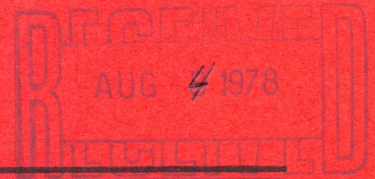


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SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 780370

---

ALBAN TRACTOR COMPANY,

.....Appellant

v.

WALTER RALEIGH SHEFFIELD  
AND  
KITZMILLER CONSTRUCTION COMPANY,

.....Appellees

---

JOINT APPENDIX

---

R. CRAIG JENNINGS  
SLENKER, BRANDT, JENNINGS  
AND O'NEAL  
1012 North Utah Street  
Arlington, Virginia 22201

Counsel for Appellant

WILLIAM G. MC MURTRIE  
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8150 Leesburg Pike  
Vienna, Virginia 22180

Counsel for Appellees



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MOTION FOR JUDGMENT

Come now the plaintiffs, through counsel, and move the Court for the entry of a judgment against the defendants, and in support thereof say:

1. That on or about the 5th day of December, 1973, suit was filed on behalf of one David Preston Hughes against the plaintiffs herein alleging negligence on the part of the plaintiff Sheffield while acting within the scope of his employment for the plaintiff Kitzmiller, resulting in personal injuries and damages to the said David Preston Hughes, the injury having occurred on the 16th day of December, 1971, in Loudoun County, Virginia.

2. That after a trial with a jury a judgment was entered in favor of the said David Preston Hughes against the plaintiff's herein, jointly and severally, on the 2nd day of May, 1975, in the amount of \$100,000.00, said judgment having been entered in At Law Number 4329, styled David Preston Hughes, Plaintiff vs. Kitzmiller Construction Company, Inc. and Walter Raleigh Sheffield, Defendants, and said judgment having been released of record and marked "paid and satisfied" on the 9th day of May, 1975.


3. That the aforesaid injuries to David Preston Hughes were caused in part by the negligence of the defendant Alban Tractor Company, acting through its agents, servants and employees, in having negligently permitted a motor vehicle owned by it to become disabled in such a manner that it required assistance from the plaintiff Sheffield, and in negligently

failing to take reasonable steps to warn persons who might be affected thereby, including the aforesaid David Preston Hughes, of the hazards created as a result of the disablement of its said vehicle.

4. That the aforesaid collision was caused in part by the gross negligence of the defendant Kirby James Updike in the operation of his motor vehicle, in that he operated it at an excessive rate of speed, failing to give full time and attention to the operation thereof, failed to keep a proper lookout and operated the same with a complete neglect for the safety of the said David Preston Hughes, and as a result thereof he caused or permitted his vehicle to collide with one owned by the plaintiff Kitzmiller Construction Company and operated by the plaintiff Walter Raleigh Sheffield, thereby producing the injuries and damages complained of by the aforesaid David Preston Hughes.

5. That by reason of the negligence of the defendants, as aforesaid, they were legally liable to the said David Preston Hughes for the injuries and damages sustained by him, and said legal liability having been fully satisfied, released and discharged by the plaintiffs herein, said defendants are liable to the plaintiffs for their respective pro rata portions of the losses and damages sustained by the plaintiffs through the negligence of the defendants.

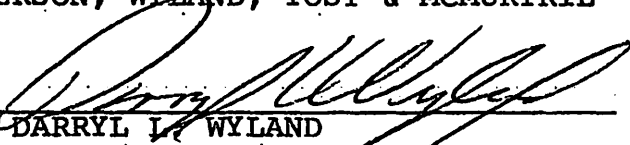
WHEREFORE, the premises considered, the plaintiffs demand judgment against the defendants, jointly and severally, in the amount of SIXTY FOUR THOUSAND SIX HUNDRED SIXTY SIX DOLLARS AND SIXTY SIX CENTS (\$64,666.66), with interest thereon from the 9th day of May, 1975, plus costs.

  
WALTER RALEIGH SHEFFIELD  
By Counsel

KITZMILLER CONSTRUCTION  
COMPANY, INC.

BY:   
Counsel

ANDERSON, WYLAND, YOST & MCMURTRIE

BY:   
DARRYL L. WYLAND  
Counsel for Plaintiffs  
8111 Gatehouse Road, Suite 409  
Falls Church, Virginia 22042

AMENDED MOTION FOR JUDGMENT

Come now the plaintiffs, through counsel, and move the Court for the entry of a judgment against the defendants, and in support thereof say:

1. That on or about the 5th day of December, 1973, suit was filed on behalf of one David Preston Hughes against the plaintiffs herein alleging negligence on the part of the plaintiff Sheffield while acting within the scope of his employment for the plaintiff Kitzmiller, resulting in personal injuries and damages to the said David Preston Hughes, the injury having occurred on the 16th day of December, 1971, in Loudoun County, Virginia.

2. That after a trial with a jury a judgment was entered in favor of the said David Preston Hughes against the plaintiffs herein, jointly and severally, on the 2nd day of May, 1975, in the amount of \$100,000.00, said judgment having been entered in At Law Number 4329, styled David Preston Hughes, Plaintiff vs. Kitzmiller Construction Company, Inc., and Walter Raleigh Sheffield, Defendants, and that said judgment was paid and satisfied by the insurance carrier for the defendants, American Mutual Insurance Company of Boston, the said judgment having been released of record and marked paid and satisfied thereafter on the 9th day of May, 1975. The amount of the payment by the American Mutual Insurance Company of Boston on behalf of their insureds Kitzmiller Construction Company, Inc. and Walter Raleigh Sheffield was \$97,000.00. This payment was

made to the plaintiff, David Preston Hughes and his attorneys Samuel Engle and Robert Mitchell.

3. That the aforesaid injuries to David Preston Hughes were caused in part by the negligence of the defendant Alban Tractor Company, acting through its agents, servants and employees, in having negligently permitted a motor vehicle owned by it to become disabled in such a manner that it required assistance from the plaintiff Sheffield, and in negligently failing to take reasonable steps to warn persons who might be affected thereby, including the aforesaid David Preston Hughes, of the hazards created as a result of the disablement of its said vehicle.

4. That the aforesaid collision was caused in part by the gross negligence of the defendant Kirby James Updike in the operation of his motor vehicle, in that he operated it at an excessive rate of speed, failing to give full time and attention to the operation thereof, failed to keep a proper lookout and operated the same with a complete neglect for the safety of the said David Preston Hughes, and as a result thereof he caused or permitted his vehicle to collide with one owned by the plaintiff Kitzmiller Construction Company and operated by the plaintiff Walter Raleigh Sheffield, thereby producing the injuries and damages complained of by the aforesaid David Preston Hughes.

5. That by reason of the negligence of the defendants, as aforesaid, they were legally liable to the said David Preston Hughes for the injuries and damages sustained by him, and said legal liability having been fully satisfied, released and dis-

charged by the plaintiffs herein, said defendants are liable to the plaintiffs for their respective pro rata portions of the losses and damages sustained by the plaintiffs through the negligence of the defendants.

WHEREFORE, the premises considered, the plaintiffs demand judgment against the defendants, jointly and severally, in their pro rata portion of the entire judgment paid and satisfied by the plaintiffs through their insurance carrier in the amount of \$97,000.00, This pro rata share upon each of the defendants would be in the amount of \$64,666.67, with interest thereon from the 9th day of May, 1975, plus costs.




WALTER RALEIGH SHEFFIELD  
By Counsel

KITZMILLER CONSTRUCTION  
COMPANY, INC.

BY:   
Counsel

ANDERSON, WYLAND, YOST & MCMURTRIE

BY:   
WILLIAM G. MCMURTRIE  
Counsel for Plaintiffs  
8111 Gatehouse Road, Suite 409  
Falls Church, Virginia 22042



E X C E R P T O F  
P R O C E E D I N G S

4

Whereupon,

LARRY SHEFFER KOOGLE

was called for examination by counsel for the defendant,  
Kirby James Updike, and, having been first duly sworn,  
was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE DEFENDANT  
KIRBY JAMES UPDIKE:

BY MR. MITCHELL:

Q State your full name and address please?

