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Record No. 4998

In the Supreme Court of Appeals of Virginia at Richmond

GEORGE M. PANNELL

v.

HERSEY W. FAUBER

FROM THE CIRCUIT COURT OF AUGUSTA COUNTY

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. 4998

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 11th day of February, 1959.

GEORGE M. PANNELL, Plaintiff in Error,

against

HERSEY W. FAUBER, Defendant in Error.

From the Circuit Court of Augusta County

Upon the petition of George M. Pannell a writ of error and *supersedeas* was awarded him by one of the justices of the Supreme Court of Appeals on February 10, 1959, to a judgment rendered by the Circuit Court of Augusta County on the 3rd day of March, 1958, in a certain action at law then therein depending wherein Hersey W. Fauber was plaintiff and the petitioner was defendant; and it appearing that a *supersedeas* bond in the penalty of twenty-five hundred dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

CIVIL DOCKET NO. B-1395.

VIRGINIA:

COUNTY OF AUGUSTA, TO-WIT:

To the Sheriff of said County:

I hereby command you to Summon George M. Pannell, Lyndhurst, Virginia to appear at Staunton on the 5th day of July, 1957, at 10:00 o'clock a. m., in Augusta County Court to answer the complaint of Hersey W. Fauber upon a claim for money for the sum of One Thousand Nine Hundred Thirty Five and 50/100 Dollars, ($1,935.50), with interest thereon from the ..... day of ....., 19...., at the rate of 6 per cent per annum until paid, and .....% attorney's fees, and Five and 00/100 costs, due by damages to automobile in accident 4/23/1956 and then and there make return of this warrant.

Given under my hand, this 21 day of June, 1957.

C. B. HICKMAN, J. P.

R. F. McPHERSON, p. q.
Staunton, Va.

IN DEBT.

23rd day of August, 1957.

Judgment, that the plaintiff recover of the defendant One Thousand Nine Hundred Thirty-five & 50/100 Dollars, ($1,-935.50), with interest thereon from the 23rd day of August, 1957, at the rate of 6 per cent per annum until paid, and ....% attorney's fees, and $5.00 costs.

T. C. ELDER, Judge.

* * * * *

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* * * * *

BILL OF PARTICULARS.

For Bill of Particulars plaintiff states as follows:

That on or about April 23, 1956, around 6:05 P. M., the undersigned was proceeding West on Fifth Street in Waynesboro, Virginia, and at the intersection of Fifth Street and Augusta Street the undersigned slowed his car and then came to a complete stop at which time the defendant was proceeding South on Augusta Street approaching said intersection at a distance from said intersection which would warrant a prudent man in the exercise of reasonable care to conclude that it was safe to proceed into and across said intersection and that the plaintiff did so proceed into said intersection as he had the right to do but that the defendant did proceed at a fast, unreasonable and unlawful rate of speed, did not yield the right of way to the plaintiff, did not keep a proper lookout and take action to avoid any danger thereby disclosed, and did not keep his automobile under proper control, and as a result of said negligence drove his vehicle into the plaintiff's vehicle damaging it in the amount sued for.

HERSEY W. FAUBER
By Counsel.

* * * * *

(on back)

Filed in the Clerk's Office of the Augusta County Court 7/13/57.

Teste:

E. McN. BERGIN, Clerk.

* * * * *

page 3 }

* * * * *

GROUNDS OF DEFENSE.

The defendant, George M. Pannell, for grounds of defense to the above entitled action, alleges the following:

(1) That the plaintiff was guilty of reckless driving and negligence as the sole proximate cause of the collision complained of in the bill of particulars, in that the plaintiff, from a stopped position, suddenly and without warning, as the defendant neared the intersection involved, entered the said intersection, thereby operating his said automobile "in a manner so as to endanger life, limb or property of other users of the streets," particularly the defendant and his passenger, in violation of the Code of the City of Waynesboro, 29-38;

(2) That the plaintiff, from a stopped position at the Fifth Street and Augusta Avenue intersection in the City of Waynesboro, Virginia, as the defendant approached and neared the said intersection and was about to enter the same, suddenly and without warning of his intention to drive into and enter the intersection, did negligently and carelessly attempt to pass through the said intersection immediately ahead of the defendant, and thereby, as the sole, proximate cause, precipitated the accident complained of, it being apparent to anyone in the exercise of ordinary care that said movement from the stopped position could not be made with safety, in violation of the said City Code, Section 29-64;

(3) That the plaintiff was guilty of negligence in failing to keep his automobile under proper control, failing
page 4 } to give warning of his intention to enter said intersection from a stopped position, failing to look and see the defendant approaching the said intersection, and, otherwise, in exercising reasonable care and prudence demanded by the circumstances to avoid the collision complained of; and

(4) That the defendant denies that the plaintiff exercised reasonable care in the operation of his automobile at the time and place complained of, denies that he was driving at a fast, unreasonable and unlawful rate of speed, denies that he did not yield the right of way, denies that he did not keep his automobile under proper control or a proper lookout, and, therefore, the collision at the time and place aforesaid was due as a proximate cause to the negligence of the plaintiff, and as a consequence thereof, the defendant denies that he is liable for the sum of $1,935.50, or for any part thereof whatsoever.

