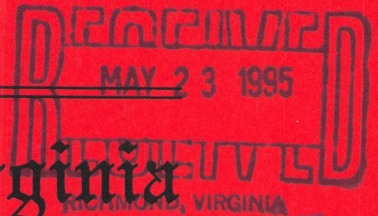


250 Va 444

CLERK
SUPREME COURT OF VIRGINIA



Supreme Court of Virginia

RECORD NO. 942034



**FRANCONIA ASSOCIATES and
THE FISCHER GROUP, INC.,**

Appellants,

v.

ALGERNON CLARK,

Appellee.

JOINT APPENDIX VOLUME II

**David C. Schroeder, Esquire
MURPHY, MCGETTIGAN,
RICHARDS & WEST
225 Reinekers Lane
Suite 700
Alexandria, Virginia 22314
(703) 549-5353**

Counsel for Appellants

**David R. Axelson
LAW OFFICES OF
DAVID R. AXELSON
10617 Jones Street
Suite 301A
Fairfax, Virginia 22030
(703) 591-9096**

Counsel for Appellee

TABLE OF CONTENTS
VOLUME I

Appendix Page

Motion for Judgment filed October 1, 1993	1
Answer and Grounds of Defense filed November 1, 1993	6
Excerpts of the trial before The Honorable Jane Marum Roush, Judge, dated August 16, 1994	9
Testimony of Algernon (Allan) Clark:	
Direct Examination	15
Direct Examination, continued	168
Cross Examination	172
Testimony of Peter J. Schubring:	
Direct Examination	89
Cross Examination	92
Testimony of Alan R. Funk:	
Direct Examination	95
Cross Examination	134
Redirect Examination	148
Recross Examination	150
Testimony of Steven W. Johnson:	
Direct Examination	157
Cross Examination	162

TABLE OF CONTENTS, Volume I, continued:

Appendix Page

Excerpts of the trial before
The Honorable Jane Marum Roush, Judge,
dated August 16, 1994, continued:

Testimony of Gerald Robinson:

Direct Examination	209
Cross Examination	225
Redirect Examination	226

Excerpts of the trial before the Honorable Jane Marum Roush, Judge, dated August 17, 1994	231
---	-----

First Deposition of Ruben D. Cabrera, M.D.:

Direct Examination	253
Cross Examination	279
Redirect Examination	312
Recross Examination	313

Second Deposition of Ruben D. Cabrera, M.D.:

Direct Examination	318
Cross Examination	322
Redirect Examination	326

Testimony of L. Andrew Smith, D.C.:

Direct Examination	343
Cross Examination	380

Testimony of Robert Gordon:

Cross Examination	409
-----------------------------	-----

TABLE OF CONTENTS, Volume I, continued:

Appendix Page

Excerpts of the trial before
the Honorable Jane Marum Roush, Judge,
dated August 17, 1994, continued:

Testimony of Algernon (Allan) Clark:

Direct Examination 413

Testimony of Gerald Robinson:

Direct Examination 425

Cross Examination 438

Redirect Examination 453

Testimony of Merrill Sporkin:

Cross Examination 455

Redirect Examination 456

**TABLE OF CONTENTS
VOLUME II**

Appendix Page

Excerpts of the trial before The Honorable Jane Marum Roush, Judge, dated August 18, 1994	462
Testimony of Brian Embrey:	
Direct Examination	466
Cross Examination	471
Redirect Examination	482
Deposition of Jacqueline Figueroa:	
Direct Examination	485
Cross Examination	490
Testimony of Algernon (Allan) Clark:	
Direct Examination	496
Jury Instructions	554
Closing Arguments, Plaintiff	564
Closing Arguments, Defendants	593
Closing Arguments, Plaintiff	621

TABLE OF CONTENTS, Volume II, continued:

Appendix Page

EXHIBITS:

Plaintiff's Exhibits:

No. 1:	Photo of Mall Entrance 3	633
No. 2:	Photo of Mall Entrance 3	633
No. 3:	Photo of Mall Entrance 3	633
No. 1a:	Photo of Mall Entrance 3	634
No. 4:	Photo of Mall Entrance 3	635
No. 5:	Photo of Mall Entrance 3	635
No. 6:	Photo of Mall Entrance 3	635
No. 5a:	Photo of Mall Entrance 3	636
No. 7:	Photo of Mall Entrance 3	637
No. 8:	Photo of Mall Entrance 3	637
No. 9:	Photo of Mall Entrance 3	637
No. 10:	Photo of Mall Entrance 3	638
No. 11:	Photo of Mall Entrance 3	638
No. 12:	Photo of Mall Entrance 3	638
No. 13:	Photo of Mall Entrance 3	639
No. 14:	Photo of Mall Entrance 3	639

TABLE OF CONTENTS, Volume II, continued:

Appendix Page

Plaintiff's Exhibits continued:

No. 15:	Photo of Mall Entrance	639
No. 16:	Photo of Mall Entrance	640
No. 17:	Photo of Mall Entrance	640
No. 18:	Photo of Mall Entrance	640
No. 16a:	Photo of Mall Entrance	641
No. 17a:	Photo of Mall Entrance	642
No. 18a:	Photo of Mall Entrance	643
No. 19:	Photo of Mall Entrance	644
No. 20:	Photo of Mall Entrance	644
No. 21:	Photo of Mall Entrance	644
No. 22:	Photo of Mall Entrance	645
No. 23:	Photo of Mall Entrance	645
No. 24:	Photo of Mall Entrance	645
No. 22a:	Photo of Mall Entrance	646
No. 23a:	Photo of Mall Entrance	647
No. 25:	Photo of Mall Entrance	648
No. 26:	Photo of Mall Entrance	648

TABLE OF CONTENTS, Volume II, continued:

Appendix Page

Plaintiff's Exhibits continued:

No. 25a:	Photo of Mall Entrance	649
No. 27:	Store Layout of Springfield Mall	650
No. 28:	Operations Bulletin #140 dated March 11, 1993	651
No. 29:	Weekly Exterior Door Checklist dated March 31, 1993	653
No. 30:	Incident Report dated April 25, 1993	655
No. 31:	Event Situation dated April 25, 1993	656
No. 32:	Event Situation dated April 21, 1993	659
No. 33:	Operations Bulletin #19 dated May 10, 1993	662
No. 38a:	Fairfax Hospital Emergency Department Medical Report dated April 29, 1993	666
No. 41a:	MRI of Allen Clark dated June 10, 1993	668
No. 42a:	Intake and Medical Records from Fairfax Orthopedic Clinic dated July 15, 1993 - August 2, 1994	669

TABLE OF CONTENTS, Volume II, continued:

Appendix Page

Defendant's Exhibits:

No. 8: Chart Notes of Dr. Smith	678
Final Judgment Order of The Honorable Jane Marum Roush, Judge, entered September 2, 1994	684
Order of The Honorable Jane Marum Roush, Judge, entered September 16, 1994	687
Assignments of Error	688

1 V I R G I N I A

2 IN THE CIRCUIT COURT FOR

3 THE COUNTY OF FAIRFAX

4 - - - - - x

5 ALGERNON (ALLAN) CLARK, :

6 Plaintiff, : At Law No:

7 vs. : 126947

8 FRANCONIA ASSOCIATES, et al., :

9 Defendants. : PAGES 618 - 789

10 - - - - - x

11

12 Jury Trial before JUDGE JANE MARUM ROUSH, held at the
13 offices of Fairfax Circuit Court, 4110 Chain Bridge
14 Road, Fairfax, Virginia, commencing at 10:06 A.M.,
15 Thursday, August 18, 1994, before RANDY T. SANDEFER,
16 Court Reporter and Notary Public.

17

18

19

20

21

22

1 A P P E A R A N C E S O F C O U N S E L:

2 FOR ALGERNON CLARK,

3 DAVID R. AXELSON, P.C.

4 BY: DAVID R. AXELSON, ESQUIRE

5 THOMAS F. KOERNER, ESQUIRE

6 10617 Jones Street, Suite 301A

7 Fairfax, Virginia 22030

8 (703) 591-9096

9

10 FOR FRANCONIA ASSOCIATES, et al.,

11 MURPHY, McGETTIGAN, RICHARDS & WEST, P.C.

12 BY: DAVID C. SCHROEDER, ESQUIRE

13 CECILY V. SCHULZ, ESQUIRE

14 Suite 700, King Street Station

15 225 Reinekers Lane

16 Alexandria, Virginia 22314-2822

17 (703) 549-5353

18

19

20

21

22

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

C O N T E N T S

D-X C-X RD-X RC-X

DEFENDANT'S EVIDENCE:

B. Embrey 623 627 638

J. Figueroa 641

PLAINTIFF'S REBUTTAL:

A. Clark 652

1

2

E X H I B I T S

3

PAGE

4

5

PLAINTIFF'S

6

14 Photograph of 5-4-93 658

7

15 Photograph of 5-4-93 658

8

16 Photograph of 5-4-93 658

9

17 Photograph of 5-4-93 658

10

18 Photograph of 5-4-93 658

11

19 Photograph of 5-4-93 658

12

20 Photograph of 5-4-93 658

13

21 Photograph of 5-4-93 658

14

22 Photograph of 5-4-93 658

15

23 Photograph of 5-4-93 658

16

24 Photograph of 5-4-93 658

17

25 Photograph of 5-4-93 658

18

26 Photograph of 5-4-93 658

19

20

DEFENDANT'S

21

1 Defendant's Exhibit 17A Renamed 651

22

1 P R O C E E D I N G S

2 - - -

3 JUDGE ROUSH: Good morning. Please bring
4 the Jury back.

5 MR. SCHROEDER: Judge, may I take a look at
6 the photographs for just a quick second?

7 JUDGE ROUSH: Do you want the one in
8 evidence?

9 MR. SCHROEDER: I need to look at all of
10 them. It will only take a second. I only have a
11 Xerox copy.

12 JUDGE ROUSH: Are we ready to bring the
13 Jury back?

14 MR. AXELSON: Yes, Judge.

15 JUDGE ROUSH: All right, that's good.

16 - - -

17 (Jury returned to the Courtroom at 10:08
18 o'clock a.m.)

19 - - -

20 JUDGE ROUSH: Welcome back, Ladies and
21 Gentlemen of the Jury.

22 Mr. Schroeder, call your next witness,

1 please.

2 MR. SCHROEDER: Brian Embrey. I believe
3 that he is in the hallway.

4 - - -

5 BRIAN EMBREY,
6 having been first duly sworn by
7 the clerk, a Notary Public
8 within and for the State of Virginia,
9 was examined and testified as
10 follows:

11 - - -

12 DIRECT EXAMINATION

13 BY MR. SCHROEDER:

14 Q. Good morning, Mr. Embrey. What is your
15 position in the Mall?

16 A. I work in maintenance.

17 Q. And when did you begin working at the Mall?

18 A. In October.

19 Q. Of what year?

20 A. '93 -- '92, I'm sorry.

21 Q. Now, you know the doors at entrance number

22 3?

1 A. Yes, sir.

2 Q. We are going to talk a little bit about the
3 door that's on the left side as you are inside the
4 Mall looking out.

5 Do you know which one I'm referring to?

6 A. Yes, sir.

7 Q. And you understand that there was an
8 accident involving Allan Clark on that door?

9 A. Yes, sir.

10 Q. Now, prior to that accident, Mr. Embrey,
11 did you have anything to do with the replacement of a
12 hinge at that door?

13 A. Yes, I did.

14 Q. And could you tell the Jury what it was
15 that was wrong with the door that caused you to
16 replace the hinge?

17 A. The original hinges that were on the door
18 were wore out.

19 Q. And what was the result of that in terms of
20 how the door was operating?

21 A. It was striking the other door at the top.

22 Q. And what did you do to remedy that

1 situation?

2 A. Put the ROTON hinge on the door.

3 Q. What, if anything, did you do to the closer
4 of the door at that time?

5 A. Nothing.

6 Q. After you put the ROTON hinge on, what, if
7 anything, did you do in terms of testing the door in
8 terms of operations?

9 A. Open the closer to see if it worked
10 properly.

11 Q. And when you say "to see if it worked
12 properly," what do you mean by that?

13 A. To make sure that the door shut at the
14 right speed.

15 Q. And from full open, how long should it take
16 for it to be operating properly?

17 A. 4 to 5 seconds.

18 Q. And you tested this particular door?

19 A. Yes, sir, I did.

20 Q. And how long did it take?

21 A. About 4 or 5 seconds.

22 Q. Now, did you ever adjust the door closer on

1 that door between the time that you put on the ROTON
2 hinge and the time of this accident?

3 A. I can't remember.

4 Q. Did you ever have to adjust the closer
5 after putting on the ROTON hinge?

6 A. No, I did not.

7 Q. Mr. Embrey, I want to show you a photograph
8 that has been marked as Plaintiff's Exhibit Number
9 17A. Would you take a look at that?

10 Now, is that the door that we have been
11 talking about?

12 A. I could not tell you by this picture.

13 Q. Well, Mr. Embrey, looking on the right side
14 of the picture looking through the window that's
15 pictured there, do you see a little sign?

16 A. Yes, sir, I do.

17 Q. What is that sign?

18 A. That's a sign of the rules and regulations
19 of the Mall.

20 Q. And is that sign located at every entrance
21 of the Mall?

22 A. Yes, it is.

1 MR. SCHROEDER: I have no further
2 questions, Your Honor.

3 JUDGE ROUSH: Cross examination?

4 MR. AXELSON: Yes, Your Honor.

5 CROSS EXAMINATION

6 BY MR. AXELSON:

7 Q. Mr. Embrey, after you replaced the ROTON
8 hinge on the door that we are talking about, the door
9 would only open to a maximum of about 75 degrees.

10 Is that correct?

11 A. Yes, sir.

12 Q. That's as far as that door would go?

13 A. Yes, sir.

14 Q. You could actually pull a little bit
15 further if you really leaned on it; but then if you
16 let go, it would start swinging back.

17 Is that right?

18 A. Yes, sir.

19 Q. You checked that door twice a week, right?

20 A. Yes, sir.

21 Q. And that's Mondays and Fridays?

22 A. Yes, sir.

1 Q. Now, you have no special training for this
2 job, do you?

3 A. Just on the job.

4 Q. You have never had any instructions --
5 except on the job instructions -- on how to maintain
6 the door or how to maintain the hinges?

7 A. No, sir.

8 Q. You have never seen any written
9 instructions on how to do that?

10 A. No, sir.

11 Q. As a matter of fact, the Mall has no
12 written maintenance manual on how to do various
13 things?

14 MR. SCHROEDER: Your Honor, may we
15 approach?

16 JUDGE ROUSH: Yes, sir.

17 - - -

18 (Discussion at sidebar as follows)

19 - - -

20 MR. SCHROEDER: We are getting beyond the
21 scope of direct. I asked him about what he did with
22 this door.

1 JUDGE ROUSH: Are you asking him about the
2 subject of the maintenance in --

3 MR. SCHROEDER: I asked him about what he
4 did to this door.

5 JUDGE ROUSH: You asked him about the
6 maintenance of this door.

7 MR. SCHROEDER: But he is going into Mall
8 policy.

9 JUDGE ROUSH: I overrule the objection.

10 - - -

11 (Conclusion of discussion at sidebar.)

12 - - -

13 BY MR. AXELSON:

14 Q. The Mall has no written maintenance manual
15 on how to do various procedures such as maintaining
16 the door; is that correct?

17 A. That's correct.

18 Q. And you maintain no records on what you
19 did? Again, in terms of maintenance?

20 A. That's correct.

21 Q. So, you are relying entirely on your memory
22 as to what you did?

1 A. That's correct.

2 MR. AXELSON: May I see exhibit 1A, please?

3 BY MR. AXELSON:

4 Q. I show you a photograph that has been
5 marked and admitted into evidence. This is a picture
6 of the door and there are 2 individuals standing
7 outside of the door.

8 One of those individuals is you, is it not?

9 A. Yes, it is.

10 Q. So, it would be safe to assume that you
11 were there that day? The day this picture was taken?

12 MR. SCHROEDER: Your Honor, I want to renew
13 my objection. May I approach again?

14 JUDGE ROUSH: Your objection is having to
15 do with exceeding the scope of direct?

16 MR. SCHROEDER: Yes, he is talking about
17 something -- this photo was taken after the accident.
18 And my scope is definitely limited to stuff before
19 this accident.

20 JUDGE ROUSH: I am not sure where he is
21 going with this. I think that your objection at this
22 point is premature.

1 Go ahead, Mr. Axelson.

2 BY MR. AXELSON:

3 Q. That's you shown in the photograph?

4 A. Yes, sir.

5 Q. And there is a maintenance cart shown in
6 the photograph as well, is that correct?

7 A. Yes, sir.

8 Q. Now, Mr. Embrey, do you recall what
9 maintenance you did on the door on the day that
10 particular photograph was taken?

11 MR. SCHROEDER: Your Honor?

12 JUDGE ROUSH: Hold up for a second,
13 Mr. Axelson.

14 Counsel, approach the bench.

15 - - -

16 (Discussion at sidebar as follows)

17 - - -

18 JUDGE ROUSH: What date is this photograph?

19 MR. AXELSON: April the 29th.

20 MR. SCHROEDER: Now, you know --

21 MR. AXELSON: Your Honor, the issue in this
22 case is whether or not the closing was ineffective on

1 that date. One of the primary things was the closing
2 speed.

3 Mr. Embrey has testified on a deposition
4 this he adjusted the closing speed on that particular
5 day. That's his testimony in deposition.

6 JUDGE ROUSH: That's purely post-accident
7 repair.

8 I will sustain the objection.

9 MR. AXELSON: Your Honor, may I respond,
10 please?

11 JUDGE ROUSH: No, I'm not in the habit of
12 getting into long colloquies about my rulings.

13 MR. AXELSON: I understand, Your Honor.
14 They have denied that there was anything wrong on the
15 door. I can impeach by showing that they did
16 something to repair the door on that particular day.
17 That's a proper use of the post-accident repair.

18 JUDGE ROUSH: What is your position on
19 this?

20 MR. SCHROEDER: Well, the post-accident
21 repair arises in the situation -- we have all denied
22 liability. How else would it make any sense?

1 Moreover, there is no evidence that the
2 door was broken when Mr. Clark ran through it. That's
3 whether they replaced all of the bolts that day on the
4 day of -- the extra maintenance day.

5 JUDGE ROUSH: All right, I sustain the
6 objection.

7 - - -

8 (Conclusion of discussion at sidebar.)

9 - - -

10 BY MR. AXELSON:

11 Q. Prior to April 29th, Mr. Embrey, there was
12 no way to adjust or correct the amount of back check
13 that this door was exhibiting; is that correct?

14 A. Not that I'm aware of.

15 Q. So --

16 JUDGE ROUSH: Mr. Embrey, would you mind
17 speaking up? I'm having a little trouble hearing you.

18 BY MR. AXELSON:

19 Q. So, there would be no reason for you to
20 check the back check, correct?

21 A. I just check to see if the door opened and
22 was closing properly.

1 Q. So, does the door open?

2 A. Yes, sir.

3 Q. You didn't check the back check?

4 A. No, sir, not that I --

5 Q. Thank you. The only people that worked on
6 the doors in 1993 were you, Nelson Beavers, and a
7 Mr. Jim Arrington. Correct?

8 A. Correct.

9 Q. Mr. Arrington was your supervisor?

10 A. Correct.

11 Q. He is the one that gave you the on-the-job
12 training?

13 A. Yes, sir.

14 Q. Now, you have seen other people run through
15 those doors, have you not?

16 MR. SCHROEDER: Your Honor, I would like to
17 approach again.

18 JUDGE ROUSH: Well, unless it involves
19 matters that are at all confidential, I don't think
20 that every objection has to be made at the bench.
21 It's disruptive to the proceedings and to the Court
22 Reporter --

1 MR. SCHROEDER: I will make it back here,
2 Your Honor.

3 JUDGE ROUSH: What is the legal basis of
4 your objection?

5 MR. SCHROEDER: I think we are talking
6 about (indicating) this door. I think that the
7 question has to be directed about this door.

8 JUDGE ROUSH: I think that he did that --

9 MR. SCHROEDER: I don't think that he did.

10 MR. AXELSON: I will rephrase it if I
11 didn't.

12 BY MR. AXELSON:

13 Q. Mr. Embrey, you have seen other people run
14 through this particular door, have you not?

15 A. No, I have not.

16 Q. All right. You have seen individuals from
17 the Mall run through other doors, have you not?

18 A. Yes, I have.

19 Q. Did you ever -- you were tightening the
20 bolts on this particular door on a fairly regular
21 basis, correct?

22 A. We were checking it.

1 Q. So, you would have to take the security
2 cover off and put a screwdriver up there and make sure
3 they were tight?

4 A. Yes, sir.

5 Q. Were they working loose?

6 A. Sometimes they would and sometimes they
7 wouldn't. You would just have to check.

8 Q. Did you do this every Monday and Friday?

9 A. Yes, sir.

10 Q. So, every Monday and Friday prior to April
11 29th, you were coming around to this particular door
12 and taking the cover off of it and trying the bolts?

13 A. Yes, sir.

14 Q. And sometimes they were loose and sometimes
15 they weren't?

16 A. Yes, sir.

17 Q. Did you ever go to Mr. Arrington and say
18 why are the bolts working loose?

19 A. No, sir.

20 Q. Did you and Nelson Beavers ever discuss why
21 the bolts come loose on this door?

22 A. No, sir.

1 Q. Are there bolts which hold the hinges on
2 the other doors, the ones that have the offset pivot
3 hinges?

4 A. I don't understand what you were asking.

5 Q. There is offset pivot hinges on some other
6 doors, correct? As opposed to the ROTON hinge on this
7 door?

8 A. Correct.

9 Q. Bolts hold that hinge on, correct?

10 A. Yes.

11 Q. Do bolts hold on the offset pivot hinges?

12 A. Yes, sir.

13 Q. Did you have to go around and check the
14 hinges on those doors?

15 A. Yes, sir.

16 Q. So, you were doing that also?

17 A. Yes, sir.

18 Q. But you didn't have to take a security
19 cover off or anything to get to those bolts?

20 A. No, sir.

21 Q. Did you ever have any discussion with
22 Mr. Arrington, with Mr. Beavers, or with anybody else

1 about why the bolts were working loose?

2 A. No, sir.

3 MR. AXELSON: I have no further, questions.

4 Thank you.

5 JUDGE ROUSH: Any redirect?

6 MR. SCHROEDER: I have a few.

7 REDIRECT EXAMINATION

8 BY MR. SCHROEDER:

9 Q. The reason you were checking the bolts was
10 because it was normal wear and tear that caused it to
11 come loose; wasn't it?

12 A. Yes, sir.

13 Q. Now, Mr. Axelson asked you if you had ever
14 seen anybody running through the door; is that
15 correct?

16 A. Yes, sir.

17 Q. Did you ever see anyone injured by the
18 door?

19 A. No, sir.

20 Q. You began working in October of 1992; is
21 that correct?

22 A. Yes, sir.

1 Q. Between October of 1992 and the time of
2 this accident, how many times have you replaced a door
3 with an offset pivot hinge with a ROTON continuous
4 hinge?

5 A. About half a dozen times.

6 Q. And did Mr. Arrington instruct you on how
7 to do that?

8 A. On the first one; yes, sir.

9 Q. Mr. Embrey, why don't you tell the Jury
10 what happened the first time that you ever did it?

11 A. We --

12 MR. AXELSON: Objection, Your Honor. It
13 exceeds the scope of cross examination.

14 JUDGE ROUSH: What is the point of this?

15 MR. SCHROEDER: I will withdraw the
16 question.

17 Thank you, Mr. Embrey.

18 JUDGE ROUSH: Thank you, Mr. Embrey.

19 Is this witness subject to recall?

20 MR. SCHROEDER: No, Your Honor.

21 JUDGE ROUSH: Mr. Axelson?

22 MR. AXELSON: I have no further questions

1 for him.

2 JUDGE ROUSH: Thank you, Mr. Embrey. You
3 may remain in the courtroom or leave, whichever you
4 prefer.

5 MR. SCHROEDER: Your Honor, I have got
6 Plaintiff's Exhibit 17A here still.

7 JUDGE ROUSH: Exhibit 1A is also missing in
8 action. Perhaps on the podium?

9 MR. AXELSON: Did I walk back here with it?
10 Here it is.

11 JUDGE ROUSH: Mr. Schroeder, call your next
12 witness, please.

13 MR. SCHROEDER: I would like to read the
14 deposition of Jackie Figueroa.

15 JUDGE ROUSH: All right.

16 MR. SCHROEDER: Can we use Ms. Schultz as a
17 reader?

18 JUDGE ROUSH: Yes, absolutely.

19 Ladies and Gentlemen of the Jury,
20 Ms. Figueroa is not available to come to trial today.
21 So just as Dr. Cabrera testified by deposition, her
22 deposition was taken, she was under oath. Ms. Schultz

1 is going to play the part of Ms. Figueroa in the
2 reading of the deposition.

3 MR. AXELSON: Your Honor, if I may, I have
4 the original of the deposition. And to assist the
5 Court, I have a marked copy.

6 JUDGE ROUSH: I will just follow with the
7 original.

8

- - -

9

CECILY V. SCHULTZ,
10 having been first duly sworn by
11 the clerk, a Notary Public
12 within and for the State of Virginia,
13 to accurately read the de bene esse
14 deposition of JACKIE FIGUEROA,
15 playing the part of Ms. Figueroa,
16 read the testimony as follows:

17

- - -

18 (The following deposition testimony was
19 read into the record.)

20

- - -

21

BY MR. AXELSON:

22

Q. Would you state your full name, please?

Deposition of Jacqueline Figueroa - Direct

642

1 A. Jacqueline Figueroa.

2 Q. And, Ms. Figueroa, you have been
3 subpoenaed or called as a witness on behalf of the
4 plaintiff in this case, Allen Clark. I understand
5 that you are not going to be in this area on the
6 anticipated trial date in August of 1994; is that
7 correct?

8 A. That's correct.

9 Q. You're going to be out of the state?

10 A. That's correct.

11 Q. Where are you going to be?

12 A. I'm going to California, Long Beach.

13 Q. And you will be attending college out
14 there?

15 A. Yes, sir.

16 Q. What is your home address, Jackie?

17 A. 6345 Rockshire Street, Alexandria,
18 Virginia 22310.

19 - - -

20 JUDGE ROUSH: Let me stop you right there.

21 Is there any dispute about the use of this deposition?

22 MR. SCHROEDER: Not that I am aware of,

1 Your Honor.

2 JUDGE ROUSH: All right. I will make a
3 ruling that the de bene esse deposition can be used.

4 Long Beach, California is more than a
5 hundred miles of the courthouse.

6 MR. AXELSON: I believe that is, Your
7 Honor. I believe that out of state also covers it.

8 JUDGE ROUSH: Out of state -- you mean
9 Washington, D.C.?

10 MR. AXELSON: As I read the rule.

11 JUDGE ROUSH: Thank you for reading the
12 rule and saving me the time of -- it's amazing what
13 you --

14 MR. AXELSON: Truly astounding.

15 - - -

16 (The reading into the record continued.)

17 - - -

18 BY MR. AXELSON:

19 Q. Now, you understand what this lawsuit is
20 about?

21 A. Yes. It's about Allen Clark and a little
22 accident they had in the mall.

1 Q. You were a co-worker of Allen Clark in
2 April of 1993, were you not?

3 A. Yes, I was.

4 Q. And both you and he worked where?

5 A. Elegant Nails Plus.

6 Q. And that is in Springfield Mall?

7 A. Yes.

8 Q. Were you working on the 25th of April of
9 1993?

10 A. Yes, I was.

11 Q. And were you aware of an event that began
12 in the Roy Rogers that afternoon?

13 A. Yes. There were was a robbery there, and
14 a lady came by and said, "Call the police, and that
15 was the manager at Roy Rogers, and then Allen, Issa,
16 and I ran around the corner to see what was going
17 on.

18 Q. Would this be toward entrance number
19 three in the mall?

20 A. Yes.

21 Q. All right, go ahead.

22 A. And I stopped at the corner but Issa and

1 Allen kept on running.

2 Q. Did you see Allen reach the door?

3 A. Allen went -- yes, I saw him push the
4 doors and then all I saw was that he stopped.

5 Q. Where was it that he was stopped?

6 A. What do you mean?

7 Q. Where was he when he was stopped when you
8 saw him?

9 A. Oh, well, I saw him stop at the door and
10 then on the other side of the door, and then he
11 didn't go anywhere.

12 Q. And where did you go from there?

13 A. I turned around and went back to the
14 store because my boss was looking for me probably.

15 Q. Did Allen come back to the store after
16 that?

17 A. After a while he did come back.

18 Q. And what did he tell you at that time?

19 A. He told me that he got caught in the
20 doors, and he didn't tell me anything else. He just
21 told me he got caught in the doors.

22 Q. Did you give him a ride home that

1 evening?