A Larry Sheffer Koogle.

Q And your address?

A Box 104, Route 3, Middletown, Maryland.

Q Okay. By whom are you presently employed?

A Alban Tractor.

Q And were you employed by that company on  
December 16, 1971?

A Yes.

Q Okay. At that time, how long had you been  
employed by the company?

A I'd say about five years, something like that.

Q What was your job with the company at that time?

A Field Service Mechanic.

Q Okay. On that date, December 16, 1971, did you

1 have occasion to be at the site of an automobile  
2 accident in Loudon County on Route 15, north of  
3 Leesburg?

4 A Yes.

5 Q Okay. Had you been working in that area that  
6 day?

7 A For about an hour.

8 Q Where had you been earlier in the day?

9 A I have no idea.

10 Q Was it on another job?

11 A Oh yes.

12 Q And generally speaking, was it your responsibility  
13 with that company at that time to go around to various job  
14 sites or to places where your equipment was located, or if  
15 you were called for a service call, to make repairs on  
16 vehicles?

17 A Yes.

18 Q Had you received a call to go to that location?

19 A Yes.

20 Q And what time of day did you arrive there?

21 A Three, three thirty.

22 Q And did someone meet you there or who was there  
23 when you arrived?

1           A     The superintendent or foreman of the job was  
2     there.

3           Q     Was anyone else there?

4           A     No.

5           Q     Do you recall what the weather conditions were  
6     on that day?

7           A     I don't know.

8           Q     Do you recall the name of the superintendent?

9           A     Sheffield.

10          Q     Sheffield?

11          A     Sheffield, whatever you pronounce his name.

12          Q     Walter Sheffield?

13          A     Yes.

14          Q     Did you know him before that date?

15          A     I had met him, yes.

16          Q     Before that time?

17          A     Yes.

18          Q     All right. What was your purpose in being  
19     there on that date?

20          A     To make a repair to TDA.

21          Q     Is that a bulldozer?

22          A     That is a caterpillar dozer, right.

23          Q     And where was that vehicle parked with respect

1 to U. S. Route 15?

2 A It was parked approximately fifteen feet from  
3 the road, be on the left side going toward Leesburg.

4 Q Okay, now what was between the hard surface  
5 edge of the hard surface of the road and that caterpillar,  
6 what was the contour of land, what was it's condition?

7 A Well, I'd say fifteen or twenty feet, maybe,  
8 to the edge of the bank there was a slight bank and a  
9 tractor was sitting up on the bank.

10 Q That bank that you refer to, is that -- is  
11 that going up?

12 A It is up, right.

13 Q A rising bank?

14 A Rising bank.

15 Q At the base of that bank, was there a ditch?

16 A Slight ditch, just -- it wasn't -- it was more  
17 like a swale. You couldn't consider it as a ditch, no.

18 Q Was this the usual highway drainage swale or  
19 ditch?

20 A I'd say so.

21 Q Was that wet or muddy, do you know?

22 A Well, it didn't seem to be wet at first, but  
23 it was wet.



1           Q     All right. How much distance was there between  
2 the edge of the hard surface of the road and that ditch,  
3 if we can call it that?

4           A     I'd say twenty feet; maybe.

5           Q     So there was a twenty foot shoulder?

6           A     At least twenty.

7           Q     When you arrived there, where did you park  
8 your vehicle?

9           A     Right -- actually I pulled right up along the  
10 edge of the bank and actually down in the swale as far  
11 as I could get off the road.

12          Q     In which direction was your vehicle facing?

13          A     Toward Leesburg.

14          Q     So you, in effect, were off the shoulder of  
15 the road facing Leesburg, and the traffic in the nearest  
16 lane would have been coming toward you, is that right?

17          A     Right.

18          Q     Now, when you parked, were both of your wheels  
19 of your vehicle, left wheels of your vehicle in the ditch?

20          A     Uh hum.

21          Q     And were you able to get out of the vehicle  
22 on the driver's side when you got out?

23          A     I don't know, I can't remember if I did or not.

1           Q     And while you were there, did you do some work  
2     on the caterpillar?

3           A     Yes.

4           Q     Was Mr. Sheffield there with you the whole time  
5     you were there?

6           A     The whole time.

7           Q     Was there any construction work going on while  
8     you were there?

9           A     No.

10          Q     Now, after the work was completed on the  
11     bulldozer, what happened then?

12          A     Well, I don't know what you mean.

13          Q     Did you go back to your truck?

14          A     Oh yes.

15          Q     All right. And did you try to drive the truck  
16     out of the ditch?

17          A     Right.

18          Q     Were you able to?

19          A     I wasn't able to.

20          Q     When you first realized you were not able to,  
21     what action did you take to try to get the vehicle out?

22          A     That is when Sheffield said about he would get  
23     the backhoe and assist me with the backhoe.

1           Q     What did you do before he said he would get  
2 the backhoe to try to get the vehicle out of the ditch?

3           A     What did I do?

4           Q     Yeah.

5           A     Well, I tried to drive it out, I couldn't.

6           Q     Did you rock it back and forth?

7           A     Yes.

8           Q     And that was unsuccessful, is that right?

9           A     Right.

10          Q     All right. Did he in fact get the backhoe?

11          A     Yes.

12          Q     All right. And hook it up to the truck?

13          A     Right.

14          Q     How did he do that?

15          A     With a chain.

16          Q     Did you assist him in hooking it to the chain?

17          A     I think I did, yes.

18          Q     Explain as best you can recall exactly how the  
19 chain was hooked to the backhoe and how it was hooked to  
20 your truck?

21          A     It was hooked to the backhoe bucket and it was  
22 hooked to my rear bumper.

23          Q     Do you recall how was it fixed to your bumper,

1 by hook or wrapped around the bumper, or what?

2 A I think it was by hook, under the bumper, under  
3 the frame. I don't really know.

4 Q Do you recall what type of vehicle you were  
5 driving at that time?

6 A It's one ton four truck.

7 Q What was the color of that truck?

8 A White.

9 Q All right, now, do you recall how the chain  
10 was hooked to the backhoe?

11 A It was hooked to the backhoe bucket.

12 Q Was it hooked by virtue of hook or wrapped --  
13 was the chain wrapped around the backhoe?

14 A I don't know, I can't remember.

15 Q All right. Now, that piece of equipment, that  
16 backhoe, did that have both front end hoe and backhoe on  
17 it?

18 A Yes.

19 Q And was the backhoe part of the apparatus that  
20 was hooked to the chain which was hooked to your truck,  
21 is that right?

22 A Right.

23 Q Now, when that hookup was made, where was that



1 vehicle located with relationship to your vehicle?

2 A He was -- we were back to back really. I mean,  
3 the rear of his tractor was to the rear of my truck.

4 Q So the hookup was to the rear of your truck?

5 A Right.

6 Q And as he sat -- as Mr. Sheffield sat on his  
7 piece of equipment, he would have been facing away from  
8 your truck?

9 A Right.

10 Q So he then would have been facing away from  
11 the traffic coming on the nearest lane on Route 15?

12 A Right.

13 Q Now, after the chain was hooked up, did you  
14 get back in your truck?

15 A Yes.

16 Q Do you recall whether you were able to get  
17 back in the driver's side or whether you got in the  
18 passenger side?

19 A I got in the passenger side.

20 Q Was that because you were unable to get in  
21 the driver's side?

22 A Right.

23 Q Did he give you any instructions on what to do

1 when he started up the backhoe?

2 A No, not that I can recall. I tried to assist  
3 him too, I mean, I tried to back the truck up.

4 Q Okay, the truck -- you did start the truck then,  
5 or it was left started?

6 A Right.

7 Q Okay, the motor was running?

8 A Right.

9 Q Okay, did you put the truck in gear?

10 A I'd say yes, yeah, I would say yes.

11 Q Was it straight transmission or automatic  
12 transmission?

13 A Straight.

14 Q Now, after you got back in there and got seated  
15 in the truck, did Mr. Sheffield start up the backhoe and  
16 start pulling on your truck?

