201 VA 193

Return to
FILE COPY
Clerk Supreme Court of Appeals
Richmond, Va.

Record No. 4978

In the Supreme Court of Appeals of Virginia at Richmond

FLOYD R. MILLER

v.

LYONS S. QUERY

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4978

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 22nd day of January, 1959.

FLOYD R. MILLER, Plaintiff in Error,

against

LYONS S. QUERY, Defendant in Error.

From the Court of Law and Chancery of City of Norfolk

Upon the petition of Floyd R. Miller a writ of error and *supersedeas* is awarded him to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 14th day of October, 1958, in a certain motion for judgment then therein depending wherein Lyons S. Query was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said Law and Chancery Court in the penalty of six thousand dollars, with condition as the law directs.

RECORD

* * * * *

page 4 } INSTRUCTION P-1.

The Court instructs the jury that the law of Virginia requires the operator of a disabled vehicle to remove the same from the highway as soon as reasonably possible. The violation of this law is negligence.

If you believe from the evidence that Jackie Lee Hamrick violated this law he was guilty of negligence and if you believe from the evidence that defendant aided or assisted Hamrick in the violation of this law, then defendant was likewise guilty of negligence.

Granted.

J. H. T.

page 5 } INSTRUCTION P-2.

The Court instructs the jury that if you believe from the evidence that the defendant and Jackie Lee Hamrick were engaged in a joint venture or enterprise then the negligence, if any, of Hamrick is imputed to defendant, or in other words, the negligence, if any, of Hamrick is the negligence of defendant.

Granted.

J. H. T.

page 6 } INSTRUCTION P-4.

The Court instructs the jury that if you believe from the evidence that defendant was guilty of negligence which proximately caused or contributed to the injuries of the plaintiff, you shall find for the plaintiff.

Granted.

J. H. T.

page 7 } INSTRUCTION P-5.

The Court instructs the jury that as used in these in-

structions negligence is the failure to exercise that degree of care which is exercised by a person of ordinary prudence.

Granted.

J. H. T.

page 8 } INSTRUCTION P-6.

The Court instructs the jury that if you find for the plaintiff you should fix the award at such sum as you believe from the evidence will compensate plaintiff for the injuries he received; and in fixing the amount you may take into consideration the physical incapacity, pain and suffering and mental anguish endured by plaintiff since he received the injuries, and such physical incapacity, pain and suffering and mental anguish as he will probably endure in the future as the result thereof; the necessary expense for medical treatment plaintiff has incurred by reason of his injuries; any other expenses or losses incurred by plaintiff by reason of his injuries; and the character and extent of plaintiff's injuries and their effect upon his health.

Granted.

J. H. T.

page 9 } INSTRUCTION D-1.

The Court instructs the jury that negligence of defendant in this case cannot be inferred from the mere happening of the accident. He is presumed to be free of such negligence until the contrary is shown by a preponderance of the evidence and the burden rests with the plaintiff to prove by such preponderating evidence that said defendant was guilty of negligence and further that such negligence, if any, proximately contributed to the injury and this burden remains with the plaintiff throughout the entire trial and applies at every stage thereof. Accordingly if you believe it is just as likely that defendant was not guilty of negligence as that he was, than your verdict should be for the defendant.

Granted.

J. H. T.

page 10 } INSTRUCTION P-3.

The Court instructs the jury that the law of Virginia requires that every vehicle upon a highway within this State shall display lighted lamps and illuminating devices (head and tail lights) from a half hour after sunset to a half hour before sunrise. The violation of this law is negligence.

Refused.

J. H. T.

page 11 } INSTRUCTION D-2.

The Court instructs the jury that if you believe from the evidence that Hamrick was negligent in this case and that his negligence was the sole proximate cause of the accident, then your verdict should be for the defendant.

Refused.

J. H. T.

page 12 } INSTRUCTION D-3.

The Court instructs the jury that even should you believe from the evidence that defendant in this case was negligent, if you further believe from the evidence that an intervening act of negligence was the cause of the accident and not the negligence of defendant, then your verdict should be for the defendant.

Refused.

J. H. T.

* * * * *

page 14 } October 8, 1958.

Mr. W. C. Pender
Coward & Pender
Western Union Building
Norfolk, Virginia

Mr. George H. Gray
Royster Building
Norfolk, Virginia

Re: Query *v.* Miller.

Dear Sirs:

In the above case I am of the opinion that defendant's motion to set aside the verdict of the jury and either enter judgment for the defendant or grant him a new trial must be denied.

To me it seems clear that the defendant Miller and Jackie Lee Hamrick were engaged in a joint enterprise and I am of the opinion that the court should have so determined as a matter of law; however, the issue was submitted to the jury and in view of their verdict the error, if any, was harmless.

In any event there would appear to be no doubt but that Jackie Lee Hamrick did not remove his disabled vehicle from the highway as soon as reasonably possible as required by law and that defendant aided and assisted him in the violation of this duty by propelling Hamrick's car along and upon the public highways. Under the circumstances Hamrick's negligence, as determined by the jury, would be imputed to defendant.

Judgment will be entered upon the verdict returned by the jury.

Very truly yours,

J. HUME TAYLOR
Judge.

JHT:meg

page 15 }

* * * * *

In the Court of Law and Chancery of the City of Norfolk, on the 14th day of October, 1958.

ORDER.

This day came again the parties, by counsel, and the motion of the defendant, by counsel, to set aside the verdict of the jury, heretofore rendered on the 14th day of August, 1958, and enter up judgment for the defendant or in the alternative set aside the verdict and grant a new trial, now, having been fully heard and maturely considered by the Court is overruled, to which action of the Court the defendant, by counsel, duly excepted.

Whereupon it is considered by the Court that the plaintiff recover of the said defendant the sum of Five Thousand ($5,000.00), Dollars, with interest thereon to be computed after the rate of six per centum per annum from the 14th day of August, 1958, until paid, together with his costs about his suit in this his behalf expended. To all of which action of the Court the defendant, by counsel, duly excepted.

A Copy—Teste:

W. L. PRIEUR, JR., Clerk
By L. M. CALVERT, Deputy Clerk.

page 16 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Pursuant to Rule 5.1, Paragraph 4, of the Rules of the Supreme Court of Appeals of Virginia, Floyd R. Miller, defendant, hereby gives notice of his intention to petition the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* in this action and hereby sets forth as his assignments of error:

(1) The Court erred in denying defendant's motion for summary judgment upon the conclusion of plaintiff's counsel's statement to the jury.

(2) The Court erred in denying defendant's motion to strike the evidence upon the conclusion of plaintiff's evidence.