GEORGE M. PANNELL
By G. H. BRANAMAN
Counsel.

Filed in the Clerk's Office of the Augusta County Court 7/23/57.

Teste:

C. B. H., Clerk.

* * * * *

page 18 } INSTRUCTION 1.

The Court instructs the jury that if they believe from the evidence that the plaintiff, Fauber, had approached, entered, and was passing through the street intersection ahead of and before the defendant, Pannell, reached said intersection then it was the duty of Mr. Pannell to yield the right-of-way to Mr. Fauber and if he failed so to do, he was guilty of negligence and if the jury believe that such negligence was the proximate cause of the accident, they shall find for the plaintiff, Fauber, and fix his damages in the amount of $1,935.00 unless they further believe from the evidence that the plaintiff, Fauber, is guilty of negligence which proximately caused or contributed to cause the accident complained of.

W. S. M.

page 19 } INSTRUCTION 2.

The Court instructs the jury that if they believe from the evidence that the defendant, Pannell, was traveling in excess of twenty-five miles per hour as he approached and entered the intersection then the plaintiff, Fauber, had the right-of-way at said intersection and it was the duty of Mr. Pannell to yield the right-of-way to Mr. Fauber and if he failed to do so he was guilty of negligence and if the jury believe that such negligence was the proximate cause of the accident they shall find for the plaintiff, Fauber, and fix his damages in the amount of $1,935.00 unless they further believe from the evidence that the plaintiff, Fauber, is guilty of negligence which proximately caused or contributed to cause the accident complained of.

W. S. M.

page 19a } INSTRUCTION 3.

The Court instructs the jury that it was the duty of the defendant, Pannell, in the operation of his car, when approaching the intersection, to use reasonable care to keep his car under control, and like care to keep a proper lookout, and like care to keep his car under such control that he could, if necessary, stop same in order to avoid a collision with another car already within the intersection as Mr. Pannell approached same, and under all the facts and circumstances it was the duty of Mr. Pannell, having due regard to the width, traffic, surface and all other conditions then and there existing, to exercise ordinary care in the operation of his automobile, and if you believe from the evidence that Mr. Pannell did not exercise such care, and that the accident involved in this action was proximately and solely caused by the failure of Mr. Pannell to comply with his duties in the operation of his said automobile, and if you further believe that Mr. Fauber was proceeding in a lawful manner, and was guilty of no negligence, then you must find for the plaintiff in the amount of $1,935.00.

W. S. M.

page 20 } INSTRUCTION 4.

The Court instructs the jury that if the plaintiff, Fauber, saw the defendant, Pannell, approach from the north at a distance which would warrant a prudent man in the exercise of reasonable care to conclude that it was safe to proceed across the intersection then the plaintiff had a right so to proceed.

W. S. M.

page 21 } INSTRUCTION 5.

The Court instructs the jury that the credibility of witnesses is a question exclusively for the jury, and the law is that where a number of witnesses testify, directly opposite each other, the jury is not bound to regard the weight of evidence as equally balanced. The jury has the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their relationship to each other, if any, their interest, if any is shown, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances

appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly.

W. S. M.

page 22 } INS. A.

The Court instructs the jury that under the facts and circumstances disclosed by the evidence in this suit, it was the duty of the plaintiff, Fauber, to observe and perform each and every one of the following duties in the operation of his automobile at the time and place of the collision with the defendant's automobile, namely:

1. Not to operate his automobile in a manner so as to endanger the life, limb and property of any person;
2. To keep his automobile under proper control;
3. To keep a proper look-out and see traffic approaching in his plain and unobstructed view; and
4. Not to enter the intersection from a stopped position ahead of approaching traffic dangerously near the intersection in his plain and unobstructed view.

And if the jury believe from all of the evidence that the plaintiff, Fauber, failed to exercise reasonable care and prudence in observing and performing any one or more of the foregoing duties, and that such failure under the circumstances then and there existing proximately caused or efficiently contributed to the collision between the two automobiles, the plaintiff, Fauber, cannot recover any damages sustained by him, and the jury should find for the defendant.

W. S. M.

page 22a } INS. B.

The Court instructs the jury that if they believe from the evidence the plaintiff, Fauber, was negligent in the operation of his automobile at the time and place of the collision complained of, that is to say, if he failed to operate his automobile as a reasonably careful and prudent person would have done under the same or similar circumstances, and as a proximate cause, or a contributing cause, the collision occurred with the defendant's automobile at the intersection of

5th Street and Augusta Avenue, in Waynesboro, the plaintiff cannot recover and a jury should find its verdict for the defendant.