17 A Yes.

18 Q Did the truck move?

19 A Yes. I think it moved some.

20 Q What did he -- what did you do when the truck  
21 started to move in terms of operation of your vehicle?  
22 What were you doing?

23 A I was trying to back it up and it never come up

1 out of the ditch.

2 Q You had your vehicle in reverse then?

3 A Right.

4 Q And you let the clutch out?

5 A Yes.

6 Q How far did the vehicle move?

7 A I couldn't say for sure, couple feet maybe,  
8 I can't really say for sure.

9 Q Did the vehicle come up out of the ditch?

10 A No.

11 Q All right. When he was pulling you and you  
12 were doing this, where were you looking?

13 A Well, I mean, the truck was on such an angle  
14 I couldn't see anything. I mean, other than I was  
15 watching the bank along side the truck.

16 Q Were you looking out of the windshield of your  
17 vehicle or out the back window?

18 A I would say I would be looking out the driver's  
19 window.

20 Q The driver's window?

21 A Right.

22 Q The side window?

23 A Right, the side window.

1 know, that is

2 Q (Interposing) Did you ask Mr. Sheffield what  
3 had happened?

4 A Yes, I did.

5 Q What did he tell you?

6 A I mean, he told me where the front end of the  
7 bucket had swung out in front of the van.

8 Q And was there anyone else at the scene of the  
9 accident that you are aware of that witnessed the  
10 accident?

11 A Not that I know of, no.

12 Q Do you know of anyone else or heard of anyone  
13 else since then who was a witness to the accident?

14 A No.

15 Q How many people were in that van?

16 A Just two.

17 Q Did you know those people?

18 A No, I didn't.

19 Q Did you hear either of the people in the van  
20 make any statement as to what had happened?

21 A No, the only thing I heard was the driver said  
22 it happened so fast that he couldn't -- there was nothing  
23 he could do, you know, to miss it or, you know, to avoid



1 A Somewhere.

2 Q And you were there to make repairs on the  
3 tractors?

4 A Yes.

5 Q And did you make the repairs?

6 A I started to make the repairs, I needed parts  
7 to finish it.

8 Q How long did you spend making repairs before  
9 you called it quits?

10 A I guess again approximately an hour.

11 Q So it was about four or four thirty when you  
12 noticed the truck was unable to be removed from that ditch?

13 A Right.

14 Q When you drove the truck in, you didn't have  
15 any trouble putting it there?

16 A No, I didn't.

17 Q You didn't notice at that time that it might  
18 be stuck?

19 A No.

20 Q Well, in your own words, what caused it to be  
21 stuck? I know there was a ditch there?

22 A Right. Just like soft ground and apparently  
23 was frozen, maybe on top, I don't know, you know, it was

1 wet under it.

2 Q But you didn't notice any slipping or sliding  
3 going into that place?

4 A No, I didn't.

5 Q Was only when you began to back out?

6 A Right.

7 Q Could you have gone out by going forward?

8 A I may have.

9 Q Why did you choose to go backward or did you?

10 A I think the bank had something to do with it  
11 as far as hitting the side of the truck, I believe, I  
12 think that is why. I'm not positive on that.

13 Q I understand. What was Sheffield doing there  
14 at that time?

15 A When I got there or what?

16 Q Yeah.

17 A I think he was just waiting for me to get  
18 there.

19 Q And so he then offered you assistance?

20 A Yes, he did.

21 Q Did you tell him you didn't want any help  
22 or did you tell him you'd appreciate the help?

23 A What do you mean, to him to pull the truck out?

1 Is that what you mean?

2 Q Yeah, pull the truck out.

3 A I didn't tell him I didn't want any help, no.

4 Q Did you help him chain the truck up?

5 A To be honest, I think I did.

6 Q All right. Did anyone else help the two of  
7 you do that?

8 A No.

9 Q Just you and Sheffield?

10 A Yes.

11 Q Had you, in the meantime or prior to that  
12 called any trucker to send you a truck or send you  
13 assistance of any sort?

14 A No, I didn't.

15 Q Did you feel that possibly Sheffield, with his  
16 backhoe might be able to get you out of that ditch?

17 A Yes.

18 Q It was worth a try wasn't it?

19 A Yes.

20 Q And, so he was pulling you out in the reverse  
21 direction of your truck?

22 A Yes.

23 Q And how much time elapsed between the time you

1           A     Because of the bank. The truck was up too  
2     close to the bank. I couldn't get the door open.

3           Q     I see. When Sheffield was trying to pull you  
4     out, did he make any comments to you during the course  
5     of his efforts, I mean, while he was trying to move the  
6     truck out?

7           A     No, not that I can recall.

8           Q     After you got in the truck you heard nothing  
9     more from him, just I guess tried to cooperate with him  
10    in pulling the truck out?

11          A     As far as I can remember, right.

12          Q     Next thing you heard was the crash?

13          A     Right.

14          Q     Was that the crash of his backhoe falling over  
15    or was that the crash of the van into the backhoe?

16          A     The van into the backhoe.

17          Q     You didn't hear a crash before that?

18          A     No.

19          Q     You were never aware of the backhoe tipping over  
20    onto the roadway?

21          A     It never tipped over.

22          Q     You were never aware of the backhoe lurching  
23    into the roadway then?

1           A     No.

2           Q     You said earlier in response to Mr. Mitchell's  
3 question, you couldn't believe the accident happened.  
4 Why was that?

5           A     Well, I couldn't believe it happened because,  
6 I mean, the way he was going to pull me up out of the  
7 ditch and what he did to that backhoe is what caused --  
8 I didn't realize what he did until after the accident  
9 was over.

10          Q     And what did he do?

11          A     I mean, he took the backhoe, boom and moved it  
12 to the side, which his point of pull was way off center  
13 of the tractor and that is what pivited the tractor  
14 around.

15          Q     Caused it to fall into the roadway?

16          A     He just pulled the front of the tractor out in  
17 the roadway.

18          Q     Did he do that or could --

19          A     (Interposing) Yes.

20          Q     (Continuing) Could that have happened in the  
21 course of pulling the truck?

22          A     He had to do that.

23          Q     Are you sure of that?

1           A     Well, he had to. I mean, he had to move the  
2 boom of the backhoe over to the side.

3           Q     That is controlled by a gear?

4           A     Is controlled by hydraulics.

5           Q     Couldn't go on itself, on through the force  
6 of pulling the truck?

7           A     I can't say no, anything is possible.

8           Q     You had the windows shut in the truck?

9           A     I don't know, can't recall.

10          Q     But you can't recall hearing any brakes either?

11          A     I can't recall hearing no brakes.

12          Q     Where was Sheffield at the time of the crash,  
13 do you know?

14          A     Where?

15          Q     Was he sitting on the tractor?

16          A     He was on the tractor.

17          Q     You saw that?

18          A     I did not see that, no.

19          Q     How did you know that?

20          A     Well, I mean if he was operating it, he would  
21 have to be on the tractor.

22          Q     Well, that is a guess?

23          A     Right.

1 Q You don't know whether he got off in time or  
2 not?

3 A Right.

4 Q So, after you got in the truck, you were looking  
5 out the driver's side?

6 A Right.

7 Q You really don't know what was going on with  
8 regard to that backhoe?

9 A Right.

10 Q Well, tell me how you know the boom was off  
11 center?

12 A Because he told me for one thing.

13 Q When was that?

14 A After the accident.

15 Q Can you remember what he told you precisely?

16 A Only thing he told me, he tried to pull the  
17 backhoe boom around, he to the left I would say, left  
18 of the tractor.