(3) The Court erred in granting any and all of the instructions offered in this case on behalf of plaintiff.

(4) The Court erred in granting plaintiff's instruction P-2

for the reason that there was no evidence of joint venture or enterprise in the case.

(5) The Court erred in granting instruction P-1 since said instruction was contrary to the law and the evidence.

(6) The Court erred in refusing to grant defendant's instruction D-2 for the reason that same properly stated the law applicable to the facts in this case.

(7) The Court erred in refusing to grant defendant's instruction D-3 for the reason that same properly stated the law applicable to the facts in this case.

(8) The Court erred in refusing to strike the evidence upon the conclusion of all the evidence in this case.

page 17 } (9) The Court erred in refusing to set aside the verdict as contrary to the law and the evidence and enter judgment for defendant.

FLOYD R. MILLER
By W. C. PENDER
Of Counsel.

* * * * *

Filed 10-27-58.

H. L. STOVALL, D. C.

* * * * *

page 3 }

* * * * *

The Court: Mr. Gray, show me manually how this thing happened.

Mr. Gray: What do you want me to use?

The Court: I don't care.

Mr. Gray: All right. This did not occur at an intersection.

The Court: I understand, but it was a driveway?

Mr. Pender: It is called a private driveway.

The Court: Yes. Now, am I right, Mr. Miller was driving the pushing car?

Mr. Gray: He was driving the pushing car.

page 4 } The Court: All right. Now, was the purpose to drive him up to that driveway, did Mr. Miller know that he was going to turn right?

Mr. Gray: I don't know what his purpose was.

The Court: All right, show me what Mr. Miller did.

Mr. Gray: Well, Mr. Miller was pushing this unlighted vehicle down the road.

The Court: Yes, unlighted vehicle?

Mr. Gray: Unlighted. I stated that it was an unlighted vehicle.

The Court: That is what I didn't catch.

Mr. Gray: Yes, sir. Then, as this car got here, this vehicle suddenly turned and they collided like this (demonstrating).

The Court: What are you claiming as the negligence of Mr. Miller, in pushing an unlighted automobile down the road?

Mr. Gray: For one thing, he was engaged in a
page 5 } joint venture; for another in an attempt to get the
automobile started; and third, the law requires, as I understand it, that a disabled vehicle be removed from the highway as soon as possible, and on the contrary Mr. Miller was pushing a disabled vehicle down the highway with no intention of, whatsoever, to remove it from the highway.

The Court: If you are right on the joint venture, he turned from a straight position into the path of another automobile without first using reasonable care to see if the movement can be made in safety.

All right, Mr. Pender, why should I strike the evidence, or rather summary judgment?

Mr. Pender: Because, as he stated, he had no activity with the man which constituted negligence. The cause of this accident, according to his statement, was the activity of the man at the wheel of this car in making a left- turn.

The Court: Isn't it negligence?

Mr. Gray: First, it is a joint enterprise, and
page 6 } consequently the negligence of the man operating
an unlighted car would be imputed to the other.

Mr. Pender: He has made no joint enterprise in his statement to the jury.

The Court: He stated he was pushing the other man's car and the two of them were endeavoring to get it started.

Mr. Pender: He was helping the man get his car out of the way.

The Court: An act of a Good Samaritan could be a joint enterprise, can't it?

Mr. Pender: Not unless they are engaged together, where the man actually helped, that does not make it a joint enterprise. The negligence of one is not imputable to the other in a case of that kind.

The Court: Isn't it negligence to push an unlighted vehicle as it is to operate an unlighted vehicle? What is the difference?

Mr. Pender: That is, nothing happened from the pushing. What caused the accident was the turning. The man turned in the face of oncoming traffic. That was the negligence.

page 7

The Court: I am going to overrule your motion.

Mr. Pender: Exception, if your Honor, please.

The Court: I don't think you stated that you move for summary judgment on the grounds counsel's opening statement did not show any negligence on the part of the defendant?

Mr. Pender: That's right.

The Court: All right, ask the jury to step in the box.

(The jury were recalled into the jury box, after which the following occurred):

Mr. Gray: Mr. Hillegass, will you take the stand?

The Court: Wait a minute, Mr. Pender hasn't made his opening statement yet.

Mr. Gray: Oh, I'm sorry.

The Court: That is the usual procedure.

(Thereupon, counsel for defendant made an opening statement, after which the trial proceeded as follows):

page 8

MICHAEL G. HILLEGASS,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Gray:

Q. State your name, please, sir?

A. Michael G. Hillegass.

Q. And where do you reside, Mr. Hillegass?

A. 2221 Dean Drive. That is in Princess Anne County.

Q. And where are you employed, sir?

A. Smith Douglas Fertilizer Company, Incorporated.

Michael G. Hillegass.

Q. And in what capacity are you employed?
A. Sales supervisor.
page 9 } Q. Now, on May 7th, 1958, was your vehicle involved with a collision with another vehicle?
A. That is true, yes, sir.
Q. Who was in your automobile at that time?
A. I had Mr. Lyons Samuel Query and William Sprott.
Q. And where was Mr. Query seated?
A. In the front seat on the right-hand side.
Q. And where was Mr. Sprott seated?
A. In the back seat towards the middle.
Q. Where had you come from?
A. Knights of Columbus meeting.
Q. And had you had more people in your car when you left the Knights of Columbus meeting?
A. One more.
Q. And who was he?
A. Mr. Walker. Mr. William T. Walker.
Q. And where did you leave him before the accident?
A. At his home.
Q. And then what street were you proceeding on at the time of the accident?
A. Tidewater Drive.
Q. In what direction, sir?
A. Going towards Little Creek.
Q. Now, what was your intention with respect to Mr. Query and Mr. Sprott? Where were you carrying them?
page 10 } A. My intentions were to take them home.
Q. Which one were you taking home first?
A. Mr. Sprott lived the closest, so naturally he would be first.
Q. All right, sir. Now, what were the weather conditions that night?
A. Very hazardous. The rain, the conditions was very heavy, more so than usual.
Q. And was the streets dry or wet?
A. Well, it had been raining off and on that entire evening. At that particular time it was raining very heavy, so naturally it would be.

The Court: Did he say what time it was?

By Mr. Gray:
Q. What time of day or night was it?

Michael G. Hillegass.

A. Well, I think in the neighborhood of one to one-thirty.
Q. All right, sir.

The Court: That's in the early morning?
The Witness: Yes, sir; yes, sir.