W. S. M.

page 22b } INS. C.

The Court instructs the jury that if they believe from the evidence in this case that the collision involved was occasioned by the concurring or combined negligence of both the plaintiff and the defendant, which contributed as a proximate cause to the accident, the plaintiff cannot recover, as Courts will not undertake to balance the negligence of the respective parties where both have been at fault in order to ascertain which is most at fault.

W. S. M.

page 22c } INS. D.

The Court instructs the jury that no presumption arises that the defendant was guilty of any negligence upon the mere showing that an accident occurred, and that the plaintiff's automobile was damaged, but the burden rests upon the plaintiff, Fauber, to establish by a preponderance of the evidence that the defendant, Pannell, was negligent in the manner and form charged, and that such negligence was the sole proximate cause of the accident. The Court further tells the jury that this burden of proof never shifts to the defendant, but rests upon the plaintiff throughout the entire trial. If, upon the evidence, the jury is undecided and in doubt as to whether the plaintiff has made out his case by a preponderance of the evidence, or if the evidence is evenly balanced, then the jury cannot find a verdict for the plaintiff. The jury's verdict must not be based upon speculation, conjecture, surmise or sympathy for either party, but must rest entirely upon the evidence in this case and the instructions given by the Court.

W. S. M.

page 22d } INS. E.

The Court instructs the jury that the law of Virginia is that every driver of an automobile who intends to start shall

first see that such movement can be made in safety, by the exercise of reasonable care and prudence, and whenever the operation of any other vehicle may be affected by such movement, the operator shall give a signal or warning thereof to other users, likewise by the exercise of reasonable care in giving such signal or warning, and if the jury believe from all of the evidence in this case that the plaintiff, Fauber, failed and neglected to observe the duties required of him at the time and place of the collision involved, he is guilty of negligence, and he cannot recover, if such negligence was the sole proximate cause or contributed to the collision between the two automobiles.

W. S. M.

page 22e } INS. H.

The Court instructs the jury that even though they may believe from the evidence that the defendant, Pannell, was negligent in the operation of his automobile at the time and place of the collision complained of, yet if they further believe from the evidence that the plaintiff, Fauber, failed to exercise that degree of reasonable care a prudent man would have done under the same or similar circumstances, and as a consequence of such failure on the part of Fauber his failure efficiently contributed to the collision, Fauber cannot recover, and the jury should return its verdict for the defendant.

W. S. M.

page 23 } INSTRUCTION 4.

The Court instructs the jury that if the plaintiff, Fauber, saw the defendant, Pannell, approach from the north at a distance which would warrant a prudent man in the exercise of reasonable care to conclude that it was safe to proceed across the intersection then the plaintiff had a right so to proceed.

Refused as drawn but given as amended as indicated above.

W. S. M.

page 24 } INS. G.

The Court instructs the jury that the law is when two

automobiles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right of way to the vehicle on the right, therefore, if the jury believe from the evidence the defendant, Pannell, in the exercise of reasonable care on his part, approached or entered the intersection from the right at approximately the same time as the plaintiff, then the plaintiff, Fauber, was required to yield the right of way to the defendant, Pannell, and if the failure so to do on the part of Fauber caused the collision between the two automobiles, or efficiently contributed thereto, Fauber cannot recover, and the jury should return its verdict for the defendant.

Refused.

W. S. M.

page 24a } INS. F.

The Court instructs the jury that if they believe from the evidence that the plaintiff, Fauber, drove his automobile west on 5th Street and stopped at and before entering the Augusta Avenue intersection, as the defendant, Pannell, approached and neared the intersection travelling south on Augusta Avenue, and that the defendant, Pannell, looked and saw the plaintiff's automobile stopped and standing on 5th Street at the said intersection, then the defendant, Pannell, had the right to assume and to act upon the assumption, until it otherwise appeared in the exercise of reasonable care, that the plaintiff, Fauber, would not undertake to drive into and pass through the said intersection immediately ahead of the defendant, Pannell, and not yield the right of way.

Refused.

W. S. M.

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page 26 }

* * * * *

ORDER.

This day again came the plaintiff and the defendant, by their respective attorneys, and the Court having maturely

considered the motion heretofore submitted by the defendant to set aside the jury's verdict is now of the opinion that the motion should be overruled.