19 Q That is toward the roadway?

20 A That would be toward the roadway, which that  
21 made the front pull around by him pulling on my truck.

22 Q Did he say why he did that?

23 A To try to get the truck up out of the ditch.

EXCERPT OF PROCEEDINGS

WALTER RALEIGH SHEFFIELD, HAVING BEEN DULY SWORN BY THE  
CLERK OF THE COURT, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION  
BY MR. McMURTRIE:

Q. STATE YOUR NAME AND YOUR ADDRESS FOR THE COURT PLEASE.

A. WALTER R. SHEFFIELD, 627 OLD FORGE DRIVE, FREDERICKS-  
BURG, VIRGINIA.

Q. IN DECEMBER 1971, BY WHOM WERE YOU EMPLOYED, MR.  
SHEFFIELD?

A. KITZMILLER CONSTRUCTION COMPANY.

Q. IN WHAT CAPACITY?

A. SUPERINTENDENT.

Q. AND WHERE WERE YOU WORKING AT THAT TIME?

A. DIFFERENT PLACES, MAINLY ALONG 15 NORTH OF LEESBURG.

Q. AND WHAT WAS YOUR...WHAT WERE YOUR DUTIES?

A. I WAS OVERSEEING TELEPHONE CONSTRUCTION.

Q. AND ON DECEMBER 16TH, 1971, WERE YOU IN THE LEESBURG  
AREA?

A. YES I WAS.

Q. AND WHERE?

A. 15 NORTH OF LEESBURG.

Q. RIGHT WHERE THIS ACCIDENT HAPPENED?

A. YES.

Q. ALL RIGHT, AND WHO WAS THERE WITH YOU THAT DAY?



1 A. LARRY (McKENNY) FROM ALBAN TRACTOR.

2 Q. WHY WAS HE CALLED?

3 A. I HAD A PROBLEM WITH A D-A CATERPILLAR.

4 Q. NOW, WHAT WAS THAT MECHANIC'S NAME?

5 A. UH, KOOGLE.

6 Q. YOU HEARD HIS TESTIMONY THIS MORNING?

7 A. YES SIR.

8 Q. HAVE YOU BEEN TO THE SCENE OF THAT ACCIDENT, SINCE  
9 THE ACCIDENT OCCURRED?

10 A. YES.

11 Q. HAVE YOU MEASURED THE DISTANCE...ARE YOU FAMILIAR  
12 WITH THE DISTANCE FROM THE LITTLE ROCK MOTEL TO THE  
13 POINT OF THE IMPACT?

14 A. YES I AM.

15 Q. WHAT IS THAT DISTANCE, APPROXIMATELY?

16 A. TWELVE-THIRTEEN HUNDRED FEET.

17 Q. NOW, HAVE YOU MEASURED THAT YOURSELF?

18 A. YES I HAVE.

19 Q. DID YOU HAVE PLATS WITH YOU WHEN YOU WERE DOING  
20 THIS WORK FOR THE C & P TELEPHONE?

21 A. YES.

22 Q. WOULDN'T THAT ALSO INDICATE THE DISTANCE?

23 A. OH, YES.

24 Q. ABOUT WHAT TIME DID MR. KOOGLE ARRIVE, IF YOU RECALL?

25 A. ABOUT FIVE O'CLOCK.

1 Q. AND HOW MUCH TIME DID HE SPEND WORKING ON THE TRACTOR?

2 A. A HALF HOUR OR SO.

3 Q. AND HE ADVISED YOU AT THAT TIME WHAT WITH REFERENCE  
4 TO THE CONDITION OF THE TRACTOR.

5 A. WELL, WE NEEDED A CARBURETOR ON IT...ON THE AUXILIARY  
6 ENGINE. HE DIDN'T HAVE ONE; HE HAD TO BRING ONE THE NEXT  
7 DAY.

8 Q. NOW, HOW FAR FROM THE HARD SURFACE OF THE ROAD WAS  
9 THERE IN TERMS OF DISTANCE TO THE POINT WHERE YOU  
10 WERE WORKING...WHERE THE C & P TELEPHONE COMPANY WAS  
11 WORKING, DO YOU KNOW?

12 A. PROBABLY TWENTY-FIVE FEET.

13 Q. ALL RIGHT, AND WHAT IS THE WIDTH OF THE SHOULDER, THE  
14 SOFT...WELL, THE GRAVEL SHOULDER?

15 A. APPROXIMATELY TEN FEET.

16 Q. AND THE DITCH IS HOW FAR FROM THE HARD SURFACE OF  
17 THE ROADWAY?

18 A. ABOUT EIGHT-TEN FEET.

19 Q. THE DITCH IS RIGHT THERE AT THE END OF THE SHOULDER?

20 A. RIGHT.

21 ~~Q. NOW, DID YOU SEE MR. KOOGLE ARRIVE AT THE SCENE?~~

22 ~~A. NO, I DIDN'T.~~

23 ~~Q. WHEN DID YOU FIRST MEET HIM?~~

24 ~~A. HE WAS THERE. WE GOT THERE APPROXIMATELY THE SAME~~  
25 ~~TIME. I DON'T REALLY KNOW WHO GOT THERE FIRST, HE~~

1 Q. ALL RIGHT. DO YOU RECALL WHETHER OR NOT HE LEFT HIS  
2 ENGINE RUNNING?

3 A. YES, IT WAS RUNNING.

4 Q. ALL RIGHT, NOW JUST PRIOR TO THE ACCIDENT, DID YOU  
5 HAVE A CONVERSATION WITH MR. KOOGLE REGARDING HIS  
6 CAR AND THE POSITION IT WAS IN NEXT TO THE DITCH,  
7 AND SO FORTH?

8 A. OH, YES.

9 Q. ALL RIGHT. TELL THE COURT AND THE JURY WHAT THAT  
10 CONVERSATION CONSISTED OF.

11 MR. JENNINGS: I OBJECT. THAT'S  
12 HEARSAY.

13 MR. McMURTRIE: I'M NOT TALKING  
14 ABOUT WHAT MR. KOOGLE SAID, NOW, I JUST WANT TO KNOW  
15 WHAT HE SAID. YOU'LL HAVE A CHANCE TO CROSS EXAMINE.

16 CONTINUATION OF DIRECT  
17 EXAMINATION BY MR. McMURTRIE:

18 Q. JUST TELL US WHAT YOU TOLD KOOGLE.

19 A. WELL, WE'D DECIDED THAT HE COULDN'T REPAIR THE TRACTOR  
20 THAT DAY AND HE WAS GOING TO LEAVE. WHEN HE GOT READY  
21 TO LEAVE I TOLD HIM TO BE REAL CAREFUL WHEN HE LEFT,  
22 IF HE TOOK OFF IN A HURRY OR ANYTHING, IF HE SPUN HIS  
23 WHEELS HE WAS GOING TO SLIDE INTO THE DITCH AND GET  
24 STUCK.

25 Q. WHAT HAPPENED?

1. A. HE SLID IN THE DITCH AND GOT STUCK THERE.

2 Q. ALL RIGHT. NOW THEN DID YOU AND HE HAVE A CONVERSATION  
3 AFTER THAT AS TO WHAT TO DO ABOUT THE TRUCK?

4 A. WELL, WE HAD TO GET IT OUT.

5 Q. YOU BOTH AGREED TO THAT?

6 A. YEAH, BETWEEN THE TWO OF US WE GOT A CHAIN OFF OF  
7 HIS TRUCK, WE GOT MY BACK HOE...I GOT THE BACK HOE  
8 HE GOT THE CHAIN.

9 Q. WHERE WAS THE CHAIN FROM, HIS TRUCK?

10 A. YEAH, FROM HIS TRUCK THERE.

11 Q. OKAY, AND WHO PUT THE CHAIN ON THE TRUCK?

12 A. I THINK HE HOOKED IT TO THE TRUCK AND I HOOKED IT  
13 TO THE BACK HOE, OR VICE VERSA. WE BOTH HOOKED THE  
14 CHAIN UP.

15 Q. AT ANY TIME WHEN YOU WERE TRYING TO GET THIS TRUCK  
16 OUT OF THE DITCH, DID MR. KOOGLE TELL YOU NOT TO  
17 HELP HIM?