By Mr. Gray:
Q. Do you know what the speed limit is on Tidewater Drive?
page 11 } A. Yes, sir.
Q. Where this occurred?
A. I know it very well. It is 40 miles per hour.
Q. And what speed were you driving at?
A. Well, I was driving at 25 miles an hour. The reason I say that is prior to the accident we were speaking of the conditions that evening that prevailed and mentioned that it was a terrible night to be out and visibility was limited.
Q. All right, sir. Now, is Tidewater Drive laned off with white lines?
A. It is a four-lane, and I believe it is laned off. That is usually with white lines.
Q. With a double line in the center?
A. I believe so.
Q. What lane were you proceeding in?
A. I would be in the outside lane; that would be called the "curb lane," I believe.
Q. All right, sir, were there any other vehicles on the road?

By the Court:
Q. Well, that is the curb lane for northbound traffic?
A. Yes, sir. The inside lane would be the center
page 12 } lane.
Q. That would be the eastern lane, wouldn't it?
A. Well, yes, sir, it could be the eastern lane.
Q. Wouldn't it be?
A. If he were going north, I guess it would be heading in the north lane.
Q. No, I mean the easternmost lane of the traffic?
A. Yes, yes, sir, that is the easternmost lane.

By Mr. Gray:
Q. All right, sir. Was there any other traffic on the road?

Michael G. Hillegass.

A. Well, it was limited to that particular time of the night. It's never heavy. I would say it was limited.

Q. Did you see Mr. Miller's automobile?

A. Yes, I did.

Q. And where was it?

A. It was in the outside lane. I mean on the inside lane.

Q. Ahead of your car or behind you or where?

A. Well, when I first saw it it was, naturally, well ahead of me.

Q. And was it lighted?

A. Yes, it was properly lighted—well, I could see his brake-lights.

Q. You could see the tail lights?

A. That is correct.

page 13 } Q. And was he traveling faster or slower than you?

A. I would say he was going very casually, slower than I was.

The Court: I don't believe he said in what direction he was going.

By Mr. Gray:

Q. All right, what direction on Tidewater Drive was he proceeding?

A. The same direction I was; that's north.

Q. All right, sir. When you approached him from the rear, you in the outside lane and he in the inside lane, what happened?

A. Well, I would say that we were approximately going at 20 to 25 miles per hour up to that point. I think possibly I had slowed down some in passing him on the inside lane, but when I had reached, I would say, approximately the rear of his vehicle that I noticed this car cutting across my path, this black old type Packard has no gloss or very little shine to it at that particular time of the evening. I think then I hollered to "look out," just a natural reaction.

By the Court:

Q. Were there any lights on the car you are speaking of, this Packard?

A. No, sir, none whatsoever. I believe that is

page 14 } why he was pushing him because the battery was completely dead.

Michael G. Hillegass.

By Mr. Gray:

Q. When you hollered "look out," what did you do, anything else?

A. Well, naturally you go for the brakes, and I guess—

Q. What happened?

A. Well, that is the point of contact.

Q. What part of your car collided with what part of this Packard?

A. The front end of my automobile met the—well, the middle or the rear of his automobile.

Q. And where was—

By the Court:

Q. What do you mean by "his automobile." There are three automobiles. Do you mean the Packard?

A. I—well, I would say the Packard, yes, sir.

By Mr. Gray:

Q. Where was Mr. Millers' automobile at this time?

A. Mr. Miller was the gentleman who was pushing him?

Q. Yes. Where was his automobile with respect to your automobile?

A. At the point of impact—contact?

Q. Yes, sir.

page 15 } A. Well, that would be a mighty hard question to answer. I couldn't answer that.

Q. Well, let's put it another way: when you saw this automobile turning in front of you, did you have any opportunity to either go to the right or to the left?

A. Well, if I had gone to the right, naturally I would have had to have driven over the curb, and possibly had there been a telephone pole or tree I would have had a rather serious accident, and had I turned left I would naturally have driven into Mr. Miller; but at that particular time there wasn't going to have to turn in too many different directions. That car was in front and—

Q. You did what you had to do?

A. It was just like something was dropped out of heaven is the only way you can describe it. It just came from nowhere. The car was in front of us and that was it.

Q. Do you know what happened to Mr. Query?

A. Well, no. I could say that at the point of impact or in the accident there was a thudding or noising sound on the window.

Q. What damage was done to your automobile?

Michael G. Hillegass.

A. The damage done on my car consists of a total of $278.00, in that neighborhood.

Q. Yes, but I am speaking of the specific damage: to your front end, and did you have any glass broken?

page 16 } A. That's right, on the right-hand side where Mr. Query was sitting the windshield was cracked.

Q. The windshield?

A. Yes, sir.

Q. All right, now, after it where did your car come to a stop?

A. Well, about at the point of impact.

Q. Where did the Packard come to a stop?

A. Well, he glided down a little ravine or a hill or into a private residence, another driveway there that he entered.

Q. Did you have any conversation with the driver of the Packard automobile?

A. Yes, I did.

Q. What was that conversation?

A. Well, naturally, the first thing was should we get an officer to investigate the accident. I believe they were called. We didn't—as we noticed he didn't have any lights, one of the questions we asked him was "Did you have any lights on?"

Mr. Pender: If your Honor please, he can't testify as to what this other man said at the scene.

By Mr. Gray:

Q. All right, I will come back to that. Mr.

page 17 } Hillegass, did you have any conversation with Mr. Miller?

A. Yes, sir, I did.

Q. What was that conversation?

A. Well, the conversation pertained primarily to the accident, to the fact that there was no headlights on the other vehicle. I believe that was one of the questions we asked him, the Hamrick* vehicle, the fellow who was driving the Packard. Mr. Hamrick at first said that he did have lights, but Mr. Miller here, Floyd Miller, said that he didn't have a light.

GEORGE H. GRAY, p. q.
W. C. PENDER, p. d.

---

*It is stipulated that the correct spelling of this name here and throughout the record should be Hamrick.

Michael G. Hillegass.

By the Court:

Q. Well, did Mr. Miller admit he had been shoving this Packard automobile?

A. Yes, sir.

Q. How far did he say he shoved it?

A. From his house, I believe he said.

Q. Did he tell you where his house was?

A. He lived—I don't know the exact address, but I believe he said Biltmore. Am I correct?

By Mr. Gray:

Q. What relationship, if any, was related to you, what relationship between Mr. Hamrick and Mr. Miller was related to you, if any?

A. You mean what relation would Mr. Miller have to Mr. Hamrick?

page 18 } Q. Yes, at the time.