Wherefore, it is considered by the Court that the motion to set aside the jury's verdict be and the same is hereby overruled and that the plaintiff, Hersey W. Fauber, have judgment against and recovery of the defendant, George M. Pannell, the sum of One Thousand Nine Hundred and Thirty-five ($1,935.00) in accordance with the jury's verdict together with interest thereon from the 19th day of February, 1958, the date said verdict was rendered, as well as his costs in this behalf expended. To which the defendant, by counsel, excepts, on the grounds that the Court erred in not permitting the pleadings between the same parties in the contribution action to go to the jury as evidence, in overruling the motion to strike at the completion of the plaintiff's evidence, in overruling the motion to strike the plaintiff's evidence at the conclusion of all of the evidence and rendering final judgment for the defendant, in granting the instructions for the plaintiff, over the objection of the defendant, in refusing to grant instructions F and G for the defendant, as requested, and in refusing to set the verdict aside and entering final judgment for the defendant, on the grounds that the verdict was contrary to the law and the evidence and without evidence to support it.

page 27 } Whereupon, as an appeal is contemplated, it is ORDERED that a bond with satisfactory surety, conditioned according to law, be executed before the Clerk of this Court in the penalty of Two Thousand Five Hundred ($2,500.00) Dollars, for and on behalf of the defendant, within ten days from the entry of this Order.

Enter:

WM. S. MOFFETT, JR., Judge.

3/3/58.

Entered March 3, 1958 Common Law Order Book No. 34 Page 287.

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page 30 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To Rudolph L. Shaver, Clerk of the Augusta County Circuit Court:

Notice is given that George M. Pannell appeals in this case and will apply for a writ of error and *supersedeas*:

ASSIGNMENTS OF ERROR.

The following are the errors assigned:

The Circuit Court erred:

1. In refusing to permit the pleadings in the contribution action between the same parties to go to the jury as evidence on behalf of the defendant, although the plaintiff admitted negligence in his motion for judgment and settled at $2,700.00, with a guest passenger in the defendant's automobile;
2. In overruling the motion of the defendant to strike the plaintiff's evidence upon the completion thereof;
3. In overruling the defendant's motion at the conclusion of all of the evidence to strike the plaintiff's evidence and in entering final judgment for the plaintiff;
4. In granting any instructions for the plaintiff over the objection of the defendant;
5. In refusing to grant Instructions F and G as offered and requested for the defendant; and
6. In refusing to set aside the verdict of the jury and in entering final judgment for the plaintiff, or else granting a new trial as the verdict was contrary to the law and evidence and without evidence to support it.

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GEORGE M. PANNELL
By WALLACE R. HEATWOLE
G. H. BRAMANAN
Counsel
Waynesboro, Virginia.

Filed in the Clerk's Office of the Circuit Court of Augusta County, March 11, 1958.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

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page 2 }

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In the opening statement to the jury, Mr. Branaman, Counsel for the Defendant, made the following remarks:

There is another suit pending in this Court between the same identical parties, Hersey W. Fauber and George M. Pannel, in which the allegation of negligence on the part of the Plaintiff, Hersey W. Fauber, is admitted; and it shows that a settlement had been reached between Coley Pannel and the Plaintiff, and $2,700.00 had been paid to Coley Pannel, who was a guest passenger in the Pannel car, by your Plaintiff, Hersey W. Fauber.

Mr. McPherson: I know nothing about what Mr. Branaman speaks of, whether it is true or not true, but I object to the statement to the jury and move for a mistrial.

Judge Moffett: I will see you in chambers about this matter.

IN CHAMBERS.

Mr. Branaman: If it please the Court, there is on page 3 } the docket of this Court Case No. 576, brought by Hersey W. Fauber against George W. Pannel, Lyndhurst, Virginia, which reads as follows: "Motion for Judgment" the Plaintiff, Hersey W. Fauber, hereby moves the Circuit Court of Augusta County, at Staunton, Virginia, for judgment against the defendant, George M. Pannel, in the sum of $1350.00, with interest thereon from May 16, 1957, and the costs of this proceeding, for the damages, wrongs and injuries hereinafter set out, to-wit:

"That, heretofore, to-wit, on the 23rd day of April, 1956, at or about 6:05 P.M., an automobile owned and operated by the undersigned, collided with an automobile operated by the defendant, George M. Pannel, at the intersection of 5th and Augusta Streets, in the City of Waynesboro, Virginia, as a direct and proximate result of the gross negligence of the defendant;

"That, in said collision, one Coley Pannel, a passenger in defendant's automobile, suffered serious personal injuries and this plaintiff, feeling that the facts showed him also to be guilty of some negligence, made a compromise settlement with said Coley Pannel for his injuries and damages, by which

this plaintiff, on May 16, 1957, paid said Coley Pannel the sum of $2,700.00; and plaintiff alleges that said compromise settlement was fair and reasonable under the circumstances;

"That, by virtue of plaintiff's right of contribution between joint tort feasors, the defendant is indebted to him page 4 } in the sum of $1350.00, plus interest from May 16, 1957, and plaintiff has made demand therefor, but payment has been refused by the defendant.

Wherefore, plaintiff prays judgment against defendant as aforesaid.

HERSEY W. FAUBER
By Counsel."