18 A. NO.

19 Q. DID HE TELL YOU, LEAVE ME ALONE; I CAN GET HELP ON  
20 ON MY OWN ?

21 A. NO, HE WANTED TO GO HOME.

22 Q. AND HE WANTED YOUR HELP?

23 A. YES, HE HAD TO HAVE IT.

24 Q. ALL RIGHT. DID YOU SAY, LOOK, GET OUT OF HERE, I'LL  
25 GET YOUR TRUCK OUT; WHEN IT'S OUT YOU CAN GET BACK IN

1. AND DRIVE IT ?

2. A. NO. I ASKED HIM TO GET IN THE TRUCK AND HELP ME.

3. Q. ALL RIGHT. WHAT DID YOU ASK HIM TO DO?

4. A. GET IN THE TRUCK, PUT IT IN REVERSE, AND JUST EASE  
5. BACK A LITTLE BIT AS I PULLED HIM TO GIVE ME WHATEVER  
6. HELP THE TRUCK WOULD DO.

7. Q. AND DID HE DO THAT?

8. A. YEAH.

9. Q. HOW FAR DID THE TRUCK AND BACK HOE MOVE BEFORE THE  
10. PROBLEM STARTED?

11. A. OH, FIFTEEN-TWENTY FEET MAYBE.

12. Q. ALL RIGHT. WHAT WAS THE RELATIONSHIP OF THE TRUCK  
13. TO THE SHOULDER OF THE ROAD? WAS IT PARALLEL?

14. A. YES.

15. Q. AND WAS THE BACK HOE IN THE DITCH TOO?

16. A. NO. I DOUBT IT.

17. Q. TELL US...YOU HEARD MR. KOOGLE'S TESTIMONY ABOUT THE  
18. BACK HOE BEING OFF-CENTER. EXPLAIN TO THE JURY IF  
19. YOU...AND MYSELF, BECAUSE I CERTAINLY DON'T UNDER-  
20. STAND IT YET, WHAT...

21. MR. JENNINGS: YOUR HONOR, I  
22. OBJECT TO HIS COMMENTARY ON THAT. HE CAN MAKE THAT  
23. IN FINAL ARGUMENT.

24. THE COURT: SUSTAINED.

25. MR. McMURTRIE: I WITHDRAW THE

1 COMMENT.

2 CONTINUATION OF DIRECT  
3 EXAMINATION BY MR. McMURTRIE:

4 Q. EXPLAIN TO THE JURY, THEN, WHAT THE RELATIONSHIP OF  
5 THE BACK HOE WAS TO THE TRUCK.

6 A. WELL, THE TRUCK WAS IN THE DITCH ON THE SHOULDER, ON  
7 THE SIDE OF THE NORTH LANE...NORTHBOUND LANE, AND THE  
8 TRUCK WAS HEADED SOUTH. THE BACK HOE WAS ON THIS  
9 SIDE OF THE NORTHBOUND LANE ON THE SHOULDER HEADED  
10 NORTH. I BACKED THE BACK HOE UP, WE HOOKED THE CHAIN  
11 TO IT, FROM THE BUMPER TO THE BUCKET OF THE BACK HOE,  
12 AND I STARTED TO PULL HIM OUT OF THE DITCH. SOMEWHERE  
13 DURING THE COURSE OF THIS PULLING SOMETHING HAPPENED,  
14 I DON'T KNOW WHAT IT WAS, WHETHER HE HIT THE BRAKES, HIS  
15 MOTOR CONKED OUT, WE HUNG A ROCK...ANYTHING COULD HAVE  
16 HAPPENED. THE TRUCK STOPPED, THE BACK HOE RARED UP  
17 IN THE AIR, AND WHEN IT CAME DOWN, IT CAME DOWN IN  
18 THE NORTHBOUND LAND OF ROUTE 15.

19 Q. NOW WHERE WAS THE BUCK OF THE BACK HOE?

20 A. IT WAS BEHIND THE TRACTOR, HOOKED TO THE BUMPER WITH  
21 A CHAIN.

22 Q. THE CHAIN WAS WRAPPED AROUND THE BUCKET?

23 A. I DON'T RECALL WRAPPING IT AROUND IT, NO. IT WAS  
24 HOOKED TO IT WITH A HOOK.

25 Q. ALL RIGHT. WHERE WERE THE FOUR WHEELS OF THE TRACTOR?

1 A. ON THE SHOULDER.

2 Q. NOW, AFTER THEY REARED UP AND WENT OVER ON THE ROAD,  
3 WHERE WERE THEY?

4 A. THEY WERE IN THE NORTHBOUND LANE.

5 Q. WAS ANY PORTION OF THE TRACTOR IN THE SOUTHBOUND LANE?

6 A. No.

7 Q. ARE YOU SURE OF THAT?

8 A. I'M REASONABLY SURE, YES.

9 Q. YOU WERE WHERE AT THIS TIME, SITTING ON THE TRACTOR?

10 A. YES.

11 Q. ALL RIGHT, WHAT HAPPENED AFTER THE TRACTOR REARED UP,  
12 TURNED AND LANDED ON THE ROAD ON THE NORTHBOUND PORTION  
13 OF ROUTE 15. WHAT DID YOU DO THEN?

14 A. WELL, THE FIRST THING I DONE, WAS TRY TO GET THE  
15 BUCKET AROUND TO GET SOME SLACK IN THE CHAIN TO GET IT  
16 LOOSE, BECAUSE EVERYTHING HAD TIGHTENED UP WHEN ALL  
17 THIS HAPPENED. I JUST TRIED TO PUT THE SYSTEM OUT  
18 OF REACH AND GET A LEVER TO WORK A HYDRAULIC CYLINDER,  
19 AND IT WOULDN'T DO, SO I JUMPED OFF THE TRACTOR, I  
20 WENT UP AND POUNDED ON THE GLASS OF THE TRUCK, ASKED  
21 MR. KOOGLE TO GET OUT AND FLAG THE TRAFFIC, THE  
22 TRACTOR WAS IN THE ROAD.

23 Q. DID HE GET OUT OF THE TRUCK?

24 A. No.

25 Q. WHAT DID YOU DO NEXT?

1 A. I GOT BACK ON THE TRACTOR, AND WAS ATTEMPTING TO GET  
2 IT OUT OF THE...GET EVERYTHING UNHOOKED. IF I COULD  
3 HAVE GOT SOME SLACK IN THE CHAIN, I COULD HAVE SLIPPED  
4 IT OFF THE BUCKET, AND MOVED IT. I COULDN'T GET SLACK  
5 IN THE CHAIN, BY THAT TIME HERE COME MR. UPDIKE AND  
6 IT ALL HAPPENED.

7 Q. WELL, WHEN YOU SAY IT ALL HAPPENED, YOU WERE STILL  
8 SITTING ON THE TRACTOR?

9 A. I WAS ON THE TRACTOR WHEN IT GOT HIT.

10 Q. AND HOW FAR AWAY WAS MR. UPDIKE WHEN YOU FIRST NOTICED  
11 HIM?

12 A. OH, DOWN BY THE MOTEL SOMEWHERE.

13 Q. WELL, WHEN YOU FIRST SAW THAT HE WAS GOING TO HIT  
14 THAT TRACTOR, HOW FAR AWAY WAS HE? AND WHERE WERE...

15 A. WELL, I WAS ON THE TRACTOR, OF COURSE, AND HE WAS  
16 LIKE, I DON'T KNOW, THREE HUNDRED...TWO OR THREE HUNDRED  
17 FEET AWAY. THREE HUNDRED FEET AWAY.