2 A. Yes, I did.

3 Q. And did you see him the following day?

4 A. Yes, I did.

5 Q. Did he complain to you about anything the
6 following day?

7 A. Yes. He complained about his leg hurting
8 and then he was limping.

9 Q. This was the day after?

10 A. The day after.

11 Q. Now, when he was going toward the door,
12 was he having any difficulty walking or running?

13 A. No. He didn't have any difficulties
14 before that.

15 BY MR. SCHROEDER:

16 Q. Now, you said when there was this robbery
17 some lady came by and said to call the police?

18 A. I heard a lady yell, saying, "Call the
19 police," and it was the manager of Roy Rogers.

20 Q. It was the manager from Roy Rogers who
21 yelled that?

22 A. Right.

1 Q. Do you remember if Allen ever said, "Call
2 the police" or "Call 911"?

3 A. I don't recall him saying anything.

4 Q. Now, you said Issa and Allen ran after
5 this person? Who is Issa?

6 A. Issa was the other person that worked at
7 Elegant Nails for us.

8 Q. Did Issa run through the doors at
9 entrance number three after the person?

10 A. I think he did. Like I was telling him,
11 I go back and I'm trying to remember everything, but
12 I think he did.

13 Q. Do you recall if there was other people
14 running after that person that robbed Roy Rogers as
15 well?

16 A. There was a lot of commotion going on
17 that day that probably there were other people. I
18 paid no attention to it.

19 Q. Do you remember if Allen was in front of
20 the people chasing the robber or if he was in the
21 middle of that pack or at the rear of the pack
22 chasing the robbery?

1 A. I don't remember.

2 Q. When you said he got to the door he
3 stopped. Was he still standing or was he falling
4 down?

5 A. No. He was still standing.

6 Q. Even when he got to the other side of the
7 door, the outside?

8 A. Yeah. I still saw him standing.

9 Q. That was when he was outside of the mall
10 of entrance number three?

11 A. Yes.

12 Q. You didn't see him falling on the ground?

13 A. I turned around and I went back to work.
14 I just saw him standing, and I had to get back to
15 work. I didn't see whether he fell. I don't know.

16 Q. But you saw him from the point where he
17 took off running until he got outside?

18 A. To the other side, yes.

19 Q. And you didn't see him fall down?

20 A. No.

21 Q. Now, was he running when he got to the
22 door?

1 A. Was he running?

2 Q. Yes.

3 A. He was running and walking fast in that
4 little thing -- I guess it would have been running
5 and walking at the same time real fast.

6 Q. Do you remember how hard he pushed the
7 door open?

8 A. No.

9 Q. Did you see the door spring back and hit
10 him?

11 A. Spring back?

12 Q. Yeah.

13 A. Like I said, I saw him push it and he
14 stopped and then I saw him at the other side. I
15 don't recall. You know, I don't remember if it came
16 back on him.

17 Q. You didn't see what the door did; is that
18 what you're saying?

19 A. I didn't see. No, I wasn't close enough
20 to see it.

21 Q. Now, after this accident you were still
22 working at Elegant Nails?

Deposition of Jacqueline Figueroa - Cross

650

1 A. Right.

2 Q. Do you remember when Allen came back
3 after the accident?

4 A. He came back and he told me that he had
5 gotten his leg caught on the door, but he said
6 nothing of it.

7 Q. Were you up near the reception desk at
8 that time?

9 A. I think I was probably more where the
10 hairdressers were in the back.

11 Q. How close is that to the phone in Elegant
12 Nails?

13 A. It's not too far. Probably where I was,
14 it was not too far away from the phone.

15 Q. Do you know of anyone else there that
16 works at Elegant Nails who would know who Issa, what
17 his last name is or how one could find him?

18 A. No. Allen probably knows.

19 - - -

20 JUDGE ROUSH: All right. Mr. Schroeder,
21 call your next witness.

22 MR. SCHROEDER: I have no further

Deposition of Jacqueline Figueroa - Cross

651

1 witnesses, Your Honor.

2 JUDGE ROUSH: All right, the defense rests.

3 Does the Plaintiff have any rebuttal evidence?

4 MR. AXELSON: I do, Your Honor. Very
5 briefly.

6 MR. SCHROEDER: Oh, Your Honor, I would
7 like to move into evidence Plaintiff's Exhibit Number
8 17A as Defendant's Exhibit.

9 JUDGE ROUSH: All right.

10 MR. AXELSON: May I see it for a moment,
11 Your Honor?

12 JUDGE ROUSH: Yes. That's not moved in
13 already as a Plaintiff's Exhibit?

14 MR. AXELSON: No, it wasn't.

15 JUDGE ROUSH: Any objection to that coming
16 into evidence as Defendant's Exhibit Number 1?

17 MR. AXELSON: No, Your Honor.

18 JUDGE ROUSH: Plaintiff's Exhibit Number
19 17A is renumbered as Defendants' Exhibit 1 and is
20 admitted into evidence without objection.

21 Are you recalling Mr. Clark?

22 MR. AXELSON: I'm calling Mr. Clark.

1 JUDGE ROUSH: Mr. Clark, I would remind you
2 that you are still under oath from your previous
3 testimony yesterday and the day before.

4 MR. AXELSON: Bear with me for one second,
5 Your Honor.

6 JUDGE ROUSH: Surely.

7 - - -

8 ALLAN CLARK,
9 having been previously sworn,
10 testified as follows:

11 - - -

12 DIRECT EXAMINATION

13 BY MR. AXELSON:

14 Q. Mr. Clark, who is Issa?

15 A. Issa was another employee who worked with
16 us at Elegant Nails Plus.

17 Q. Did Issa work on Sundays?

18 A. No, he never worked on Sunday.

19 Q. Was he present there on April 25th of 1993

20 A. No, he was not.

21 Q. And how do you know that?

22 A. Because Issa never worked on Sundays. He

1 took Sundays off because he had a limousine service.

2 Q. When Ms. Figueroa refers to having to go
3 back to the store because the boss was looking for
4 her; who was the boss?

5 A. I was in charge and Jackie was a
6 receptionist. I rode to work with her every Sunday.
7 She opened the gate and I was in charge -- I was the
8 only hairdresser that worked and there was two other
9 nail technicians.

10 Q. Who is the boss that she is referring to?

11 A. That's the owner, that was Wilma.

12 Q. And was Wilma there on Sunday the 25th?

13 A. No, she does not work on Sundays.

14 Q. Now, where was Jackie when the pursuit of
15 Mr. Hamilton began?

16 A. Behind the desk.

17 Q. And if she had wanted to join the pursuit,
18 what would she have had to have done?

19 A. Come around from behind the desk because
20 there was a wall on this side between the Mall and the
21 desk, (indicating) like this. She would have had to
22 come around the side of the desk, around, and outside

1 the shop.

2 Q. Would it have been possible for Jackie to
3 get to a point where she could have seen you going
4 through the door in time for her to have seen you?

5 A. No.

6 MR. AXELSON: May I see exhibit -- the
7 blow-up of 27, please? Thank you.

8 BY MR. AXELSON:

9 Q. Now, I show you what has been marked as
10 Exhibit Number 27. Why would it have been impossible
11 for Jackie to have seen you go through the door?

12 A. Well, first I'm the one that told her to
13 call 911. As I took off running from here,
14 (indicating) I saw her pick up the phone and start to
15 dial. She would have had to wait for a delay, 911
16 answered, they asked her the information, meanwhile I
17 am still running.

18 By that time they ask you to hold for a
19 moment. Then she would have hung up and she would
20 have had to come from around the desk this way,
21 (indicating) out the store and around. The only way
22 that she can see these doors is when you get to the

1 second door right here (indicating) by Taco Laredo,
2 and I was already outside by then.

3 Q. This diagram which shows the corner of Taco
4 Laredo, is that accurate? Is there a corner there?

5 A. Yes, there is.

6 Q. Can you see the door until you get to the
7 corner?

8 A. No, you can't see the door until you get to
9 this corner right here. (Indicating)

10 MR. AXELSON: Thank you.

11 BY MR. AXELSON:

12 Q. Mr. Clark, there have been a number of
13 photographs which have been referred to as
14 Plaintiff's -- marked as Plaintiff's Exhibits 14
15 through 26 that were reviewed by Mr. Korkowski.

16 What date were those photographs taken?

17 There is a small --

18 A. About the 14th or 15th.

19 Q. May I see those photographs, 14 through 26?

20 A. I think they were taken 6 days after the --

21 Q. All right. You see the small numbering
22 which appears on the side?

1 A. Yes.

2 Q. What is that number?

3 A. 4, 10, and then 2 dots and 48.

4 Q. And does that mean May the 4th, 10:48?

5 A. Yes.

6 Q. Were those pictures taken on May 4?

7 A. Yes.

8 Q. Were you present when the pictures were
9 taken?

10 A. Yes, I was.

11 MR. AXELSON: Your Honor, I would move the
12 introduction of Plaintiff's Exhibits 14 through 26
13 into evidence at that time.

14 JUDGE ROUSH: Any objection?

15 MR. SCHROEDER: I do have an objection.
16 This is suppose to be rebuttal, and I don't see how
17 this is rebuttal at this point.

18 MR. AXELSON: Your Honor, the previous
19 testimony by Mr. Korkowski concerning the date at
20 which these pictures were taken -- not Mr. Korkowski,
21 Mr. Robinson. I think that we are entitled to
22 establish that what he testified to was, in fact, that

1 these pictures were taken on the 4th and that's the
2 date that it occurred.

3 JUDGE ROUSH: Well, how are these
4 photographs rebuttal? Well, first of all, let me take
5 a look at them.

6 The objection is these are not properly
7 rebuttal. How are these rebuttal?

8 MR. AXELSON: Your Honor, strictly
9 speaking, I don't believe they are rebuttal. However,
10 there has been testimony about them. The questioning
11 centered on whether or not they were taken on May 4th.
12 And I think that we need to tie it all together.

13 JUDGE ROUSH: Well, Mr. Robinson identified
14 them as being doors in the Mall. And he said that he
15 could only guess that they were taken on May 4th.

16 MR. AXELSON: If his testimony --

17 JUDGE ROUSH: And it just says "4" and
18 10:48.

19 MR. AXELSON: Its the date, not the month
20 and date, Your Honor.

21 MR. SCHROEDER: I will stipulate that they
22 were taken on May 4th. The only problem with that --

1 he is entitled to put on rebuttal evidence as
2 necessary, and that not rebuttal to anything.

3 MR. AXELSON: If Mr. Schroeder is willing
4 to stipulate those photographs that Mr. Robinson
5 examined were taken on May 4th, that's fine. I don't
6 have any further need.

7 JUDGE ROUSH: You don't want them
8 introduced in evidence?

9 MR. AXELSON: I would like them introduced
10 into evidence, but if Mr. Schroeder is going to object
11 to them, that's fine.

12 JUDGE ROUSH: Are you withdrawing them?

13 MR. AXELSON: Your Honor, I'm going to
14 proffer them. If the Court is willing to --

15 JUDGE ROUSH: Either move or not move.

16 MR. AXELSON: I am going to proffer them,
17 yes. I move them into evidence at this time.

18 JUDGE ROUSH: All right, they are admitted.
19 I will note the Defendants' objection.

20 MR. SCHROEDER: Thank you.

21 MR. AXELSON: And I have no further
22 questions for Mr. Clark.

1 JUDGE ROUSH: All right. Any cross
2 examination?

3 MR. SCHROEDER: No, Your Honor.

4 JUDGE ROUSH: Thank you very much,
5 Mr. Clark. Any further rebuttal evidence?

6 MR. AXELSON: No, Your Honor.

7 JUDGE ROUSH: All right, the Plaintiff
8 rests.

9 Ladies and Gentlemen, at this point you
10 have heard all of the evidence that is going to appear
11 in this case. We are going to take a recess now,
12 you -- well, we are going to be at work, you are going
13 to be able to take a break now.

14 We are going to go over the Jury
15 instructions when you come back and it will probably
16 be -- what, could Counsel estimate?

17 MR. SCHROEDER: I would be surprised if it
18 takes half an hour.

19 JUDGE ROUSH: All right. We will get back
20 to you very shortly and then I will give you the
21 instructions of law and attorneys will have their
22 closing arguments and very shortly you will be

1 retiring to begin your deliberations.

2 So, if you excuse us now, we will get you
3 right back as soon as we can for the Jury
4 instructions.

5 - - -

6 (Jury escorted from the Courtroom at 10:38
7 o'clock a.m.)

8 - - -

9 JUDGE ROUSH: All right. Does Counsel have
10 a copy of the Jury instructions without cites?

11 MR. SCHROEDER: Yes, Your Honor, I believe
12 that we do. Here is mine without cites.

13 Your Honor, Mr. Axelson and I have already
14 talked about a number of these --

15 JUDGE ROUSH: I am delighted to hear that.

16 MR. SCHROEDER: -- And I'm just going to
17 give you the ones that are not duplicates of his, if I
18 may.

19 JUDGE ROUSH: All right, this is music to
20 my ears. I have been trying to get attorneys to do
21 this over the years and nobody ever does.

22 MR. AXELSON: Judge, I have here an

1 additional instruction that's a life expectancy
2 instruction. Which in light of the --

3 MR. SCHROEDER: That's fine, I don't object
4 to it.

5 MR. AXELSON: -- In light of the Court's
6 instruction that we handle the life expectancy in this
7 matter, we have prepared it and that would be our
8 number 16, please.

9 JUDGE ROUSH: 16, all right.

10 Well, I'm delighted, as I said, that you
11 exchanged ahead of time and come to some agreement.

12 Instruction number 1 reads -- first off,
13 let me say, unless you tell me otherwise, I'm going to
14 say these instructions in their current form, these
15 come from Mickey's Model Jury Instructions without any
16 changes other than maybe insert the names of the
17 parties in this case. And they don't come from any
18 other source.

19 Now, if they come from other models, you
20 need to tell me.

21 MR. AXELSON: We will do so. The numbered
22 instructions are mine, the lettered instructions are

1 Mr. Schroeder's.

2 JUDGE ROUSH: All right. The clerk is also
3 delighted. The other attorneys rarely get that
4 straight, as well.

5 All right, instruction number 1, the
6 general credibility instruction. Any objection to
7 that, Mr. Schroeder?

8 MR. SCHROEDER: I don't have any objections
9 to 1 through 3, Your Honor.

10 JUDGE ROUSH: 1 is granted. 2 is granted.
11 3 is granted.

12 All right. 4?

13 MR. SCHROEDER: Your Honor, 4 and 5, I'm in
14 agreement with a change that Mr. Axelson has suggested
15 to the instruction. I don't know if you have
16 actually --

17 MR. AXELSON: I have not actually prepared
18 it. Our proposed instruction combines 4 separate
19 instructions; 4, 5, "Q" and "O."

20 And it would read as follows: "An invitee
21 is one who visits premises lawfully at the invitation
22 of the owner or occupant. The Court instructs the

1 Jury that Allan Clark was an invitee of the Defendants
2 unless he exceeded the scope of his invitation.

3 "If the invitee uses the premises in a way
4 that exceeds the scope of the invitation to him, he
5 ceases to be an invitee and becomes a trespasser."

6 JUDGE ROUSH: All right. And you both
7 agree to that?

8 MR. SCHROEDER: Yes, that is based on the
9 ones in the blue book.

10 JUDGE ROUSH: That's 4, that makes 4, 5,
11 and what?

12 MR. SCHROEDER: "Q" and "O."

13 MR. AXELSON: Your Honor, we are going to
14 have to have that typed up, which would be done down
15 at the bar office in -- it will take us 5 minutes.

16 MR. SCHROEDER: I have got a copy of
17 Mr. Axelson's letter which states that, if it would
18 help somewhat.

19 MR. AXELSON: Well, we could take it down.

20 JUDGE ROUSH: Did you pull that --

21 MR. SCHROEDER: I did not, out of that one.
22 That's something that came up.

1 JUDGE ROUSH: I don't have "O" in here.

2 MR. SCHROEDER: Well, maybe I did pull it
3 out.

4 JUDGE ROUSH: If you have that with you
5 now, I think my clerk can type up the closing
6 arguments, as long as we don't have a lot of typing.

7 MR. AXELSON: Judge, what might work for
8 you is she could leave the copy with you and you could
9 read it to the Jury while she is typing it to get to
10 the Jury.

11 JUDGE ROUSH: I can read to the Jury from
12 raw data, then she cleans it up during closing
13 arguments. It's just this last paragraph right here.

14 MR. AXELSON: Yes.

15 JUDGE ROUSH: All right. That will be --
16 we will make that instruction --

17 MR. AXELSON: I think 17 would be the first
18 number that is unused at his point.

19 JUDGE ROUSH: Okay, instruction number 17
20 is granted. It will be retyped.

21 And so 4 is withdrawn?

22 MR. AXELSON: Yes, Your Honor.

1 JUDGE ROUSH: 5 is withdrawn?

2 MR. AXELSON: Yes, Your Honor.

3 JUDGE ROUSH: All right. Instruction 6.

4 MR. AXELSON: Your Honor, the only
5 disagreement that we have on this is that
6 Mr. Schroeder doesn't want the last line in. It's
7 from Mickey's.

8 The last line is, "If an occupant fails to
9 perform either or both of these duties, then he is
10 negligent." I think that's verbatim.

11 MR. SCHROEDER: Your Honor, I think
12 negligence -- I think that that seems to imply that we
13 are liable. It doesn't mention causation. I think
14 that's misleading. I know that is a model
15 instruction, but I do think it is misleading and I
16 don't think that's even necessary to have that in
17 there one way or the other.

18 JUDGE ROUSH: I understand your objection.
19 I'm going to grant instruction 6. I think all of the
20 instructions should say -- they should be issued
21 instructions that say issues are -- were the
22 Defendants negligent, was it negligent, or proximate

1 cause of the injuries and if it was, what is the
2 damage.

3 So, I think if the Jury follows the
4 instructions, the whole instructions, I don't think
5 that the whole instructions will cause a problem.

6 Instruction number 7?

7 MR. SCHROEDER: Your Honor, I think what we
8 have agreed to there is to delete the language; "If
9 the invitee knows or should know of any unsafe
10 condition or." There is no real -- this isn't an open
11 and obvious danger sort of case.

12 MR. AXELSON: So, it would read as revised,
13 the second sentence; "This assumption does not apply,
14 however if the invitee uses the premises in a manner
15 that exceeds the scope of the invitation."

16 JUDGE ROUSH: And that's agreed? With that
17 change?

18 MR. SCHROEDER: Yes, Your Honor.

19 JUDGE ROUSH: All right, granted. What is
20 the source of that cite from Mickey's? Because my
21 clerk has it on some kind of word processing program.

22 MR. AXELSON: The last one? 23.030.

1 JUDGE ROUSH: All right. She can call it
2 up by the letter.

3 All right. 8?

4 MR. AXELSON: I think at that point we
5 withdraw number 8. I think that's covered by 7.

6 JUDGE ROUSH: 8 is withdrawn. 9?

7 MR. AXELSON: Standard rejected or
8 stricken --

9 MR. SCHROEDER: No objection, Your Honor.

10 JUDGE ROUSH: I'm thinking, was there any
11 evidence in this case that was stricken? I think --
12 objections, but I don't think that I ever said --

13 MR. SCHROEDER: Well, you struck one
14 question.

15 JUDGE ROUSH: All right, granted.

16 Okay. 10, the expert witness?

17 MR. AXELSON: We are going to utilize
18 Mr. Schroeder's "H" in place of. I think it covers
19 the same subject.

20 JUDGE ROUSH: And 10 is withdrawn?

21 MR. AXELSON: Yes, Your Honor.

22 MR. SCHROEDER: Yes, Your Honor.

1 JUDGE ROUSH: Mr. Schroeder, you cannot
2 withdraw Mr. Axelson's objection -- I mean, his Jury
3 instruction.

4 MR. SCHROEDER: I am sorry, Your Honor. It
5 has been a long day.

6 JUDGE ROUSH: 11?

7 MR. AXELSON: 11, Your Honor, this is
8 adapted from 4.015, the Virginia Model Jury
9 Instructions. The Virginia Model Jury Instructions
10 addresses the issue of concluding the Defendants'
11 negligence from the fact of an accident.

12 I think that we need to make it clear to
13 the Jury that you can't conclude the Plaintiff's
14 contributory negligence merely from the fact of the
15 accident, either.

16 JUDGE ROUSH: Are you offering the
17 corollary of that, Mr. Schroeder?

18 MR. SCHROEDER: I am, Your Honor. The
19 corollary is a standard instruction in any case. And
20 if you look at the Mickey's completely, there is no
21 instruction like this for contributory negligence.
22 You always use the standard negligence instruction

1 with the standard contributory negligence instruction.

2 I think there is a reason for that. I have
3 offered all of the standard model Jury instructions
4 for contrib.

5 JUDGE ROUSH: Actually, the commentary for
6 that instruction doesn't really like that instruction.
7 The fact that there was an accident doesn't mean that
8 the Plaintiff is entitled to recovery.

9 If you read the commentary, it says that
10 it's too argumentative, but it has got a long history
11 of acceptance. I think this is the flip side of it;
12 if it is one, it may as well be the other.

13 MR. AXELSON: It is, Your Honor. That's my
14 position.

15 JUDGE ROUSH: All right. I will grant it.

16 MR. SCHROEDER: Note my exception.

17 JUDGE ROUSH: Yes, sir. If you want to
18 withdraw both, I will withdraw both. I tend to agree
19 with the commentary regarding that.

20 MR. SCHROEDER: I don't want to do that,
21 Your Honor.

22 JUDGE ROUSH: All right. Instruction 12?

1 MR. AXELSON: I don't believe this is from
2 the model. It is from Virginia Jury Instruction.

3 MR. SCHROEDER: I do object to 12, Your
4 Honor. It is not the model and I don't think that it
5 correctly states the law. It doesn't talk about
6 proximate cause, it doesn't talk about the proper
7 foreseeability standard.

8 I think we ought to go with the model
9 instruction on that one, Your Honor.

10 JUDGE ROUSH: Do you have a model
11 instruction on this one or have you offered any one?

12 MR. SCHROEDER: I believe so, Your Honor.

13 JUDGE ROUSH: I'm going to set 12 aside.

14 All right, 13 is the damage instruction?

15 MR. AXELSON: 13 is damage instruction. I
16 don't think --

17 MR. SCHROEDER: No objection.

18 MR. AXELSON: 14 is --

19 JUDGE ROUSH: Wait a minute. I have a duty
20 to instruct the Jury, so I read these things.

21 MR. AXELSON: Judge, we just expect you to
22 know these things by heart.

1 JUDGE ROUSH: Well, you have to read once,
2 because you have to read the items. You have done a
3 good job. Normally -- this one we always scratch off
4 because we get to the end of the time and we realize
5 that there is no evidence about future evidence, but
6 you have done a good job of moving into evidence right
7 in accordance with the evidence when it came in.

8 All right. 13 is granted. 14?

9 MR. AXELSON: Pertinent proof instruction?

10 MR. SCHROEDER: No, this is a damage
11 instruction.

12 JUDGE ROUSH: He doesn't have to form his
13 opinions with mathematical precision?

14 MR. AXELSON: Yes, I am sorry. I was
15 misreading it.

16 JUDGE ROUSH: Any objection?

17 MR. SCHROEDER: I do have an objection.
18 It's not the model instruction. I don't think it
19 states the law as well as the model instruction does
20 and I have offered the model instruction in mine.

21 JUDGE ROUSH: Where does 14 come from?

22 MR. AXELSON: Virginia Jury Instructions

1 Doubles.

2 JUDGE ROUSH: All right. I'm going to set
3 this aside and look at the model. I do prefer the
4 model, Doubles, because there is a Plaintiff's version
5 and a Defendants' version. And the model instruction,
6 I think, are right down the middle, isn't that right?

7 The Doubles are very argumentative. There
8 are 2 sides?

9 MR. AXELSON: I thought Doubles was a
10 person, Your Honor.

11 JUDGE ROUSH: Well, you are probably right.
12 But there are 2 sides to each instruction. There is a
13 Professor Doubles or something.

14 But I prefer the models, I think everybody
15 does.

16 MR. AXELSON: I have no problem with that,
17 Your Honor. If there is a satisfactory one that
18 addresses the same issue, I will be happy with that
19 one.

20 JUDGE ROUSH: Now, how about 15, the amount
21 sued for? Is anybody going to mention sued for in
22 their closing argument? Or the amount requested,

1 which you can now do.

2 MR. AXELSON: Before we make a decision on
3 that, I would like to confer with my client very
4 briefly. I think we could address the --

5 JUDGE ROUSH: How about you, Mr. Schroeder.
6 Are you going to mention it?

7 MR. SCHROEDER: No.

8 JUDGE ROUSH: All right, I will put that
9 aside.

10 16, the life expectancy. I understand
11 there is no objection to that?

12 MR. SCHROEDER: No, Your Honor.

13 THE COURT: All right. Now, going to the
14 Defendants' instructions.

15 MR. SCHROEDER: "A" and "B" have already
16 been withdrawn, Your Honor.

17 JUDGE ROUSH: Well, I don't even have them.
18 The first one I have is "C."

19 Any objection to instruction "C?"

20 MR. AXELSON: No objection, Your Honor.

21 JUDGE ROUSH: It's granted.

22 MR. SCHROEDER: "D" is withdrawn.

1 JUDGE ROUSH: I don't have that. The next
2 one I have is "E."

3 MR. AXELSON: "D" was withdrawn because it
4 was covered by one of the ones that Plaintiff had
5 submitted.

6 JUDGE ROUSH: If they were not presented to
7 me --

8 MR. SCHROEDER: Your Honor, the ones that I
9 have withdrawn and haven't given to you were
10 previously filed with the cites and everything on
11 them.

12 JUDGE ROUSH: That's fine. "E?" Am I
13 missing a witness instruction?

14 MR. AXELSON: I don't know who such witness
15 it would have been.

16 JUDGE ROUSH: Who is that in this case?

17 MR. SCHROEDER: Issa.

18 JUDGE ROUSH: What are we to presume? Who
19 should have called Issa?

20 MR. SCHROEDER: I think that the Plaintiff
21 should have.

22 JUDGE ROUSH: How about you? She may have

1 been an eye witness--

2 MR. SCHROEDER: I think that is an
3 explanation of law, I didn't know how to get in touch
4 with Issa.

5 MR. AXELSON: And our explanation was that
6 Issa didn't see it, because he wasn't there.

7 JUDGE ROUSH: I'm going to deny this
8 instruction. I don't think that it helps anybody.

9 MR. SCHROEDER: Your Honor, I withdraw it.

10 JUDGE ROUSH: All right. Instruction "F?"
11 Any objection to that?

12 MR. AXELSON: Yes, Your Honor. I don't
13 think there is any evidence of a failure to mitigating
14 damages.

15 JUDGE ROUSH: Wasn't the Defendants' main
16 argument that he didn't seek the proper medical care
17 promptly enough?

18 MR. AXELSON: Well, they testified that he
19 could have reached exactly the same result, possibly,
20 if he had seen a different kind of doctor. But he
21 explained why he didn't.

22 JUDGE ROUSH: Well, I think that is a

1 subject for argument. I am going to grant the
2 instruction for that, I think there is some evidence
3 of that, I'm going to allow it.

4 "H"? Expert?

5 MR. AXELSON: Did we skip over "G?"

6 JUDGE ROUSH: I don't have a "G."

7 MR. AXELSON: This is the instruction that
8 is going to be given in place of 10.

9 JUDGE ROUSH: So, there is no objection?
10 All right.

11 MR. SCHROEDER: I'm sorry, Your Honor. I
12 do have it. It's the form instruction on mentioning
13 the amount sued for. Let me hand it up to you.

14 JUDGE ROUSH: All right.

15 MR. AXELSON: Yes, that would be
16 substituted for 15 if we decided we would want to
17 mention the amount sued for.

18 JUDGE ROUSH: All right. "G," I will set
19 aside and 15 is withdrawn, is that right?

20 MR. AXELSON: Provided that "G" is offered,
21 subject to whether or not we want it.

22 JUDGE ROUSH: Right. 15 is withdrawn, "G"

1 is set aside at this point.

2 The next one I have is "I."

3 MR. SCHROEDER: Is "H" in, Your Honor?

4 JUDGE ROUSH: "H" is in by consent. "I?"

5 MR. AXELSON: Your Honor, I don't have any
6 real objection to this one. I don't know that it
7 particularly applies, but it's an accurate statement
8 of the law.

9 JUDGE ROUSH: All right. I have an odd
10 instruction.

11 MR. AXELSON: I guess my objection to it is
12 sort of an irrelevance objection. What does it have
13 to do with this case? But --

14 MR. SCHROEDER: I withdraw it.

15 JUDGE ROUSH: All right. It's one of those
16 instructions that's in the book, but I'm not sure if
17 it adds to the case. Unless the witness gets on the
18 stand and --

19 MR. AXELSON: If he has been impeached,
20 yes.

21 JUDGE ROUSH: And he has hardly been
22 impeached and doesn't stand apprised of his Counsel by

1 telling some kind of off-the-wall story, then you
2 would give us this instruction. But not for long, he
3 is bound by it.

4 MR. AXELSON: Been there, done that.

5 JUDGE ROUSH: Okay, the issues instruction.
6 I have no "J," by the way. "J" has been withdrawn?

7 MR. AXELSON: That's correct, Your Honor.

8 I think we have agreed on a slight -- well,
9 you would have the revised version. I think that we
10 have agreed on this.

