, around behind the truck, and came up the other side to go into the scale house?

A. Yes, sir.

Q. When you went behind the truck, did you have a chance then to observe whether the truck was in position for the grain to go into the pit or not?

A. Yes, sir. That's one—That's one reason. Besides, it's

O. Ralph Puccinelli, Jr.

easier. You can't get around the other side of the
page 107] weigh house.

Q. When you went across there, though, did you have a chance to see if the truck would dump right if it was raised at that time?

A. Yes, sir.

Q. Was the truck in position to dump if the truck had been raised up right then?

A. Yes, sir.

Q. The grain would have gone right into the pit where it was supposed to go?

A. Yes, sir.

Q. Was there any reason for the truck to be moved one way or the other —

A. No, sir.

Q. — in order to dump it?

A. No, sir.

Q. Have you in your experience ever seen one of these trucks move more than two or three inches one way or the other when elevated in the front?

A. No, sir.

Q. I believe you said you never had an occasion to recall adjusting the location of the cradle for the length of the truck?

A. No, sir.

Q. Most of these trucks that come in there about that time
of year are all farm trucks, anyway, are they not?
page 108] A. Yes, sir.

Q. Most of them are about the same length?

A. *Juest* about, yes, sir.

Q. At the point opposite the cradle, could a person standing there look to the back of the truck and tell whether it was in the right position or not, from that distance?

A. I don't believe—I don't believe he could get a good idea of the picture, because one reason I think the controls are back there where they are is because the man operating can judge when, you know, when all the grain is coming out, and sometimes he has to stop it when it gets so high. You don't want too much to come out at one time. And I don't think he could judge it as precisely as someone who is back there or, you know—

By The Court:

A. How long are these trucks? You can point it out, if you don't know in feet. How long was Mr. Garber's truck?

O. Ralph Puccinelli, Jr.

A. I'd say it was from the end of that table up to about right here.

The Court: Twenty feet?

Mr. Russell: How many?

The Court: Twenty feet?

Mr. Poole: Is this where you mean, about here?
page 109] I would say about eighteen feet.

Mr. Russell: That's about fifteen feet.

The Court: Well, shall we stipulate that it is sixteen, seventeen or eighteen feet?

Mr. Poole: That will be fine, sir.

Mr. Russell: That is the distance he has estimated here. I wouldn't want to stipulate that is the length of the truck.

The Court: That is what I mean.

By Mr. Russell: (Continuing)

Q. After Mr. Garber got hurt, did you go ahead and unload his truck?

A. Yes, sir. Another boy helped me, I think.

Q. Did you have to move the truck to unload it?

A. Well, we lowered it and we had to shovel the grain out, because it jammed up the cables. It wouldn't raise any more. They had to work on it.

Q. You mean after he got caught?

A. Yes, sir.

Q. When you saw that Mr. Garber's hand was caught in this thing, did you get excited?

A. Yes, sir. I just ran back to the controls and let it down.

Q. When the truck came onto the cradle, was any part of it touching either one of the cables on either side?
page 110] A. No, sir.

Q. Was there any necessity for the cable to be held to keep it from hitting the side of the truck for any reason?

Mr. Causey: I think that calls for a conclusion of the witness, sir, and it is an improper question.

The Court: I sustain the objection.

A. Do you want me to answer it?

Q. No, you can't. Did you say that the truck and cable were not touching as he came onto it?

A. Yes, sir.

Vernon C. Kaler

Q. As far as you could tell, did the cable ever come in contact with the side of the truck?

A. No, sir.

Mr. Russell: I think that is all.

Mr. Poole: We have no further questions.

Witness Stood Aside.

Mr. Poole: That is the defendant, Mr. Puccinelli's, evidence, sir.

The Court: Is there any rebuttal?

page 111] Mr. Russell: I would like to put Mr. Kaler on to ask him one question. It would not be rebuttal.

The Court: All right, sir.