Now, the Grounds of Defense to that Motion for Judgment is as follows:

"The defendant, George M. Pannel, by way of defense to the above entitled action instituted against him by Hersey W. Fauber, alleges the following:

"(1) Denies that he is liable to the plaintiff in the sum of One Thousand Three Hundred Fifty Dollars ($1,350.00), with interest from May 16, 1957 and the costs of this proceeding, for the damages, wrongs and injuries complained of, or that he is liable to the said plaintiff for any amount whatsoever;

"(2) Denies that he was guilty of any actionable negligence at the time and place of the said collision in the notice of motion for judgment;

"(3) Alleges that the collision between the two automobiles and the injury to Coley Pannell, a guest passenger in the defendant's automobile, was directly caused by the negligence of the plaintiff, Hersey W. Fauber; and

"(4) True it is, as alleged in the said motion for judgment, the facts showed the plaintiff was guilty of page 5 } negligence and warranted a compromise settlement, as therein alleged, but he denies that the facts justify any contribution to such settlement on the part of this defendant, as he was not guilty of any acts of negligence which either caused or contributed to the collision between the two automobiles involved.

GEORGE M. PANNELL
By Counsel."

That is the record in your Court, Sir. It admits negligence and he is estopped by it.

Judge Moffett: Thank you. Mr. McPherson.

Hersey W. Fauber.

Mr. McPherson. I would like to look at that. I have never seen it. * I would like for you to swear Mr. Fauber, and I would like to ask him some questions about the record.

HERSEY W. FAUBER,
being duly sworn, testified as follows:

By Mr. McPherson:

Q. I show you a Motion of Judgment, instituted in this Court in your name, in which your name is typed, and your counsel listed as Timberlake and Smith, which was filed in this Court on August 19, 1957. Did you ever authorize Mr. Timberlake, whose name is signed to this, to bring this suit in your name?

A. No, sir.

Q. Do you know Mr. Timberlake?

page 6 } A. I do not.

Q. Have you ever seen Mr. Timberlake, to the best of your knowledge and belief?

A. No, Sir, I wouldn't know him if I saw him.

Q. To the best of your knowledge and belief, have you ever talked to Mr. Timberlake in your life?

A. No, Sir, I haven't.

Q. You never authorized anyone to bring suit in your name?

A. No, sir.

Q. That's all.

Mr. Heatwole: May we ask Mr. Fauber several questions?

Q. You say you never saw or talked to Mr. Timberlake; that you don't even know him?

A. If I do, I don't remember it.

Q. You did not authorize this suit?

A. No, Sir.

Q. You have seen a paper known as a subrogation procedure in which you gave your insurance carrier the right to institute action in your behalf, have you not,

A. I probably did; I don't know that I did.

Q. That's all.

Mr. Wayt B. Timberlake, Counsel for the Plaintiff in Case No. 576, as above referred to: I don't know whether

page 7 } the Court or Counsel want any clarification on the statutes, but as far as my knowledge is concerned . . .

Judge Moffett: Gentlemen, I assume this is a subrogation matter and that the suit was brought pursuant to an agreement with the insurance carrier.

Mr. Timberlake: I think I can very briefly state to the Court what it is. This gentleman here is entirely correct in his statement that he doesn't know me and has never seen me or had any contact with me whatever. He happens to carry liability insurance with my client, The State Farm Mutual Automobile Insurance Company, and as far as I know, he does not carry collision with that Company, and I am in no way interested in any subrogation claim that may or may not exist as to damages to his car. My client, on liability, following the happening of the accident and an investigation of the facts, found that a passenger in the other automobile, the Pannell automobile, was injured, seriously injured, and recognizing the fact that the negligence, if any, of the driver of the Pannell car would probably be a bar to recovery by the guest passenger in a suit, by Fauber, did negotiate a compromise settlement with the guest passenger for $2,700.00.

Following the negotiation and closing of that settlement for $2,700.00 with the passenger in the Pannell automobile, the State Farm Mutual Insurance Company employed me to bring a contribution suit against Pannell under the general right of subrogation given by statute I believe for one-half of the $2,700.00. It was not necessary, according to my understanding and my recollection of my file, for Mr. Fauber to institute any subrogation agreement to enable his insurance carrier to bring this suit. It was simply brought under the general contribution statute under Mr. Fauber's name as I am advised the insurance company had a right to do without taking the matter up with him or without authorization from him. He was in no way interested in the recovery of the one-half paid by the insurance company to the Pannell guest. That is the situation as revealed by my employment.