11 JUDGE ROUSH: Is there any issue about
12 separating the witnesses and Defendants?

13 MR. AXELSON: I don't believe so, Judge.

14 JUDGE ROUSH: Were either or both of the
15 Defendants -- isn't it -- were the Defendants
16 negligent?

17 MR. SCHROEDER: That's how we originally
18 had it, but he wanted it on to rebuttal.

19 MR. AXELSON: My concern was that there
20 might be an issue of separating the Defendants, but --

21 JUDGE ROUSH: I don't know how you could.

22 MR. AXELSON: I guess my concern is that

1 the Jury might think that one of them was guilty of
2 negligence, but not the other --

3 JUDGE ROUSH: Well, the Jury knows
4 absolutely nothing about relationship between the
5 owner and the manager.

6 MR. AXELSON: Well, they have heard that
7 the Mall is owned by Franconia Associates and Fisher
8 Group was the manager and was the agent of the owner.

9 JUDGE ROUSH: Right. Well, if you agree to
10 this --

11 MR. SCHROEDER: I think that it's
12 confusing. I agree with you, Your Honor. I put it in
13 there to be accommodating, but I do think it is
14 confusing and I don't think there is any issue about
15 whether one or not one is involved --

16 JUDGE ROUSH: I'm going to say, "Were the
17 Defendants negligent -- if the Defendants were
18 negligent, was that negligence the proximate cause of
19 the accident? Was the Plaintiff negligent? If he
20 wasn't, his called for" -- all right.

21 MR. AXELSON: Judge, my concern is the Jury
22 may get back there and say we believe --

1 JUDGE ROUSH: I will tell them when I read
2 these instructions that there is no question of
3 them -- if they find in favor of the Plaintiff, that
4 they should not portion their verdict between the 2
5 defendants. They should be considered as one and the
6 same.

7 MR. AXELSON: If that's the instruction,
8 that is fine. So that if either of the Defendants is
9 negligent, then they can find against both of them.

10 JUDGE ROUSH: Right. They will consider
11 the Defendants as a group.

12 MR. AXELSON: That's fine.

13 JUDGE ROUSH: All right. What's the cite,
14 the Mickey cite, on this instruction?

15 MR. AXELSON: Which?

16 JUDGE ROUSH: "K."

17 MR. SCHROEDER: "K" is 3.000 and 45.005.

18 JUDGE ROUSH: 3.000 and give me that one
19 more time?

20 MR. SCHROEDER: 45.005.

21 JUDGE ROUSH: All right. "L" is the
22 finding instruction?

1 MR. AXELSON: And now we run into that same
2 problem.

3 MR. SCHROEDER: I think that we can change
4 that to take out the second paragraph there and just
5 change Franconia to the Defendants.

6 JUDGE ROUSH: All right.

7 MR. AXELSON: Judge, there is a couple of
8 instances where we have to prove, according to this,
9 that both Defendants were negligent. "You shall find
10 your verdict for the Plaintiff and against both of the
11 Defendants if the Plaintiff has proved, by the greater
12 weight of the evidence, that both Defendants were
13 negligent."

14 MR. SCHROEDER: I will agree to take out
15 "of" and just put "the."

16 JUDGE ROUSH: Done.

17 MR. AXELSON: Your Honor, it really needs
18 to say "If either of the Defendants were negligent."
19 That's the distinction that we have been struggling
20 with here.

21 JUDGE ROUSH: This is really not a
22 difficult issue here. It is cured by me telling the

1 Jury that they have no evidence if one Defendant was
2 negligent, they were both responsible. Don't worry
3 about Franconia Associates and Fisher Group are one
4 and the same for the purposes for the purposes of --
5 if they find they were negligent, both Defendants are
6 responsible, just come up with one award. If that is
7 what you decide to do and don't worry about having to
8 proportion to the Defendants and who is going to pay
9 for it or allocating between themselves.

10 MR. AXELSON: That satisfies it, Your
11 Honor.

12 JUDGE ROUSH: And we will take out both the
13 Defendants in that last paragraph. "We shall find in
14 favor of the Defendants if." As to --

15 MR. AXELSON: I think the "as to" --

16 JUDGE ROUSH: Well, the "as to Defendants"
17 clause come out. For proximate cause -- all right.
18 With those changes?

19 MR. AXELSON: Judge, would you review --

20 JUDGE ROUSH: I will read it. "You shall
21 find your verdict for the Plaintiff and against the
22 Defendants if the Plaintiff has proved by the greater

1 weight of the evidence that 1, the Defendants were
2 negligent and that 2, the Defendants' negligence was a
3 proximate cause of the Plaintiff's accident and
4 damages."

5 Next paragraph is deleted. "You shall find
6 your verdict for the Plaintiff and against the
7 Defendants if the Plaintiff has proved by the greater
8 weight of the evidence that 1, the Defendants were
9 negligent and 2 that the negligence of the Defendants
10 was a proximate cause of the Plaintiff's accident and
11 damages."

12 MR. AXELSON: I think those 2 paragraphs
13 are the same.

14 JUDGE ROUSH: They are the same, you are
15 right. Take out the 3rd paragraph.

16 Okay, what was the 4th paragraph, which is
17 now the 2nd paragraph; "You shall find your verdict
18 for the Defendants if, 1, the Plaintiff has failed to
19 prove either negligence or proximate cause or 2, you
20 find by the greater weight of the evidence that the
21 Plaintiff was contributorily negligent and that his
22 contributory negligence was the proximate cause of the

1 accident."

2 All right, with those changes, how about
3 instruction "L," any objection?

4 MR. AXELSON: None, Your Honor.

5 MR. SCHROEDER: Fine, Your Honor.

6 JUDGE ROUSH: All right, granted.

7 Instruction "M?" This is the corollary to
8 that other one. Any objection?

9 MR. AXELSON: No, Your Honor.

10 JUDGE ROUSH: Okay --

11 MR. AXELSON: Provided that the other one
12 comes in.

13 JUDGE ROUSH: It's in. "N", definition of
14 negligence?

15 MR. AXELSON: Your Honor, I think that the
16 first paragraph is fine, that's the instruction out of
17 the book.

18 The second paragraph is something that
19 Mr. Schroeder has added and I would object to it.

20 JUDGE ROUSH: I think that it's helpful,
21 though, isn't it? I mean, this is stuff that we all
22 learned in the first year of law school. The Jury

1 won't remember invitee and trespasser.

2 MR. SCHROEDER: I think you ought to read
3 that it is not in the model instruction. It's usually
4 not an issue.

5 JUDGE ROUSH: I'm going to grant
6 instruction number "N."

7 MR. AXELSON: I will withdraw my objection
8 to this, Your Honor.

9 JUDGE ROUSH: All right. "N" is granted.
10 "P?"

11 MR. SCHROEDER: "P" is the same as 6 that
12 was admitted over my objection.

13 JUDGE ROUSH: But it's the same, you said?

14 MR. SCHROEDER: Well, there is one
15 sentence. I took out the sentence about negligence at
16 the end.

17 JUDGE ROUSH: Okay, are you withdrawing
18 "P," or do you want me to deny "P?"

19 MR. SCHROEDER: I don't want you to deny
20 it, but I'm submitting it for the record only.

21 MR. AXELSON: Denied over your objection,
22 that way you have protected yourself.

1 MR. SCHROEDER: And note my exception.

2 JUDGE ROUSH: All right. You are covered,
3 now. "P" is denied.

4 "R?"

5 MR. AXELSON: I object to "R," Your Honor,
6 because I don't believe that there was any evidence
7 that would justify the Court in finding that Mr. Clark
8 was a trespasser.

9 MR. SCHROEDER: Your Honor, they have
10 already agreed to --

11 JUDGE ROUSH: We are instructing the Jury
12 on the duty to adhere to invitees and trespassers,
13 aren't we?

14 MR. SCHROEDER: That's right, Your Honor.
15 I think it ought to be read -- it only makes sense if
16 it is read right after the one that was submitted to
17 you on Mr. Axelson's letterhead? The one that we have
18 to get typed up?

19 JUDGE ROUSH: 17?

20 MR. SCHROEDER: Yes.

21 JUDGE ROUSH: Is this a model instruction?

22 MR. SCHROEDER: Yes, it is, Your Honor.

1 JUDGE ROUSH: All right, granted. I'm
2 going to grant this one. I think this is an issue in
3 this case.

4 If I were the fact finder, I would be
5 ultimately persuaded by the fact. But, I think that
6 the Defendants have put on some evidence and are
7 entitled to be instructed on their theory of the case.

8 MR. SCHROEDER: I guess I won't be making
9 that motion for summary judgment, then.

10 MR. AXELSON: Can we withdraw our motion
11 for a jury trial, Judge?

12 JUDGE ROUSH: Well, possibly the
13 trespasser. And as things go hand-in-hand, is that a
14 model instruction?

15 MR. SCHROEDER: Yes, that's straight out
16 of --

17 JUDGE ROUSH: All right, granted.

18 MR. SCHROEDER: Your Honor, could I also
19 ask that 17, "R," and "S" be read after -- I think
20 that they need to be put after "P," or after 6, in the
21 stream of things.

22 JUDGE ROUSH: Well, I do try to organize

1 this in some kind of sensible order. That and the
2 definition of the duty to an invitee.

3 MR. SCHROEDER: Yeah, that's 6.

4 JUDGE ROUSH: All right. "T?"

5 MR. SCHROEDER: Your Honor, I think "T,"
6 the only objection is to the last sentence.

7 MR. AXELSON: This is not a standard
8 instruction, Your Honor. But the last sentence is the
9 particularly objectionable part to it.

10 We have no burden to demonstrate how long
11 the defective condition existed. Our burden is to
12 demonstrate that it existed for long enough that the
13 Defendants should, in the exercise of reasonable care,
14 have learned about it and done something about it.

15 And this confuses that issue.

16 JUDGE ROUSH: I think Mr. Axelson has
17 stated the law, has he not? I mean, this is very
18 similar to a slip and fall in the grocery store in a
19 puddle of water. The puddle of water could have been
20 there for 10 minutes or 3 years, but it's not up to
21 the Plaintiff to prove how long it has been there.
22 Just that the grocery store had notice of it.

1 MR. SCHROEDER: Your Honor, I think that
2 the Supreme Court doesn't feel the same way. There is
3 4 cases in particular that I cited in the original
4 instructions. Great Atlantic versus Barry, Safeway
5 versus Tolson, Roll Away Rinks versus Smith and
6 Kennedy. In all of those cases, the Court says the
7 Plaintiff failed in their burden to show constructive
8 knowledge because they were not able to show how long
9 this condition existed.

10 JUDGE ROUSH: Well, that's because they
11 walk in the grocery store and they slip on the puddle
12 and they have no idea as to whether it was put there
13 by the person who walked over that spot 5 seconds
14 earlier or if it had been there 4 hours.

15 In this case, the point of fact of this
16 evidence, some evidence, that there might have been a
17 problem with this door existing for a period of time.
18 The mailman --

19 MR. SCHROEDER: I don't think this is the
20 case at all, Your Honor. This is the problem that I
21 have had from the beginning of this case. I really
22 want to note a strong objection here, because there

1 has been all of this talk about pivot points, how far
2 this door opens and all of that.

3 That has nothing to do with closing speed.
4 Mr. Axelson has promised you 3 times that he was going
5 to tie it together. I have not heard it tied together
6 yet, and I don't know how it can be tied together.
7 Both of the door experts admitted that these things
8 did not affect closing speed. The closing speed is
9 the only dangerous condition that could have caused
10 this accident that they were contending here.

11 And so, while there may have been evidence
12 about the fact that this door only opened 75 degrees
13 from the postman -- that was his problem with it --
14 that has nothing to do with what the -- the potential
15 cause of this accident was.

16 JUDGE ROUSH: I do understand that, but
17 this is a Jury issue, though. I'm sure that I am
18 going to be hearing about that from after the Jury --

19 MR. SCHROEDER: Well, that's my point.
20 They have put on no evidence to show how long this
21 condition existed, this particular condition. They
22 put on evidence to show how long other conditions

1 existed, but those have nothing to do with the case.

2 JUDGE ROUSH: Well, that is a Jury question
3 as to whether they did or did not make the case, to
4 tell you the truth.

5 I will delete the last paragraph there.

6 MR. SCHROEDER: All right. I have a clean
7 instruction on that, Your Honor.

8 JUDGE ROUSH: Is that the last paragraph?

9 MR. SCHROEDER: Without the last paragraph
10 anticipating your ruling.

11 JUDGE ROUSH: All right. I'm just going to
12 strike out "either or both of the Defendants."

13 MR. SCHROEDER: Yes, that's --

14 JUDGE ROUSH: I don't think that we need to
15 retype that. Revised instruction is granted.

16 MR. AXELSON: Your Honor, I'm reading this
17 over for the first time here, unless this is the
18 version that I sent to you --

19 MR. SCHROEDER: I changed the "either or
20 both" part to show I wanted either or both.

21 JUDGE ROUSH: I'm assuming that both
22 paragraphs are exactly the same?

1 MR. AXELSON: I don't believe it is, Your
2 Honor.

3 JUDGE ROUSH: Well, let's take a moment and
4 read it. You don't want to read it the first time to
5 the Jury.

6 JUDGE ROUSH: Your Honor, this is the
7 version that I suggested in my revision to
8 Mr. Schroeder.

9 JUDGE ROUSH: All right. So, if I grant
10 it, you have no objection?

11 MR. AXELSON: No, Your Honor.

12 JUDGE ROUSH: Correct, you have no
13 objection?

14 MR. AXELSON: That's correct, I have no
15 objection. It sounds an awful lot like "Yes, we have
16 no bananas," Judge.

17 JUDGE ROUSH: So, old instruction "T" you
18 still proffer. Is that right, Mr. Schroeder?

19 MR. SCHROEDER: Yes, Your Honor.

20 JUDGE ROUSH: All right, I'm denying that
21 "U," definition of proximate cause.

22 There can't be much dispute about that.

1 MR. AXELSON: No, Your Honor.

2 JUDGE ROUSH: All right, it's granted.

3 "V," contributory negligence?

4 MR. SCHROEDER: These are the ones that --
5 "V," "W," and "X," are the ones that we were going to
6 set aside his contrib objection -- or instructions.

7 JUDGE ROUSH: All right.

8 MR. AXELSON: Your Honor, I'm not sure if
9 this is the proper time to do it, but I want to make a
10 motion at some point in time to strike the Defendants'
11 evidence with regard to contributory negligence.

12 I don't think there is enough evidence here
13 that the Jury could make a finding in contributory
14 negligence. The only evidence that has been
15 established is that Mr. Clark was running as he
16 approached the door. He then testified that he pushed
17 the door open.

18 There is no evidence of how fast he did it
19 or how hard he did it. I don't think there is enough
20 there that the Jury could conclude, based on the
21 evidence submitted to them, that he did anything
22 negligent in opening the door. And that is the only

1 thing that has been --

2 JUDGE ROUSH: Well, as I understand the
3 Defendants' case, it was more that he entered into
4 this pursuit with the robber more than anything else.

5 Is that what the contributory negligence
6 was?

7 MR. SCHROEDER: Yes, he ran full speed
8 through a door, through a mall. And there is posted
9 signs saying no running. I think that is just common
10 sense that running through a common place where he
11 said there was other people there and running through
12 a swinging door is contributory negligence, just as a
13 matter of law.

14 MR. AXELSON: But running through the
15 public place is not what injured him. What injured
16 him is the door.

17 JUDGE ROUSH: And that's the whole issue.
18 I would say that Defendants -- and I tell the Jury
19 that these instructions are going to be inconsistent,
20 because I have a duty to instruct both the Plaintiff's
21 and the Defendants' case.

22 As I understand the Defendants' theory in

1 the case, he was running along as a middle aged man
2 with an Achilles tendon, was torn and ruptured. And
3 maybe it wasn't even hit by the door.

4 MR. AXELSON: Then what is the negligence?
5 Just to be running?

6 MR. SCHROEDER: That's a causation argument
7 on my part. That is not the contrib argument. The
8 contrib argument is --

9 JUDGE ROUSH: The Defendants dispute he was
10 even hit by the door.

11 MR. AXELSON: Yes, but that's not a
12 negligence issue.

13 JUDGE ROUSH: Where is the contributory
14 negligence issue?

15 MR. SCHROEDER: The contrib is, putting
16 that aside, the causation problem, putting that aside,
17 the contrib is running full speed through a door; a
18 swinging door. And if the reason the door comes back
19 and hits him is because he threw it open with such
20 great and unexpected force that it rebounded and came
21 back, then that's contributory negligence. Because as
22 anybody knows, if you push a door open really hard,

1 there is that potential for it to come back.

2 And there is several cases in my trial
3 brief that talk about that, how people have a duty to
4 guard against the door recoiling against them. And I
5 think in addition to that, their expert never
6 testified about how this door should have operated
7 under those set of circumstances.

8 He only gave testimony about how the door
9 should operate under normal use conditions. I don't
10 think there has been any evidence that the door was
11 used normally.

12 ROUSH JUDGE: I thought the evidence was
13 that it doesn't matter how much you push open the
14 door. If the closer mechanism is working, it's going
15 to control the speed of the door.

16 MR. SCHROEDER: That's right, Your Honor.
17 He never testified that was under normal use
18 conditions. The first question I asked him was every
19 opinion you have rendered is based on normal use, and
20 he said yes.

21 JUDGE ROUSH: I think the whole discussion
22 shows that there was sufficient evidence on both sides

1 of the case here. I think the instruction should be
2 given.

3 MR. AXELSON: But Judge, where is the
4 contributory negligence? The discussion we just had
5 goes to how the door operates. Where is the evidence
6 of what Mr. Clark did that was abnormal?

7 There isn't any.

8 JUDGE ROUSH: Well, I think that there is
9 some evidence here where the Jury might conclude that
10 he was contributorily negligent. And I think that the
11 Defendant is entitled to instruct the Jury on this
12 issue.

13 MR. AXELSON: Note my objection to the
14 Court's ruling.

15 JUDGE ROUSH: Yes, sir. All right,
16 instruction "W" goes hand in hand with that, so I will
17 grant instruction "W."

18 Instruction "X," the same thing. Granted.

19 All right, now, instruction "Z," this is
20 one that I think we set aside. 14 we set aside.

21 MR. SCHROEDER: "Z" is directly from the
22 model.

1 JUDGE ROUSH: I prefer "Z." Do you have a
2 problem with "Z," Mr. Axelson?

3 MR. AXELSON: Let me see what 14 looks
4 like.

5 No, we don't have any probable with "Z."
6 It will replace 14.

7 JUDGE ROUSH: 14 is withdrawn, then?

8 MR. AXELSON: Yes, Your Honor.

9 JUDGE ROUSH: There is no "Y," then, is
10 that correct? Or am I confusing it with --

11 MR. AXELSON: No, "Y" has been dealt with
12 on some other issues.

13 JUDGE ROUSH: All right. That leaves 2
14 that are set aside. "G," which I need to make a
15 decision on that, and 12. "If you believe from the
16 evidence and other discussions in Court that the
17 Defendant is liable, he is liable for all of the
18 injuries occurred to the Plaintiff which naturally
19 resulted from the incident and is immaterial that all
20 such consequences might not reasonably have been
21 expected to result."

22 MR. SCHROEDER: I think "Z" is what covers

1 this issue about damages.

2 JUDGE ROUSH: All right. Well, it's really
3 a sort of foreseeability. It's an egg shell
4 sculptured --

5 MR. AXELSON: Yes, Your Honor.

6 JUDGE ROUSH: I know other people have
7 pointed this out to me, the whole concept of
8 foreseeability. It really is not taken care of in the
9 definition of proximate cause. Looking at the
10 instruction here, "Proximate cause of any accident,
11 injury, or illness that is the cause of a natural
12 continuous sequence," for this would be absolutely
13 true.

14 But it didn't say anything about
15 foreseeability.

16 MR. SCHROEDER: Your Honor, that's why I --
17 I think there is a hole, in the premises liability
18 cases from the notice issues -- that's why I have
19 formulated "T". I think "T" also answers the
20 foreseeability question in a number of ways.

21 JUDGE ROUSH: Did I grant "T?"

22 MR. SCHROEDER: Yes, the modified "T."

1 JUDGE ROUSH: But it's the whole thing with
2 the Achilles tendon. The Achilles tendon might not
3 normally, or it might be very odd for an Achilles
4 tendon to be ruptured by direct impact, but Mr. Clark
5 might be that one in a million case.

6 That's what this instruction is geared
7 towards.

8 MR. AXELSON: Yes, Judge.

9 JUDGE ROUSH: Where did it come from?

10 MR. AXELSON: Virginia Jury Instructions,
11 23.04, Doubles Jury Instruction.

12 JUDGE ROUSH: I'm sorry, looking for all of
13 this, now I lost which instruction this is?

14 MR. AXELSON: 12, Your Honor.

15 JUDGE ROUSH: I am going to grant
16 instruction 12. I think that's an issue in this case
17 and I think there is evidence to instruct the Jury on
18 it and I think that the Plaintiff is entitled to have
19 the Jury instructed on this issue.

20 MR. SCHROEDER: Please note my exception,
21 Your Honor.

22 JUDGE ROUSH: Yes, sir. All right, I'm

1 going to take a moment to organize these instructions
2 into some kind of logical sequence. And if,
3 Mr. Axelson, if could you confer with your client and
4 let me know about instruction "G."

5 MR. AXELSON: All right, I will do that
6 right now. Thank you, Judge.

7 JUDGE ROUSH: Also, I tend to take a
8 morning recess before instructions are given. So you
9 can take a moment and walk around while the Court is
10 adjourned.

11

- - -

12 (Recessed at 11:24 o'clock a.m)

13 (Reconvened at 11:26 o'clock a.m)

14

- - -

15 MR. AXELSON: Judge, I'm going to withdraw
16 the instruction on mentioning the amount sued for. I
17 will not mention the amount sued for.

18 JUDGE ROUSH: In the closing arguments, is
19 that correct?

20 MR. SCHROEDER: Agreed.

21 JUDGE ROUSH: Instruction "C," which I
22 granted, seems to be duplicative of the issues

1 instruction.

2 MR. SCHROEDER: "C?"

3 JUDGE ROUSH: "In the greater weight of the
4 evidence that the Defendants' negligence proximately
5 caused the injury to the Plaintiff."

6 It is exactly the same.

7 MR. AXELSON: It does, Your Honor. I
8 proffer the simpler one.

9 JUDGE ROUSH: "1, were the Defendants
10 negligent. 2, if they were these issues, Plaintiff
11 has the burden of prove."

12 I guess it tells the Jury that the burden
13 is the greater weight of the evidence.

14 MR. SCHROEDER: That's --

15 JUDGE ROUSH: I guess that's the only thing
16 that that adds. I think that would be better to say
17 because if there are some issues, I guess -- when a
18 party has the burden of proof on an issue, the party
19 must prove that issue by the greater weight of the
20 evidence. And then go into instruction 3, which
21 defines the greater weight of the evidence.

22 MR. AXELSON: That would satisfy me, Your

1 Honor.

2 JUDGE ROUSH: Well, let me take instruction
3 3 and add a new paragraph. All right.

4 I have added a new paragraph at the
5 beginning of instruction 3 that says, "When a party
6 has the burden of proof on an issue, that issue must
7 be proven by the greater weight of the evidence. The
8 greater weight of the evidence is sometimes called
9 blah, blah, blah."

10 Is that acceptable, Counsel?

11 MR. SCHROEDER: Could you say it one more
12 time, Your Honor?

13 JUDGE ROUSH: "When a party has a burden of
14 proof on an issue, that issue must be proven by the
15 greater weight of the evidence. The greater weight of
16 the evidence is sometimes called the preponderance of
17 the evidence, which is that evidence which you find
18 more persuasive. The testimony of one witness whom
19 you believe is the greater weight of the evidence."

20 MR. AXELSON: So, you have essentially
21 combined "B" and "C?"

22 JUDGE ROUSH: "C" and 3 and made "C" just

1 single out Mr. Clark and says what his burden is.
2 Where the issues instruction, which is "L" -- no,
3 that's the finding instruction.

4 The issue instruction, which is "K," finds
5 the issues more even-handedly given that I am
6 instructing the Jury on contributory negligence.

7 Do you all see the method to my madness?

8 MR. AXELSON: I believe so, Judge.

9 JUDGE ROUSH: Any objection to this
10 revision?

11 MR. SCHROEDER: No, Your Honor.

12 JUDGE ROUSH: It's granted. Does anybody
13 have the cite for old instruction 3, the greater
14 weight of the evidence?

15 MR. AXELSON: Old instruction 3 is Virginia
16 Model of Jury Instructions, 3.100.

17 JUDGE ROUSH: All right. Let's go off the
18 record here and take our morning break and I will
19 continue to organize these.

20

- - -

21 (Recessed at 11:31 o'clock a.m.)

22 (Reconvened at 11:51 o'clock a.m.)

1

- - -

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

JUDGE ROUSH: All right. Let me go and give Counsel the order I intend to read the instructions, and you can double check me.

First is instruction number 1, credibility instruction. Second is number 2, not to base the verdict on similar bias or guesswork. Next is "K," the issues instructions.

Next is "L," the finding instruction. Next is 3, the burden of proof and definition of greater weight of the evidence. Next is "U," the definition of proximate cause.

Next is "M," the fact that there was an accident that allowed the Plaintiff to recover. Next is "N," the definition of negligence and 17, the definition of invitee.

Then 6, the duty to an invitee. Next is 7, what the invitee has a right to assume. Next is "R," the duty to a trespasser. Next is "S," the definition of willful and wanton conduct.

Next is "T," the actual constructive knowledge instruction. Then comes 12, what I would

1 call the egg shell Plaintiff instruction. Next is
2 "X," contributory negligence. "V," definition of
3 contributory negligence. 11 is the corollary to the
4 other instruction, the fact that there was an accident
5 doesn't mean that the Plaintiff was contributorily
6 negligent. Next is "W," to comparative negligence.

7 Then we get into the series of damage
8 instructions. 13, the itemized damage instructions.
9 "Z," the fact that the Plaintiff is not required to
10 proof his damage with mathematical certainty. "F,"
11 the duty minimizes. Next is 16, life expectancy.

12 Next is "H," the expert witness
13 instruction, and 9, don't consider a matter that was
14 rejected or stricken by the Court.

15 Have I missed any? Or other than the ones
16 that were denied or withdrawn?

17 MR. SCHROEDER: I don't think so.

18 JUDGE ROUSH: All right. Mr. Koerner, I
19 have forgotten your request. Will we be able to take
20 care of that now?

21 MR. KOERNER: If you can, we need a
22 second --

1 JUDGE ROUSH: All right, we are going to
2 take another very brief recess, and I will be right
3 back. Everybody just stay put.

4 - - -

5 (Recessed at 11:57 o'clock a.m.)

6 (Reconvened at 12:00 o'clock p.m.)

7 - - -

8 JUDGE ROUSH: Mr. Koerner, do you need a
9 drink of water?

10 MR. KOERNER: Yes, please.

11 JUDGE ROUSH: Would Counsel like a drink of
12 water before closing arguments or --

13 MR. AXELSON: I would like to have a cup of
14 water that I can sit here in case I talk too much.
15 Thank you.

16 JUDGE ROUSH: Well, I don't want to
17 encourage you to do that.

18 MR. SCHROEDER: Thank you.

19 JUDGE ROUSH: All right, let's bring back
20 the Jury for instructions.

21 - - -

22 (Jury returned to the Courtroom at 12:01

1 o'clock p.m.)

2

- - -

3

JUDGE ROUSH: Welcome back, Ladies and
4 Gentlemen of the Jury. Again, I apologize. Things
5 are taking longer than I thought, it always happens.
6 One time yesterday I told you I would only take a
7 second, but instructions took a little bit longer than
8 I anticipated.

9

But we have now finished going over all the
10 instructions and I am about to read to you the
11 instructions of law that will govern your
12 deliberations in this case. I ask that you play close
13 attention to them.

14

However, don't concern yourself if you miss
15 them or can't hear because you will be able to take
16 the written instructions back into the jury room with
17 you.

18

When you get the instructions back into the
19 jury room, you will see that some of them are lettered
20 and some of them are numbered and not necessarily in
21 numerical or alphabetical sequence. Don't concern
22 yourself with that. I can assure this is a complete

1 set of instructions and you are not missing any.

2 Also, you will notice that the instructions
3 may appear to be contradictory. That's because I
4 cannot predict what your findings of the fact are
5 going to be in this case. And as I told you the first
6 day, you are the sole determinant of the fact of this
7 case.

8 It is my duty as Judge to instruct you
9 about the Plaintiff's theory of the case and the
10 Defendants' theory of the case. So, that's why they
11 might appear to be inconsistent and that is one of
12 your jobs as jurors to sort this out.

13 I'm going to give you one general
14 instruction in the beginning. Some of the
15 instructions are worded in terms as to whether you
16 find against either or both of the Defendants.

17 Counsel and I have agreed there is no
18 evidence for you to separate out the owner of the Mall
19 versus the manager of the Mall. You are just to treat
20 both Defendants as a group. You are either going to
21 find for the Plaintiff or the Defendants.

22 If you find for the Plaintiff, don't try to

1 separate out whether one Defendant was negligent and
2 not another. If you make an award, don't try to
3 proportion your award between the Defendants. Just
4 consider the Defendants as if they were one entity.

5 So, with that general instruction, I'm now
6 going to give you more specific instructions and I'm
7 going to take care to read them to make sure that I
8 don't miss anything.

9

- - -

10 (The following instructions were read to
11 the Jury.)