VERNON C. KALER,

first being duly sworn, introduced in behalf of the Defendant Southern States, testified as follows:

DIRECT EXAMINATION

By Mr. Russell:

Q. Will you please state your name for the record, sir?

A. Vernon C. Kaler.

Q. What is your capacity with respect to Southern States Grain Marketing Cooperative?

A. Manager.

Q. Were you on the premises the day this accident happened?

A. Yes, sir.

Q. Did you see it happen?

A. No, sir.

Q. Did you go to the scene after it happened?

A. Yes, sir.

Q. Will you tell us, sir, with respect to the drum on which the cable is wound, what condition you found it
page 112] in when you got there?

A. Well, in the excitement, apparently in leaving the lift down, Puccinelli had wound it all the way down until it completely unwound on the drum, so it became inoperative.

Q. Was there anything else wrong with it after that?

A. No, sir.

Q. What was done to put it back into operation?

Vernon C. Kaler

A. Just rewound up on the drum on top. The maintenance man went up there, rewound the drum, and loosened it up so it would go back in operational condition.

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IN CHAMBERS

Mr. Russell: On behalf of Southern States Grain Marketing Cooperative, we would at this time like to renew our motion to strike the plaintiff's evidence, on the ground that there has been, first of all, no showing of any actionable negligence on the part of Puccinelli, in that the only evidence so far is that he told this man to grab hold of the cable. If you take that out of the case, there is certainly no case against Puccinelli. It certainly appears to me, sir, with that in the case even, there is still no evidence of it because there is certainly no evidence that this machinery was in any way dangerous. The condition which caused this man to be injured was perfectly open and obvious to anyone, and particularly to anyone who had knowledge of pulleys, as this man said he had. He also admitted he knew the fact, or if he had stopped to think about it a minute he would have been aware of the fact that the cable ran through the pulley to pick the front of the truck up off the ground.

I don't believe you can predicate liability on the theory that if I tell you to stick your hand in a sausage grinder, or something of that kind, that you have to do it, regard-
page 114] less of the fact you may know you are going to get hurt when you do.

There is certainly nothing negligent about the instruction, assuming that the instruction was given, and on that theory there would be no basis of which a recovery could be based. Secondly, even if he gave him the instruction, that did not relieve Garber of the responsibility of exercising reasonable care for his own safety; and to stand there and hold that thing, having spent most of his life on a farm and certainly being familiar with arrangements of that kind, I do not believe he should be allowed to come in here and contend that he was not responsible for his own misfortune as a matter of law.

Even if the Court were to feel that there was some negligence on the part of Puccinelli, I just cannot see that would in any way relieve Garber of the responsibility of looking out for himself. I do not think that is the kind of thing that reasonable

men can differ over; and, as a result of that, we move the evidence be stricken on the ground Garber, also, was negligent as a matter of law.

Mr. Poole: If Your Honor please, we move to strike the evidence against Puccinelli for the reasons here-
page 115] tofore stated, and also the reasons Mr. Russell has just stated; That the evidence is all in at the present time, and the evidence convicts Mr. Garber of negligence as a matter of law; and in allowing it to go to the jury would be purely on speculation.

The Court: The motions are overruled.

Mr. Russell: We note the exception for the reasons previously assigned.

Mr. Poole: The defendant, Puccinelli, also notes the exception to the Court's ruling.

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page 116] Mr. Russell: The defendant, Southern States Grain Marketing Cooperative, objects and excepts to the Court's granting of any finding instruction for the plaintiff on the grounds cited in its motion to strike the plaintiff's evidence; on the ground that there is no evidence to substantiate any such instruction on the part of the plaintiff in that there was no actionable negligence on the part of Puccinelli in the first place; and secondly, that the plaintiff, himself, was guilty of negligence as a matter of law in the actions that he engaged in by placing his hand on the cable and leaving it there, knowing that the equipment was in operation.

INSTRUCTION NO. A

(Refused)

Mr. Russell: The defendant, Southern States, objects and excepts to the Court's refusal to grant *Instruction No. A* on the ground that it is a correct statement of the law in this case, and the fact that the plaintiff's own evidence indicates that he knew the hoist was being operated at the time, and that the placing of his hand on the cable, knowing the hoist was to be operated, he assumed the risk of the
page 117] pulley catching his hand as the cable passed through it, plus the further fact that even if he was not relieved of the duty of *maintaining* a lookout for his own safety; particularly since he knew his hand was in a place where it could be injured, or should have known it could be injured, one or the other. The jury should be al-

lowed to consider the various elements set fourth in Instruction No. A in concluding or determining whether or not the plaintiff was guilty of negligence efficiently contributing to the accident.