18 Q. CONSTANT RATE OF SPEED?

19 A. YEAH. SEEMED TO ME. I DIDN'T HEAR ANYTHING SLOWING  
20 DOWN.

21 Q. WELL, WHEN...DID HE SLAM ON THE BRAKES?

22 A. YES, HE DID HIT THE BRAKES, BEFORE HE HIT THE TRACTOR.

23 Q. HOW FAR AWAY WAS THAT FROM THE TRACTOR?

24 A. OH, MAYBE A HUNDRED FEET OR LESS. IT SLID ABOUT LIKE  
25 THIRTY OR FORTY FEET, BECAUSE THE SKID MARKS STOPPED



1 A. YEAH.

2 Q. OKAY, BUT YOU GOT THE FORD BACK HOE TO HELP HIM GET  
3 THE TRUCK OUT, RIGHT?

4 A. RIGHT.

5 Q. AND YOU WERE DOING THIS AS, YOU KNOW, AS A FRIENDLY  
6 GESTURE, RIGHT?

7 A. RIGHT.

8 Q. YOU KNEW...DID YOU KNOW KOOGLE BEFORE THEN?

9 A. I'D SEEN HIM.

10 Q. ON SOME OTHER JOB SITES?

11 A. HE'D WORKED ON THE TRACTOR BEFORE.

12 Q. OKAY. AND YOU KNEW MR. UPDIKE AND HIS PASSENGER TOO,  
13 DIDN'T YOU?

14 A. OH YES.

15 Q. ALL RIGHT, YOU KNEW THEM BEFORE THAT NIGHT?

16 A. YES.

17 Q. SO YOU WERE GOING TO HELP HIM OUT AS A FRIENDLY  
18 GESTURE?

19 A. RIGHT.

20 Q. OKAY. AND YOU HAD THE EQUIPMENT THERE, AT LEAST YOU  
21 HAD A BACK HOE TO DO IT, RIGHT?

22 A. RIGHT.

23 Q. OKAY. HE HAD TRIED TO GET THE TRUCK OUT OF THE DITCH  
24 FIRST BY ROCKING IT, HADN'T HE?

25 A. YES.

1 Q. ALL RIGHT, HE COULDN'T GET IT OUT, RIGHT?

2 A. (NODDING IN THE AFFIRMATIVE.)

3 Q. SO YOU SAID YOU TOLD HIM TO STICK IT IN REVERSE, AND  
4 THAT YOU WOULD TRY AND PULL HIM OUT, YOU'D EASE HIM  
5 ON OUT, RIGHT?

6 A. RIGHT.

7 Q. OKAY, AND HE WAS COMING BACK SOME DISTANCE YOU SAY  
8 THAT WAS MOVING?

9 A. OH, YES.

10 Q. ALL RIGHT. AND THEN FOR SOME REASON THAT YOU DON'T  
11 HAVE ANY IDEA, THE TRUCK SOMEHOW CAME TO A STOP?

12 A. RIGHT.

13 Q. WHETHER THAT WAS BECAUSE IT HIT A ROCK, OR IT MAYBE  
14 WENT DEEPER IN THE HOLE OR SOMETHING LIKE THAT, YOU  
15 DON'T KNOW, DO YOU?

16 A. No.

17 Q. AND WHEN THAT HAPPENED, YOU SAY YOUR BACK HOE REARED  
18 UP IN THE AIR AND PIVOTED, RIGHT?

19 A. RIGHT.

20 Q. AND WENT OUT ON TO ROUTE 15?

21 A. RIGHT.

22 ~~Q. OKAY. AND THEN WHEN IT WAS OUT THERE ON 15 YOU WERE~~  
23 ~~TRYING TO SWING THE BUCKET AROUND, WEREN'T YOU?~~

24 A. RIGHT.

25 Q. THIS IS HYDRAULICALLY OPERATED?

1  
2 CROSS EXAMINATION  
3 BY MR. JENNINGS:

4 Q. MR. SHEFFIELD, IT HAD RAINED THAT MORNING, HAD IT  
5 NOT?

6 A. I THINK SO. I RECALL SOMETHING LIKE THAT.

7 Q. AND THE GROUND WAS DAMP?

8 A. YES.

9 Q. IT HAD BEEN A RIGHT MISERABLE DAY, HAD IT NOT?

10 A. (NODDING IN THE AFFIRMATIVE.)

11 Q. AND WHEN HE STARTED TO GO OUT THE...BY HE I'M TALKING  
12 ABOUT MR. KOOGLE...DID HE TRY TO MOVE HIS PICK-UP  
13 TRUCK BACK AND BACK IT OUT?

14 A. NO, I THINK HE TRIED TO PULL IT FORWARD.

15 Q. AT FIRST?

16 A. YES.

17 Q. AND WHEN HE DID THAT, THE LEFT SIDE SLIPPED DOWN IN  
18 THIS DITCH, DIDN'T IT?

19 A. RIGHT.

20 Q. AND GOT STUCK, AND WHEN HE WAS TRYING TO ROCK AND  
21 BACK IT OUT HE ALMOST GOT MORE STUCK, DID HE NOT?

22 A. HE WENT DOWN A LITTLE, YEAH.

23 Q. ALL RIGHT, AND THAT'S BECAUSE THAT GROUND IN THAT  
24 AREA WAS MUDDY?

25 A. RIGHT.

1 Q. NOW, HELP ME TO UNDERSTAND SOMETHING A LITTLE BIT  
2 BETTER. WHEN HE IS IN THE DITCH, AND YOU'VE HEARD DITCH  
3 REFERRED TO...HOW MUCH BELOW ROAD LEVEL DOES THAT  
4 DITCH GO, CAN YOU GIVE US AN APPROXIMATION?

5 A. THE BOTTOM OF THE DITCH?

6 Q. YES SIR.

7 A. PROBABLY TWELVE INCHES.

8 Q. SO YOU'RE TALKING ABOUT NOT A BIG DROP-OFF, YOU'RE  
9 TALKING ABOUT...

10 A. OH, NO...

11 Q. ...A LITTLE SWELL?

12 A. WELL, YOU HAVE A SHOULDER THAT'S HAD LITTLE SLIGHT  
13 SLOPE TO IT AND A VERY FEW DEGREES, AND YOU HAVE A  
14 SMALL DITCH UP FROM IT. FROM THE SURFACE OF THE ROAD  
15 TO THE BOTTOM OF THE DITCH, TAKING INTO CONSIDERATION  
16 A LITTLE SLOPING SHOULDER, THE DITCH WAS ABOUT TWELVE  
17 INCHES OF A TILT.

18 Q. ALL RIGHT. AND HIS LEFT WHEELS WERE DOWN IN THAT...  
19 I MEAN, I'M TALKING ABOUT THE LEFT FRONT AND LEFT  
20 REAR WHEELS TO THE TRUCK WERE DOWN IN THAT DITCH?

21 A. YES SIR.

22 Q. SO HIS TRUCK WAS GOING TO BE AT AN ANGLE, WOULD IT  
23 NOT?

24 A. SLIGHTLY.

25 Q. ALL RIGHT. AND DO YOU RECALL WHICH DIRECTION...WHEN

1 HE WAS IN THERE, AND STUCK LIKE THAT, AND YOU WERE  
2 GETTING READY TO PULL HIM OUT, DO YOU RECALL WHICH  
3 DIRECTION HE WAS POINTED? WAS HE POINTED...WAS HE  
4 ANGLED A LITTLE BIT TO THE RIGHT, WAS HE POINTED  
5 DIRECTLY PARALLEL TO THE ROAD, WAS HE ANGLED A LITTLE  
6 BIT IN TOWARD THE...TOWARD THE FIELD?

7 A. PARALLEL TO THE ROAD.

8 Q. ALL RIGHT. AND THE DRIVER'S DOOR WAS STUCK, RIGHT?  
9 I MEAN, IT COULDN'T OPEN, COULD IT?

10 A. I DIDN'T TRY TO OPEN IT.

11 Q. WELL, I MEAN, I'M TALKING ABOUT THE BOTTOM OF THE  
12 DOOR WOULD BE AGAINST THE...CLOSE TO THE GROUND,  
13 RIGHT? IF YOU TRIED TO OPEN IT YOU COULD ONLY GET IT  
14 OPEN MAYBE SIX-EIGHT INCHES?

15 A. IT'S POSSIBLE.

16 Q. AND HE HAD A BUNCH OF OTHER GEAR IN THE TRUCK TOO,  
17 DID HE NOT?

18 A. YES SIR.

19 Q. ALL RIGHT, NOW, YOU ARE FAMILIAR WITH BACK HOES, ARE  
20 YOU NOT SIR?

21 A. OH, YES.

22 Q. AND HOW MANY YEARS HAVE YOU HAD EXPERIENCE OPERATING  
23 BACK HOES?

24 A. FIFTEEN.

25 Q. AND YOU ARE AWARE ALSO, ARE YOU NOT, SIR, THAT THEY

1. WILL, IF...DEPENDING UPON WHAT FORCE IS EXERTED  
2 AGAINST WHAT...THEY WILL REAR UP, RIGHT?

3 A. YES.

4 Q. HAD THAT HAPPENED TO YOU BEFORE?

5 A. OH, YES.

6 Q. AND BY REAR UP I'M TALKING ABOUT THE FRONT END PORTION  
7 OF IT WOULD GO UP IN THE AIR.

8 A. YES.

9 Q. ALL RIGHT. AND DEPENDING UPON WHERE THE FORCE BEING  
10 EXERTED AND WHAT ANGLE, THAT BACK HOE MIGHT SWING, TOO,  
11 MIGHT IT NOT?