A. I am certainly sure they were friends and Mr. Hamrick was a guest of Mr. Miller that evening.

Q. How did you learn that?

A. Mr. Miller told me that.

Q. What, if anything, did he say with reference to his pushing that automobile?

A. Well, I believe that he stated that Mr. Hamrick had that afternoon sent his wife home, who was at the time pregnant, and he was worried of the fact that he had gone out in his wife's present condition, that he was a guest at Mr. Miller's house that evening; that he couldn't sleep, that he felt restless and that he wanted to go back to the ship, and he went out to start his car, and I guess he found it wouldn't start as the battery was dead, and Mr. Miller in turn took the Ford vehicle that he was driving and pushed him onto the street with the intentions of getting him started.

By the Court:

Q. How far was this from Mr. Miller's home, if you know?

A. Well, I don't know exactly where Mr. Miller lives, your Honor.

Q. All right—

A. But I would say—

Q. Well, was it on Tidewater Drive?

page 19 } A. I would say it was a couple of blocks. Do you know where Thole Street is?

Michael G. Hillegass.

By Mr. Gray:
Q. You tell me between what streets.
A. All right, sir. Between Thole Street and Little Creek Road, in that field.

The Court: All right.

By Mr. Gray:
Q. Was the point of impact south of the intersection of Tidewater Drive and Biltmore Road?
A. I would say so, yes.
Q. About how far south would you put it?
A. Well, I don't know exactly where Biltmore Road is.
Q. That's all right, then. Were the police called?
A. Yes, sir, we immediately—I went to the police, or to 'phone, to call them; Mr. Miller furnished the transportation there and drove us up to the telephone booth and waited for us.
Q. Did the police respond?
A. Yes, they did.
Q. Which officer—
A. Officer Farr was investigating officer.

Mr. Gray: Answer Mr. Pender, if you will, Mr. Hillegass.
page 20 }
The Witness: All right.

CROSS EXAMINATION.

By Mr. Pender:
Q. Did Mr. Miller turn his car to the right in front of you at any time?
A. I couldn't answer that, sir, I wouldn't be in a position to say that he had turned in front of me at any time.
Q. I understand you to say that you were parallel with his car, with Mr. Miller's car at the time of the accident?
A. I would say, that close to the point of the accident, I naturally would have been close to parallel with him, sir.
Q. At the time of the accident where was the front of your car with relation to the front of Mr. Miller's car?
A. I don't believe that I could definitely answer that truthfully, where I was at that particular time.
Q. Had you actually passed him?
A. I truthfully could not answer that. I would say that naturally I would have been up in the front of him, if the

other man had turned I would have hit two auto-
page 21 } mobiles.

Q. When you came to pass Mr. Miller's car, did you blow your horn?

A. No, sir, I did not.

Q. Did you give him any signal that you were to pass?

A. I proceeded with caution, sir. There was a 40 mile an hour limit, I would say.

Mr. Gray: Your Honor, I object to the question. There is no requirement that any signal be given.

The Court: There is no requirement but I will allow the question. There is no requirement assuming it is within the City limits, is it? I don't know.

The Witness: Yes, sir, it is in the City limits.

By Mr. Pender:

Q. How soon did the accident happen after you first saw that car turn, was it an instantaneous turning and hit, like that, or how much time elapsed?

A. Well, to be perfectly truthful with you, I think that the car, the Packard, in its having no lights and being a black car and a dirty automobile and on a hazardous evening, that an accident like that is something you couldn't *gage* time.

You couldn't say it was five seconds, you could
page 22 } not say it was ten seconds. And just as I pro-
ceeded alongside of Mr. Miller that is when I first noticed the automobile there. I am sure Mr. Miller had pushed him—

By the Court:

Q. Was he in the act of turning when you saw it, or was it across your path?

A. Moving across my path. Well, he turned like that (demonstrating), just like a real sudden turn to the right. From the force of Mr. Miller pushing him, naturally he pushed him hard enough to send him on down into the driveway after I had contact with it with my automobile.

By Mr. Pender:

Q. Was Mr. Miller's car still in contact with the Hamrick car at the time you struck the Hamrick car?

A. No, sir, had it been I would have hit two automobiles.

Q. Where did Mr. Miller's car stop?

A. (Pause).

Michael G. Hillegass.

Q. (Continuing) With respect to the accident, with relation to the accident?

A. Well, I would say within ten feet of the accident, one way or the other. I couldn't make a correct statement—I did not measure or take any marks of any sort like that at the time of the accident, but it was very close to the scene of the accident.

page 23 } Q. Can't you tell us where you were with respect to Mr. Miller's car when you first saw the Hamrick car?

A. Where I was on the Miller car when I—

Q. With relation to the Miller car were you. You were paralleling him, but had you started to pass him? Had you passed him or where was the front of your car with relation to the front of his car?

A. Well, I would say when I first saw the Packard, not the Miller car, that I was possibly coming alongside of him.

Q. Coming what?

A. Coming alongside, starting at the rear bumper.

Mr. Gray: Come down here and show us that.

The Witness: All right, sir.

(Witness complied and left witness stand to demonstrate on chart table.)

By Mr. Pender:

Q. Make this green car Hamrick.

The Court: All the cars are going south, let's get them going north.

A. All right, sir, we were going in this fashion I would say about here, and the contact came, he was pushed into the driveway, I would say it hit him about like

page 24 } that.

Q. Now, when you say "pushed," this car didn't turn this way, did it?

A. Well, I could not answer that, sir. I would say that if he had turned that way I would have hit two automobiles.

Q. Then all you know is then that you were about half a car length away from the point of the impact?

A. Right, sir.

Q. And when you first saw him, then was when he first came in front of you?

Michael G. Hillegass.

A. Yes, sir.

Q. If he had lights on could you have avoided striking him?

A. Well, I don't think so, if he had lights on.

Q. All right, you could not have avoided him even if he had lights on, could you?

A. If he had lights on I think I would have seen the lights up here, it would have lit up the road.

Q. But from the time he started his turn the lights had nothing to do with what happened?

A. He did not have any lights on, but I would say that this car here would have naturally blocked the lights of Floyd Miller.

Q. Exactly, to any oncoming traffic his lights here were blocked?

page 25 } A. Had Mr. Miller's lights been out here working on the highway I could have seen the car.

Q. Assuming this: that this man, suppose he had lights on and you were in this position and he turned in front of you, you still would have struck him, wouldn't you?

A. I don't think you could have missed striking anybody if you did that going down the highway.

Mr. Pender: I see. That is all, thank you.

Mr. Gray: You may come down.

By the Court:

Q. There is one question I would like to ask you.

A. Yes, sir?

Q. When did you first realize that Mr. Miller's automobile was pushing another automobile?

A. (Pause) Well, I actually—when you have an accident like that you don't realize where the other car had come from.

Q. What I am trying to find out is did you realize he was pushing the other automobile until you had seen the car in front of you?