INSTRUCTION NO. B (Refused)

Mr. Russell: The defendant, Southern States, objects and excepts to the Court's refusal to grant *Instruction No. B* on the ground that it correctly states the principle, or allows the jury to find that Puccinelli may have been guilty of negligence, they also had to find against him without considering the question of whether it was approximate cause of the accident.

page 118 } INSTRUCTION NO. C (Refused)

Mr. Russell: The defendant, Southern States, objects and excepts to the Court's refusal to grant *Instruction No. C* on the ground that it correctly sets forth the duty on the part of the plaintiff to maintain a reasonable degree of care, including the lookout for his own safety while on the premises of the defendant.

INSTRUCTION NO. D (Refused)

Mr. Russell: The defendant, Southern States, objects and excepts to the Court's refusal to grant *Instruction No. D* on the ground that this is a correct statement of the law with respect to the fact that neither Puccinelli nor Southern States are insurers of the plaintiff's safety, even though he was an invitee on the premises at the time; but that they are only required to exercise only ordinary care in keeping the premises reasonably safe. This is a statement which should be given in conjunction with the statement that the mere fact that an accident occurred does not form a basis for liability.

page 119 } INSTRUCTION NO. 3 (Granted)

Mr. Russell: The defendant, Southern States, objects and excepts to the Court's granting *Instruction No. 3* on the ground that the fact that Puccinelli told Garber to hold the cable. Even if such is believed, is not a basis for negligence. In addition to that, Garber was still required to exercise ordinary care for his own safety, and was guilty of such as a matter of law. The jury should not be allowed to speculate

about whether or not Puccinelli telling him to hold the cable was negligence.

Mr. Poole: The defendant, Puccinelli, objects and excepts to the action of the Court in giving any instruction on behalf of the plaintiff, and adopts the reasons as set forth by counsel for the Corporate defendants. In addition, the plaintiff's own testimony clearly indicates that he is guilty of negligence, which was an efficient proximate cause of this accident, and such negligence as a matter of law would bar him from any recovery. This is a point over which reasonable men would not differ.

page 120] INSTRUCTIONS NO. A, B, C, D, E AND F
(Refused)

Mr. Poole: The defendant, Puccinelli, further objects and excepts to the Court's action in refusing *Instructions A, B, C, D, E and F* on the grounds that these instructions clearly state the law applicable to the case as presented, and presents the defendant's theory of the case to the jury.

INSTRUCTION NO. 3 (Granted)

Mr. Poole: The defendant, Puccinelli, specifically objects and excepts to the Court's action in giving *Instruction No. 3* for even though the jury may well believe that Puccinelli told the Plaintiff to hold the cable, there is no evidence in this case which would indicate as to how long he was to hold the cable until such time as it became taut; and surely there is no evidence in this case that would indicate that Puccinelli told the plaintiff, Garber, to hold the cable until such a length of time until his hand would become engaged in the pulley; and, that *Instruction No 3* is misleading and leaves the jury to speculate as to this theory.

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BEFORE THE JURY

The Court: Gentlemen of the Jury, in every law suit there are two cardinal facts: One, what are the facts; two, what is the law.

The function of the jury, as you later will be told in more detail, is to determine what the facts are. The responsibility of the Court is to tell you what the law is governing the particular type of case and that law is contained in the written instructions of the Court — eight in number in this case — which I will read to you now.

Counsel, no doubt, will comment on some or all of them. You will take the written instructions of the Court to the juryroom with you, so that after you have found out what the facts are, you may apply the appropriate law.

I will ask you to give your attention to this reading of the instructions.