12

- - -

13 JUDGE ROUSH: The Court instructs the Jury
14 that you are the judges of the facts, the credibility
15 of the witnesses, and the weight of the evidence. You
16 may consider the appearance and manner of the
17 witnesses on the stand, their intelligence, their
18 opportunity for knowing the truth and for having
19 observed the things about which they have testified,
20 their interest in the outcome of the case, their bias,
21 and if any have been shown, their prior inconsistent
22 statements of whether they had knowingly testified

1 untruthfully as to any material facts in this case.

2 You may not arbitrarily disregard
3 believable testimony of a witness. However, after you
4 have considered all of the evidence in the case, you
5 may accept all or just part of the testimony of a
6 witness as you think proper.

7 You are entitled to use your common sense
8 in judging any testimony. From these things and all
9 of the other circumstances of the case, you may
10 determine which witnesses are more believable and
11 weigh their testimony accordingly.

12 You must not base your verdict in any way
13 upon sympathy, bias, guesswork or speculation. Your
14 verdict must be based solely upon the evidence and the
15 instructions of the Court.

16 The issues in this case are 1, were the
17 Defendants negligent. 2, if the Defendants were
18 negligent, was their negligence the proximate cause of
19 the accident. On these issues, the Plaintiff has the
20 burden of proof.

21 Other issues in this case are 3, was the
22 Plaintiff negligent. 4, if he was negligent, was his

1 negligence a proximate cause of the case. In these
2 issues Defendants have the burden of proof.

3 The last issue of this case is 5, if the
4 Plaintiff is entitled to recover, what is the amount
5 of his damages. On this issue the Plaintiff has the
6 burden of proof. Your verdict must be based on the
7 facts as you find them and in the law contained in all
8 of these instructions. Your decision on these issues
9 must be governed by the instructions that follow.

10 You shall find your verdict for the
11 Plaintiff and against the Defendants if the Plaintiff
12 has proved by a greater weight of the evidence that 1,
13 the Defendants were negligent and 2, the Defendants'
14 negligence was the proximate cause of the Plaintiff's
15 accident and damages.

16 You shall find your verdict for the
17 Defendants if, 1, the Plaintiff has failed to prove
18 either negligence or proximate cause, or 2, if you
19 find by the greater weight of the evidence that the
20 Plaintiff was contributorily negligent and that his
21 contributory negligence was a proximate cause of the
22 accident.

1 When a party has the burden of proof on an
2 issue, that issue must be proved by the greater weight
3 of the evidence. The greater weight of the evidence
4 is sometimes called preponderance of the evidence. It
5 is that evidence which you find more persuasive. The
6 testimony of one witness whom you believe can have the
7 greater weight of the evidence.

8 A proximate cause of an accident, injury,
9 or damage is a cause which in natural and continuous
10 sequence produces the accident or injury or damage.
11 It is a cause without which the accident, injury, or
12 damage would not have occurred.

13 The fact that there was an accident and the
14 Plaintiff was injured does not, of itself, entitle the
15 Plaintiff to recover. The Plaintiff has the burden of
16 proofing by the greater weight of the evidence that
17 the Defendant was negligent and that his negligence
18 caused the Plaintiff's injuries.

19

- - -

20 JUDGE ROUSH: That actually is a good point
21 to say -- it says Defendants were negligent, singular
22 -- I will make those changes -- "And that their

1 negligence caused the Plaintiff's injuries." Any time
2 I refer to Defendant or Defendants, you know I'm
3 talking about both Franconia Associates and the Fisher
4 Group.

5 - - -

6 (The reading of instructions to the Jury
7 continue.)

8 - - -

9 JUDGE ROUSH: Negligence is the breach of a
10 duty of ordinary care owed to another. Ordinary care
11 is the care a reasonable person would have used under
12 the circumstances of this case. The scope of the duty
13 of care in this case is determined by Algernon Clark's
14 status as either an invitee or a trespasser at the
15 Defendants' property at the time that the accident
16 occurred.

17 An invitee is one that visits premises
18 lawfully at the invitation of the owner or occupant.
19 The Court instructs the Jury that Mr. Clark was an
20 invitee of the Defendants unless he exceeded the scope
21 of his invitation. If an invitee uses the premises in
22 a way that exceeds the scope of the invitation to him,

1 he ceases to be an invitee and becomes a trespasser.

2 An occupant of a premises has the duty of
3 an invitee, 1, to use ordinary care to have the
4 premises in a reasonably safe condition for an
5 invitee's use consistent with the invitation. But an
6 occupant does not guarantee an invitee's safety.

7 And 2, to use ordinary care to warn invitee
8 of any unsafe condition which the occupant knows or by
9 use of ordinary care should know about, except if an
10 occupant has no duty to warn an invitee of an unsafe
11 condition which is open and obvious for a person using
12 ordinary care for his own safety. If an occupant
13 fails to perform either of both of these duties, then
14 he was negligent.

15 An invitee has a right to assume that the
16 premises are reasonably safe for his visit. That
17 assumption does not apply, however, if the invitee
18 uses the premises that exceeds the scope of the
19 invitation.

20 The Defendants have a duty not to willfully
21 or wantonly cause injury to a trespasser. An occupant
22 of a premises has no duty to a trespasser to keep his

1 premises in a safe and civil condition for the
2 trespasser's use. Willful and wanton conduct is
3 acting consciously and in disregard of another
4 person's right or acting with the reckless
5 indifference to the consequences to another person
6 when the Defendant is aware of his conduct and also
7 aware from his knowledge of existing circumstances and
8 conditions that his conduct would probably result in
9 injury to another.

10 In order to hold the Defendants liable for
11 negligence, the Plaintiff must prove by a greater
12 weight of the evidence that prior to the Plaintiff's
13 injury, the Defendant has knowledge of the dangerous
14 condition which Algernon Clark contends caused his
15 injury. Such knowledge may be either actual or
16 constructive.

17 Actual knowledge of this by any of the
18 Defendants or any of their employees or agents
19 actually knew of the dangerous condition.
20 Constructive knowledge exists when the dangerous
21 condition exists for such a length of time as to make
22 it the Defendants' duty in the exercise of ordinary

1 care to have discovered the condition.

2 If you believe from the evidence and the
3 other instructions from the Court that the Defendant
4 is liable, then he is liable for all of the injurious
5 consequences to the Plaintiff which naturally resulted
6 from the Defendants' act, and is immaterial that all
7 of these consequences might not reasonably have been
8 expected to result.

9 Now, in this case the Defendant claims the
10 Plaintiff was contributorily negligent. When the
11 Defendant claims contributory negligence as a defense,
12 he has the burden of proofing by the great weight of
13 the evidence that the Plaintiff was negligent and that
14 this negligence was the proximate cause of Plaintiff's
15 injuries.

16 Contributory negligence may be shown by the
17 Defendants' evidence or by the Plaintiff's evidence.
18 Contributory negligence is the failure of the
19 Plaintiff to act as a reasonable person would have
20 acted for his own safety under the circumstances of
21 this case.

22 When the Defendants rely on the defense of

1 contributory negligence, the fact that there was an
2 accident and that the Plaintiff was injured does not
3 of itself prove that the Plaintiff was contributorily
4 negligent. The Defendants have the burden of proving
5 by the greater weight of the evidence that the
6 Plaintiff was contributorily negligent.

7 If you find from the greater weight of the
8 evidence that both the Plaintiff and the Defendants
9 were negligent and that their negligence proximately
10 contributed to the accident, you may not compare the
11 negligence of the parties. Any negligence of the
12 Plaintiff which is a proximate cause of the accident
13 will bar the Plaintiff from recovering.

14 If you find your verdict for the Plaintiff,
15 then in determining the damages to which he is
16 entitled, you may consider any of the following which
17 you believe by the greater weight of the evidence is
18 caused by the negligence of the Defendant. 1, any
19 bodily injury he sustained and their effect on his
20 health according to their degree and probable
21 duration. 2, any physical pain he suffered in the
22 past and any that he may reasonably be expected to

1 suffer in the future. 3, any inconvenience caused in
2 the past and any that probably will be caused in the
3 future. And 4, any medical expenses incurred in the
4 past. Your verdict should be for such sum as would
5 fully and fairly compensate the Plaintiff for the
6 damages sustained as a result of the Defendants'
7 negligence.

8 The burden is upon the Plaintiff to prove
9 by the greater weight of the evidence each item of
10 damage he claims and to prove that each item was
11 caused by the Defendants' negligence. He is not
12 required to prove the exact amount of his damages, but
13 he must show sufficient facts and circumstances to
14 permit you to make a reasonable estimate of each item.
15 If the Plaintiff fails to do so, then he cannot
16 recover for that item.

17 The Plaintiff, Algernon Clark, had a duty
18 to minimize his damages. If you find that Algernon
19 Clark had not acted reasonably to minimize his damages
20 and that as a result they increased, then he cannot
21 recover for the amount by which they increased.

22 You may assume that the life expectancy of

1 the Plaintiff, Algernon Clark, is 38.1 years.

2 In considering the weight to be given to
3 the testimony of an expert witness, you should
4 consider the basis it was obtained and the manner by
5 which he arrived at it and the underlying facts and
6 data upon which he relied.

7 You must not consider any matter that was
8 rejected or stricken by the Court. It is not evidence
9 and it should be disregarded.

10 - - -

11 JUDGE ROUSH: That concludes the
12 instructions.

13 Mr. Axelson, do you want to make a closing
14 argument?

15 MR. AXELSON: I do, Your Honor. Thank you.

16 The case is almost over. For me, the case
17 is going to be over as soon as I talk to you 2 times.

18 Just so that you understand, the burden is
19 on the Plaintiff to prove the case. And so I'm
20 permitted to make a statement to you, a closing
21 statement; Mr. Schroeder will talk to you, and then
22 I'm permitted to talk to you again. I will try to

1 make the second one especially brief, because I know
2 by that point in time you will be eager to go back and
3 start doing your job.

4 Now, I'm going to talk about 4 things in my
5 closing statement, 4 different areas. First of all,
6 I'm going to talk about what happened, then about what
7 was wrong with the door, the third thing I am going to
8 talk about is some of the legal theories that are
9 involved in the case, especially the contributory
10 negligence case, and then I'm going to talk about
11 Mr. Clark's damages. That will give you some idea of
12 where I'm going today.

13 What happened in this case is especially
14 critical and I think the facts that you have heard
15 fall into 2 different general categories. There are
16 the uncontradicted facts and then there are the things
17 that Mr. Schroeder and I disagree on, that we feel the
18 testimony went one way or the other.

19 The point that I want to make to you is
20 there were a large number of uncontradicted facts.
21 And the uncontradicted facts are like sign posts that
22 you have to keep coming back to. No matter how I

1 argue the case happened, no matter that I say I think
2 this is the way that the evidence went, sooner or
3 later I have to come back to those uncontradicted
4 facts.

5 For example, on April 25, 1993 at about
6 4:45 in the afternoon Joseph Hamilton stole money from
7 the Roy Rogers in the Springfield Mall, he ran past
8 Elegant Nails where Mr. Clark was working, Mr. Clark
9 joined in the pursuit which led to him going through
10 entrance number 3 in the Mall.

11 Clark was in good health at the time.
12 These are absolutely agreed upon by both sides.
13 Nobody has said that this didn't happen on April 25th,
14 nobody has said that Clark was in bad health at the
15 time, nobody has said that Roy's wasn't robbed, nobody
16 has said that he didn't go out entrance number 3.
17 Those are all uncontradicted facts.

18 While still in pursuit of Hamilton,
19 Mr. Clark attempted to leave the Mall through the left
20 most door of entrance number 3. Nobody contradicts
21 that.

22 Shortly after that, Mr. Clark returned to

1 Elegant Nails, his place of employment. And just so
2 we are all clear on this, you have seen this more
3 times than you care to at this point, we are talking
4 about the Elegant Nails out and around Taco Laredo and
5 went through the left most door.

6 Shortly after that, he was coming back to
7 his place of employment; Roy Rogers is right there.
8 Nobody contradicts that fact.

9 While he was on his way back to Elegant
10 Nails, walking back, Mr. Peter Schubring, who was the
11 manager of the Roy Rogers, sees him limping. Nobody
12 contradicts that. Mr. Schubring saw him immediately
13 after this incident and he is limping. Uncontradicted
14 fact.

15 He reported to Jackie Figueroa immediately
16 after this incident, "I got my foot caught in the
17 door." Nobody contradicts that.

18 That's all that occurred on the 25th. None
19 of those facts are contradicted.

20 On the 27th, uncontradicted fact, he makes
21 a report to the Mall and it's one of these daily logs.
22 Finally catches up to the Mall folks. Tells them the

1 same thing. "I was chasing the thief, I went out
2 through the door, my leg got caught in the door."

3 You can read the report, one of the
4 exhibits in the case, uncontradicted fact.

5 He says the same thing on the 29th of April
6 at the emergency room. The emergency room report was
7 admitted into evidence, he tells them exactly the same
8 thing. No contradiction there.

9 He was seen on May 6th, which is all of a
10 week later, by Dr. Smith. Dr. Smith is the
11 chiropractor. Dr. Smith has a report that was taken
12 from him, handwritten out by Mr. Clark; he tells
13 exactly the same thing. "I was chasing the robbery
14 suspect, I went out through the door, my foot got
15 caught in the door and that's how my foot got hurt."

16 Dr. Smith, uncontradicted testimony,
17 testified that he observed a lump, I believe it was --
18 I'm not sure that that was the word that he used -- at
19 the base of his Achilles tendon. Dr. Smith further
20 testified that he saw scrapes and bruises that were
21 consistent with the fall that Mr. Clark had described.
22 Uncontradicted fact.

1 On June 4th, approximately, Dr. Smith,
2 because the ankle was not healing up properly,
3 referred Mr. Clark for an MRI; nobody argues with
4 that. The MRI discloses a frank tear of the Achilles
5 tendon, and subsequently Mr. Clark was operated on by
6 Dr. Cabrera to surgically repair the ruptured Achilles
7 tendon.

8 Now, any theory that I advance has got to
9 tie into all of these facts. Any explanation that I
10 give to you as to what happened through this entire
11 course of events has got to fit all of those facts.

12 Similarly, what Mr. Schroeder tells you he
13 thinks happened in the case has got to fit all of
14 these facts, for they are all uncontradicted.

15 Now, what is the Plaintiff's theory in the
16 case? The missing facts, the things that we do have
17 an argument about or have not covered.

18 Well, the missing facts are that the door
19 swung back very quickly. Mr. Clark testified to that.
20 Mr. Clark tells us the door closed in less than a
21 second, less than half a step, I believe was his
22 phrasing, and caught his right foot. Our evidence

1 showed that Mr. Clark's right foot suffered a ruptured
2 Achilles tendon at that point.

3 Now, here is one of those contradicted
4 facts. Dr. Cabrera tell you, "I believe to a
5 reasonable medical certainty that a direct impact can
6 cause a ruptured Achilles tendon, especially when the
7 foot is hyperextended." Example of contradiction,
8 Dr. Gordon says "I don't think that can happen."

9 But what Dr. Gordon tells you is if you
10 have your foot in dorsi flexion -- dorsi flexion you
11 will remember means the toe being up towards the
12 knee -- if you have your foot in dorsi flexion and you
13 were forced to suddenly move your foot, that could
14 cause an Achilles tendon rupture. And what he also
15 tells you is something that might cause you to do that
16 could be the door striking you.

17 All right. I don't really care whether you
18 want to say the door itself hitting the Achilles
19 tendon or the side of the foot caused the rupture, or
20 whether you want to say the door hitting the side of
21 the foot made Mr. Clark jerk his dorsi flexed
22 hyperextended Achilles tendon out of the way and as a

1 result, that caused the ruptured Achilles tendon.

2 Frankly, I don't think it makes any
3 difference whatsoever. Under both circumstances, what
4 happens is the door hits Mr. Clark and he winds up
5 with a ruptured Achilles tendon. That's an example of
6 a contradicted fact.

7 Okay, to go on. Was the door
8 malfunctioning? Now, here I want to talk for a minute
9 about what was wrong with the door.

10 What was wrong with this particular door?
11 You have heard a great deal of evidence about the
12 door. And I want you to focus your attention on 2
13 things. One is the substitution of the ROTON hinge
14 and the other is the closer itself. Now, if you will
15 bear with me I have got to go a long way away, because
16 this is not movable. We have a little white board
17 here.

18 Now, a really simple diagram will
19 demonstrate to you exactly what the impact of changing
20 the hinge has in this particular case. That's the
21 original door (indicating) sitting in the frame closed
22 up. This is the way the door could originally open up

1 (indicating), 90 degrees. You will recall the
2 witnesses testified that most of the other doors in
3 the Mall would open to 90 degrees.

4 You can look at the photographs there and
5 you can see the little closer arm on the closer. And
6 when this closer arm reaches the end of the track, the
7 door stops; that's as far as it can go. This is the
8 original pivot point of the door (indicating).

9 Now, here is what happened. We were going
10 to replace this pivot point with a different pivot
11 point that is further back this way and further out.
12 That's the ROTON hinge. So now, the door is rotating
13 about this point (indicating) and when the door goes
14 to open -- and I exaggerate this to make a point -- it
15 opens that far.

16 Now, what's the significance of that? If I
17 push the door open, instead of the door having to go
18 this far and then come back, the door is only going to
19 go this far (indicating) and then come back. That's
20 the significance of the replacement of the ROTON
21 hinge. The door obviously will take longer to go to
22 90 degrees and come back than it will to go to 75

1 degrees and come back. And remember that Mr. Embrey
2 testified that this door will only go to 75 degrees.

3 Now, the second piece of what was wrong
4 with the door is very simple. The hydraulic portions
5 of the closer were gone. They were not functioning
6 properly on the day that Mr. Clark was injured.

7 Now, how do we know that? Well, the first
8 and most obvious answer is that the door cannot go all
9 the way to 75 degrees and get back quickly enough to
10 grab Mr. Clark's ankle if these hydraulics are
11 working. If this closer is functioning perfectly,
12 then it has got to take longer than that.

13 If the closer is working perfectly under
14 ANSI standards, it's supposed to take 3 to 6 seconds.
15 Under the maintenance folks' definition, I believe you
16 would call it, it took 4 to 5 seconds for it to close.

17 That cannot be the right time for
18 Mr. Clark's ankle to have been caught. And the only
19 explanation if the door is going to go all the way
20 open and is going to go through the back check portion
21 of it through here, (indicating) which is supposed to
22 slow it down, and through the closing control portion

1 of it, and through the latching control portion of it
2 quickly enough to grab Mr. Clark's ankle, the only
3 explanation is those things were not working.

4 Now, one of the things we have to show to
5 you in order to prove negligence is we have to
6 demonstrate that the Defendants knew or should have
7 known, that they had ample time to have known, about
8 these defects in order that they would have had an
9 opportunity to correct them.

10 How long did the Defendants need to know
11 about this? Well, there is a weekly check that is
12 supposed to be made, according to Mr. Robinson, of the
13 doors. A weekly exterior door check.

14 Well, we have here one weekly exterior door
15 check and this is the only one that we have got. This
16 is the only thing that you see in the way of an
17 exterior door check. And by the the way, this one is
18 dated March 31, which is about 3 and a half weeks
19 before this injury, and it reflects that there is
20 something wrong with the door.

21 Now, I don't know what this means. "Right
22 doors latch, locks, difficult to secure." But I do

1 find it interesting that it has the word "latch" in
2 it, which is this last little bit there. So
3 apparently, somebody was referring to a problem with
4 the latching.

5 I also want to direct your attention to the
6 operations bulletin. Now, this is about 3 weeks older
7 than that. This was filed and prepared by
8 Mr. Robinson. Mr. Robinson reports up at entrance 3
9 we have some problems with that one door closing, you
10 need to work on it so that it closes fairly tight.
11 Unfortunately, we have a lot of draft in here and we
12 have had numerous compliments from Taco Laredo.

13 There is another indication that there was
14 some problem with the door. Now, what was the
15 solution to that particular problem? The solution to
16 that problem was not to address the closer; the
17 solution to that problem is we replace the hinge
18 without addressing the closer.

19 Even more important than that, something
20 else that is even more important than addressing the
21 Defendants' opportunity to know that there was a
22 problem with this door, is the testimony of Steve

1 Johnson.

2 Now, Steve Johnson -- without Steve
3 Johnson, frankly, we would have no case. Because we
4 wouldn't be able to show you how far back, how clearly
5 far back the Defendants could have had an opportunity
6 to recognize this problem.

7 Mr. Johnson goes through that door on a
8 daily basis. Mr. Johnson is a mail carrier. It's his
9 responsibility to deliver the mail to Springfield
10 Mall. And what did Mr. Johnson tell you? Mr. Johnson
11 said in no uncertain terms and completely
12 uncontradicted that there was a problem with that
13 door, that he avoided that door. That he stopped
14 going through that door because of the difficulties
15 that he had with it.

16 And what were those difficulties? The
17 difficulties that Mr. Johnson identified to you were
18 the door would spring back on you, it would jump back
19 on you. In other words, it would go quickly through
20 this back check closing control and latching control
21 cycle. How did he respond to it? "Because of the
22 problem with that door, I stopped using it." Did you

1 ever see it affect anybody else? "Yes. I would see
2 people going through that door and all of a sudden
3 they would turn around and look at it and say why did
4 that door close so quickly on me?"

5 That was Mr. Johnson's testimony, totally
6 uncontradicted. More to the point, when did
7 Mr. Johnson say this problem began? And he said it
8 was several weeks. Not days, not hours; several weeks
9 before Allan Clark was injured.

10 Now, that's plenty of opportunity to
11 recognize the problem and do something about it.

12 Now, the Defendants want you to believe
13 that there was nothing wrong with this door, there was
14 no malfunction to the door. In response to that, I
15 want to submit that you take a look at this
16 photograph.

17 This photograph was taken on April 29th
18 1993. That's a Thursday. The injury occurred on
19 Sunday the 25th, this is a Thursday. The maintenance
20 routine, as you heard from the Defendants, issued
21 there on Mondays and Fridays to tighten the bolts.

22 We have got 2 maintenance people in this

1 picture. It's a Thursday. Why are they there?

2 No explanation from the Defendants. They
3 are there to correct some kind of a problem. Well,
4 isn't it a coincidence they were out there the very
5 day that Allan Clark is told "sue me" and he starts
6 making efforts to try and collect some evidence to
7 this case?

8 And what does the Mall do? It hustles the
9 maintenance people down there to take care of the door
10 on a day when they wouldn't normally be there.

11 As if that were not enough, although they
12 still insist there is nothing wrong with the door, we
13 have ample evidence that follows on from that; that
14 the door continued to be a problem. We have a whole
15 group of photographs here taken on May 4th. Picking
16 one at random; May 4th, Plaintiff's Exhibit Number
17 23A. Big sign on door, "Door broken, do not use."

18 They had some explanation, "That's the sign
19 that we use whenever we close and lock the door."
20 That's fine; why did you close and lock the door? I
21 would say the sign speaks for itself.

22 May 4th, one would assume that they would

1 correct whatever problem existed with the door. And
2 what do we have following that? We have got
3 Dr. Smith. Dr. Smith didn't see Mr. Clark until May
4 6th. Couple of days after that, he goes to the Mall
5 to take a look at the door. He wants to understand
6 how this occurred. And what does he do? He says, "I
7 pushed on the door, gave it a push." And what did it
8 do? "Jumped right back at me."

9 Apparently as late as May 8th, they had not
10 cured whatever the problem was. That problem
11 continued to exist, existed weeks before Allan Clark
12 was injured and they still had not corrected it by May
13 8th.

14 Okay. There is one other indication, and
15 it's a little bit subtler, as to what the problem was
16 with this door. Mr. Embrey has testified to you that
17 they went around on a regular basis on Mondays and
18 Fridays, took the cover plate off and tightened the
19 bolts. And yet it never occurred to anyone to ask,
20 why are these bolts coming loose? Why do we have to
21 continuously tighten these bolts?

22 Well, Mr. Funk gave you a major clue as to

1 that. What he told you was the bolts work loose
2 because of stress and vibration.

3 Okay, following up on that, what is putting
4 stress and vibration on this door? Well, you have a
5 device on the door called a closer and the closer is
6 designed to reduce the stress and vibration. The
7 whole point, for example, of the back check is to keep
8 the door from swinging all of the way open and hitting
9 the full stop position, because that causes stress and
10 vibration.

11 The point is the fact that the bolts were
12 coming loose is a major clue to the fact that the back
13 check is not working.

14 And I asked Mr. Embrey -- you will remember
15 that he was the last witness -- I asked him did you
16 check the back check? Was that part of your
17 maintenance routine? "No." Was it something you
18 could do anything about? "No." That's why he didn't
19 check it.

20 The fact that the bolts were coming loose
21 on a regular basis is because the door was going all
22 the way open to the full stop position and suffering

1 from the stress and vibration at that point.

2 Well, what should that have told the Mall?

3 We have got a problem with the door and the closer.

4 In fact, they had 2 major problems. One is people
5 were going out through the door and expecting it to go
6 to 90 degrees are pushing it until it gets 75 degrees
7 and hits the dead stop position. That's point one.

8 Point 2 is the back check is not kicking in
9 to keep it from hitting that dead stop position. Now,
10 if they had people there, like Mr. Sporkin, who is a
11 certified door consultant, who could have looked at it
12 and said, "Oh, well, okay, I know what the problem
13 here is."

14 He would have told them, "Look, it's your
15 back check is shot. Your door is opening and hitting
16 the dead stop position, it's causing stress and
17 vibration, it's causing the bolts to loosen; you need
18 to do something about the closer."

19 That's another indication that there was a
20 serious problem with this closer and that it had
21 existed for a long time.

22 How do you know that the problem with the

1 closer existed for a long time? You can go back to
2 these photographs. Look at the door, look at the
3 hinge. There is all of these little marks on the
4 hinge and Mr. Funk told you what he thought those
5 marks were. Those marks were prying the cover plate
6 off.

7 Now, there is no way of telling how many
8 times you have to use a pry to get the cover plate off
9 once. But there is an awful lot of marks there. And
10 I would submit to you that they had to take that cover
11 plate off any number of times.

12 Now, remember that this hinge was replaced
13 sometime after March 11. It got awfully beat up by
14 having to tighten those bolts between March 11th and
15 April 29th.

16 Now, as far as maintenance; maintenance of
17 the door. It's very difficult for us to show you what
18 was done. The reason is there are no records. The
19 Mall has maintained that. They don't keep track of
20 what it is they have done, what the problems were, how
21 they corrected the problems. They don't keep a log,
22 they don't have an instruction manual that tells

1 people who are working on them how to fix these
2 problems. There is no instructional manual that tells
3 them what to look for.

4 So, it's very difficult for us to go back
5 and reconstruct what has been done. Mr. Robinson
6 wants you to believe there was daily checking.
7 Interesting fact that Mr. Robinson wants you to
8 believe that. Go into his operation bulletins, one of
9 the comments that he read to you when he was on the
10 stand, "We were supposed to be going and checking
11 these exterior doors on a daily basis, I don't believe
12 that we are doing this."

13 That's from the management. He is telling
14 you, although he wants you to believe there is daily
15 checking, they are not doing that. Something that he,
16 as a manager, was getting on them about.

17 All right. Let's talk about the defense
18 theory. Our theory is Mr. Clark was running, he comes
19 to the door, he slow down to push it open, he pushes
20 it open, the door swings open, swings back and catches
21 his foot and ruptures the tendon. He spends the next
22 couple of weeks -- excuse me, the next 4 days --

1 before he goes to the emergency room, gets treated at
2 the emergency room, sees Dr. Smith for a while and
3 then winds up with Dr. Cabrera.

4 The question I have for the defense is what
5 is their theory? Mr. Schroeder is going to get up
6 here and talk about -- he has already told you he is
7 going to talk about showing you how it was physically
8 impossible for this to have happened. He is going to
9 tell you it didn't happen because of what Jackie
10 Figueroa had to say.

11 My question to Mr. Schroeder is, what did
12 happen? Don't talk about the little individual pieces
13 that you may not be happy with, give us an explanation
14 for what did happen. Give us an explanation that is
15 consistent with the known facts and not inconsistent
16 with the known facts.

17 For example, Mr. Schroeder wants to talk
18 about how likely it is that Achilles tendons
19 spontaneously rupture. He had his doctor testify that
20 Achilles tendon ruptures spontaneously occur.

21 Okay. Let's try out his theory that this
22 was a spontaneous rupture. Mr. Clark is running

1 towards the door, he slow down, he pushes the door
2 open, he starts to go through, and this door -- which
3 is defective -- swings back and happens to hit his
4 foot at the moment that his Achilles tendon
5 spontaneously ruptures.

6 Now, Ladies and Gentlemen, if you going to
7 believe that kind of coincidence -- that's just beyond
8 the realm of possibility. Well, so, what is
9 Mr. Schroeder going to do about that? Well, his
10 approach is going to be there was nothing wrong with
11 the door. The only thing there that happened there
12 was a spontaneous rupture as Mr. Clark was going
13 through the door.

14 Okay, let's try that one now. Mr. Clark is
15 going through a door that there was nothing wrong
16 with. On the way back from that door having had his
17 ankle hurt or begin to hurt while he is limping back,
18 he decides I'm going to make up some story that the
19 Mall is going to be responsible for. He is going to
20 make up this story because he knows there was nothing
21 wrong with the door, because he pushed it and nothing
22 happened. This is the defense theory.