12 A. IT'S POSSIBLE.

13 Q. ALL RIGHT. I MEAN I'M TALKING ABOUT IF IT'S ANGLED  
14 AND WHEN IT REARS UP IT'S LIABLE TO SWING ON AROUND  
15 LIKE THIS ONE DID THAT NIGHT?

16 A. IT WAS POSSIBLE.

17 Q. YOU DIDN'T EXPECT IT TO?

18 A. NO.

19 Q. BUT IT HAPPENED.

20 A. IT HAPPENED.

21 Q. ALL RIGHT. NOW WHEN YOU WERE OPERATING THE BACK HOE,  
22 MR. SHEFFIELD, AM I CORRECT IN ASSUMING THAT YOU WERE  
23 SITTING, LOOKING TOWARD LUCKETTS, IN THAT DIRECTION?

24 A. WELL, I WAS...

25 Q. YOU WERE LOOKING NORTH?

1 A. I WAS FACING NORTH. ME AND THE TRACTOR BOTH. I WAS  
2 LOOKING AT THE TRUCK.

3 Q. ALL RIGHT, YOU MEAN WHEN YOU WERE TRYING TO GET IT  
4 OUT?

5 A. YES.

6 Q. OKAY, BUT I'M TALKING ABOUT THE FRONT END PORTION OF  
7 THE BACK HOE WAS TOWARDS...IT WAS NORTH, WAS IT NOT?

8 A. YES.

9 Q. ALL RIGHT. AND KOOGLE, WHEN HE WAS IN THE TRUCK, HE  
10 WAS SOUTH?

11 A. RIGHT.

12 Q. DID YOU HAVE ANY COMMUNICATION WITH HIM WHATSOEVER  
13 WHEN YOU WERE HYDRAULICALLY TRYING TO MOVE HIM BACK  
14 WHEN HE WAS COMING BACK? TALK TO HIM?

15 A. I DON'T THINK SO.

16 Q. HE TALK TO YOU?

17 A. NOT THAT I KNOW OF.

18 Q. COULD HE...PROBABLY COULDN'T EVEN HEAR ONE ANOTHER  
19 REALLY, COULD YOU?

20 A. I DOUBT IT.

21 Q. NOW, HE DIDN'T GIVE YOU ANY DIRECTIONS OR ANYTHING  
22 ABOUT HOW TO OPERATE YOUR BACK HOE, DID HE?

23 A. No.

24 Q. I MEAN, IN TERMS OF GETTING HIM OUT OF THERE, YOU KNEW...  
25 YOU WERE THE ONE THAT KNEW WHAT...HOW TO OPERATE A BACK

1       HOE AND WHAT WOULD NEED TO BE DONE, RIGHT?

2       A. WELL, I HOOKED THE CHAIN TO THE BACK HOE. HE HOOKED  
3       IT TO THE SIDE OF THE BUMPER HE WANTED IT HOOKED TO  
4       TO PULL THE TRUCK OUT.

5       Q. YES SIR, I UNDERSTAND THAT, BUT I'M TALKING ABOUT  
6       AFTER YOU WERE UP ON THE BACK HOE IN TERMS OF MANEUVERING  
7       THE...YOU HAVE A LOT OF GEAR LEVERS, OR LEVERS TO OPERATE  
8       THIS THING?

9       A. NO, I JUST PUT THE TRACTOR IN GEAR AND DROVE OFF.

10      Q. HOW ABOUT WHEN YOU TRIED LATER ON TO MOVE THE BUCKET,  
11      DOES THAT TAKE A SEPARATE HYDRAULIC GEAR?

12      A. YEAH.

13      Q. AND YOU WERE THE ONE THAT KNEW HOW TO OPERATE THAT,  
14      RIGHT?

15      A. YEAH.

16      Q. HE DIDN'T HAVE ANY...HE DIDN'T SAY ANYTHING TO YOU  
17      ABOUT THAT...

18      A. HE WAS IN THE TRUCK.

19      Q. DID HE EVEN KNOW WHAT YOU WERE DOING BACK THERE IN  
20      TERMS OF, YOU KNOW, WHAT MANEUVERS YOU WERE MAKING?

21                       MR. McMURTRIE: YOUR HONOR,  
22      I THINK THIS CALLS FOR A CONCLUSION...

23                       THE COURT: SUSTAINED.

24                       MR. McMURTRIE: MR. KOOGLE  
25      CAN BEST ANSWER IT.



1 CONTINUATION OF CROSS  
2 EXAMINATION BY MR. JENNINGS:

3 Q. DO YOU KNOW WHETHER HE EVEN LOOKED BACK IN YOUR  
4 DIRECTION? DID YOU EVER SEE HIM LOOK BACK IN YOUR  
5 DIRECTION?

6 MR. McMURTRIE: AGAIN, THE SAME  
7 OBJECTION, YOUR HONOR.

8 THE COURT: HE MIGHT HAVE SEEN  
9 HIM OR HE MIGHT NOT HAVE SEEN HIM. DID YOU SEE HIM  
10 LOOK BACK, MR. SHEFFIELD?

11 MR. SHEFFIELD: NO SIR, I DIDN'T.

12 CONTINUATION OF CROSS  
13 EXAMINATION BY MR. JENNINGS:

14 Q. DID KOOGLE EVEN KNOW THAT THE BACK HOE HAD GONE UP  
15 ON THE ROAD WHEN IT DID?

16 A. I TOLD HIM.

17 Q. DID YOU...DID YOU HAVE ANY CONVERSATION WITH HIM AT  
18 THAT POINT, OR WERE YOU JUST...I THOUGHT YOU SAID YOU  
19 BEAT ON THE WINDOW AND STARTED YELLING AT HIM OR  
20 SOMETHING.

21 A. I TOLD HIM TO GET OUT OF THE TRUCK, I WAS IN THE ROAD.

22 Q. DO YOU KNOW WHETHER HE HEARD YOU?

23 A. HE LOOKED AT ME.

24 Q. DO YOU KNOW WHETHER HE HEARD YOU, SIR?

25 MR. McMURTRIE: AGAIN, IT CALLS

1 FOR A CONCLUSION, YOUR HONOR.

2 THE COURT: SUSTAINED.

3 CONTINUATION OF CROSS  
4 EXAMINATION BY MR. JENNINGS:

5 Q. DID HE RESPOND TO YOU?

6 A. I DON'T KNOW. HE DIDN'T GET OUT OF THE TRUCK.

7 Q. DID HE RESPOND TO YOU?

8 A. I DIDN'T HEAR HIM SAY ANYTHING, NO.

9 THE COURT: WHICH WINDOW DID YOU  
10 BEAT ON, MR. SHEFFIELD?

11 A. RIGHT SIDE. PASSENGER SIDE.

12 MR. JENNINGS: THAT'S ALL I HAVE,  
13 SIR.

14 THE COURT: MR. MITCHELL?

15 MR. MITCHELL: I HAVE NO QUESTIONS,

16 YOUR HONOR.

17 RE-DIRECT EXAMINATION  
18 BY MR. McMURTRIE:

19 Q. DO YOU KNOW WHETHER OR NOT MR. KOOGLE HAD ANY FAMILIARITY  
20 WITH THE OPERATION OF ONE OF THOSE BACK HOES?

21 A. I WOULD SAY HE DID. HE WORKED ON THEM.

22 MR. McMURTRIE: I HAVE NO  
23 FURTHER QUESTIONS.

24 THE COURT: YOU MAY STEP DOWN,  
25 SIR.

If you believe from a preponderance the evidence that the plaintiff Walter Sheffield, agent for Kitzmiller Construction Company and the defendant, Alban Tractor Company, through its agent Koogle, had a mutual or joint interest in the subject and purpose of the undertaking, and an equal right to direct and govern the movements and conduct of each in respect thereto, then they were engaged in a joint enterprise and each was the agent of the other, and any negligence of Walter Sheffield is imputed to the defendant, Alban Tractor Company, and it is as responsible for and charged with any such negligence as is the plaintiff Walter Sheffield.