A. Not until I had seen the car in front of me.

Q. And before then you did not realize he was pushing another vehicle?

A. No, sir.

page 26 } The Court: All right.

Mr. Gray: Come down.

I would like to call Officer Farr.

ERNEST W. FARR,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Gray:

Q. State your name, please, sir?

A. Ernest W. Farr.

Q. Officer Farr, you are a member of the Norfolk Police Force, are you not?

A. I am, sir.

Q. Did you have occasion to investigate an automobile collision on May 7th, 1958, on Tidewater Drive, at approximately 1:30 A. M.?

page 27 } A. I did, sir.

Q. And where did this collision occur with respect to any intersection?

A. The collision happened near Biltmore Road in the vicinity of the old road turning to the left by the old Naval Base Road, in that section, sir.

Q. Can you give us any estimate of how far south of Biltmore Road it was?

A. Approximately 75 feet.

Q. What is the speed limit on Tidewater Drive at that particular point?

A. 40 miles an hour.

Q. And how many lanes are there on Tidewater Drive?

A. It is a four-lane drive.

Q. Are the lanes divided by white lines?

A. Yes, sir.

Q. And where the point of this accident happened is within the City of Norfolk?

A. It is, sir.

Q. When you arrived what was the weather conditions that night?

A. Rainy and wet.

Q. When you arrived on the scene what did you

page 28 } find?

A. I found the car which allegedly had been driven by Mr. Hillegass still on Tidewater Drive. There was a black 1940 Packard sitting down in the driveway into a private residence there which had been damaged in the right-rear quarter panel. The front end of Mr. Hillegass' car had been damaged also. There was another car there which had not been actually in contact in the accident.

Ernest W. Farr.

Q. All right, sir. Did you talk to Mr. Miller about the accident at all?

A. I did, sir.

Q. And what did he tell you concerning the accident?

A. He stated that the gentleman, the driver of the black car, I believe his name was—

Q. Hamrick?

A. Hamrick, had been a guest at his home that night and he wished to return to the ship, that the car would not start. He was attempting to get him started by pushing him and that he had cut loose from the automobile and that the car made a right turn across the lane going into this private residence—the driveway there.

Q. Did you know whether or not Mr. Miller made a statement with reference to the lights of the Packard automobile?

A. No lights on the car.

page 29 } Q. Did you make any inquiries to the person driving the Packard automobile?

A. (Pause) I talked with him.

Q. Yes, sir. Can you recall his name as being Hamrick?

A. Yes, sir.

Q. What else do you recall concerning him? Could you tell us what his age was?

A. I have to look at my notes.

Q. All right, sir.

A. (Witness examining documents) I have his age listed as 19.

Q. Can you tell us whether or not Mr. Hamrick was authorized to operate a motor vehicle on the highways of the State of Virginia?

A. He had no driver's permit.

Mr. Gray: Answer Mr. Pender, if you will, please.

CROSS EXAMINATION.

By Mr. Pender:

Q. Where was the Packard when you got there with respect to the private driveway, had it entered the driveway?

A. Yes, it had entered the driveway.

page 30 } Q. Well, how much of the Packard was inside of the driveway? Was it off the highway?

A. The complete car.

Q. The complete car was off the highway?

A. To the best of my knowledge, yes, sir.

Mr. Pender: That is all, thank you.
The Witness: It was sitting there.
Mr. Gray: Come down. Thank you very much.
We want to call the doctor. Off the record.

(An off-record discussion took place, after which the following occurred):

Mr. Gray: Mr. Sprott.

WILLIAM J. SPROTT,

page 31 } called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Gray:
Q. State your name, please, sir?
A. William J. Sprott.
Q. Where do you live, Mr. Sprott?
A. 8007 Carlton Street.
Q. Where is that located?
A. Near the market on Little Creek Road, approximately three blocks from Chesapeake Street.
Q. All right, sir. Where are you employed, sir?
A. I own and operate my own oil business, home delivery.
Q. All right, now, were you in an automobile involved in a collision on May 7th, 1958?
A. Yes, sir.
Q. Where were you seated in the automobile?
A. The back, in the middle of the back seat.
Q. And who else was in the automobile with you?
A. Mr. Query, Mr. Hillegass—
Q. Who was operating your automobile?
A. Mr. Hillegass.

page 32 } Q. And where was Mr. Query seated?
A. On the right-hand side of the front seat.

Q. Where were you coming from?
A. Knights of Columbus meeting.
Q. And where were you going?
A. Home.
Q. Taking you home?

A. Yes, sir.
Q. Was it the intention to take you home first?
A. Yes, sir.
Q. Were you headed in a direct route to carry you home?
A. Yes, sir.
Q. What were the weather conditions that night?
A. It was raining heavy, dark.
Q. Were the streets wet?
A. Yes, sir.
Q. What time of day or night did this happen?
A. One or one-thirty in the early morning.
Q. What lane of Tidewater Drive was Mr. Hillegass driving?
A. The right-hand lane.
Q. And going north?
A. Yes, sir.
Q. Do you have any idea what his speed was?
page 33 } A. It was 20 to 25 miles per hour, because as we came by the curve there at Thole Street we were talking about how bad it was and then we saw the car in the center lane.
Q. Did you see the automobile of Mr. Miller before the collision?
A. Yes, sir.
Q. Did it have any tail lights burning?
A. Yes, sir.
Q. All right, can you tell us—tell us what you know about what happened just prior to the collision and at the time of the collision.
A. We saw the car and we were in the right-hand lane going north, and I guess he slowed down right then because we thought Mr. Millers' car was going to take a left-hand turn. It looked like he was slowing down to go left, and as we came up to Mr. Miller's right rear fender, all of a sudden this car came out of nowhere and we hit it.
Q. All right, sir. Do you know what happened to Mr. Query?
A. I assume his head hit the windshield.
Q. Why did you assume that?
A. Because he broke it.
Q. Which broke?
A. The windshield.
Q. What happened to the automobile that was hit?
A. The right rear panel was damaged and it
page 34 } proceeded on in the driveway.

William J. Sprott.

By The Court:

Q. The same driveway that it was headed for before you were struck—before it was struck?

A. Yes, sir.

The Court: Or apparently headed for it.

By Mr. Gray:

Q. Do you know whether or not Mr. Hillegass put on his brakes?

A. I do not know.

Q. Now, after the collision did you engage in any conversation or hear any conversation between Mr. Miller and anyone else, and if so, what did you hear, sir?