1 On his way back, he makes this story up and
2 he tells it to Jackie Figueroa. He tells it 2 days
3 later to the Mall, he tells it 4 days later to the
4 hospital emergency room folks. Mr. Clark has made up
5 this story about the door hitting his ankle when, in
6 fact, it is not so. And then somehow -- although he
7 thinks he has only got a right ankle sprain -- somehow
8 out of sheer coincidence several weeks later, that
9 very same ankle which he is hobbling around on
10 ruptures.

11 He is protecting this ankle and it ruptures
12 on its own? That's another bizarre coincidence, that
13 could not possibly have happened.

14 What I want Mr. Schroeder to do is get up
15 here and tell us a consistent theory that fits the
16 known facts that is more likely than the story that
17 Mr. Clark has told you that makes more sense than
18 that.

19 I'm going to talk about legal theories,
20 here. One of the instructions that you were read or a
21 number of the instructions that you have had read to
22 you has to do with what is called contributory

1 negligence. Now, this is another way that the defense
2 has of shotgunning us here on the case.

3 Mr. Schroeder has thrown what I call the
4 shotgun approach. He said, "Well, it didn't happen
5 and if it did happen, it's not because the door hit
6 him, and if the door, in fact, did hit him, then
7 Mr. Clark was also at fault."

8 He has just thrown every defense that he
9 can think of. One of those defenses is contributory
10 negligence. Now, contributory negligence is an old
11 doctrine in Virginia. It basically says that it takes
12 negligence to make someone liable to begin with, but
13 if the person who was injured was also negligent and
14 their negligence contributed to the injuries, then
15 they cannot recover anything.

16 And so, what Mr. Schroeder is going to talk
17 to and argue about is that Mr. Clark was
18 contributorily negligent. That his negligence also
19 contributed to the fact that he got injured.

20 My question to you is this. What was it
21 that Mr. Clark did that was contributorily negligent?
22 Mr. Schroeder is going to tell you that running

1 through the Mall is contributory negligence.

2 Well, Mr. Clark wasn't hurt because he was
3 running through the mall. The only thing that hurt
4 him was the door closing on his foot. There is
5 absolutely no evidence whatsoever that Mr. Clark did
6 anything negligent in the way that he opened the door.

7 The Mall knows those doors are going to be
8 opened in the way that Mr. Clark opened them. The
9 Mall knows that. There is a bus stop out there. They
10 know that people are going to be hurrying to catch the
11 bus. There are children that come into the Mall and
12 sometimes go outside and they know that parents are
13 going to be hurrying outside to grab their kids.
14 There are teenagers in the Mall and they know
15 teenagers are going to be horseplaying and running
16 around and they are going to go through those doors
17 quickly.

18 There is absolutely no evidence whatsoever
19 that suggests that Mr. Clark went through that door in
20 a matter that was negligent. The only testimony you
21 have is Mr. Clark's testimony that he pushed the door
22 open. Now, he gave it a push, but that door should

1 have had back check, it should have had closing
2 control, and it should have had latching control.
3 That would have kept it from coming back and hitting
4 him. There is nothing that Mr. Clark has done that is
5 contributorily negligent.

6 All right, let me touch on damages. The
7 Court has given you instructions that tells you the
8 things that you can consider in addressing damages. I
9 believe that I have a copy of it here.

10 "If you find your verdict for the
11 Plaintiff, then in determining the damages to which he
12 is entitled, you may consider any of the following
13 which you believe by the greater weight of the
14 evidence was caused by the negligence of the
15 Defendant." And then it lists 4 categories.

16 One of them is real easy. One of them is
17 medical expenses incurred in the past. We have
18 introduced a tremendous number of medical bills. They
19 total up to something more than \$23,700 of Mr. Clark's
20 medical bills. They include emergency room bills,
21 Dr. Smith's bills, Dr. Cabrera's bills, the hospital
22 bills for the surgery and the stay, the bill for the

1 second hospitalization -- excuse me, the second
2 surgery; you can total those all up. They come to
3 about \$24,000. That's one of the 4 items.

4 The other 3 items are subjective and they
5 were difficult for a Jury. I acknowledge this. You
6 are asked to put a dollar value on something that
7 really can't be measured in dollars. For example, the
8 Court has instructed you that you can award damages
9 for any bodily injuries that Mr. Clark sustained and
10 their effect on his health according to their degree
11 of probable duration.

12 That means that you have got to come up
13 with a dollar figure to compensate Mr. Clark for the
14 bodily injuries that he sustained.

15 Now, you heard the testimony from
16 Dr. Cabrera. Dr. Cabrera has told you that Mr. Clark
17 has a 40 percent permanent -- it is going to last the
18 rest of his life -- disability or impairment, excuse
19 me, of his right leg. You have got to come up with a
20 dollar figure for that.

21 "Any physical pain that he has suffered in
22 the past and any that he may reasonably be expected in

1 the future." Mr. Clark had to go through 2 surgeries,
2 he had to wear a brace, he has testified that his
3 ankle was swollen on numerous occasions, he described
4 his neck and back pain that he went and got treatment
5 for. In the event that you find for Mr. Clark, it
6 will be up to you to fix a dollar figure for that
7 damage as well.

8 The fourth one is any inconvenience caused
9 in the past and any that will probably be caused in
10 the future. Now, these things are difficult to place
11 a value on. That's one of the reasons that we have a
12 Jury system. We leave it up to the collective wisdom
13 of individuals that serve on the Jury to come up with
14 a dollar figure that will fully and fairly and
15 adequately compensate Mr. Clark for the injuries that
16 he suffered here.

17 The final thought that I want to leave you
18 with is that it is our position that Mr. Clark was
19 injured because he was being a Good Samaritan, he was
20 doing the right thing. He was doing what you would
21 want your neighbors to do, the people that you live
22 with in this world. He saw a problem, he saw a need,

1 he saw where someone else was going to be suffering,
2 and he did something; he took action.

3 Well, Mr. Schroeder is going to get up here
4 and say nobody from the Mall asked him to do it,
5 nobody told him he had to do it, we have got security
6 forces for this.

7 I would rather live in a world that has
8 Mr. Clark in it than a world where everybody steps
9 back and says, "No, I'm not going to take any action.
10 I'm not going to get involved in that."

11 Mr. Clark was not alone, he was not the
12 only person that was running after this man. That
13 spirit lives in a lot of people. That spirit lived in
14 the other people who were pursuing who were not
15 obligated to do so.

16 Mr. Clark was not doing anything that out
17 of the ordinary. It was to be expected, it was
18 normal, and as a result of the Mall's negligent
19 failure to maintain that door the way that it should
20 have been maintained, Mr. Clark has paid a heavy
21 penalty.

22 I would ask that you fully and fairly

1 compensate him for that injury.

2 Thank you.

3 JUDGE ROUSH: Thank you, Mr. Axelson.

4 Mr. Schroeder, do you want to make a closing argument?

5 MR. SCHROEDER: Yes, I do, Your Honor.

6 Afternoon, Ladies and Gentlemen. It has
7 been a long 3 days, I know that you have heard a lot
8 of testimony and argument. And as jurors, I don't
9 envy your position. You are going to have make some
10 tough decisions in the next couple of hours about the
11 facts and circumstances of this case.

12 And believe me, on behalf of everyone in
13 this courtroom, we appreciate what it is you are going
14 to be facing in working out the issues in this case in
15 the next several hours.

16 It's tougher still, too, in this case
17 especially, because we have here a Plaintiff,
18 Mr. Clark, who has certainly experienced a serious
19 injury. He has had a ruptured Achilles tendon. And
20 my client sympathizes with that fact.

21 But we are not here today to determine to
22 award Mr. Clark a prize for engaging in Good Samaritan

1 activity. He had the best intentions in going after
2 this thief, but we are here to determine whether or
3 not the Mall should be the one who pays for his
4 damages. We are here to determine whether or not it
5 was the Mall that was responsible for those damages.

6 No one here disputes that what Mr. Clark
7 did was noble in going after that thief and no one
8 here disputes that he has a serious injury. I just
9 want you to understand that up front before I get into
10 the facts of this case.

11 Now, you have had the Judge's instructions
12 on the law of this case which will help you make your
13 decisions. That should help things along somewhat.
14 And as I go through the facts of this case, I'm going
15 to be bringing up those instructions and talking about
16 them. And one of them I think that we ought to talk
17 about first is this instruction; the one where Judge
18 Raush instructed you that the fact that there was an
19 accident and the Plaintiff was injured does not, of
20 itself, entitle the Plaintiff to recover. That fact
21 alone does not entitle the Plaintiff to recover.

22 The Plaintiff has the burden of proving by

1 the greater weight of the evidence that the Defendant
2 was negligent and it was that negligence which caused
3 his injuries that he is seeking to recover from today.

4 Now, think about that phrase, the greater
5 weight of the evidence. Now, when you come into this
6 courthouse or any other, you see the little statue or
7 an engraving of the scales of justice. And it is the
8 greater weight of the evidence which tips those
9 scales. I doesn't have to be tipped a whole lot, just
10 a little bit.

11 He has to be the one to be able to tip
12 those scales in favor of his argument. And everything
13 that you hear and everything that you consider in this
14 case you have to apply that standard to, for the case
15 that he is putting on here.

16 Now, let's talk about what happened on
17 April 25th, let's talk about the accident in
18 particular. There were 3 witnesses on that day.
19 There was Mr. Clark, there was Mr. Schubring, and
20 Ms. Figueroa. Let's talk first about Allan Clark's
21 testimony.

22 Allan Clark said he took after this thief,

1 he was running to catch up with a thief who was trying
2 to get away from a group of people chasing him.
3 Mr. Clark wanted to catch up with the thief. He was
4 running as fast as he could in order to catch him.
5 And he ran through a mall, a public place, and through
6 a swinging door in order to do that.

7 And what he told you, several times, was
8 that when he went through a door he heard a boom and
9 then he fell flat on his face and protected his face
10 with his left arm. That is what he has told you about
11 what happened. He admitted he did not see the door
12 hit him when he felt it. Rather, all that he saw was
13 when he looked back after he was down on the ground,
14 he saw his foot in between the 2 doors with the rest
15 of his foot inside the Mall itself.

16 He also testified that his entire body had
17 cleared the swing path of the door before it hit his
18 right inside of his foot. He testified that it hit
19 the inside of his right foot.

20 Now, let's think about Mr. Clark's
21 testimony. Now, you heard Merrill Sporkin yesterday
22 show you that (indicating) is 75 degrees. I premarked

1 it on the protractor here, 75 degrees.

2 Mr. Axelson showed you during his argument
3 earlier today 45 degrees. There is a bit (indicating)
4 of a difference. Let's talk about 75 degrees.

5 Let's assume that these 2 yardsticks, which
6 are the exact width of the threshold in the door in
7 this case, were a door that was opened 75 degrees. A
8 full opening position that they agree is the door in
9 question. Mr. Clark said that he saw Mr. Hamilton
10 running from right to left. He was already outside
11 the door. He was running out towards the parking lot.
12 So, he decided to cut the distance between him and
13 Mr. Hamilton.

14 So instead of running through the right
15 hand set of doors, he ran through the left hand side
16 of the doors. So, Mr. Clark is coming in at this
17 angle (indicating), approximately. Let's square this
18 up.

19 Mr. Clark also testified in response to one
20 of my questions that he planted his right foot, the
21 one that got injured, at the threshold of the door.
22 He was adamant about the fact that he did not plant it

1 in front of the adjoining door. He was very certain
2 that he planted it within the area of the threshold
3 and right up against the door.

4 He also testified that he pushed the door
5 open with his arms extend. So, Mr. Clark is going
6 through the door, (indicating) he takes a step. Now,
7 if this door closes within a half second or less, it's
8 going to hit his left foot or the left side of his
9 body. So, if he didn't move at all, it hits him on
10 the left side of the body which he says that it never
11 did. So, we know that he didn't stand there and let
12 the door go, we know he moved.

13 Where can he go, what can he do to move?
14 He has to move (indicating) this way. And remember,
15 he is running. So, he has a lot of forward momentum
16 built up. So, before he can get his left side of the
17 body out of the way of the door, he has to take this
18 step (indicating). If he takes that step, how is it
19 possible that when he looks back that he sees his foot
20 between the 2 doors? His right foot -- he has already
21 taken that step.

22 How is it possible that when he opens the

1 door, his forward momentum completely stops and he
2 falls flat? What stopped his forward momentum? The
3 only thing that hit him was on the inside of the
4 ankle, according to Mr. Clark. Is that going to stop
5 the forward momentum of a man running after a thief?

6 Now, Mr. Axelson asked you, or challenged
7 me a few minutes ago, to explain why it was that
8 Mr. Clark's story is physically impossible. That's
9 why.

10 Now, he also challenged me to show how is
11 it possible, given the uncontradicted facts in Allan's
12 testimony, that this could have occurred? I will tell
13 you why. Think about the doctors' testimony. Both
14 doctors, Dr. Cabrera, the Plaintiff's doctor and the
15 Dr. Gordon, the gentleman who came here yesterday,
16 they both told you that in the vast majority of cases
17 Achilles tendon ruptures are caused by stretching the
18 Achilles tendon during running or during athletic
19 activity.

20 Remember, Allan Clark was standing around
21 at the end of work that day. And then, all of a
22 sudden, without warming up or without stretching or

1 without doing anything, he takes off at a full sprint
2 to catch a robber.

3 Now, both doctors told you that -- these
4 doctors, by the way, had 64 years of experience
5 between them -- they never in their entire experience
6 had ever heard or seen of a rupture being caused by an
7 impact. Dr. Gordon says it is just not possible.
8 Dr. Cabrera says that it is possible and the reason
9 that I think that it happened in this case is that I
10 have to believe what my client tells me.

11 Now, that's a nice sentiment, but what does
12 that have to do with his medical expertise? He has
13 put that aside just to believe what his client has
14 told him. Now, is it unusual for such an accident to
15 happen during running for a person like Mr. Clark,
16 where both doctors told you that it typically happens
17 with men in their 30s and 50s and they usually have
18 sedentary lifestyles; that is, they don't do heavy
19 work for a living.

20 That fits Mr. Clark's profile completely.
21 He was a hairdresser. He wasn't lifting heavy things.
22 He uses his legs much in the matter that many of us

1 do. And occasionally he engaged in physical activity,
2 such as the day this accident happened.

3 Moreover, both doctors agreed with one
4 thing; that is when a person with a rupture
5 experiences a rupture, they feel like they have been
6 shot or kicked. Even when they are running and no one
7 does that, they feel that. Remember, Mr. Clark did
8 not see the door actually hit his ankle. He felt it,
9 he felt something.

10 Now isn't it completely consistent with the
11 doctors' testimony that the accident happened as
12 follows. Mr. Clark is running towards the door, he
13 plants his foot, he is going through the door. Right
14 then there is a great amount of stress on that foot.
15 It's being extended. It pops, right then. He falls
16 down, he looks back and his foot is still there.

17 He felt something hit him but what is even
18 more likely is this. He did not plant his foot there.
19 He planted it back here (indicating) and when he came
20 through, he is stretching even more (indicating) and
21 at that moment it pops. His forward momentum
22 continues to carry him along, then he falls, and he

1 comes to rest with his ankle at the threshold of the
2 door. That is completely consistent with what both
3 doctors say and with what Mr. Clark has testified to.

4 Finally, the blow that Mr. Clark described
5 was to the inside of his foot. Where is the Achilles
6 tendon? It's on the back of the foot. This door was
7 coming from (indicating) this direction, from the
8 front.

9 Now, there was 2 other witnesses, only 2
10 other witnesses. Mr. Schubring, who didn't see
11 Mr. Clark go through the door, he just saw him limping
12 afterwards. Which is consistent with an injury
13 incurred while running. And then there is Jackie
14 Figueroa, who also saw Mr. Clark limping and
15 complaining about his leg.

16 But her testimony is different about how
17 the accident happened. Her testimony is that he never
18 fell. She never saw him fall. She saw him at the
19 door and stop it all of a sudden. Why would he stop
20 in the middle of chasing a thief? Why? Maybe his
21 Achilles tendon popped? What was that? And he steps
22 outside, she says, and he is still standing and then

1 he limps to go see what is going on at the bus stop.

2 Isn't that completely consistent with what
3 the doctors have said about how this accident could
4 possibly happen, how an Achilles tendon could possible
5 be ruptured? Now, it's inconsistent with what
6 Mr. Clark says about falling, but it is consistent
7 with the theory that the rupture occurred while
8 running before he came to the door.

9 And there is another question. Why would
10 Jackie Figueroa lie about what happened? She was
11 Allen's co-worker. She would give him a ride home
12 everyday. Why would she be telling a falsehood here?

13 Now, think again about what the greater
14 weight of the evidence means. Now, is there greater
15 weight of evidence in favor of the theory that the
16 tendon popped while he was running or is there greater
17 weight of evidence in favor of the theory that it was
18 the door that had to have caused this injury?

19 Well, both doctors say it is completely
20 consistent. One doctor says it's impossible for it to
21 occur any other way, that it occurred while running.
22 Both agree that in the vast majority of cases where

1 there is an Achilles tendon rupture that it occurs
2 while running. Both agree that there is never any
3 prior symptoms. You could be in apparently good
4 health and this could happen.

5 Both agree that it happens to people who
6 exactly fit the description of Mr. Clark. So it's
7 completely consistent with that. All of the evidence
8 lays in favor of that. But if you take Mr. Clark's
9 own testimony, it is completely consistent with that
10 which he saw and that which he felt.

11 He felt something happen in his ankle. The
12 doctors said that's exactly what happens when you have
13 this sort of injury. And when he looked back and saw
14 his ankle in the door, that's also consistent with him
15 popping the tendon, falling down, his forward momentum
16 carries him up to that point, and he stops and the
17 door comes to a close there. It's completely
18 consistent with that.

19 What do you have on the other side of the
20 scale? You have a theory that one, this door was not
21 operating correctly. And two, it happened -- the door
22 had to have hit the ankle in a particular way. And

1 three, the accident had to have occurred as he said
2 that it did. We have already shown that it could not
3 have happened that way because he would have had to
4 have moved his foot to get the rest of his body out of
5 the swing path of the door.

6 Now, there is something that you have to
7 consider, all of this issue about the door itself, if
8 you accept what I just told you. But let's talk about
9 the door. You have heard a lot about pivot points.
10 Do you remember Allan Funk's testimony about pivot
11 points, exhibit 35A here? Did any of you understand a
12 word of that?

13 You have heard a lot about loose bolts,
14 hinges, how far the door could have opened, this big
15 issue about 75 degrees and not 90. What does any of
16 that have to do with closing speed? Allan Clark's
17 contention here is that the door closed too fast.
18 None of the experts said that pivot points, loose
19 bolts, how far this door could open, back check; none
20 of this had anything to do with how fast the door
21 would close.

22 If the door is an issue, it's only an issue

1 because it closed too fast. Now, what evidence was
2 there that the door closed too fast? The only
3 evidence is Mr. Clark's opinion about how this
4 accident happened. He did not see the door close, he
5 just felt something. And he assumes that it was the
6 door coming back and hitting him.

7 We are not saying that Mr. Clark is not
8 telling you the truth here. That's a very logical
9 assumption to make when your ankle is injured and you
10 are lying down and you look back and see your foot
11 caught between 2 doors. That's a perfectly logical
12 assumption to make and we don't fault him for making
13 those assumptions.

14 But it is not supported by any evidence.
15 It is contradicted by the greater weight of the
16 evidence. Now, you had Allan Funk testify that if
17 this door were used under normal conditions, that it
18 could not have -- this accident could not have
19 happened unless the door closer was malfunctioning.

20 Well, the first question that I asked Allan
21 Funk on cross examination was, "You have assumed that
22 the door was used normally, aren't you?" He goes,

1 "yes." But was this door used normally when it was
2 used by someone running through the Mall and burst
3 through it? Was that a normal use of a door? Allan
4 Funk never testified what this door should do, what is
5 appropriate for this door to do when someone bursts
6 through it. He was talking about when someone walks
7 through it. And the only reason that he assumes that
8 the closer was malfunctioning under those
9 circumstances was because Mr. Clark says that he was
10 injured by it.

11 So, he is not basing his opinion on
12 anything that has to do with his knowledge about
13 doors. He is simply basing it on what Mr. Clark says
14 happened. He said, "Well, that would be logical to
15 assume that it is being used in a normal fashion."
16 How much weight can you give to that sort of
17 testimony?

18 Now, what else did Allan Funk, their
19 expert, testify? He said that the equipment used on
20 this door, this ROTON hinge that we have heard so much
21 about, in conjunction with the Kawneer closer; he said
22 that meets all industry and legal standards. He said

1 that he has seen it in other malls, he said that he
2 sells them to other people, he says that the equipment
3 was fine.

4 So, the Mall didn't do anything wrong by
5 using that type of equipment. I also asked Mr. Funk
6 about maintenance. I said had he had any problem with
7 the maintenance that was done by the Mall in this case
8 and he said no. He didn't have any problem with what
9 they did, he said that they didn't do anything wrong
10 as far as he could tell.

11 So, the equipment was fine and the
12 maintenance was fine. So, what was the Mall supposed
13 to be doing if they used the right equipment and the
14 maintenance was correct? This is their own expert
15 saying this.

16 Mr. Funk also assumes that the door hit
17 Mr. Clark's ankle. I have said a lot about this door
18 couldn't have hit his ankle the way he says. So, if
19 that's part of the basis of his opinion, then his
20 opinion would fall apart as well.

21 Now, you also heard from Mr. Sporkin,
22 Mr. Funk's formal boss. Mr. Sporkin put on some

1 entertaining testimony yesterday and he was adamant
2 that this door was within standards. The closer on
3 this door was such that it took 3 to 4 seconds for
4 this door to close, which was more than adequate time
5 to get through it.

6 Further on this door issue, there were some
7 fact witnesses. Mr. Axelson said that without Steve
8 Johnson's testimony, we don't have a case. What did
9 Steve Johnson testify about? He testified about how
10 far the door could open. He didn't testify about
11 closing speed, he never checked closing speed. He
12 never said that it took less than 3 seconds for this
13 door to close. He didn't say any of that.

14 He just said that, "I could not get through
15 it with all of my postal bags because it would not
16 open far enough. And if you tried to open it past
17 where it would go, it would spring back a little."

18 Of course it would, you are forcing a door
19 to do more than it is supposed to do. Moreover,
20 Mr. Johnson did not feel that there was a problem with
21 the door such that it was a safety hazard. He didn't
22 feel compelled to report this door, he didn't feel it

1 was dangerous, he didn't feel this posed a risk.

2 He could have easily tapped a security
3 person on the shoulder and said, "Hey, on that door,
4 there is something wrong with it." He could have
5 walked upstairs any day that he came here and said,
6 "You know, I have had trouble getting through this
7 door, maybe I ought to do something about it."

8 He didn't do that. And if he didn't think
9 it was important enough -- somebody who used it every
10 day, to tell people about it -- then what evidence is
11 there that the Mall should have known about it?

12 Now, there was also some discussion about
13 the complaints that the Mall had about draftiness in
14 this door, this memo of March 10th. The door was
15 drafty. That was before the ROTON hinge was put on.
16 As you heard Brian Embrey say, the original hinges had
17 worn out and was causing the door to strike the other
18 door at the top.

19 So, it wasn't going to close properly and
20 that would allow the draft in. And that's why they
21 put the ROTON hinge on. So, this whole discussing of
22 the draftiness is a red herring, it has nothing to do

1 with this case. He says that it shows there was a
2 problem with the door. There was a problem, it was
3 drafty and wouldn't close all of the way, and we fixed
4 it.

5 He says there was a latch complaint made on
6 March 31st about the same door. This was the same
7 problem. This was before they fixed it. The door
8 wouldn't close all of the way, it wouldn't latch
9 properly, because it was binding up against the door.
10 That's why they put the ROTON hinge on.

11 Now, you also heard from Andrew Smith from
12 this door. Now, Andrew Smith didn't give you an
13 estimate about the closing time. He said he opened it
14 and watched it swing back and forth. This was also 13
15 days after the accident. Who knows what had happened
16 to this door during that 13 day interval and, more
17 importantly, who knows what effect Allan Clark
18 bursting through that door had on it. It could have
19 broken the door, for all that we know.

20 There is something weird about Andrew Smith
21 coming out to the Mall on May 8th. This is 2 days
22 after Mr. Clark first sees him. Why is Mr. Clark's

1 chiropractor coming out to meet him to look at the
2 door? Is this something that chiropractors or doctors
3 do normally?

4 Well, remember Mr. Smith has an interest in
5 this lawsuit. He does not get paid unless Mr. Clark
6 wins this lawsuit. He took an assignment from this
7 lawsuit. So, he has an interest in helping out
8 Mr. Clark as much as he can.

9 Now, what do you have on the other side of
10 the scale about the door regarding these fact
11 witnesses, Mr. Johnson, the draftiness, and Mr. Smith?
12 You have Brian Embrey who timed this door right after
13 he put the ROTON hinge on. He testified that it took
14 4 to 5 seconds to close. Brian Embrey is the only
15 person who you heard from who said how long it took
16 this door to close who actually saw it. No one else
17 was to give testimony that this door took a certain
18 amount of time to close.

19 Now, Mr. Clark, on the first day of trial
20 said it took a half second or maybe a second. He
21 assumed that, because how else could it have happened?
22 But yesterday, Mr. Clark couldn't remember how long it

1 took him to get from the corner of the Mall to the
2 door. And he admitted he didn't know how much time it
3 took to get through the door, because he wasn't
4 thinking about time and how long it was taking him.
5 He was thinking about catching Mr. Hamilton, the
6 robber.

7 Now, think of something else here. After
8 15 months -- it has been 15 months since this
9 happened. They have not been able to find one
10 witness, one fact witness, to come here and say, "I
11 used this door and when I went through it, it took
12 less than 3 seconds to close."

13 Now, if this door had this problem for 3
14 weeks, they would have been able to find someone to
15 say that, but they didn't. Also, you have
16 Mr. Robinson's testimony that he tested this door
17 every day, that maintenance tested the door twice a
18 week, and that security tested the door every day.

19 Mr. Axelson makes a big point about that
20 there is this memo that says that we should test this
21 door every day. Well, the memo is addressed to Jim
22 Arrington, the maintenance supervisor. Mr. Robinson

1 is suggesting to Mr. Arrington that we shouldn't test
2 this door twice a week, we should test it every day.

3 That's what that is about. It's not an
4 admission that we weren't testing the door every day.
5 Mr. Robinson was down there testing the door every
6 day. He was telling someone else to test it every day
7 instead of twice a week.

8 And was there ever a complaint from anyone
9 about this door closing too fast? Was there ever a
10 complaint? No. There wasn't. Now, does the greater
11 weight of the evidence show that this door was
12 malfunctioning or not when the only thing that is in
13 support of the malfunctioning theory is Mr. Clark's
14 assumption that the door hit his ankle. And
15 Mr. Funk's assumption that what Mr. Clark is telling
16 is right and that Mr. Clark used the door in a normal
17 manner, and that if that had happened, it must have
18 been malfunctioning.

19 But he could not point to anything about
20 the closer to show that there was something wrong with
21 this closer, to show that it was malfunctioning. And
22 he agreed that the maintenance on the closer was

1 proper. So, what is the evidence that this door
2 malfunctioned other than assumptions about what
3 happened? Assumptions which are inconsistent with the
4 greater weight of the evidence.

5 Now, the Judge has provided you with some
6 instructions on negligence and whether or not
7 Mr. Clark was an invitee or trespasser. These are
8 legalistic terms, especially trespasser. It is a
9 legal term used in this case that is different from
10 what you understand the word to normally be.

11 Just accept it as being a term of art. But
12 negligence is the breach of a duty of ordinary care
13 owed to another. Ordinary care is the care a
14 reasonable person would have used under the
15 circumstances of this case. Now, what would a
16 reasonable person have done regarding maintenance of
17 this door or choice of equipment for this door?

18 Did the Mall do what was reasonable? They
19 used the right equipment according to Mr. Funk, the
20 maintenance was okay according to Mr. Funk. They
21 checked the door every day, MR. Robinson did that.
22 They had security coming out every day to check it and

1 they had maintenance coming out twice a week to check
2 it. Is that ordinary care? Would it be extraordinary
3 to require them to do more? Because if it is
4 extraordinary, then there hasn't been any negligence,
5 because it's only a breach of ordinary care.

6 Now, the scope of the duty owed by the Mall
7 to someone in the Mall is determined by their legal
8 status as either invitee or trespasser. It's either
9 one or the other in this case. An invitee is someone
10 who is invited out there, someone who uses the Mall to
11 shop, someone who works the Mall.

12 There is no question in the world that
13 Allan Clark was an invitee shortly before 4:45 p.m.
14 that day. He was an employee of a shop in the Mall,
15 he was supposed to be there. But what happened the
16 moment that he decided to 1, break Mall rules
17 regarding running, 2, engage in activity that was
18 completely voluntary on his part, no matter how well
19 intentioned, it was completely voluntary on his part.

20 Is that something that the Mall should be
21 charged with, that he took on a risk in running
22 through a crowded public place, bursting through a

1 swinging door after a felon. Is that a risk that the
2 Mall should bear? Because he took it on himself?