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Judge Moffett: Do you gentlemen have any questions of Mr. Timberlake,

Mr. McPherson: No, Sir. If Your Honor please, from the information we have gathered here, it appears that Mr. Timberlake has never represented Mr. Fauber in any way, personally, and, accordingly, I feel that any statements that are made by Mr. Timberlake in the Motion for Judgment here are not binding on Mr. Fauber. They are not in any way spoken in his behalf, but are just voluntary statements by someone with no personal relationship, as far as lawyer and client, and

cannot bind him in any way; and, accordingly, it is error for any mention to be made in the opening statement or subsequent talk to the effect that Mr. Fauber has admitted any negligence; and because that has been done and brought out to the jury in the opening statement, we, accordingly, move for a mistrial.

page 9 } Mr. Heatwole: Your Honor, our position on this is quite simple. It is our position that it has not been established here by counsel, or Mr. Timberlake or Mr. Fauber as to whether or not an actual subrogation agreement was signed. However, the standard policy gives the right of subrogation as does the statute, and, of course, you are bound by it, by the counsel or the person presenting that suit; and this suit is a matter of record. This contribution suit was filed by Mr. Timberlake. Of course, the insurance company is not a party to the suit. Mr. Fauber is the party plaintiff to the suit; his name is there, by counsel, and I ask the Court to take judicial notice that when the party comes in and is represented by counsel, that party is bound by allegations set forth in the pleadings. We feel it is clear cut and that negligence has been admitted by Mr. Fauber, and whether or not it was a matter of specific signing of a subrogation agreement we feel is immaterial because the general provisions of the standard policy and the statute gives the right of subrogation and the party litigant is bound. This is a vital factor; under our theory of contributory negligence he has no right to recover when he has admitted in written pleadings that he is negligent—has been negligent. We think this is a very vital factor and certainly no ground for a mistrial.

Mr. McPherson: Any lawyer could bring a suit on behalf of anyone and admit anything and bind that so-called client.

page 10 } There is absolutely no relationship here, and there is great relationship between lawyer and client. We have two men who have never seen each other and who have never talked to each other, and if this is admitted—the fact that this suit has been brought—if that is admitted, it would bring up the point of Mr. Fauber's having to show that he never authorized the suit to be brought in his name; and when that is done, the matter of insurance would be brought out in the trial. In all cases and under all the rules, it is objectionable to bring any mention of insurance into a case, and it is cause for a mistrial. There is no other way to explain it unless the matter of insurance is brought out.

Mr. Heatwole: I just want to point out that to say that any counsel could file or execute for any client, and allege any-

thing is not on all fours here. This is a right Mr. Timberlake, as counsel, has by the provision of the standard liability policy and by statute, and to say otherwise is fallacious.

Mr. McPherson: I would like to point out that this suit here, brought by Mr. Timberlake, is not a suit for Mr. Fauber, it is strictly for the insurance company.

Judge Moffett: I am going to overrule the motion for a mistrial. I feel that this case which is the subject of this motion has no place in this case, and I am going to instruct the jury to disregard Mr. Branaman's remarks.

Mr. Branaman: To which counsel for the defendant in this case excepts on the grounds that the record, or the
page 11 } parties to the record are the same. As the record shows, that is an admission in the record of negligence, that there was a settlement for $2,700.00. It is an admission of record between the same parties, and it is evidence that can be introduced and should be introduced, and it has been so held time and time again.

Mr. McPherson: Counsel for the defendant already in his opening statement has advised the jury that the plaintiff has admitted negligence in another suit between the same parties, and even if the jury is advised to disregard this statement by counsel for the defendant, the harm has been done and cannot be rectified, and a mistrial should be granted at this time.

IN THE COURTROOM.

Judge Moffett: Members of the Jury, in determining the issues in this case, you are to determine these issues solely on the evidence you hear from the witness stand in light of the instructions the Court will give you at a later date. The statement of counsel, which was in progress when we recessed for a few minutes, and also the closing argument of counsel is no part of the evidence in this case. In the opening statement, Mr. Branaman made reference to another suit pending in this Court in which Mr. Fauber is a party, and he made some reference to negligence on the part of Mr. Fauber. I will ask you gentlemen to disregard that statement in its entirety in arriving at the verdict. The ruling of the Court is
page 12 } that no reference shall be made, or considered, to the other case in which Mr. Fauber is involved. We will proceed.

Mr. Branaman: At this time. In my opening statement about the suit of Fauber *v.* Pannell—

Sergeant Boyle Orville Bateman.

Judge Moffett: Or any later time unless permission is given by the Court.

Mr. Branaman: We will offer the evidence away from the jury.

Judge Moffett: All right, sir.

EVIDENCE PRESENTED ON BEHALF OF THE PLAINTIFF.

SERGEANT BOYLE ORVILLE BATEMAN, the first witness, after being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. McPherson:

Q. Sgt. Bateman, will you please state your name, age, and residence?

A. My name is Boyle Orville Bateman, 37 years old, my residence is 201 Skyland Avenue, Waynesboro, Virginia.

page 13 } Q. Are you a member of the Waynesboro Police Force?