A. As we got out of the car I wanted to know where the black car came from, and then I saw—I ran back to Mr. Miller's car, three of us walked back and asked him could he testify in case anything happened, said there were no lights on the car and he said he was pushing the car and there were no lights.

Q. Did he say where he had pushed it from?

A. Out of Biltmore Road, and they took a right on Tidewater Drive, which would be going south, and proceeded up that way and then turned around and come back, page 35 } which would be going north, and that's where we met him.

Q. All right, sir. Were the police called?

A. Yes, sir.

Q. Did the police respond?

A. Yes, sir.

Mr. Gray: Answer Mr. Pender, if you will, sir.

CROSS EXAMINATION.

By Mr. Pender:

Q. Where were you with respect to Mr. Miller' car when the Hamrick car started to make a turn?

A. I did not see the Hamrick car start to make the turn. The first time I saw it was when it was probably from me to you, in front of the Hillegass car.

Q. He was in front of you then?

A. Yes, sir, right square in front of me.

Q. Where was the Miller car then?

A. It was to the left.

William J. Sprott.

Q. To your left?

A. Yes, sir, it was probably—I don't know exactly where it was right to my left, but I know we had just gone by and I was looking straight ahead and saw the car, and I assume he was still there.

page 36 } Q. Was the Miller car in contact with the Hamrick car at that time?

A. I don't think so.

Q. You don't think so. Then if the Hamrick car was about, you say, from here to you in front of where you were—

A. In front of the car.

Q. Yes. Then—

A. The Hillegass car. It seemed to me to be that far.

Q. Then the Hillegass car was about the same distance then between the Miller car and the Hamrick car at that time, wasn't it?

A. It probably was.

Q. What's that?

A. It probably was.

Q. Yes. You did not see the Hamrick car when it started his turn, did you?

A. No, sir.

Q. Were you looking at the cars?

A. Yes, sir, I had my eyes on the road and was looking straight ahead.

Q. Where did the collision actually take place with respect to the private driveway that the car went into?

A. The car was headed straight for the driveway

page 37 } when we hit it.

Q. Perpendicular to you at the time?

A. Yes, sir.

Q. What part of the car did you strike?

A. The right-rear.

Q. Which wheel, the right wheel?

A. The right-rear wheel, I guess it is, or fender.

Mr. Pender: That's all that I have.

By The Court:

Q. Tell me this: How many people were in the black automobile?

A. I only saw one get out of it.

The Court: All right.

Lyons S. Query.

RE-DIRECT EAMINATION.

By Mr. Gray:
Q. How many were in the Miller automobile?
A. One.
Q. Mr. Sprott, do you know whether they ever did get the motor started on that Packard automobile?
A. I don't think they did. I think they left it there all night, I guess.

Mr. Gray: All right, sir, you may come down, page 38 } sir.
The Court: The Court will recess until 2:00 o'clock, gentlemen. Be back at 2:00 o'clock.

(The Court Recessed at 12:55 P. M.

At 2:00 o'clock P. M. the trial proceeded as follows):

AFTERNOON SESSION.

LYONS S. QUERY,
the plaintiff, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Gray:
Q. State your name, please, sir?
A. Lyons S. Query.
Q. And where do you reside, Mr. Query?
A. 7915 Bison Avenue.
Q. Are you married?
A. Yes.
Q. Where are you employed?
page 39 } A. State Farms Insurance Company.
Q. In what capacity?
A. Insurance agent.
Q. Now, were you in an automobile on May 7, 1958, that was involved in a collision?
A. Yes, I was.
Q. And where in the automobile were you seated?
A. I was seated on the right-front seat.
Q. Who was operating the automobile you were in?
A. Mr. Hillegass.

Lyons S. Query.

Q. And who else were in the car?
A. William Sprott.
Q. Where was he seated?
A. He was sitting in the back seat.
Q. And where were you coming from?
A. Knights of Columbus meeting. We had just come from William Walker's house on the way back to take Willie Sprott home when the accident happened.
Q. And what street were you proceeding on?
A. Tidewater Drive going north.
Q. Going north. And what were the weather conditions?
A. Very rainy and very poor.
Q. Do you know the speed limit there at that—?
A. 40 miles an hour.
page 40 } Q. 40 miles an hour. What lane was Mr. Hillegass driving in?
A. He was in the curb lane, or the eastern lane on Tidewater Drive.
Q. All right, sir. Now, can you tell us approximately where on Tidewater Drive this collision occurred?
A. The collision occurred right in front of 7418, is the residence where the Packard pulled into the driveway of.

By The Court:
Q. Did you ever find out why it was pulling into that driveway?
A. No, I haven't. They said they didn't know the people, the boy in the Packard.

By Mr. Gray:
Q. Where was the point of impact with reference to any intersection of which you might know about?
A. There was no intersection at all. On the right-hand side of the road until you got to Little Creek Road, which was approximately a quarter of a mile down the highway, there was no intersection at all on the east side of Tidewater Drive.
Q. All right, how about on the other side?
A. Well, Biltmore Street was practically in front of 7418, I think.
page 41 } Q. Yes. All right. Now, did you see the Miller automobile before the collision?
A. I saw the tail lights.
Q. Where was it with reference to the Hillegass automobile?
A. At the time I saw it we were—you could see it maybe a

block down the street, or a half a block, it was, because it was raining real hard, and we proceeded on in the right lane and were going to pass him.

Q. And what happened when you proceeded to go by him?

A. When we proceeded to go by him is when the Packard cut right in front of him.

Q. What happened then?

A. That's when Mr. Hillegass struck his right quarter panel in the right side of his car, and then the Packard kept on going on up into the driveway.

* * * * *

page 46 }

* * * * *

By Mr. Pender:

Q. Mr. Query, did you see the Hamrick car when it made its turn?

A. I saw it after I saw the tail end of it, just before we struck it when I saw it.

Q. You did not see it make the turn?

A. No, I did not.

Q. How fast were you going?

A. We were going about 20 when we were going by the Miller car.

Mr. Pender: That's all, thank you.

Mr. Gray: Come down, sir. I would like to call Mr. Miller as an adverse witness.

page 47 } FLOYD R. MILLER,

the defendant, called as an adverse witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION. (Adv.)

By Mr. Gray:

Q. State your name, please, sir?

A. Floyd R. Miller.

Q. And where do you reside, Mr. Miller?

A. 421 Biltmore Road.

Q. What is the name of the man who was operating the

Floyd R. Miller.

automobile, or steering the automobile which you were pushing?