3 Now, if you consider him to be an invitee,
4 then we have to use ordinary care to have the premises
5 in a reasonably safe condition for the invitee's use
6 consistent with the invitation. Consistent with the
7 invitation.

8 Now, was it consistent with our implied
9 invitation to Mr. Clark that he act in the manner that
10 he has? Now, there were rules against it for one
11 thing; 2, we had security there to take care of
12 criminal activity; 3, we have the police to take care
13 of criminal activity. We don't expect the Mall
14 patrons or employees or employees of other tenants to
15 engage in this sort of activity. That is specifically
16 set aside for other people.

17 Moreover, the Mall itself with its own
18 security people instructs them not to run through the
19 Mall. You heard Gerald Robinson testify about that
20 yesterday. If that's what it would take to stop the
21 criminal, they instruct their own people not to do
22 this. So, they surely don't expect Mr. Clark to do

1 it. Therefore, the invitation does not extend that
2 far.

3 Now, if he exceeded the scope of his
4 invitation, he becomes what is legally termed a
5 trespasser. And if he is a trespasser, if you find
6 that he exceeded the scope of his invitation, then the
7 only duty that the Mall would have to Mr. Clark is a
8 duty not to willfully or wantonly cause injury to him.

9 We have no duty to keep the premises in a
10 reasonably safe condition to a trespasser. Now, we
11 are not saying this premises was not in a reasonably
12 safe condition. It was. But even if you were to
13 decide that it wasn't, it doesn't matter if Allan
14 Clark is considered a trespasser. Because we have no
15 duty to a trespasser to keep our premises in a
16 reasonably safe condition. Our only duty is not to
17 willfully and wantonly injure him.

18 Is there any evidence that Springfield Mall
19 did anything willfully and wantonly to injure him?
20 The Judge will instruct what willfully and wantonly --
21 has instructed you what that means. And by the way,
22 you will have a copy of these instruction available to

1 you in the jury room which you can refer to in
2 deciding the case.

3 Contributory negligence. Mr. Axelson has
4 anticipated my arguments somewhat about contributory
5 negligence. Contributory negligence, according to the
6 law that has been read to you, is the failure of a
7 Plaintiff to act as a reasonable person would have
8 acted for his own safety of the circumstances of this
9 case.

10 Now, is it reasonable for someone who works
11 at Elegant Nails to take off after a criminal who has
12 stolen money from Roy Rogers who is already being
13 followed by 5 or 6 people chasing him, when there is
14 already a security force in the Mall, when there is
15 already a responsive police force? Is it reasonable
16 for him to run through the Mall and burst through a
17 swinging door? Did he use ordinary care in deciding
18 to do that and doing it?

19 Because if he did use ordinary care, then
20 he is contributorily negligent. As Mr. Axelson has
21 told you and the Judge has told you, if he is
22 contributorily negligent and if you find that his

1 negligence was part of the cause of his injuries, then
2 you have to find a verdict in the favor of the
3 Defendants. You have no choice.

4 Remember, this was risky behavior he was
5 engaging in. He took it upon himself without any
6 encouraging, from the Mall, against the Mall rules.
7 He did it all himself. And now he is asking you to
8 blame the Mall for the injury that he suffered because
9 he engaged in this behavior.

10 Please use your common sense in evaluating
11 this evidence. Please consider, again, that this
12 accident could not have happened the way that he said
13 it. And please consider again that, as I have
14 described it to you, that the accident is completely
15 consistent with Mr. Clark's testimony of what he
16 actually felt and saw. And there is much more
17 evidence in favor of the theory that we have advanced
18 as to how this accident occurred. Please consider
19 that.

20 Mr. Axelson is going to have the chance to
21 speak to you once more. His party bears the burden of
22 proof in this case and that's why he gets 2 shots to

1 present the argument to you. I will not be able to
2 speak to you again.

3 I ask that when you go into the jury room
4 to consider the evidence and the arguments, that you
5 anticipate what my response would have been to what
6 Mr. Axelson is about to tell you.

7 I hope that this has not been an unpleasant
8 experience for you. It has been a long experience for
9 all of us. We have complete faith in your ability to
10 render a fair and just verdict.

11 Thank you.

12 JUDGE ROUSH: Thank you, Mr. Schroeder.

13 Mr. Axelson?

14 MR. AXELSON: Yes, Your Honor. Recognizing
15 the time, I will try to be brief.

16 JUDGE ROUSH: Thank you, because I was
17 about to tell you that if the jury doesn't get down to
18 the cafeteria before 2:00, they won't get lunch. And
19 I was concerned that --

20 MR. AXELSON: They will be there, Your
21 Honor.

22 JUDGE ROUSH: All right.

1 MR. AXELSON: Ladies and Gentlemen, this is
2 perfect. Push, start to go out, door catches you, he
3 goes down. It is not physically impossible, not in
4 the least. If he plants his foot here, (indicating)
5 his second foot lands (indicating) about here. He was
6 stepping through as the door come out, it catches him
7 and he goes down. Very simple.

8 I told you that Mr. Schroeder was
9 shotgunning the defense. He wants you to believe a
10 half a dozen different things. He has thrown them all
11 up in front of you.

12 He tells you about Jackie Figueroa and he
13 wants you to believe that Jackie Figueroa's version in
14 which Allan Clark went through the door and didn't
15 fall down. So, where do we get the ruptured Achilles
16 tendon if you believe Jackie Figueroa?

17 He wants you to believe that Allan Clark
18 fell down. He told you that he had the Achilles
19 tendon rupture and fell down, then why should we
20 believe Jackie Figueroa?

21 How do we put together a defense theory in
22 this case? Don't you know that if Mr. Schroeder could

1 have done it, if he could have said that this is what
2 happened, "A," "B," "C," "D," he would have told you.
3 If only one consistent story, one consistent version
4 that goes through and explains all of the facts.

5 Now, some of them are contradicted. Some
6 of them are difficult to understand. The doctors, for
7 instance, contradicting each other on whether or not a
8 direct blow could cause it. Fine, it's unlikely.
9 That may be true, maybe the majority of Achilles
10 tendon ruptures do occur when people are running. But
11 no doctor said that it was impossible that Mr. Clark's
12 version of the events could have been correct. If
13 Mr. Clark is going out like this (indicating) and has
14 his foot out in hyperextension, the door comes
15 swinging back, it catches the side of his foot;
16 exactly as Mr. Clark has said. This is not a
17 physically impossible situation.

18 The only other thing that I want to address
19 is this issue of trespasser versus invitee. When
20 Mr. Clark is there, he is an invitee. Mr. Schroeder
21 wants to say once he started running and chasing after
22 the criminal, he became a trespasser.

1 It wasn't the running that hurt him. It
2 wasn't the running that did the damage to his foot.
3 It was the door. And that's where the contributory
4 negligence argument falls apart. There is no evidence
5 whatsoever that Mr. Clark did anything wrong in
6 pushing that door open.

7 Mr. Schroeder tried real hard to convince
8 you of that. His favor word was "burst." Mr. Clark
9 burst through this door. That's not a word that
10 anybody else ever used.

11 There is only one person, only one, who has
12 told you how he went through that door and that's
13 Mr. Clark. They have absolutely no evidence that he
14 did it any other way than to push the door open. They
15 have no evidence that the door was pushed in any
16 negligent or wreckless or dangerous or excessive or
17 bursting manner.

18 Mr. Clark was in a hurry, but it was not in
19 a manner of anybody else who was in a hurry going
20 through that door. Someone rushing to get to a bus,
21 someone rushing to get to their children, someone in a
22 hurry for some other reason. It is raining, my car

1 door is open, I'm going through that door as quickly
2 as I can to my car and get the window rolled up.

3 And what the Mall wants to tell you is, we
4 can have a door that's defective, but if you go
5 through that door and you are doing anything quickly
6 and you get hurt, you are out of luck. The words that
7 Mr. Schroeder used were "risky business." There is
8 absolutely nothing to show that Mr. Clark was engaged
9 in risky business here.

10 It was not an unexpected thing for him to
11 do. Half a dozen other people were doing the same
12 thing. This is foreseeable behavior and it is
13 foreseeable that people go through that door in a
14 hurry. And because of that, because it is
15 foreseeable, the Mall has a duty to maintain that
16 door.

17 It is a duty that they breached and their
18 breach of that duty has caused the damages to
19 Mr. Clark. I would ask you to find the Mall liable
20 for breaching their duty to maintain that door as they
21 should have and to fully and fairly compensate
22 Mr. Clark for his damages.

1 Thank you.

2 JUDGE ROUSH: Thank you, Mr. Axelson.

3 Ladies and Gentlemen of the Jury, you have
4 now heard all of the evidence and arguments. Normally
5 I would tell you to retire and start your
6 deliberations; however, I would urge you to go to
7 lunch, first. As I mentioned, if you don't get lunch
8 before 2:00, you won't be able to have lunch today and
9 I have no idea how long your deliberations will take,
10 but we have no funds to provide you with meals later
11 on if you should change your mind.

12 So, this is literally your last chance to
13 have any nourishment this afternoon. I think it would
14 be better if you did deliberate after having had your
15 lunch. So I would urge you to go to lunch between
16 1:30 and 2:30 and that would also enable the attorneys
17 and the Court staff to go to lunch as well during that
18 period of time without having to worry about you going
19 to do your deliberating and would have some questions
20 that would cause us to have to reconvene.

21 So, when you return from lunch, the first
22 thing that you should do is elect a foreman or

1 forewoman. The job of the foreman is to see that the
2 deliberations proceed in an orderly and businesslike
3 manner, that each juror has the opportunity to express
4 his or her views and that the deliberations are
5 conducted only in the jury room and only when each
6 member of the Jury is present.

7 Keep in mind that this is an important
8 case, both to the Plaintiff and the Defendant. In
9 order to return a verdict, you must agree upon your
10 verdict. In other words, your verdict must be
11 unanimous. You may take all of the time that you feel
12 is necessary. If you have any questions whatsoever,
13 get them down in writing and give them to the deputy.

14 Thank you very much. And at this point, we
15 will take you to the jury room now. Again, I urge you
16 to go to lunch.

17 - - -

18 (Jury escorted from the Courtroom at 1:30
19 o'clock p.m.)

20 - - -

21 JUDGE ROUSH: Would Counsel please approach
22 the bench and review the verdict forms, please?

1 Do both sides approve the verdict forms?

2 MR. AXELSON: Yes, we do.

3 MR. SCHROEDER: Yes, we do.

4 JUDGE ROUSH: All right, we will see you
5 all at 2:30.

6 - - -

7 (Recessed at 1:32 o'clock p.m.)

8 (Reconvened at 3:31 o'clock p.m.)

9 - - -

10 JUDGE ROUSH: I understand that we have a
11 verdict. Let's bring the Jury back.

12 - - -

13 (Jury returned to the Courtroom at 3:31
14 o'clock p.m.)

15 - - -

16 THE CLERK: Members of the Jury, have you
17 reached a verdict?

18 THE FOREMAN: We have.

19 THE CLERK: And is your verdict unanimous?

20 THE FOREMAN: It is.

21 THE CLERK: "We the Jury, in issuing a
22 verdict in the case of Algernon Clark, Plaintiff,

1 versus Franconia Associates and Fisher Group,
2 Defendants, find our verdict in favor of the Plaintiff
3 and assesses damages in the amount of \$120,000, George
4 Kay, foreperson."

5 JUDGE ROUSH: Any motions to be made before
6 the Jury before I discharge the Jury?

7 MR. SCHROEDER: Would you poll the Jury,
8 Your Honor?

9 JUDGE ROUSH: Yes, sir.

10 THE CLERK: If this was your verdict,
11 please answer yes when I call your name. If it was
12 not, answer no.

13 - - -

14 (The verdict was unanimous.)

15 - - -

16 JUDGE ROUSH: All right, the Court finds
17 that the Jury verdict is unanimous.

18 Ladies and Gentlemen, I want to thank you
19 very much. You have been a very attentive Jury over
20 the last 3 days and I know that I and all Counsel for
21 the parties very much appreciate the diligence with
22 which you have listened to the testimony and

1 deliberated over your decision. I thank you very much
2 for your service.

3 I know this is your first trial this term.
4 Normally I might agree to meet with you and discuss
5 matters, not related to this specific case, but to the
6 general administration of justice. However, since you
7 have other cases this term, I'm going to hold off on
8 that offer. Let me say that at the end of your term,
9 if you have any suggestions on how we might improve
10 things here or improve your Jury service or any
11 questions at all, please feel free to call me.

12 I know you will probably be meeting with a
13 Judge after your last case of the term. We try not to
14 meet with you at the beginning of the term, because we
15 don't want to let go of any of our state secrets
16 before you have heard your cases.

17 So, please feel free to call me. If you
18 have any suggestions, I would be glad to hear from
19 you. You are part of the system and we want your
20 input as to how to make it better.

21 So, thank you very much. You are
22 discharged until your next day of Jury service.

1 The attorneys in the case, a lot of times,
2 like to call up the jurors afterwards and find out
3 what you were persuaded by and you were not persuaded
4 by. You are now free to discuss the case.

5 If you would like to discuss it with the
6 attorneys, you may. It's up to you.

7 Thank you very much.

8 - - -

9 (Jury escorted from the Courtroom at 3:34
10 o'clock p.m.)

11 - - -

12 JUDGE ROUSH: Mr. Axelson, would you
13 prepare an order and present to me within 10 days,
14 please?

15 MR. AXELSON: I will do so. I would like
16 to speak with Mr. Schroeder. We may possibly agree to
17 a settlement before the order is sent.

18 JUDGE ROUSH: It's never too late to settle.
19 Thank you very much.

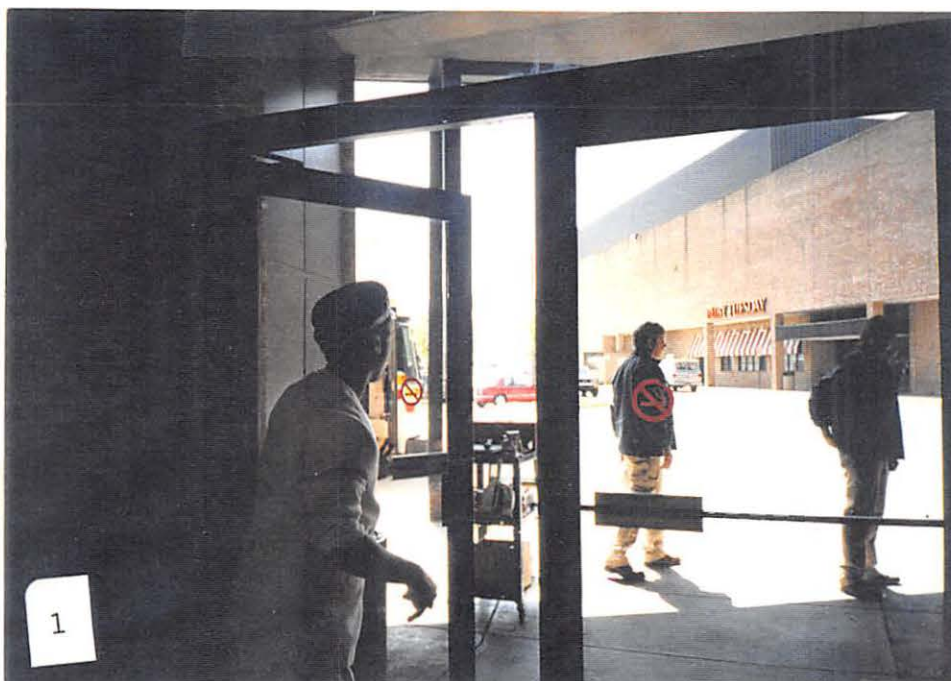
20 MR. AXELSON: Thank you, Judge.

21 MR. SCHROEDER: Thank you.

22 - - -

1 (Hearing closed at 3:35 o'clock p.m.)
2 - - -
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

BLOCK COURT REPORTING (202) 638-1313



633 8/16/94 L126947 JMR.



Plaintiff's Exhibit 1a



635

8/16/94 L126947

Jmf



Plaintiff's Exhibit 5a



637 8/16/94 L126947 JMR





8/17/94
L126947
JMR



8/17/94
L126947
JMR



640



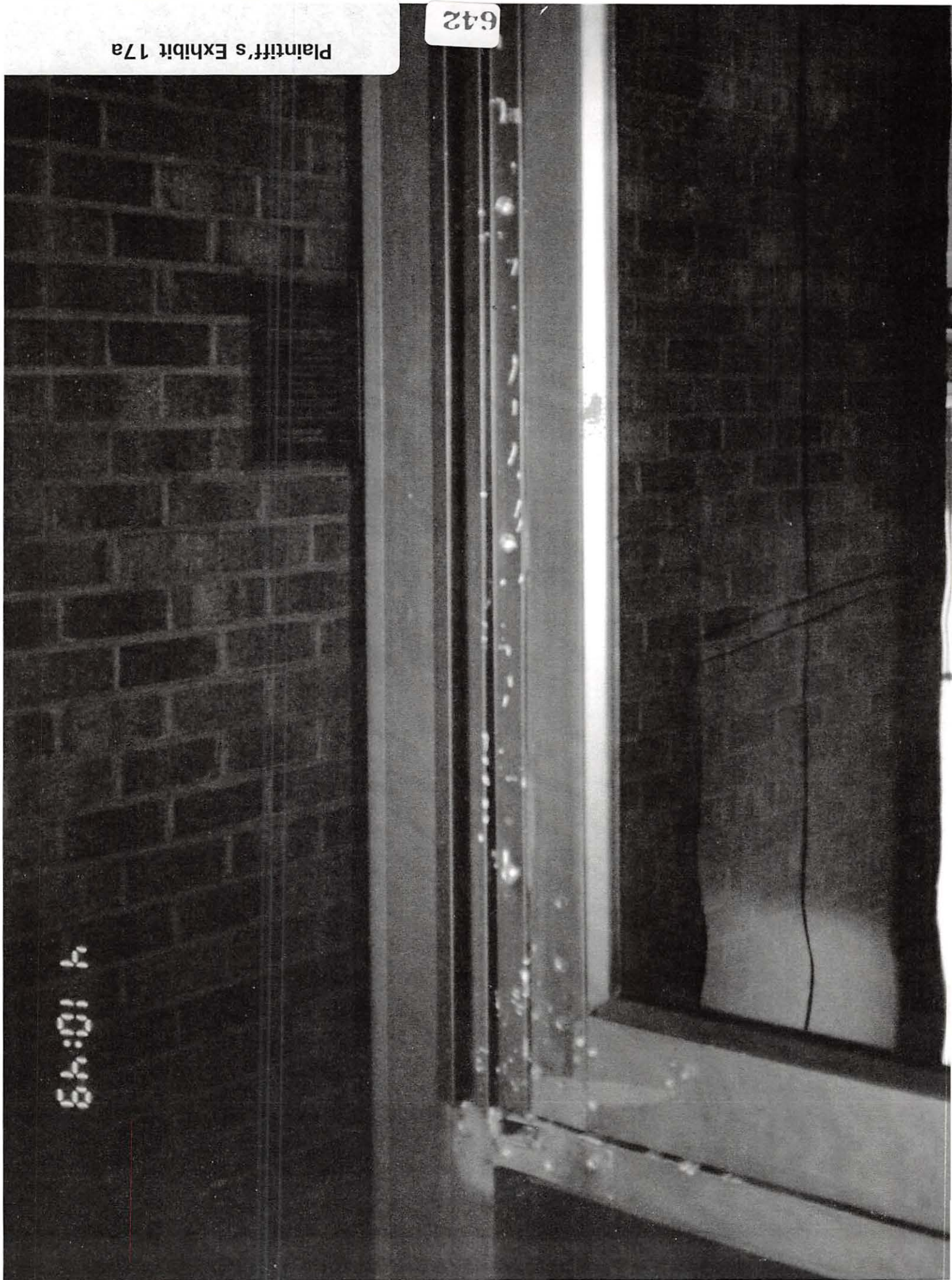
Plaintiff's Exhibit 16a

641

642

Plaintiff's Exhibit 17a

4 10:43





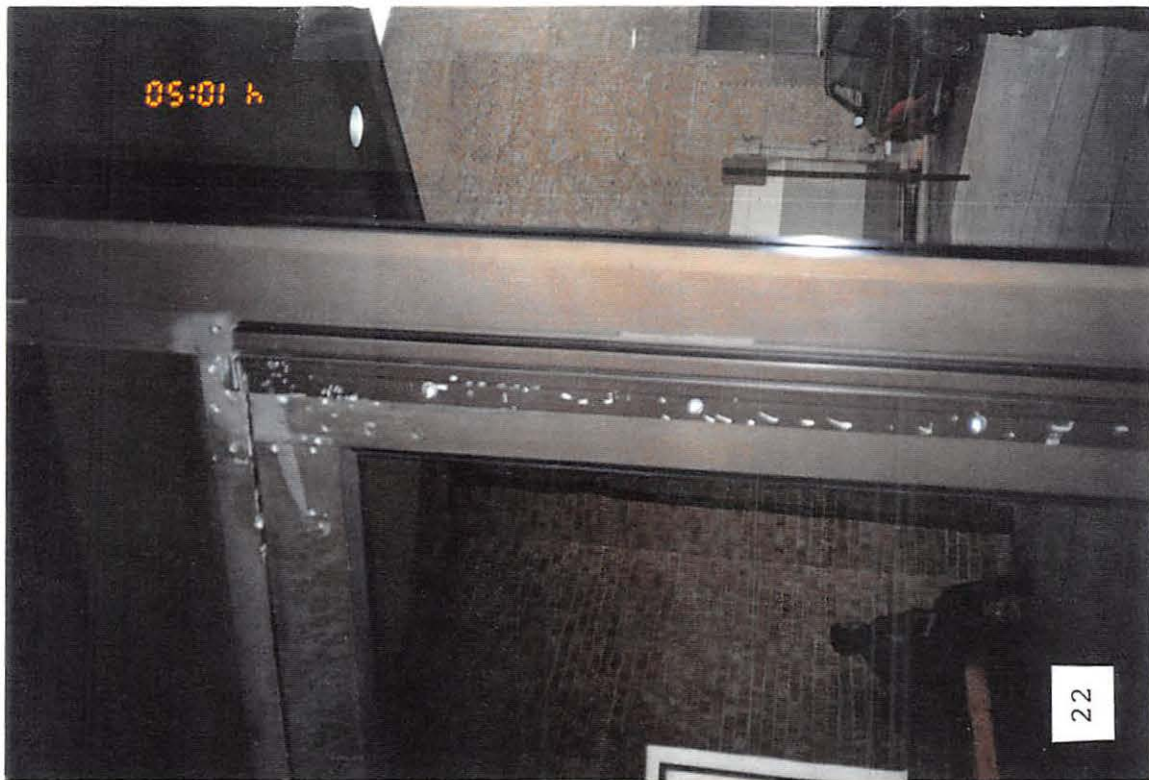
Plaintiff's Exhibit 18a

643

8/17/94
L126947
JMR



8/17/94
L126947
JMR



645



Plaintiff's Exhibit 22a

646



Plaintiff's Exhibit 23a

647



8/17/94
L 124947
JMR



649

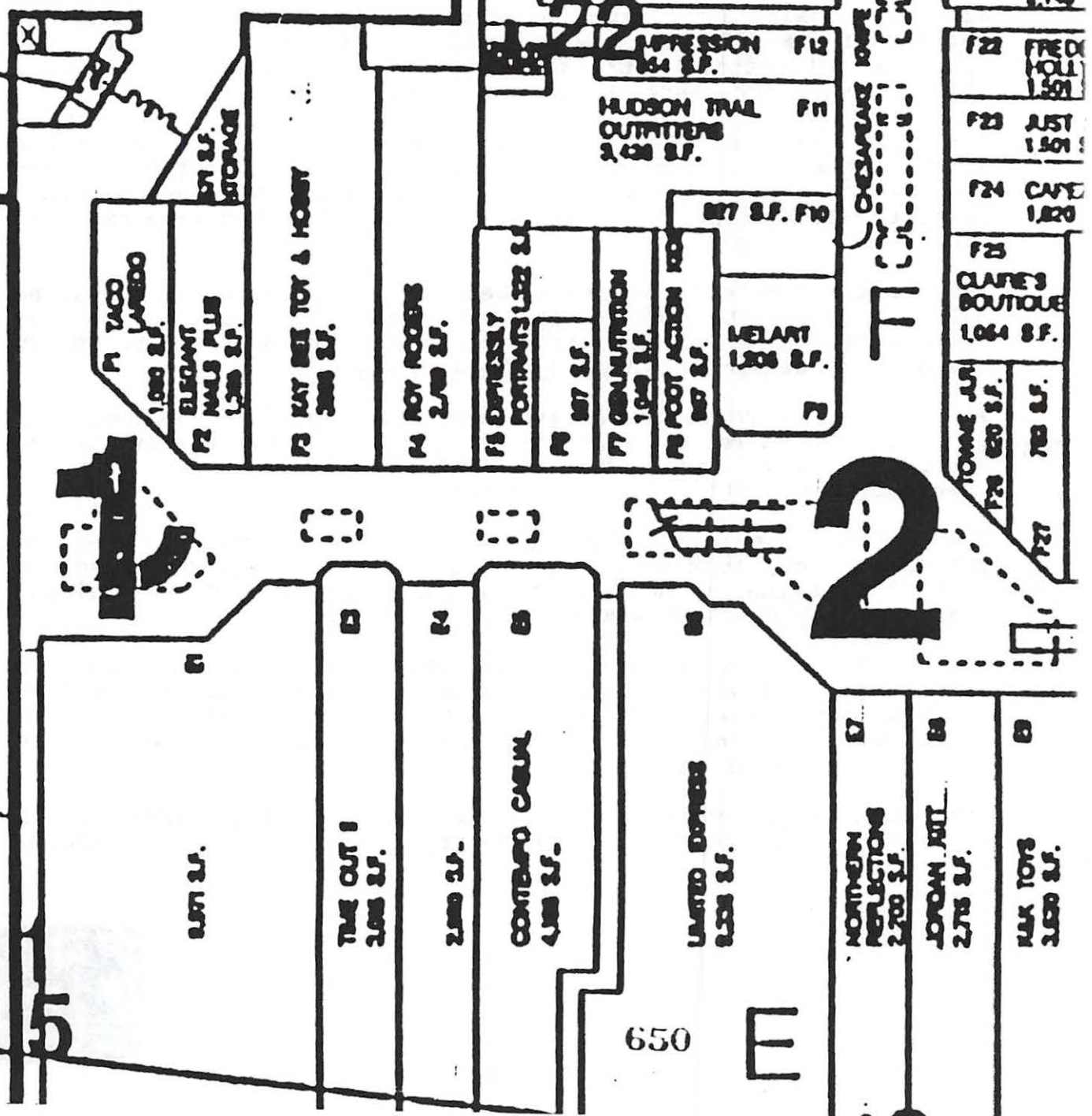
Plaintiff's Exhibit 25a

10 MONTGOMERY WARD

ENTRANCE
3B



ENTRANCE 3



Operations Bulletin #140
March 11, 1993

Jim - Probably around next week or so, we need to get together and walk the parking lot, look at the damage over the winter for the asphalt. Just highlight what we need repaired and then get two or three bids on getting that done probably from some asphalt patched areas.

Dorte - I need Kevin Nelson's social security number from Security. That is the part of his form I did not have filled out. If you could get me that at your convenience, I sure would appreciate it.

Jim - It appears one of the globes on the drive lane on one of the entrance's came off, its now currently located in the vacant space opposite CPI Photo. Let's make sure we get that installed once it's get safe out there to drive the JLG around.

Jim - In corridor 26 where we have about three sets of double doors, let's put a sign in one double door "Please Use These Doors" and make sure they're always working. And the other ones we won't worry too much about, but clearly right now it looks like two sets can't even get open.

Ski - Let's make sure our guys whenever we lock down doors during mall hours, get the signs on the doors and point the arrow and say "Door Closed" for both directions to be sure no one tries to injury themselves opening it. **MAIN ENTRANCE DOORS**

X Jim - Up at entrance 3, we have some problems with that one door closing, you need to work on it so it closes fairly tight. Unfortunately we have a lot of draft in there and we have had numerous complaints from Taco Laredo.

Jim - After the snow melts, right in front of County Seat and Steven Windsor, look up on the bulkhead and we have got numerous water stains that we will need to get taken care of and painted over. Probably a little Kilz and white paint will help.

Jim - Get with Ski on his March 12, 1993 log, there a entrance in here that talks about an electric box and light strip that was shorting out. Talked about 9/39 and 9/40 getting involved. Please check that out with Ski and let me know what transpired and what is the problem and is it fixed.

me Jim - Get to get down and repair the lock at Larry's Cookies, it appears the fire department had to pry it open to check an alarm.



Page Two

Jim - I have seen several write-ups regarding entrance 5 lock that is broken and needs repair and replacement. Please get with security or engineering, find out which one that is and get it repaired.

Dana - Let me know on the Security time clock what a new motor would cost. If that's more expensive or close to being what it would to fix a super time clock, we just may do that.

All Department Heads - When you're talking to store managers, assistant managers or store employees, you are not under any circumstance to say that we have looked at it, but we haven't done anything regarding what the problem may be. Let me do that type of discussion with them all you have to do is assess the situation as it is, but under no circumstance do you just indicate work has not been done even though it was identified a couple weeks ago.