A. I am.

Q. What is your rank?

A. Sergeant.

Q. Did you investigate this accident between Mr. Fauber and Mr. Pannell in April of 1956?

A. Yes. I did.

Q. Do you know at what time you got the call to go to the accident?

A. I must have received the call around 6:00 o'clock in the evening. I believe we established the time as around 6:05, somewhere in that vicinity.

Q. Sergeant, this accident happened several years ago. If there is no objection, I will hand you some notes that you made at that time to help you refresh your memory.

Mr. Heatwole: Your Honor, we will have to object unless it is established that this is the record Sgt. Bateman made at the time, which we contend it is not.

Mr. McPherson: If Your Honor please, I will hand this to Sgt. Bateman and see what his recollection is as to this particular paper.

Sergeant Boyle Orville Bateman.

Judge Moffett: It is your understanding that he made up this report?

page 14 } Mr. McPherson: Yes, Sir.

Judge Moffett: Ask him.

By Mr. McPherson:

Q. Sgt. Bateman, I hand you this report and ask you to examine it. Did you or not make up that report?

A. Yes, I did. I made this report and this is my drawing on the back of the scene of the accident, and this is my handwriting, and this is my signature on the bottom. This is a copy, a duplicate report.

Q. I am offering it to the Officer not as evidence, but to refresh his memory of the accident which happened two years ago.

Mr. Heatwole: As I understand from looking at it, that is a photostat or a photograph of the original, made up and signed by you?

A. I believe it is. It is marked Police Report, posted May 8, 1956. The original copy we had in our file at police headquarters we don't know where it is. You can get a copy from the Division of Motor Vehicles.

Q. How soon after the accident did you make up the report?

A. It was some time in the evening after the accident occurred. How long, I can't tell you.

Mr. Heatwole: We have no objection.

By Mr. McPherson:

Q. Sgt. Bateman, what was the time of the ac-

page 15 } cident?

A. Around 6:00 o'clock, or 6:05 p. m.

Q. After you got the call, did you go to the scene of the accident?

A. Yes, Sir, immediately.

Q. Who went with you?

A. Officer Rexrode.

Q. Did anyone else accompany you?

A. No.

Q. You two officers investigated the accident?

A. That's correct.

Sergeant Boyle Orville Bateman.

Q. In April around 6:00 p. m., what was the condition as far as daylight was concerned, was it light, dusk, or dark?

A. It was daylight. This was on the 23rd of April, and at that time, it was daylight.

Q. What were the weather conditions?

A. It was clear. It had not been raining.

Q. Were the streets dry?

A. Yes, Sir.

Q. Where did the accident take place?

A. It happened at the intersection of Fifth Street and Augusta Avenue over in the Basic City side of Waynesboro.

Q. What is the speed limit at this intersection?

page 16 } A. That would be 25 miles an hour.

Q. When you got to the scene of the accident, will you show the jury where the vehicles were? You can use this traffic board to help to describe to the jury where they were. In the opening statement, I used this as Augusta and this as Fifth, with the arrow I have drawn here pointing north. Would that be true?

A. Yes, Sir.

Q. Where were the vehicles when you got there?

A. After the accident occurred?

Q. Yes, after the accident occurred.

A. After the accident, this one was here like this.

Q. Which vehicle is that which you have placed?

A. Mr. Fauber's which was coming from this direction (east). This would be Mr. Pannell's automobile, which was coming from the north on Augusta Avenue. This would be Fifth Street.

Q. Did you determine from your investigation which way Mr. Fauber was travelling before the accident took place?

A. Yes, Mr. Fauber was coming from the east and was driving toward the west.

Q. Mr. Pannell was coming from the north, driv-

page 17 } ing to the south. Is that correct?

A. That's correct, yes, Sir.

Q. What is the width of these streets, Sergeant?

A. I did not measure the streets.

Q. Do you know approximately what the widths are, or not?

A. Augusta Avenue is wider than Fifth Street. I would say Fifth Street is approximately 20 feet wide. That is the hard surface, now, and Augusta is probably 30. I am not positive about this at all. I am not positive, it is an estimate only. The

hard surface is narrow, but the right of way is wide. I would say there is about a third of the street hard surfaced, Augusta Avenue—I am not positive, and Fifth Street would be somewhat narrower.

Q. Turn around so the jury can hear you. From Fifth Avenue, looking north, and from Augusta, looking south, is the visibility good or is it obscured by anything?

A. I would say the visibility is practically perfect. There is nothing to obstruct the view other than at this point here. There is a house here, but it is well back off the street.

Q. There is a house at the northeast corner of the intersection, but it is well back from Augusta Street, and also from Fifth?

A. Yes.

Q. What is the grade on Augusta Street?

page 18 } A. It is almost level; there is probably a slight grade to the south, but it is almost level.

Q. How about Fifth Street?

A. East of the intersection there—it is almost level with a slight incline. It levels off at this particular intersection.