A. In other words you are referring to the Packard?

Q. Yes, sir.

A. Jack Hamrick or Jackie Lee Hamrick.

Q. Jackie Lee Hamrick. Now, I understand that prior to this collision he had been a guest in your home?

A. I had invited him for dinner that afternoon and we watched TV.

Q. So he came over on the afternoon of May the 6th to watch TV and have dinner with you?

A. That's right.

Q. And did he drive his automobile over?

page 48 } A. He did, sir.

Q. Where did he park it?

A. He parked it in front of my house on Biltmore Road.

Q. Facing in which direction?

A. Facing Tidewater Drive, sir.

Q. And, I suppose you watched the television and had dinner and he stayed there for the evening?

A. We had dinner, watched television for one program, then we drove into town to see a friend of his and mine also from the same ship and came back to the house and watched television until—

Q. You drove your own car to see your friend?

A. I drove my car.

Q. And came back and watched television some more. Did you retire for the night?

A. No, sir.

Q. Was it not the intention of Mr. Hamrick to spend the night in your home?

A. No, sir.

Q. It was not his intention to stay there for the night then?

A. No, sir.

Q. All right. What time did he proceed to leave?

A. Approximately one o'clock he went out of my

page 49 } house.

Q. And so he went out to get into his car?

A. He went out and got in the car and tried to start it. The motor turned twice and wouldn't start; it would not kick over completely.

Q. This automobile he was driving was, I understand, a 1940 Packard automobile?

A. Yes, sir.

Floyd R. Miller.

Q. And you say it was parked on Biltmore Road facing Tidewater Drive?

A. In an easterly direction, sir.

Q. Where was your automobile at that time?

A. In my driveway, sir.

Q. So, I gather that you got into your car and backed up your car out of the driveway and placed it behind his and commenced pushing?

A. Not until approximately ten minutes after he left from the house and come back and asked me to do so, sir.

Q. He came back and asked you to push the car and to help him?

A. To help him get it started.

Q. So, you came out of the house, backed out of the driveway and placed your car behind his automobile?

A. That's right, sir.

Q. This Mr. Hamrick was a young man, wasn't
page 50 } he?

A. Yes.

Q. About nineteen years old?

A. That's right, sir.

Q. Just a boy. He got into his automobile, the Packard, and you got into yours and you commenced to push it?

A. That's right.

Q. That is correct. All right, now, you pushed him down Biltmore Road to the intersection of Biltmore and Pennington, did you not?

A. No, sir, I pushed him to the intersection of Biltmore and Tidewater Drive.

Q. Well, you crossed the intersection of Biltmore and Pennington then?

A. I had already broken away from him at that point, and he continued on up there, and he was still trying to get his car to turn over and it didn't.

Q. When you got to the intersection of Biltmore and Pennington you did not turn there on Pennington?

A. No, he did not turn. I was ready to turn. He was—he had control of his car. I had broke away from him before I had gotten that far.

Q. All right, yes, sir. So you then proceeded up behind him again, did you not?

A. I did.

Q. And pushed him again?

page 51 } A. No, I also told him that there was a service station two blocks up, I will say south, on Tidewater Drive that I thought may be open, I didn't know.

Floyd R. Miller.

Q. All right, so you pushed him. And you also crossed Biltmore and Wellington Avenue?

A. Wellington turns to the left near the Southern Shopping Center.

Q. Yes, sir, you crossed that intersection?

A. It isn't an intersection, sir.

Q. Well, does not Wellington intersect Biltmore?

A. It come in Biltmore and there it stops.

Q. It's an intersection then?

A. Well, if that is what you call an intersection, sir.

The Court: That is called an intersection and you crossed that road. Go ahead.

By Mr. Gray:

Q. It is an intersection. All right. Then you proceeded to push him down to Tidewater Drive?

A. Yes, sir, that is right, sir.

Q. You entered Tidewater Drive from Biltmore Road?

A. Right.

Q. Which direction did you proceed in then,
page 52 } north or south?

A. South.

Q. And you proceeded to push him down Tidewater Drive, south?

A. To a service station.

Q. What lane were you driving in?

A. On that side going south I was in the outside lane, sir.

Q. Next to the curb?

A. Next to the curb.

Q. And how far down Tidewater Drive did you push him in a southerly direction?

A. If you are going to use country blocks it is *might* short. If you are using city blocks, it is still two short blocks.

Q. You pushed him down Tidewater Drive two short blocks. That would carry you to the Naval Base Road?

A. That's right.

Q. And what happened when you had gotten him down there?

A. We found that the service station was closed so I pushed him around the tank to put him back on the inside lane coming north to Biltmore.

Q. In other words you found the filling station was closed.

Was there anything at the filling station to pro-
page 53 } hibit you or prohibit him from pushing his car off
the road up onto the filling station property?

Floyd R. Miller.

A. No, sir.

Q. In other words it would have been a very easy thing to push his automobile up onto that filling station property?

A. I pushed him up on the filling station lot, sir, and got him around the tank.

Q. Did you stop on the filling station lot?

A. Only long enough to see there was no traffic coming in either direction.

Q. In other words then, it was not your intention to leave the car on the filling station lot but merely to use it as a turning-around point?

A. That is where we did stop and I told him "I will take you back home and you can leave the car in front of my house while we are going out."

Q. All right. So you turned him around in the filling station on Naval Base Road and Tidewater Drive and then proceeded up Tidewater Drive pushing him further?

A. No, I was taking him back north on Tidewater Drive, not south.

Q. All right, you pushed him north on Tidewater Drive. And you crossed the intersection of Tidewater Drive and Gladstone Road, had you not?

page 54 } A. (Pause) Just a minute. That is when I told him there was two blocks that he had to go before he turned left. The first one was Gladstone and the second one was to turn left on Biltmore Road.

Q. All right, sir. So you had passed Gladstone and were between Biltmore, between Biltmore and Gladstone Road on Tidewater Drive?

A. That is where the accident happened, sir.

Q. And you never did get the car started, did you?

A. No, sir.

Q. And he didn't have any headlights or tail lights burning as you pushed along Tidewater Drive?

A. Yes, sir, he did at the beginning.

Q. After you had turned around the filling station, however, there were no lights?

A. No, that is when the lights went out completely.

Q. Where, before you went into the filling station or afterwards?

A. Just as we were getting ready to come out of the filling station, sir, from the filling station, sir.

Q. Did you know that Hamrick was not authorized to operate an automobile on the roads of the State of Virginia?

A. No, sir, I did not.

Floyd R. Miller.

Q. Did you make any inquiry of him before you proceeded to push him?

page 55 } A. I knew that he had a driver's license, sir.