WEEKLY EXTERIOR DOOR CHECK LIST

DATE: 3/mar 93

COMPLETED BY: 931-915

RIDOR #1

✓

Corridor #2

Doors will not secure
PUSH BAR PULLING LOOSE FROM DOOR,
DOOR BENT AND WARPED.

CORRIDOR #3

✓

CORRIDOR #4

✓

CORRIDOR #5

✓

CORRIDOR #18

✓

CORRIDOR #22

DOOR LATCH ATTACHED TO FRAME, SCREWS
GETTING LOOSE, ~~DOOR~~

CORRIDOR #23

✓

CORRIDOR #24

✓

CORRIDOR #25

✓

CORRIDOR #26

will not lock

CORRIDOR #27

✓

CORRIDOR #28

✓

CORRIDOR #29

✓

IRWAY #D

✓

STAIRWAY #J

✓



STAIRWAY #Q ✓	STAIRWAY #R ✓
ENTRANCE #1 ✓	ENTRANCE #2 ✓
ENTRANCE #3 RT DOORS Latch Locks Difficult to SECURE.	ENTRANCE #3B ✓
ENTRANCE #5 LOWER ✓	ENTRANCE #5 UPPER ✓
ENTRANCE #6 RT DOORS. Latch Lock Difficult to SECURE	SPRINGFEST ✓

INCIDENT REPORT

PLAINTIFF'S
EXHIBIT
#30Type of Incident STRONG ARM ROBBERY Date Occurred APRIL 25 1993 Time 1700Location ROY ROGERS SPRINGFIELD MALL Date Reported APRIL 25 1993 Time 1715Reporting Party's Name JOSEPH DE HAMILTONAddress 4810 EASTERN LANE # 103 SUITLANDCity, State, Zip MD. 20789Home Phone No. (301) 736-8921 Work No. N/A.

Suspect #1

Name: JOSEPH DE HAMILTONAddress: 4810 EASTERN LANE # 103
SUITLAND MD. 20789Sex: M Race: BLACK Age: 47Hgt: 5'11" Wgt: 185 lbs. Eye: BROWNHair: BLACK Build: LARGE FRAMEDist. Features: NUMEROUS SCAR INBACK OF HAIR LINEDOB: 10/2/45 Arrest: Yes ☐ No ☐

Suspect #2

Sex: Race: Age: Hgt: Wgt: Eye: Hair: Build: Dist. Features: DOB: Arrest: Yes ☐ No ☐

Vehicle Description:

Year: Make: Model: Color: Lic #: State:

Narrative (Description of how crime incident was committed):

AT APPROX. 1700 99 INFORMED 201 AND MYSELF THERE WAS A STRONG ARM ROBBERY IN PROGRESS LOWER LEVEL ROY ROGERS. THE SUSPECT FLED ON FOOT OFFICER DISR MADE THE ARREST AT ENTRANCE 3 ALONG FRONTIER DRIVE, MYSELF AND 970 ASSISTED. SUSPECT WAS #1 MALE HAD HIS HAND IN CASH REGISTER APPARENTLY ROY ROGERS EMPLOYEE BEHELD SUSPECT BUT HE WORKED HIMSELF FREE AND RAN THROUGH ENTRANCE 3

Continue on reverse

Reporting Officer: CARY MARSHALL # 917Date: 4/25/93 Reviewed By:

655

25 APR 93

Page of Page

1 of 1

TIME	EVENT/SITUATION
2400	Avery & Deane on-duty. / paper accounts for.
0115	Construction workers in old Lifestyle space. Employees still in Claire's Boutique. KeyBee Toys has numerous toys by gate. #918
0130	Management office check. All secure. #918 #914
0300	Fireboard check. All in order. #918
0330	Entrance 3B unlocked to let some Claire's Boutique employees out. Rescued at 0345. #914. Detour rounds initiated by 918.
0445	2 employees still in Claire's Boutique. All secure. #914
0520	Claire's Boutique employees depart the mall. Entrance 3B opened to let out. #918
0745	Farrill called and requested entrance #1 doors be opened for a tour bus coming to their store. Doors opened and gate lowered. #918. Bus arrived at 0748 hrs.
0800	Avery, Deane off duty. Nelson & Coleman on duty
0900	Open call exterior doors (due to breakfast) #1300 notified. #929 #916
0950	False fire alarm "tone only" #1300
1100	escalators & turn board turned on, fire panel checked #929.
1200	Drummond & Gillis on duty
1205	Mall checked late openings all #900s
1255	Shoplifting Montgomery Ward's #929
1500	Fire alarm Sports Authority @ smoke @ Fire: Kid pulls the alarm lever in the store & family left just after alarm sounding. #1300 #929 #935
1343	lock-out entrance #1 #916
1400	Wensel on duty
1500	A Contracted by a woman next to 99 about her

25 Apr 93

TIME	EVENT/SITUATION
Cont.	daughter, who got sick after eating at Manchu Wok, the child (13 years) was throwing up and felt extremely. Suggested to the mother we call a rescue unit to come to help. Rescue unit was called and responded in 10 minutes. After examination by the rescue unit the child was taken to Fairfax County hospital. #935
1600	Fire alarm coming from the Au bon pan. Upon investigation it was found that the alarm was set off by the oven (some bagels got overcooked) there was no smoke + no fire found at the scene. The fire department responded and further investigated - nothing was found. The area was then declared all clear by the Fire Dept. Alarm panel reset at this time. #935, 921, 913, + 1303 responded.
1600	Corlew + Nelson off duty, Hamlett, + Banus on-duty.
1655	Call from Lower Level time out that they had two 8 or 9 yr olds they caught in the corridors. One #1 male belonged to Fragrance by Seba, and the #3 male belonged to Taco Laredo. Both businesses were told that the children must remain with their parents at all times. #913
1700	99 reported that a #1 male had strong armed money from the cash register at Roy's Rogers. The manager was in pursuit and #917 joined him. #201 made the apprehension. Suspect was arrested between Frontier Rd. Entrance and The Bridge to Macy's Deck. See report - #917, 201, 970, 913.
1745	Customer at Macy's "tripped" over a clothes cart (inside)

TIME	EVENT/SITUATION
2300	DREW ON DUTY. 1 Page net Accountable.
2305-2400	Lock corridors found open. Found one of the wooden trash cans apparently from Macys Deck Level six thrown over the rail and lying in the driveway shredded. Put the remainere in 1100's section lower level MACYS. #939.
2400-0100	locked Remaining doors.
0100-0200	Set IN FRONT OF Rem-gars until closings and locked Entrance # 2. #939
0205-0235	accessed Management office to make copies & conduct Security check, All secure. #939
0300	BANK Escort Rubys Tuesday. to 1st American. #939
0400	FIRE Panel Check. 939
0440	OPENED 3B For Fannie May Truck driver. 939.
0515	ADT CALLED STATING THE ALARM Panel showed a supervisory. Circuit in trouble WAS Northwest THEATERS. Attempt to Reset, unsuccessfully so I Disabled Circuit FOR 1300's ATTENTION. Notified MIKE AT ADT.
0700	STARTED OPENING DOORS.
0800	DREW OFF DUTY. 926 ON DUTY.
0820	Campbell and Murray on duty
0900	Calculators turned on #922, #931
0900	mail run #926
1000	Memos passed out
1000	Mail checked for late openings #922, #931
1230	request that News papers in front of



TIME	EVENT/SITUATION
1200	Springfest be tossed in compactor #920 Base informs #900 that there will be no bank run today
1310	E. Nail employee was asked to dress after a fleeing suspect on Sunday. The store manager for Key Kops made the request. While running and attempt ing to open a door at entrance #2, the employee injured his lower leg. McAllar Clark explained further that he was in pain and would see a doctor tonight
1330	lunch relief into desk #922
1625	juvenile banned for using the parking lot as a restroom, the suspect was spotted by #200 and escorted to their office
1625	#939 will not be able to make it in tonight due to an emergency at work
1700	Ted Ray will be #1 hour late
1700	lock out entrance #2 #931
1705	lock out complete
1851	Management open for housekeeping. 920
1852	99 received a long distance call from Florida asking if we would please send security to Mrs. Fields and have them clear their telephone line for an incoming emergency phone call. 914 accomplished.
1920	Possible two drinks inside lower level Time out

1 APRIL 72

[illegible]

Operations Bulletin #19

May 10, 1993

All Personnel - Impostors will be closing on Saturday, May 15, 1993.

Jim - Down here in the vacant space under DMV, we still have the remnants of the dustwall that weren't thrown in the open top. Need to get that cleaned up. I have already charged Frizzles for that and the other thing, we've got one of the globes that goes on the light poles out there and I would like it stored someplace else, maybe out in the mall, storage area ~~and~~ deck. We need to get that taken care of before it walks on us. *Under the*

Dana - There is some pipe insulation down here in the space, it was underneath DMV but it's all in the back corner closest to the mall management area, also one package of ceiling tile. Dana you might want to check and put the pipe installation someplace where you folks can use it.

Jim - Get that one package of ceiling tile, probably can use it someplace else before it walks on us again. This is right as you come out of the door backway to electric room 5 and then take an immediate right. 180 degrees around, you will find it.

Ski - I see on your log of May 8th, that the detect ~~it~~ was initiated, said AC-I key will not work in sprinkler room 12. Be more precise where sprinkler room 12 is.

Ski - I've talked to Orange Bowl and A & W Hot Dogs & More and both said they would voluntarily try to impose the "No Smoking" in their stores as well. I don't know how successful they will be, I don't think Orange Bowl will be a problem, need to keep an eye out for A & W, don't site, them but just let me know of any violations in the log.

Jim - With the table here for the folks with the blood pressure and everything. Need to make sure when we set it up, that on the same day, like about 2:00 or 3:00 p.m. we come by and take it down instead of having to call every day. *AUTOMATIC*

Dave Jerry - Get three boxes of mall gray floor tile and 1 gallon of paint down to Arthur Treachers.

Jim - Doors coming out of corridor 26 *towards leading area* looks like one of the protected plates there for the Von Dupren hardware has come loose. Need to get that repaired as soon as possible.



3-
Page Two

Jerry - Met with Dan Richardson of Au Bon Pain, he will get back with me next Monday to discuss trash charges. Also looking for rent relief.

Dave - You might also want to be concerned that Au Bon Pain is looking for rent relief in the future.

X Jim - I see where there's still a double set of doors down here at entrance 3 closed and locked up. Need to get those repaired as soon as possible. Keep them repaired.

awc Jerry - This is for Expressly Portraits, need electric shut-down Thursday night, midnight Friday morning.

Jim - The exterior door at entrance one on the far left as you exit the building. Looks the ~~rotor~~ hinge is missing, the top three screws. Also the closer arm looks like it's broken and coming loose from the top of the frame. We need to get that fixed and fixed immediately.

D Jim - On the doors like this we need to go around first thing in the morning and check all these. I don't think we are doing that on a daily basis.

One Jim - Let's get two gallons of mall gray paint down to Claire's Boutique.

→ Jim - I was down in the housekeeping storage room and I needed magnifying glass because it was so dark down there. What do you say that we get the light bulbs changed out right away.

Jim - Looks like down here at corridor 26, by the gas meters right here the exterior doors. That protect~~or~~ rods that are sitting over there by it, looks like the lead anchors have come out of the brick work and it is just barely hanging on there. We need to make sure that's secure.

Valerie - Checked out Harper's and Harper's is clean, so you can go ahead and tire up the check.

Jim - We need to get working on this laminate that's coming off, just have the guys start working on that. Gluing up that which is still there and then replacing that which is already fallen down.

Page Three

Dana - See where also Schindler put on their little maintenance list that the air intake screen needs to be cleaned. Let's get that done right away. Hopefully this will prevent us from going off on thermal overload for the central court elevator.

Jim - Also made aware of a roof leak in Sports Authority about 2/3 of the way back on the left hand side. 1304 was the one who saw it and thought it may have been the results of a leak around a roof drain. We need to check that out, says see Heather, ~~Memo~~ let's make sure we do that, I don't want Sports Authority on my neck as well.

Dorte - Have we received a bill from C & P regarding checking the lines for focus pad down in engineering. I've got a PO outstanding for C&P #1012723 and I'm not sure if that work has been completed or not.

Walt - Has that work been completed, I know we have had some problem with the focus pad we are checking out the telephone lines and I gave Dana that PO number. Anyway you can check and see if that's been used or not.

Jim - We also have one outstanding PO for Fergerson Interprises, #1012713 dated March 4, 1993 for six sloan toilet kits and six delta pop-up facets. I have not received the invoice on that, could you check and see what the status is and did we receive the material.

Debbie - Need to know if the Gap has paid their \$750.00 quarterly charge for storage area for January through March of 1993.

Jerry - Check with the Gap and see if they want to continue leasing this for another 12 month period.

Dorte - How about sending a follow up letter to ^{They called} Precis in regard to invoice #130 and ~~Easy Spirit in regard to invoice #131~~ that haven't been paid. These were back in December 25th and 26th respectively of 92.

Dorte - Also we want to follow-up on the invoice for Impostors from January 8, invoice #140 that was to install an access panel and a bulkhead for \$142.74. Also you might want to send a letter to Jean Nicole regarding invoice #150. We send an initially letter out on 2/3/93, this was to install "Ready To Apply" sign for their construction in Jean Nicole Plus for \$58.91. We have received nothing back to date on it.

Jerry - Call VA. Peddlar and see if he wants to lease that space for another month that he currently has temporary space that's H-8. Same rate \$250.00 per month. YES!

Page Four

Jerry - Overflowing sink in the back room of J. Riggins caused alot of water damage on the carpets in Britches Great Outdoors and also damage to about five ceiling tiles in the back area of Casual Corner.

Jim - We probably need to paint or refurished the entrance way, the ceiling to entrance way number 3 there if you look up, it really looks like it is in dire need of some work.

Jim - After Allen's folks clean compactors, I suggest we might want to touch-up paint on some of them like number 3. The backside looks good but the front side could certainly use a touch-up. *Also door on #5 compactor.*

Jim - We need to go down and replace ceiling tiles in Casual Corner sometime this week, as soon as we're sure its all dried out up there. It's probably about six or seven tiles, we will put this on a bill to J. Riggins for the water damage that was incurred on Monday, the 19th.

Done Walt - The space heaters up in the third level management corridor, appears half of them are still on, let's make sure we get those all turned off.

; Allen - Need to be sure Children's Place is cleaned for Moms and Moppets by close of business Tuesday.

Done Jerry - Call K-T and find out when they are going to start our grass cutting.

Done Jerry - Check Benningan's hallway, there been a complaint by Steven Windsor. It's discussing.

Jerry - Check the number 8 escalator which is the down escalator at Limited Express for damage to the handrail.

/ Jerry - Be sure and invoice Lott for \$50.00 for repairing the 3 x 3 section of drywall and painting it under the Macy's bridge third level.

Jim - How about checking out the electric switch down in sprinkler room 1, appears that the cover is off the switch and there usual standing water there, to make sure we don't have anyone electrical. Let's get on this right away.

/ Dave - The grass will be mowed starting Thursday morning according to K-T, weather permitted.

EMERGENCY DEPARTMENT — MEDICAL RECORD
FAIRFAX HOSPITAL FALLS CHURCH, VIRGINIA

MODE OF ARRIVAL TO TRIAGE
☐ RESCUE ☐ AMBULATORY ☐ WHEELCHAIR/STRETCHER TIME 1748
TRIAGE ASSESSMENT ☐ YES ☐ NO ☐ CODE # SEVERITY

CHIEF COMPLAINT low back pain neck

TRIAGE ASSESSMENT painful back pain
got injured 4/25/93 @ work
got caught in a door +
fell

547 35 0032/E/R 162 03 40
CLARK, ALLAN 034Y
0350340532
4 29 93 3 16 59

PATIENT IDENTIFICATION

DOB 3/14/5

LAST ED VISIT

VISUAL ACUITY

☐ WITHIN 30 DAYS
☐ WITHIN 72 HOURS

OD
OS
OU

VITAL SIGNS		MEDICATIONS:	CURRENT MED. HX	ALLERGIES:	DRUG SENSITIVITIES:
TIME	1200				
TEMP.	98.7				
PULSE	95				
RESP.	16/58				
B/P	137/58				
		<input type="checkbox"/> LNMP DATE		DATE OF LAST TETANUS:	WEIGHT:

PHYSICIAN HISTORY/PHYSICAL EXAM

INFORMED CONSENT OBTAINED:

PMD

☐ NONE

Chronic "rotten" @ Ray's @ nallinhouse
dog rescued and caught @ Ray's
then fell part of the way down
and fell part of the way down
back stopped. No dumb, have to this and
HX Fx BLE Tib Fib and eye ~14

R.O.S.:

Past Medical Hx:

Family Hx:

Social Hx:

Head wounds, neck surgery NT FROM
Spine NT, chest NT. H. Clavus
Ptd. NT, Ptd. NT
BLE defunct (14) Tib Fib and eye
other ext all

LABORATORY	<input type="checkbox"/> ABG (F O ₂)	<input type="checkbox"/> DRUG LEVELS	<input type="checkbox"/> TUBA	<input type="checkbox"/> OLD RECORDS	XRAY
	<input type="checkbox"/> AMYLASE	<input type="checkbox"/> DIG ETCH	<input type="checkbox"/> TUBA	<input type="checkbox"/> TUBA	
	<input type="checkbox"/> BHCG QL QT	<input type="checkbox"/> THEO	<input type="checkbox"/> TUBA	<input type="checkbox"/> TUBA	
	<input type="checkbox"/> CCU PROFILE	<input type="checkbox"/> PT/PTT	<input type="checkbox"/> TUBA	<input type="checkbox"/> TUBA	
<input type="checkbox"/> CHEM 14 23	<input type="checkbox"/> TOX SCREEN	<input type="checkbox"/> SOURCE	<input type="checkbox"/> TYPE	<input type="checkbox"/> TYPE	<input type="checkbox"/> TYPE
<input type="checkbox"/> C & S	<input type="checkbox"/> SOURCE	<input type="checkbox"/> TYPE	<input type="checkbox"/> TYPE	<input type="checkbox"/> TYPE	<input type="checkbox"/> TYPE

<input type="checkbox"/> CBC	<input type="checkbox"/> CHM7	<input type="checkbox"/> DIP	<input type="checkbox"/> ABG	<input type="checkbox"/> O ₂ L/MIN	<input type="checkbox"/> MASK
Hb	WBC	<input type="checkbox"/> MICRO	F O ₂	<input type="checkbox"/> PULSE	<input type="checkbox"/> PEAK
Hct	Pit	<input type="checkbox"/> EKG	PH	<input type="checkbox"/> OXIMETER	<input type="checkbox"/> PRE
		<input type="checkbox"/> MONITOR	PCO ₂	<input type="checkbox"/> FLOW	<input type="checkbox"/> POST
			PO ₂		
			HCO ₃		

CLINICAL ANALYSIS	CASE DISCUSSED WITH	DISPOSITION OF PATIENT	STATUS
<u>old Tib Fib Fx</u>		<input type="checkbox"/> DISCHARGE TIME	<input type="checkbox"/> IMPROVED
		<input type="checkbox"/> ADMIT Dr.	<input type="checkbox"/> NO CHANGE
		<input type="checkbox"/> AMA	<input type="checkbox"/> STABLE
		<input type="checkbox"/> TRANSFERRED TO:	<input type="checkbox"/>
IMPRESSION:		ACCEPTED BY:	
<u>Quadrant sprain</u>			

ED STAFF PHY SIGNATURES	ATTO STAFF PHY SIGNATURE	NURSE SIGNATURES

FAIRFAX HOSPITAL
Department of Emergency Medicine
3300 Gallows Road, Falls Church, VA 22046 698-3111
DISCHARGE INSTRUCTIONS

C5932 E/R 162 03 40
CLARK, ALLAN 034Y M
DR
01520340 5932
4 29 93 3 16 59
PATIENT IDENTIFICATION

- | | | |
|--|--|--|
| <input type="checkbox"/> Abdominal Complaints | <input type="checkbox"/> Epistaxis | <input type="checkbox"/> Head Injuries |
| <input type="checkbox"/> Animal Bites | <input type="checkbox"/> Ear Infection | <input type="checkbox"/> Lacerations & Wound Care |
| <input type="checkbox"/> Asthma | <input type="checkbox"/> Eye Injuries | <input type="checkbox"/> Sprains / Contusions |
| <input type="checkbox"/> Back Strain | <input type="checkbox"/> Fractures | <input type="checkbox"/> U.R.I. |
| <input type="checkbox"/> Burns | <input type="checkbox"/> Gastroenteritis | <input type="checkbox"/> U.T.I. |
| <input type="checkbox"/> Corneal Abrasion | <input type="checkbox"/> Fever Control | <input type="checkbox"/> Vomiting / Diarrhea (Pediatric) |
| <input type="checkbox"/> Medication Instructions | <input type="checkbox"/> Headache | <input type="checkbox"/> Other Instructions |

- Keep splinted
- Don't do weight bearing
- MOTRIN 600mg 3x / day for pain
(#15)

Return to Emergency Department if:

Referred to personal or on-call physician Dr. *(ortho) White 671 2225* for:

- ☒ Follow-up care in 7 days ☐ If needed ☐ X-Ray follow-up
- ☐ Suture removal in _____ days Time off from work: _____ days ☐ Culture result follow-up

Other: _____

SCHOOL OR WORK EXCUSE

- ☐ No school _____ days ☐ No work _____ days ☐ May return to school on _____
- ☐ No Physical education _____ ☐ Light duty for _____ days ☐ May return to work on _____

I certify that I have received and understand these Discharge Instructions.

X *[Signature]*
Signature (Patient / Relative)

Physician Signature

667

Date

Nurse Signature

Time



Fairfax City Imaging Center

IMAGING CONSULTATION

ANDREW SMITH MD
6300 B SPRINGFIELD PLAZA
SPRINGFIELD, VA 22150

10721 Main Street
Fairfax, Virginia 22030
Tel: (703) 591-6974
Fax: (703) 591-3758

Joseph P. Finizio, M.D., Director

PATIENT: CLARK, ALLEN DOB: 03/16/59 AGE: 34 TEL: (703) 922-7886 XRAY: F0003116
DATE OF EXAM: 06/10/93 DX: MRI ACHILLES TENDON RT, R/O TORN ACHILLES TENDON

MRI ACHILLES TENDON:

CLINICAL INFORMATION: The patient presents with ankle pain.

TECHNIQUE: T1 and FFE sequences were employed. Sagittal and axial projections as well as coronal projections were employed.

FINDINGS: The study confirms frank abnormal signal in the distal portion of the Achilles tendon which increases on FFE sequences and is compatible with a disruption of the Achilles tendon. The study fails to demonstrate additional abnormality. The flexor digitorum longus and flexor hallucis longus tendons are normal. The retrocalcaneal bursa is normal at this time. The calcaneus and plantar aponeurosis are normal. There are mild degenerative changes of the talar navicular joint and tibiotalar joint. No intra-articular free fragments are appreciated.

IMPRESSION: FRANK TEAR OF THE ACHILLES TENDON, 2 1/2 TO 3 CM PROXIMAL TO THE INSERTION UPON THE POSTERIOR TUBERCLE OF THE ACHILLES TENDON. THE REMAINING LIGAMENTOUS AND TENDINOUS STRUCTURES ARE CURRENTLY NORMAL.

Thank you for the consult.

Joseph P. Finizio, M.D.
6/10/93
CV



FAIRFAX ORTHOPEDIC CLINIC
10720 Main St. Fairfax, VA 22030

JUL 15 1993

Albert C. Casabona, M.D.

Ruben D. Cabrera, M.D.

NAME: Algernon Clark AGE: 34 DATE: 7-15-93

HOME PHONE: 202-7621 OTHER PHONE TO REACH YOU: _____

COMPLAINT/S briefly state motive/s for consultation: Torn Achilles tendon

DURATION: 4-18-93 Wound

IF YOU HAVE PAIN/S give the site or location. Lower Right leg, BACK, Neck
@ in ruptor: 14 after accident.

Does the PAIN radiate or run to other parts of your body? Some times

Wound is 14 in. long

CIRCLE what applies to your PAIN: All the time Part of the time Mild Moderate
Severe Made worse by: periods of standing

ACCIDENT: If you were involved in an accident, give date 4-18-93
WORK HOME AUTO ACCIDENT OTHER
and location(place) Springfield Mall

Are you seen at an Emergency Room? Please Circle: Fair Oaks Hospital Reston
Fairfax Hospital NO. VA. Doctors Hospital OTHER: _____

Please explain how the ACCIDENT occurred Chasing Robbery suspect
E.R. (Fairfax Hosp) → sprain ankle and neck & back
pain - Elbow, neck, back, manipulation. R. ankle
& Elbow simulation. He called me R.I. → Rupture

PAST MEDICAL HISTORY: Do you have or have you ever had (CIRCLE)? Ulcer

Asthma Bleeding problem High Blood Pressure Heart Attack Angina Diabetes

Other: Back pain - & neck

Are you ALLERGIC to anything? NO YES Please Explain: grasses, cedar, pollen
local fly

Previous Surgery? YES Circumcision
at Springfield Mall (Mall)

MEDICATIONS currently taking: Analog, tolectid

Thank You. Please turn the page over and mark the DIAGRAM.

SIGNATURE OF PERSON COMPLETING FORM



669

JUL 15 1993

CLARK, Algernon

CC: Injury right Achilles Tendon.

DURATION: 04/18/93

HISTORY: This thirty-four year old hair dresser said that he injured the right Achilles tendon in the Springfield Mall when he was chasing a robber. His foot got caught in one of the mall doors and he sustained a crushing injury to the lower part of the leg. Went to Fairfax Hospital where he was examined and released. Then he stated under the care of a chiropractor who treated the injury with some kind of electrical stimulation. He is also being treated for his neck and lower back; he continues under the chiropractor's care for the neck and back. The chiropractor tried to arrange to have the Achilles Tendon repaired following an MRI on 6/10/93 at Fairfax City Imaging Center. Apparently he was referred to an orthopedic surgeon who required money up front. He has been trying to get this tendon repaired and after (he says) a lengthy wait he was scheduled to be interviewed at So. Co. Health Center who referred the patient to us.

Patient is healthy.

PHYSICAL: Examination demonstrated a well developed, pleasant male who is not in acute distress. Examination of the left calf showed that there is severe atrophy of the calf muscle. Examination showed that there is a gap in the lower part of the Achilles approximately 2 inches above its insertion in the tuberosity of the calcaneus. Compression of the calf muscles on the right elicits no plantar flexion as opposed to the opposite side where there is a normal response. Fairly good ROM of the ankle present.

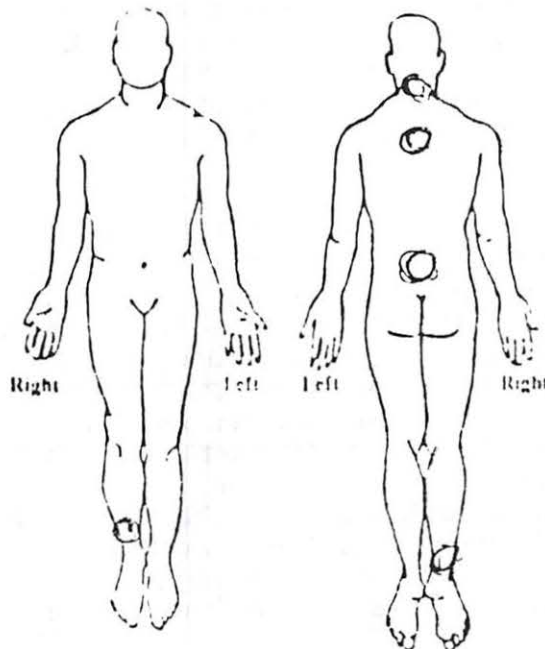
MRI showed rupture of the Achilles tendon.

DIAGNOSIS: Ruptured Achilles tendon on the right (3 months old).

TREATMENT: I told this patient that we are dealing with a bad situation here because of the 3 months delay since the time of injury. The tendon has retracted; the tissues are not as pliable as normal and a gap may persist. This will weaken the tendon and his question about having a normal foot and ankle as well as the ability to engage in sports is answered by the prospects being greatly diminished - even if this had been a recent injury. Therefore he knows that we are NOT anticipating a perfect result here. He will require approximately 2 months immobilization in a cast with the foot in plantar flexion and the recovery of this normal position will take some time. He will have to use an orthosis to prevent dorsiflexion of the foot for several months. It will be several months of followup when we could give him some idea about sports/activities. He is being referred back to So. Co. Health for routine lab work and he will be scheduled for surgery at FOH in 6 days time. Patient will have to be admitted because a lengthy incision will be required. RDC/sk

07/21/93 ADMIT TO FOH
07/21/93 SURGERY:

670



PATIENT'S SIGNATURE

Handwritten signature of the patient.

CLARK, Allen (Algernon)

07/19/93 PHONE CONVERSATION

I talked to this patient and explained to him some of the complications that can occur, namely infection, deep vein thrombosis, etc. I told him that he cannot get his cast wet and naturally we cannot guarantee him a good result because of the time that has lapsed from the injury to the repair. RDC/sk

07/21/93 SURGERY (ADMITTED AFTER SURGERY because of the lengthy incision).