TWENTIETH JUDICIAL CIRCUIT  
OF VIRGINIA



RAYNER V. SNEAD, JUDGE  
POST OFFICE BOX 8  
WASHINGTON, VIRGINIA 22747

CARLETON PENN, JUDGE  
DRAWER 471  
LEESBURG, VIRGINIA 22075

FAUQUIER, LOUDOUN AND  
RAPPAHANNOCK COUNTIES

15 July 1977

R. Craig Jennings, Esquire  
1012 North Utah Street  
Arlington, Virginia 22201

William G. McMurtrie, Esquire  
8111 Gatehouse Road  
Falls Church, Virginia 22042

In re: Sheffield, et al v. Alban  
Tractor Company, et al  
At Law No. 4743

Gentlemen:

The court has considered your memoranda, your arguments, your letters and the authorities cited, and has also done some research on its own. Upon consideration of all of which, it is of the view that the motion to set aside the verdict of the jury herein must be denied, the issue of joint enterprise having been submitted to the jury, joint entrepreneurs being joint tort-feasors for the purpose of this action for contribution.

Mr. McMurtrie will please prepare the judgment order.

Very cordially yours,

  
Carleton Penn

CP:fp

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WALTER RALEIGH SHEFFIELD,  
et al,

Plaintiffs,

v.

ALBAN TRACTOR COMPANY,  
et.al,

Defendants. ]

At Law No. 4743

FINAL ORDER AS TO DEFENDANT  
ALBAN TRACTOR COMPANY

THIS MATTER came before the Court for trial on April 19, 1977, and after a jury of seven was duly empanelled in accordance with law, the opening statements of counsel were made, and plaintiffs adduced their evidence as part of their case in chief.

WHEREUPON, after plaintiffs rested their case, defendant Alban Tractor Company, by counsel, moved to strike plaintiffs' evidence and for entry of summary judgment in its favor on the ground that no actionable negligence had been proven as to defendant Alban Tractor Company and further that no prima facie evidence existed to warrant the jury finding that plaintiffs and defendant Alban Tractor Company were engaged as joint enterprisers at the time of the subject vehicular accident, said motion being denied by the Court, to which action of the Court defendant Alban Tractor Company, by counsel, duly noted its objection and exception.

WHEREUPON, the defense then introduced evidence on their behalf and rested, and thereafter plaintiffs and defendant Alban Tractor Company moved to strike the other's evidence and for the entry of summary judgment in their favor respectively. The grounds for defendant Alban Tractor Company's renewed motion being identical to those raised at the conclusion of plaintiffs' evidence and each motion was denied by the Court, to which action the parties duly noted their objection and exception.

WHEREUPON, preparatory to hearing arguments on written instructions submitted by the parties, defendant Alban Tractor Company renewed its motion to strike plaintiffs' evidence on the following grounds: (1) there was a fatal variance between the pleadings and the evidence adduced inasmuch as plaintiffs sought recovery against Alban Tractor Company premised upon allegations of negligence and not upon a theory of "joint enterprise," and (2) there could be no recovery by the plaintiffs against defendant Alban Tractor Company as a matter of law on a theory of "joint enterprise," since plaintiffs were actively culpable and defendant Alban Tractor was alleged to be liable merely by virtue of its relationship as a joint enterpriser, and said motion on both grounds was denied by the Court, the defendant Alban Tractor Company, by counsel, duly noting its objection and exception to the ruling of the Court.

WHEREUPON, the jury was instructed in accordance with the instructions of law granted by the Court and final arguments of counsel were made.

WHEREUPON, after due deliberation, the jury returned its verdict in favor of the plaintiffs against Alban Tractor Company in the amount of FORTY-EIGHT THOUSAND AND FIVE HUNDRED DOLLARS (\$48,500.00), there being no objection to the form of the verdict.

WHEREUPON, defendant Alban Tractor Company, by counsel, requested and was granted leave to file Motion to Set Aside the Verdict, and thereafter defendant Alban Tractor Company filed its Motion to Set Aside the Jury Verdict in timely fashion, and the matter was argued by counsel for the parties on June 1, 1977, and under date of July 15, 1977, a memorandum decision of the Court was entered denying the motion of defendant Alban Tractor Company to set aside the verdict of the jury.

WHEREUPON, a Motion to Reconsider was filed and heard by the Court on August 5, 1977, and denied by the Court pursuant to

the letter of September 7, 1977, from Deputy Clerk Fay W. Payne, said letter being incorporated herein by reference; and

IT FURTHER APPEARING TO THE COURT that the testimony of plaintiff Walter Raleigh Sheffield and witness Larry Sheffer Koogle is the only evidence in the case with a material bearing on the issue of joint enterprise and that counsel for the parties so agree, and that therefore such testimony should be made a part of the record in this case; and

IT FURTHER APPEARING TO THE COURT that the testimony of Walter Raleigh Sheffield has already been transcribed and filed and that testimony of witness Larry Sheffer Koogle is in the form of a de bene esse deposition that was read to the jury verbatim at the time of trial, the latter deposition to be used by agreement of counsel in lieu of the recorded trial transcript; and

IT FURTHER APPEARING TO THE COURT that the Order entered in this case on December 7, 1977, by error contained no entry of judgment and should therefore be rescinded and set aside; it is therefore

ORDERED that the testimony of plaintiff Walter Raleigh Sheffield previously transcribed and filed and the de bene esse deposition of witness Larry Sheffer Koogle read to the jury in the case be, and the same hereby are, made a part of the record in this case; and it is further

ORDERED that the Order of December 7, 1977, heretofore entered be vacated; and it is further

ORDERED that judgment be, and the same hereby is, awarded in plaintiffs' favor against Alban Tractor Company in the sum of FORTY-EIGHT THOUSAND AND FIVE HUNDRED DOLLARS (\$48,500.00) in accordance with the verdict of the jury rendered on April 19, 1977; and it is further

ORDERED that upon entry of this Order the Clerk of the Court shall forward certified copies of same to all counsel of record.

AND THIS ORDER IS FINAL

Entered this 19th day of December, 1977.

Carlton Penn  
J U D G E

WE ASK FOR THIS:

ANDERSON, WYLAND, YOST AND MC MURTRIE

By: William G. McMurtrie  
William G. McMurtrie, Counsel for  
Plaintiffs

SEEN, OBJECTED TO AND EXCEPTION TAKEN:

SLENKER, BRANDT, JENNINGS AND O'NEAL

By: Craig Jennings  
Craig Jennings, Counsel for  
Defendant Alban Tractor Company

A COPY—TENTE

G. T. MARTZ, CLERK

By: James W. Lane  
Deputy Clerk



### ASSIGNMENTS OF ERROR

1. The Court erred in failing to grant defendant Alban's Motion to Strike premised upon insufficient evidence to support a finding of "joint enterprise"; this error was compounded in sending the case to jury on that theory of recovery in accordance with Instruction 8.

2. Assuming the existence of a "joint enterprise," the Court erred in failing to grant defendant Alban's Motion to Strike made at the conclusion of the evidence and in failing to sustain defendant Alban's Motion to Set Aside the Verdict of the Jury, each of which was made on the ground that a member of a joint enterprise actively guilty of negligence has no right of contribution from another "non-negligent" member of the enterprise merely by virtue of the special relationship existing between the two.

3. The Court erred in failing to grant defendant Alban's Motion to Strike plaintiff's evidence made at the conclusion of the case which was based upon a fatal variance between the theory of recovery pleaded in plaintiffs' Amended Motion for Judgment (negligence) and the altogether different legal theory adopted by plaintiffs at trial (joint enterprise).