Note: The Court now reads the written instructions. Following the reading of Instruction No. 3 the Court states as follows:

page 122] The Court: Let me interpose at this point, gentlemen of the jury, to say that whereas originally this suit was instituted against Puccinelli, Southern States Grain Marketing Cooperative, Incorporated, and Cooperative Mills, a third defendant it has now been ascertained that Cooperative Mills was not the employer of Puccinelli, and, therefore, I have dropped them from the case as a matter of law. So your whole concern here is whether the plaintiff can recover against the defendant, Puccinelli, and his employer Southern States Grain Marketing Cooperative, Incorporated.

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The Court: Have you gentlemen reached a verdict?

Foreman of the Jury: We have, Your Honor.

The Court: Gentlemen of the jury, you have to arrive at the exact verdict. This verdict reads: "We, the jury, find for the plaintiff in the amount of ten thousand dollars plus medical expenses."

Gentlemen of the jury, you have heard the evidence of what the medical expenses were. You have the instructions of the Court dealing with damages. I will ask you to retire and give attention to those things, and bring in your verdict in a little different form.

Note: The jury retire at 6:49 P. M. and return at 7:07 P. M.

The Court: (Paperwriting is handed to the Court) Where is the verdict? Is it this sheet of paper?
page 126] Foreman of the Jury: Yes, sir. That was it.

The Court: Is it this sheet of paper? This sheet of paper that the jury has handed to me has written on it the following figures: 1-Four thousand; 2-One thousand; 3-One thousand; 4-Four thousand; 5-Four Hundred; and likewise does the damage instruction No. 7, have the figures written on the side of it.

Gentlemen of the jury, let me say to you that the form of your first verdict was in correct language, except the business about plus medical expenses; That is the reason the Court asked you to retire to your room to prepare a different verdict.

I will have to ask you to retire again and to write out a verdict. If you find for the plaintiff, you shall so state, and state a lump sum of money in your verdict. If you find for the defendants, you shall simply state that you find for the defendants.

Will you retire again please.

Note: The jury retire at 7:09 P. M. and return at 7:12 P. M.

The Court: (Paperwriting is handed to the
page 127] Court) This verdict reads: April 16, 1963. "We, the jury, on the issue find for the plaintiff in the amount of ten thousand four hundred dollars. R. A. Ranson, Foreman."

Gentlemen, I am going to add the words here, "on the issue joined." The verdict as amended reads as follows — I will ask you if this is your verdict: April 16, 1963. "We, the jury, on the issue joined find for the plaintiff in the amount of ten thousand four hundred dollars. R. A. Ranson, Foreman." Is this your verdict?

Note: The jurors reply in the affirmative.

Mr. Poole: If Your Honor please, may we have the privilege of polling the jury in this matter?

The Court: You may. I ask each individual Juror to state whether the verdict that I have read finding for the plaintiff in the amount of ten thousand four hundred dollars is his individual verdict.

Note: The foregoing question being put to each individual

juror, each juror replies in the affirmative. Thereupon there being no motion before the jury retire, the jury is dismissed, and the following motion made:

page 128] MOTION TO SET ASIDE THE VERDICT

Mr. Russell: If it please the Court, the defendant, Southern States Grain Marketing Cooperative, Incorporated, moves the Court to set aside the verdict and enter up judgment for the defendant; or, in the alternative, to award the defendant a new trial on the grounds that the verdict of the jury is contrary to the law and the evidence, and without evidence to support it; for the further ground that the plaintiff is guilty of negligence as a matter of law which efficiently concurred or contributed to cause the occurrence in question; the refusal of the Court to grant certain instructions that were offered by the defendant, and in granting certain instructions over objection of the defendant, and for the admitting of certain evidence over objection of the defendant, and refusal to admit certain evidence over objection of defendant.

Mr. Poole: May it please the Court, the defendant, Puccinelli, moves the Court to set aside the verdict as to him on the same grounds and for the same reasons as stated by Mr. Russell. To conserve time, I do not believe it necessary, sir, to reiterate them. I assume the Court does not want to have any argument on this at this time.

page 129] The Court: No, sir.

Mr. Russell: I assure you that Counsel want to be heard.

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A Copy—Teste:

H. G. TURNER, Clerk.

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