~~SURGERY:~~ Repair of the right Achilles Tendon performed using the Lindholm Technique by bringing two strips of tendon to span the defect. Prior to that, the proximal part was pulled down, using a towel clip and then a two Mercelene was used to approximate the tendon, using a Kessler Suture. Some of the posterior scar tissue was saved since it appeared to have a good blood supply and it was added and attached to the transplanted tendon. The plantaris was present but there was a very small, about 1 mm in diameter, part that was practically useless. It was used just to go around the thinnest part of the tendon. The proximal stump was thick and there was a lot of scar tissue. The distal fragment was very small, measuring less than 1/2 inch and the Kessler Mercelene Suture went thru both ends, leaving a gap of about 3/4ths of an inch approximately. Patient received antibiotics IV and a short leg cast, fiberglass was applied after the long incision (about 8-10 inches) was closed.

07/22/93 DISCHARGED FROM FOH to be followed in the office. RDC/sk

Cancelled
07/22/93: This patient was discharged on 07/22/93, one day after surgery. He has been receiving IV antibiotics and a pac for relief of pain. I gave him Rx for Tylenol #3 and instructions to use the crutches; avoid straightening the knee and return to the office in one week. RDC/sk

CHART NOTE

~~This patient WAS TO BE DISCHARGED 07/22/93: HOWEVER he has had a fever all morning and at the time of discharge, it was 102°. Naturally, I cancelled the discharge and ordered CBC, chest xray, urine culture as well as blood culture. As soon as we get him afebrile and find the cause of the problem and take care of it, we'll send him home. RDC/sk~~

CHART NOTE

07/23/93

This patient could not go home today; he still has a temp. of 102°. RDC/sk

07/23/93

We got an answer from Bailey's that one of the family physicians or the chief resident will see him today. RDC/sk

07/24/93 PATIENT DISCHARGED FROM THE HOSPITAL

He was kept in the hospital after surgery because of temp. elevation of 102° and xrays were inconclusive; there was a possible atelectasis in the lung. The same day they called me 3 times from the Shelter where he is living and told me that he had a temp. of 101 to 102° and therefore, PATIENT WAS RE-ADMITTED TO FOH on 07/24/93. A physician from family practice is following him. RDC/sk

Progress Notes

Date

CLARK, Algernon

RE-ADMITTED TO FOH ON 07/24/93

07/25/93 (SUNDAY): I opened the cast in the hospital and made a window to inspect the wound. No evidence of infection of the wound was found. RDC/sk

07/27/93 I PHONED THE HOSPITAL TODAY. Patient was checked by Dr. Casabona yesterday and determined that he is feeling fine. He has no fever and he is being DISCHARGED FROM THE HOSPITAL today 07/27/93 RDC/sk

AUG 2 1993

Wound check

CHART NOTE 07/29/93

We have been trying to get in touch with this patient - he lives in a shelter. We want to check him this week. RDC/sk

We inspected the wound today. RDC/sk

AUG 6 1993

*Cast removed - looks good. Defect = about 1/2 inch
No signs - new SLE*

The cast was removed and the wound looks fine with no evidence of infection and no discharge except in a small area measuring about 5-6 mm's where there is a slight opening of the wound and there is no drainage from it. The staples were removed and new short leg fiberglass cast was applied with the foot in slight equinus. To return in 3 days and we'll make a window. We applied Neosporin and Scarlet Red ointment. RDC/sk

AUG 10, 1993

Wound looked well - (clean, pink)

Window made in the lower part of the leg and examination showed that the small defect is healing very well with no evidence of infection. We gave him a prescription for the orthosis to be applied after the cast is removed in approximately 8 wks. from the date of surgery. This orthosis is to prevent dorsiflexion. RDC/sk

AUG 17 1993

The wound was inspected and it looks fine. The small defect has healed and there is no drainage from the area. He is to return to see me in 2 wks. RDC/sk

AUG 31 1993

PHYSICAL: Examination reveals a skin defect measuring approximately 12 mm's by 4 mm's in the medial side which appears to be cleaned. It was dressed with Elase. He is to return to see me in a week. They are working to see if they can obtain a consult. RDC/sk

CLARK, Algernon

SEP 7 1993

This patient is better. RDC/sk

SEP 15 1993

*Improving. Defect appears healed
1 cm x 1 cm - on this. All L.L.*

SEPTEMBER 07, 1993:

This patient is better. The small opening appears to be healing satisfactorily; there is no drainage. The tendon does not appear to be exposed. We redressed the wound with scarlet red. He said that the brace has been ordered. RDC/sk

SEPTEMBER 15, 1993:

This patient is doing well. The small defect appears to be healed. I cannot see any discharge in the dressing or when the foot is squeezed. We redressed the wound today and applied scarlet red and antibiotic ointment. RDC/sk

SEP 22 1993

This patient has the brace which looks fine and is accomplishing its purpose - namely to prevent dorsiflexion of the foot. He has an area of 6-8 mm by 4 mm that worries me. He is to dab the area with hydrogen peroxide every-other-day; cover it with scarlet red dressing that was given to him and then a bandaid. To use the brace continuously. RDC/sk

SEP 30 1993

OCT 7 1993

10/01/93 PHONE CONVERSATION

Patient said that he had to move and he has to go up and down stairs; also he needs a refill for medication that has to be non-narcotic. RDC/sk

10/07/93 OFFICE VISIT

This patient came today; he was not wearing the brace. The small defect was debrided and a small piece of soft tendon came out. I told this patient to soak the area twice a day with boiled water, dry it and apply a bandaid. If this persists, we may have to take him to the hospital and under anesthesia, do a debridement. This patient has a job that is going to start very soon. RDC/sk

OCT 11 1993

CLARK, Algernon

October 11, 1993 continued:

This patient is still draining and I told him that we will have to do an exploration of the wound and perhaps remove part of the tendon. Patient will be scheduled for the surgery at Fair Oaks Hospital outpatient. Dressing change today. RDC/sk

PHONE CONVERSATION

10/18/93: I talked to a plastic surgeon and we discussed the problem in this patient. The surgeon said that it is mandatory that this patient rest after either a primary closure or a split thickness graft in that area. If he keeps walking, the chances of getting this healed will be practically none. We will try to get in touch with Mr. Algernon and emphasize that fact. This patient is moving from one place to another unfortunately, living in shelters. He just got a job and to comply with the restrictions here, it is going to be difficult for him. He will need at least a week to 10 days of rest with elevation of the leg. We'll see what we can do for this nice gentleman. RDC/sk

10/20/93 T. J. Clark 3-11-93 951-1385 JCL

CLARK, ALGERNON

FOR:

SURGERY 10/20/93: Under gen. anesthesia and with the patient in the prone position and after prep of the skin with Betadine, drape in the usual fashion, wound was inspected. Wound looked fine with no evidence of infection. There was an area just approximately 10-12 mm's in length now markedly closed, measuring about 3-4 mm's in width. No drainage from it. The wound was enlarged proximally and distally and exposed tendon as well as the skin were removed. Merc. suture with knot was removed. Portion of tendon or fascia that we felt were devitalized were excised. The small defect was closed after the wound was profusely irrigated with antibiotic solution. Patient received 2 grams of Rocephin IV. There was no problem approximating the skin edges. No tension was required. The wound was totally closed leaving no dead space. We tried to approximate some of the muscle to the previously draining area in case a skin graft is needed. Short leg cast (fiberglass) applied. Patient tolerated the procedure well and was returned to the recovery room in excellent condition. RDC/sk

OCT 29 1993

Wound closed. No drainage. No infection.

This patient
goes to hip
to hip
to hip

CLARK, Algernon

10/29/93 continued

WINDOW MADE IN THE CAST AND THE WOUND INSPECTED. IT LOOKS DRY with no drainage. We squeezed it and no secretion came out. To return to see me in 5 days to have the cast removed. Patient was warned that standing on his feet for extended periods of time could be extremely detrimental. RDC/sk

NOV 3 1993

HISTORY: The wound looks fine with no drainage. It is well-closed, there is no redness. The sutures were removed and steristrips were applied. The patient was told not to disturb the steristrips, just wait until they fall off. I emphasized for him the need that he cannot engage in jogging, racewalking or any other physical activity. He can use the upper extremities but no exercises involving the lower extremities except the normal walking activity. He should use the brace that I ordered for him to prevent hyperextension. To be checked in one week. RDC/psc

NOV 10 1993

This patient is doing well. There is no secretion from the wound; there is a small area about 1 mm or less in diameter exposed but clean. We put a little bit of scarlet red and applied steristrips. We gave him 3" elastic bdge. to prevent swelling that could be extremely detrimental. He is a hair stylist and he has to stand on his feet but he should alternate standing on the feet with elevation. He should also sleep with the leg elevated. 3" elastic bdge. given to him with instructions. He is to continue using the brace continuously. To return to see me in a week. RDC/sk

NOV 18 1993

This patient is doing well. I can see no drainage from the wound that appears to be healing satisfactorily. To keep the leg elevated and return to see me in a week. RDC/sk

CLARK, Algernon

DEC 22 1994

This patient said that he is doing fine; he hasn't had any discharge from the wound and the wound looks fine. I told this patient and I emphasized this fact, that there is weakness in the tendon as a result of having to remove one tendon to debride the area. RDC/sk

FEB 2 1994 Int A

July 12/94 Deposition of Mr. Axelsson
(plaintiff) and Mr. Schweder regarding
the Mall.

40% impairment

August 2/94 (R) elbow Reg. 12
August 4/94 (L) " " 15
[in elbow] → P.T. with (R) 15 1/4
[Shirazone] → D. (L) 16 1/4
Deposition Aug

CODE 1 0830 ①

CHANGE PER VISIT 1

LAST NAME FIRST NAME INIT DATE BP

HOME# WORK#

SPEC. INSTRUCTIONS

X RAY VIEW

PHYS EXAM RE EXAM X RAYS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RECORD begins, N.I. DEFENDANTS EXHIBIT 8

EXERCISES

HOME INSTRUCTION

1. 1st exam/Consult
2. 1st exam/Consult
3. 1st exam/Consult
4. 1st exam/Consult
5. 1st exam/Consult
6. 1st exam/Consult
7. 1st exam/Consult
8. 1st exam/Consult
9. 1st exam/Consult
10. 1st exam/Consult
11. 1st exam/Consult
12. 1st exam/Consult
13. 1st exam/Consult
14. 1st exam/Consult
15. 1st exam/Consult
16. 1st exam/Consult
17. 1st exam/Consult
18. 1st exam/Consult
19. 1st exam/Consult
20. 1st exam/Consult
21. 1st exam/Consult
22. 1st exam/Consult
23. 1st exam/Consult

DATE	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
5-6-93																							
5-7-93																							
5-10-93																							
5-11-93																							
5-15-93																							
5-14-93																							
5-12-93																							
5-19-93																							
5-21-93																							
5-25-93																							
5-27-93																							
5-28-93																							
6-1-93																							
6-4-93																							
6-8-93																							
6-9-93																							
6-11-93																							
6-14-93																							
6-16-93																							

CHARGE PER VISIT

Clark

LAST NAME

FIRST Name

INIT.

HOME #

WORK #

DATE B.P.

6.25.93

6.28.93

6.29.93

7.2.93

7.6.93

7.8.93

7.12.93

7.14.93

SPEC. INSTRUCTIONS

X RAY VIEW

PHYS EXAM
RE • EXAM

X RAYS

THERAPY • TREATMENT PROCEDURE • FINDINGS • MAJOR COMPLAINTS

EXERCISES

HOME INSTRUCTION

SM

OV

EMS

Hart/Le

TP

Tractin

"Low back pain at day" - Quadratus Lumborum myospasm w/ RQM in R rotation at L5-S1

"Gait slip due to pain in R low back" - quadrates R myospasm persists - adjust side posture

"Low back quite a bit better" - patient walking w/ wide based gait -

Altered ambulatory kinetics contributing to R myospasm of quadratus + R latissimus

"Walk w/ HA" - trapezius radiation into regard bilaterally - adjust cervical search -

"In HA" - noted edema in suboccipital region w/ RQM C-C2 at lateral Flexion R

"Gait slip - can't find comfortable position" - Side posture adj - top L5-S1 PRS-specific

"Hurts to turn head R" - (L) levator scap myospasm

CODE # 0230		CHANGE PER VISIT	LAST NAME	FIRST	INIT.	DATE	WORK#	HOME#	SPEC INSTRUCTIONS	X RAY VIEW	PHYS EXAM	RE • EXAM	X RAYS	DIAGNOSIS	THERAPY • TREATMENT PROCEDURE • FINDINGS • MAJOR COMPLAINTS	HOME INSTRUCTION	EXERCISES	OTHER	REMARKS
1																			
2																			
3																			
4																			
5																			
6																			
7																			
8																			
9																			
10																			
11																			
12																			
13																			
14																			
15																			
16																			
17																			
18																			
19																			
20																			
21																			
22																			
23																			
24																			
25																			
26																			
27																			
28																			
29																			
30																			
31																			
32																			
33																			
34																			
35																			
36																			
37																			
38																			
39																			
40																			
41																			
42																			
43																			
44																			
45																			
46																			
47																			
48																			
49																			
50																			

④ levator scapula myospasm persists - pt. is using crutches to lean forwards + looking up - subocc. tenderness

Suboccipital channel (R) over rectus musculature
"Can't keep head up w/o pn. into eyes behind"

Atlas-axis motion much better in rotation but flexion at C1-occ & ~20%

"feeling good today" - pt. walking w/ less vix
- based stance - (R) Quadratus slight myospasm

"low back very sore today" (Changing cast + removing stitches) - (R) Quadratus flare up

(R) Quadratus lumborum pn persists - 1st & 2nd Coasted seated cervical - flexion at C7-T1 in motion

"Hires to walk with crutches past few days" "onfire back aches"

& Myospasm (R) Quadratus lumborum - No 2 RDL

CHARGE PER VISIT

Clark

LAST NAME

FIRST *Allen* INIT:

HOME #:

WORK #:

DATE RPT

8.18.93

8.23.93

8.24.93

8.26.93

8.30.93

9.2.93

9.9.93

9.14.93

SPEC INSTRUCTIONS

X RAY VIEW

PHYS EXAM
RE • EXAM

X RAYS

DEPOSITS

HOLDS
INSTRUCTION

THERAPY • TREATMENT PROCEDURE • FINDINGS • MAJOR COMPLAINTS

SM

OV

ENS

H/est

TPT

Tractm

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

latissimus dorsi TPis w/ radiation down arm on (B) - "can't stand for long periods" ~ 1 hr.!

(B) C7-T1 pain w/ radiation into forearm
(B) Jacksons (B) for dorsum encroachment -

Pn at medial border of (B) scapula w/ radiation to (B) lat. extensors in forearm -

"an feel area around surgical work" - noted swelling over incision - (B) C7-T1

"Headaches past 2 days behind eyes" - pt is distressed - (B) Quadratus (B) levator scapula -

(B) levator scapula myospasm persists "pn between shoulder blades" - noted C7-T1 clonus on (B) (B)

interspinous rigidity over C7-T1 - T6 (w/ clonus and hand brachialis) -

"Headaches again throughout day - behind eyes" -

1. No fusion
2. No instrumentation
3. No discography
4. No disc retractor
5. No disc removal
6. No disc replacement
7. No disc excision
8. No disc fusion
9. No disc fusion
10. No disc fusion
11. No disc fusion
12. No disc fusion
13. No disc fusion
14. No disc fusion
15. No disc fusion
16. No disc fusion
17. No disc fusion
18. No disc fusion
19. No disc fusion
20. No disc fusion
21. No disc fusion
22. No disc fusion
23. No disc fusion
24. No disc fusion
25. No disc fusion
26. No disc fusion
27. No disc fusion
28. No disc fusion
29. No disc fusion
30. No disc fusion
31. No disc fusion
32. No disc fusion
33. No disc fusion
34. No disc fusion
35. No disc fusion
36. No disc fusion
37. No disc fusion
38. No disc fusion
39. No disc fusion
40. No disc fusion
41. No disc fusion
42. No disc fusion
43. No disc fusion
44. No disc fusion
45. No disc fusion
46. No disc fusion
47. No disc fusion
48. No disc fusion
49. No disc fusion
50. No disc fusion
51. No disc fusion
52. No disc fusion
53. No disc fusion
54. No disc fusion
55. No disc fusion
56. No disc fusion
57. No disc fusion
58. No disc fusion
59. No disc fusion
60. No disc fusion
61. No disc fusion
62. No disc fusion
63. No disc fusion
64. No disc fusion
65. No disc fusion
66. No disc fusion
67. No disc fusion
68. No disc fusion
69. No disc fusion
70. No disc fusion
71. No disc fusion
72. No disc fusion
73. No disc fusion
74. No disc fusion
75. No disc fusion
76. No disc fusion
77. No disc fusion
78. No disc fusion
79. No disc fusion
80. No disc fusion
81. No disc fusion
82. No disc fusion
83. No disc fusion
84. No disc fusion
85. No disc fusion
86. No disc fusion
87. No disc fusion
88. No disc fusion
89. No disc fusion
90. No disc fusion
91. No disc fusion
92. No disc fusion
93. No disc fusion
94. No disc fusion
95. No disc fusion
96. No disc fusion
97. No disc fusion
98. No disc fusion
99. No disc fusion
100. No disc fusion

1. No fusion
2. No instrumentation
3. No discography
4. No disc retractor
5. No disc removal
6. No disc replacement
7. No disc excision
8. No disc fusion
9. No disc fusion
10. No disc fusion
11. No disc fusion
12. No disc fusion
13. No disc fusion
14. No disc fusion
15. No disc fusion
16. No disc fusion
17. No disc fusion
18. No disc fusion
19. No disc fusion
20. No disc fusion
21. No disc fusion
22. No disc fusion
23. No disc fusion
24. No disc fusion
25. No disc fusion
26. No disc fusion
27. No disc fusion
28. No disc fusion
29. No disc fusion
30. No disc fusion
31. No disc fusion
32. No disc fusion
33. No disc fusion
34. No disc fusion
35. No disc fusion
36. No disc fusion
37. No disc fusion
38. No disc fusion
39. No disc fusion
40. No disc fusion
41. No disc fusion
42. No disc fusion
43. No disc fusion
44. No disc fusion
45. No disc fusion
46. No disc fusion
47. No disc fusion
48. No disc fusion
49. No disc fusion
50. No disc fusion
51. No disc fusion
52. No disc fusion
53. No disc fusion
54. No disc fusion
55. No disc fusion
56. No disc fusion
57. No disc fusion
58. No disc fusion
59. No disc fusion
60. No disc fusion
61. No disc fusion
62. No disc fusion
63. No disc fusion
64. No disc fusion
65. No disc fusion
66. No disc fusion
67. No disc fusion
68. No disc fusion
69. No disc fusion
70. No disc fusion
71. No disc fusion
72. No disc fusion
73. No disc fusion
74. No disc fusion
75. No disc fusion
76. No disc fusion
77. No disc fusion
78. No disc fusion
79. No disc fusion
80. No disc fusion
81. No disc fusion
82. No disc fusion
83. No disc fusion
84. No disc fusion
85. No disc fusion
86. No disc fusion
87. No disc fusion
88. No disc fusion
89. No disc fusion
90. No disc fusion
91. No disc fusion
92. No disc fusion
93. No disc fusion
94. No disc fusion
95. No disc fusion
96. No disc fusion
97. No disc fusion
98. No disc fusion
99. No disc fusion
100. No disc fusion

1. No fusion
2. No instrumentation
3. No discography
4. No disc retractor
5. No disc removal
6. No disc replacement
7. No disc excision
8. No disc fusion
9. No disc fusion
10. No disc fusion
11. No disc fusion
12. No disc fusion
13. No disc fusion
14. No disc fusion
15. No disc fusion
16. No disc fusion
17. No disc fusion
18. No disc fusion
19. No disc fusion
20. No disc fusion
21. No disc fusion
22. No disc fusion
23. No disc fusion
24. No disc fusion
25. No disc fusion
26. No disc fusion
27. No disc fusion
28. No disc fusion
29. No disc fusion
30. No disc fusion
31. No disc fusion
32. No disc fusion
33. No disc fusion
34. No disc fusion
35. No disc fusion
36. No disc fusion
37. No disc fusion
38. No disc fusion
39. No disc fusion
40. No disc fusion
41. No disc fusion
42. No disc fusion
43. No disc fusion
44. No disc fusion
45. No disc fusion
46. No disc fusion
47. No disc fusion
48. No disc fusion
49. No disc fusion
50. No disc fusion
51. No disc fusion
52. No disc fusion
53. No disc fusion
54. No disc fusion
55. No disc fusion
56. No disc fusion
57. No disc fusion
58. No disc fusion
59. No disc fusion
60. No disc fusion
61. No disc fusion
62. No disc fusion
63. No disc fusion
64. No disc fusion
65. No disc fusion
66. No disc fusion
67. No disc fusion
68. No disc fusion
69. No disc fusion
70. No disc fusion
71. No disc fusion
72. No disc fusion
73. No disc fusion
74. No disc fusion
75. No disc fusion
76. No disc fusion
77. No disc fusion
78. No disc fusion
79. No disc fusion
80. No disc fusion
81. No disc fusion
82. No disc fusion
83. No disc fusion
84. No disc fusion
85. No disc fusion
86. No disc fusion
87. No disc fusion
88. No disc fusion
89. No disc fusion
90. No disc fusion
91. No disc fusion
92. No disc fusion
93. No disc fusion
94. No disc fusion
95. No disc fusion
96. No disc fusion
97. No disc fusion
98. No disc fusion
99. No disc fusion
100. No disc fusion

DATE

CODE # 0230

CHARGE PER VISIT

LAST NAME

HOME #

SPEC INSTRUCTIONS

X RAY VIEW

PHYS EXAM

RE - EXAM

X RAYS

DIAGNOSES

HOLD INSTRUCTION

THERAPY • TREATMENT PROCEDURE • FINDINGS • MAJOR COMPLAINTS

DATE B.P.

9.17.93

9.20.93

9.23.93

9.28.93

10.5.93

10.8.93

10.22.93

10.25.93

Cervical Activity
 Traction
 TPT
 Heat
 EMS
 SM
 "Can't sleep on in mid neck, hurts to turn" - levator
 Scapula on posits, & Rotation
 "Pain is worse in morning" - latissimus m. - TP's down
 crutches cause pain radiation to medial elbow.
 "Dr. trimmed wound - pus draining" pt distressed.
 @ Quadratus lumborum persists - start pt. on
 stretching maneuvers for Quadratus/Piriformis/Glute Med.
 "Stretches feeling good" ↑ ROM in mid-thoracic
 region w/ ↓ ROM at lumbar-thoracic junction
 "Can't perform wall stretch to R." - Quadratus
 lumborum slight w/ (D) lateralization of L-spine
 "Headache - neck + shoulder pain" - levator
 Scap m. spasm - noted above elbow -
 ↑ ROM at C1-C2 in rotation - elbow persists
 EMS to upper traps

	1000				
101	D				
200	X4				
300					
400	X3				
500					
600	2				
	21				

CA
VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

ALGERNON (ALLEN) CLARK,

Plaintiff,

v.

FRANCONIA ASSOCIATES, et al.,

Defendants.

At Law No. 126947

FINAL JUDGMENT ORDER

THIS CAUSE came to be heard on Plaintiff's Motion for Judgment, and in accordance with this Court's Scheduling Order, a jury was impanelled on the 16th day of August, 1994. And after the panel of thirteen was sworn, the Court and Counsel for both parties conducted a voir dire of the members of the panel. And the Court and the parties being satisfied that the panel was fairly and impartially selected, each side was permitted to exercise three strikes, leaving a jury of seven, which was sworn.

And Counsel for each side was permitted to address the jury in opening statement, after which the Plaintiff proceeded to present his evidence. Algernon Clark, Peter Schubring, Alan Funk, Steve Johnson, Andrew Smith and Dr. Ruben Cabrera testified on behalf of the plaintiff. Gerald Robinson was called as as adverse witness by the plaintiff. ~~Plaintiff's exhibits 1-13, 27-32, 35, 36, 37A, 38A, 38B, 38C, 39B, 40A, 40B, 40C, 41A, 41B, 43E, 47 were admitted without objection and exhibits 14-16, 18-26, 35A, 40D, 42B, 43D, 43E, 44C, 45C, 45D were admitted over the defendants' objection. The Court sustained defendants' objection to plaintiff's exhibits 33 and 46.~~ Defendants further objected

JMR

to the admission into evidence of certain expert testimony by Alan Funk and Dr. Ruben Cabrera, which objection was denied as to Mr. Funk's testimony and denied in part and granted in part as to Dr. Cabrera's testimony. Plaintiff then rested. Whereupon the Defendant moved to strike the Plaintiff's evidence on several grounds, which motion was denied. The Defendant then presented his evidence. Dr. Robert Gordon, Gerald Robinson, Merrill Sporkin, Brian Embrey and Jackie Figueroa testified on behalf of the defendants. The defendants also called Algernon Clark as an adverse witness. Plaintiff was allowed to use the document previously identified as plaintiff's exhibit 33 for impeachment purposes, to which defendants objected. Defendants' exhibit 1 was admitted into evidence without objection. After the defendants rested, the Plaintiff then called Algernon Clark as a witness in rebuttal. The Plaintiff then moved to strike the Defendant's contributory negligence defense, which motion was denied. The judge, after discussion with Counsel as to the appropriate and necessary jury instructions and noting counsels' objections to certain instructions, then read the law applicable to the case to the jury, after which the jury retired to deliberate. And after considering the matter, the jury returned with a verdict in favor of the Plaintiff, and fixed his damages at ONE HUNDRED TWENTY THOUSAND DOLLARS (\$120,000.00). After which the seven members of the jury panel, each of whom was present throughout the trial, were excused by the Court.

It is THEREFORE ORDERED, ADJUDGED, and DECREED, that the Plaintiff ALGERNON CLARK, sometimes also known as ALLEN CLARK or ALLAN CLARK, shall have judgment of the Defendants FRANCONIA ASSOCIATES and THE FISCHER GROUP, INC. in the amount of ONE HUNDRED TWENTY THOUSAND DOLLARS (\$120,000.00), plus costs and interest at the legal rate from the date of this Order.

ENTER this 2^d day of September, 1994.

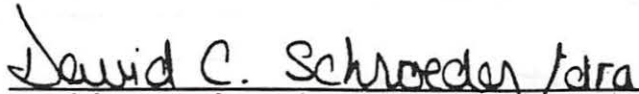

JANE MARUM ROUSH, JUDGE

I ASK FOR THIS:



David R. Axelson, Esq. (Virginia Bar #14098)
10617 Jones Street, #301A
Fairfax, VA 22030
(703) 591-9096
Counsel for Plaintiff ALGERNON CLARK

SEEN AND OBJECTED TO FOR THE REASONS NOTED ON THE RECORD IN THE PRESENCE OF THE COURT REPORTER AND FOR THE REASONS NOTED IN THE DEFENDANTS' TRIAL BRIEF AND BECAUSE THE JURY'S VERDICT IS NOT SUPPORTED BY THE EVIDENCE OR THE LAW AND IS THE PRODUCT OF SYMPATHY FOR THE PLAINTIFF:



David C. Schroeder, Esq. (Virginia Bar #27496)
MURPHY McGETTIGAN RICHARDS & WEST, P.C.
Suite 700, King Street Station
225 Reinekers Lane
Alexandria, Virginia 22314-2822
Counsel for Defendants FRANCONIA ASSOCIATES and
THE FISCHER GROUP, INC.

9-16-94

112

\$

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ALGERNON CLARK

Plaintiff(s),

VERSUS

FRANCONIA ASSOCIATES

Defendant(s)

ET AL

CHANCERY/LAW NO:

126947

This cause came on to be heard on the 16TH day of SEPTEMBER, 1994 on Plaintiff's/Defendant's motion for JNOV OR NEW TRIAL.

Upon the matters presented to the Court at the hearing it is

ADJUDGED, ORDERED and DECREED as follows:

MOTION DENIED.

Entered this 16 day of Sept 1994.

SEEN:

David R. Anderson
Counsel for Plaintiff(s)

Jane Margaret Foush
JUDGE

OBJECTED TO FOR REASONS NOTED IN BRIEF AND DURING TRIAL

[Signature]

Counsel for Defendant(s)

ASSIGNMENTS OF ERROR

1. The jury erred in imposing liability for negligence on the Mall because all of the evidence indicated that Clark had exceeded the scope of his invitation (thereby losing his status as an "invitee") and there was no evidence or contention that the Mall acted willfully or wantonly as to Clark.

2. The trial court erred when it declined to rule that Clark was guilty of contributory negligence as a matter of law when the evidence was uncontradicted that Clark had sustained his injury while in the midst of a voluntary and risky attempt to rescue the mere property of another.

3. The jury erred in imposing liability against the Mall when it was apparent that Clark's description of how the accident occurred, which was Clark's entire evidentiary basis on the issue of causation, is contrary to the laws of physics and reason and therefore could not have happened.

4. The jury erred in imposing liability for negligence on the Mall when there was no evidence which suggested the Mall knew or should have known that there was a dangerous condition involving the closing speed of the door.

5. The trial court abused its discretion in admitting into evidence the opinions of Clark's experts, Alan Funk and Dr. Ruben Cabrera, when those opinions were based on assumptions and opinions without evidentiary support and constituted opinions on matters outside of those experts' respective fields of expertise.