Q. You knew that he had a driver's license?

A. He had had a driver's license one week before. I had seen it.

Q. You had seen a driver's license that he had?

A. That's right, sir.

Q. You heard Officer Farr testify that he did not have a driver's license, did you not?

A. The reason he did not have it is because it fell out of his pocket down on the floorboards of his car. It was produced later on.

Q. You saw it later on?

A. I did not see it, Mr. Hamrick told me that he had produced it.

Q. But you don't know that for a fact?

A. That is hearsay also.

Q. You don't know?

A. Therefore, I don't know.

Q. You only know what he told you?

A. At that time; but originally, a week beforehand, I had seen the driver's license.

Q. Mr. Hamrick is stationed on the same ship as you are?

A. Was stationed on the same ship.

By The Court:

page 56 } Q. At that time, you mean?

A. At that time, sir.

By Mr. Gray:

Q. In pushing Mr. Hamrick, down the road, it was your sole purpose to get his car started, was it not?

A. Yes, sir.

Mr. Gray: That's all.

By The Court:

Q. Do you know how he happened to take that right hand turn?

A. No, sir, I do not.

Q. You had not anticipated the possibility?

A. No, sir, because as we came out I told him to take two blocks down and then turn to the left, and when he passed, from what I understood at least, after he had passed Glad-

stone he thought that was my street, and I had already broken away from him, but I was still close enough to him to know when he went to make the turn, and when he made a turn to the right I hit my brake and stopped dead and asked myself why is he turning to the right, and then I heard the collision.

By Mr. Gray:

Q. I have a couple of further questions I want to ask him. Mr. Miller, it was pouring down raining, wasn't it?

A. Very hard, sir.

page 57 } Q. And Mr. Hamrick's windshield wipers were not working, were they?

A. I don't know, sir, I wasn't in his car.

Q. Well, with his motor not running and the electrical system *were* out, do you know of anyway his windshield wipers could operate?

A. Not unless he can stand and work it, like that, and if he can how is he going to drive; that's another question.

Q. All right, sir. So do you know whether his Packard automobile had a crank through the window that you could turn?

A. No, sir, I don't. I was never in his car.

Q. So, it is a fair conclusion, is it not, to say that his windshield wipers were not working?

A. I agree with that.

Q. You do what?

A. I will agree with that.

Q. All right, sir.

Mr. Gray: That's all.

By The Court:

Q. Well, how did you happen to be not in contact with him when he turned, did the car just jump ahead because you were not going to turn left for half a block down the street?

A. I had given him a hard enough push so he

page 58 } could have coasted right on down and turned off, because there is a drop over into Biltmore, there is a slight downgrade and he had enough momentum to have carried him that far, and I was staying far enough behind him so as to enable him to use my lights.

* * * * *

page 69 }

* * * * *

Mr. Pender: If your Honor please, I move to strike the evidence of the plaintiff in this case on the ground that first, he has shown no negligence on the part of the defendant in this case. And second, that if the Court is of the opinion it was negligence for the man to drive a car on the highway under the conditions described by the evidence that that negligence, if any, was not a contributing cause of this accident.

The man anticipated something entirely different from what happened. It could never be anticipated that the operator of the car would turn right in the face of oncoming traffic. The defendant in this case made no motion, he did nothing, he turned no wheel, he pushed no signal in any manner and he could never have expected him to have turned to

page 70 } the right in the face of oncoming traffic.

The sole cause of this accident, assuming Mr. Hillegass himself was not negligent, the sole cause of this accident was the intervening negligence of Hamrick in turning his wheel and getting confused or whatever caused him to make the right turn. It was Hamrick's negligence as the sole proximate cause and the defendant in this case was free of any negligence contributing in any manner to the injury. Therefore, I move that the Court strike the evidence and enter summary judgment for the defendant.

The Court: Here is the only thing. I don't mean to say this is the only ground of negligence because Mr. Gray and Mr. Outland may point out some others to be. When I am pushing a man down the road to get his car started, isn't that a joint enterprise; isn't negligence imputed to me?

Mr. Pender: I don't think so, sir. We pushed him, and besides that we had disengaged before the man turned.

The Court: Well, that is the joint enterprise.

page 71 } It was still going on even though he had disengaged about a half a second before. Actually when you push a man down the road, unless you are a mighty good driver, you have to disengage and let him go and catch him again and so on, but if he did not disengage—the evidence shows you had disengaged, but at just that moment that joint enterprise was still going on. If the car had stopped he could have caught up and pushed him further. The joint enterprise was not over, it had not been concluded.

I am inclined to overrule your motion. I must say I am not positive in my ideas, but there is one reason I overrule the motion. If you go ahead and conclude it I still have control of the situation and I can set aside the verdict assuming that the verdict is returned against you, while in this way if I'm wrong I would have to grant a new trial. I am going to overrule your motion.

Mr. Pender: I except, if your Honor please, and respectfully ask the Court to be heard later and to file a page 72 } brief.

* * * * *

page 78 }

* * * * *

Mr. Pender: The defendant in chambers renewed his motion to strike the evidence on the ground that there is no evidence before the Court and the jury of any negligence on the part of defendant in this case, and even should there be deemed to be such negligence that that negligence, if any, is not a proximate or contributing cause of the accident. The Court overruled the motion of defendant, to which action of the Court the defendant duly excepted.

The defendant excepts to the Court's granting of any instruction in this case on the grounds that the case should not be submitted to the jury in any event and all the instructions of every character are improper, and with that general objection the defendant specifically objected to granting of each separate instruction, particularly P-1, since the evidence here showed that the parties were removing a disabled page 79 } vehicle to a place of safety after a reasonable effort to seek repair or rehabilitation of the difficulty; on the further ground there was no agency or relationship between the parties on the basis of which this defendant can in anywise be held responsible for the acts of negligence or otherwise the man that was guiding the car, being pushed, namely, Hamrick.

The defendant objects and excepts to the granting of Instruction P-2 on the grounds heretofore stated, and specifically on the ground that there are no facts in this case sufficient to justify the assumption or the finding of the existence of a joint venture or enterprise.

The defendant likewise excepts to the Court's refusal to grant Defendant's Instructions D-2 and D-3 on the grounds

heretofore stated to said instructions being directed to the same issue.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Instructions	2
Judge's Letter to Counsel	5
Judgment—October 14, 1958	6
Notice of Appeal and Assignments of Error	6
Proceedings	7, 35
Witnesses:	
Michael G. Hillegass	9
Ernest W. Farr	20
William J. Sprott	22
Lyons S. Query	26
Floyd R. Miller	28

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
RECEIVED
APR 10 1959
RECEIVED
RICHMOND, VIRGINIA