Q. Do I understand you correctly that there is a slight downhill grade down Fifth, going west, down to Augusta, leveling off in the intersection, and that it is level on the other side of the intersection?

A. That's correct.

Q. Your Honor, please, there are some exhibits there. Sgt. Bateman, I hand you a picture and ask you if you can identify the vehicles shown in that picture.

A. I can.

Q. What vehicles are they?

A. The Pontiac—it would be the car Fauber was driving, and the Ford is the automobile Mr. Pannell was driving at the time of the accident.

Q. Are those vehicles in the position you found them when you arrived at the scene of the accident?

A. Yes, Sir, they are.

Q. All right. I submit this as Exhibit No. 1.

Judge Moffett: The picture is received and marked with proper identification as Plaintiff's Exhibit No. 1.

By Mr. McPherson:

Q. Sergeant, are these cars in this picture, Plain-

page 19 } tiff's Exhibit No. 1, in the same position as you have shown them on the traffic board here?

Sergeant Boyle Orville Bateman.

A. Yes, only you have changed one of the cars.

Q. As you had them placed a moment ago, the picture shows they are in the same position?

A. Yes.

Q. Hand the picture to the jury. Mr. Fauber's vehicle is the Pontiac and Mr. Pannell's is the Ford?

A. That's correct.

Q. I hand you another picture, Sergeant. Are they the same automobiles as in Exhibit No. 1, and in the same position, just a different view of the same vehicles, from a different position?

A. They are the same vehicles. The picture was taken at the same time.

Judge Moffett: The additional four pictures will be received in evidence and marked as Plaintiff's Exhibits Nos. 2, 3, 4, and 5.

By Mr. McPherson:

Q. What portion of the Ford automobile was damaged?

A. The front end.

Q. What portion of the Fauber vehicle was damaged?

A. The right side; the Pannell car struck the Fauber car on the right side about the center of the two doors. page 20 } It was a four-door automobile, and it was struck on the right side, and also on the back end of the Fauber car was damaged because the Fauber car swerved around—the impact drove the Fauber car into a telephone pole standing in the corner here, and the Fauber car—the back end went back on that pole and bounced back.

Q. Show the jury approximately where the utility pole was.

A. The utility pole was off in the grass, I would say approximately here. There is a house that comes in here, something like this. The car bounced back like that and hit the pole and bounced forward. The Fauber car was damaged in the impact with the Pannell car on the right, and on the back it was damaged where it hit the utility pole off the hard surface in the southwest corner of the intersection.

Q. I will show you Plaintiff's Exhibit No. 3 and ask you what that represents.

A. This is the right side of the Fauber car after the right door, the right front door has been opened.

Q. I hand you Plaintiff's Exhibit No. 4. What does that represent?

A. That's the back.

Sergeant Boyle Orville Bateman.

Q. That shows the damage to the rear of the Fauber's vehicle?

A. That's correct.

Q. I hand you Plaintiff's Exhibit No. 5 and ask you what that is.

page 21 } A. This is the front end of Mr. Pannell's car.

Q. Sgt. Bateman, when you arrived at the scene of the accident, were there any automobiles parked at this intersection that would have interferred with the visibility, or do you recall.

A. I can't answer that because when I arrived at the scene, ten other people had arrived, too, and various cars were at the intersection, so I am unable to answer that.

Q. Were there any traffic controls at this intersection, stop signs or lights?

A. There were not, no, Sir.

Q. When you got there, did you find any skid marks at the place?

A. There were skid marks where the automobiles turned around in the road from the impact. The only skid marks I could determine were from the Pannell car, and as well as I recall, they were approximately a car length.

Q. Come to the board and show the jury where the skid marks were.

Q. These marks, however, were in gravel. There were some gravels kicked up at the intersection here and skid marks a car length before the impact, in gravel, as one of the pictures will probably show. There were no brake marks, just the gravel.

Q. There were marks in the road where the vehicles had come together and had then moved?

page 22 } A. Yes.

Q. Point that out to the jury. Did you place the point of impact from these marks or not?

A. Where the point of impact was?

Q. Yes.

A. It would be in a line—

Q. Show it with the two vehicles.

A. Assuming Mr. Fauber was in his proper lane and Mr. Pannell's car was to the center, or say this imaginary center line—his two left wheels were just over the center line.

Q. How did you determine that? From the skid marks?

A. From the skid marks in the gravel.

Sergeant Boyle Orville Bateman.

Q. The left wheels of the Pannell car were just over the center line of Augusta Street. Is that correct?

A. That's correct. The impact, I would say, took place like that. The damage was to the center of Mr. Fauber's car and to the front of the Pannell car, and then the marks began from here and went around like that.

Q. What would you say the distance was from the curb line of Fifth Street, the north curb line of Fifth Street, to where the two vehicles came together?

A. A line here, an imaginary straight line from there to the impact?

A. Yes.

page 23 } Q. This street, as well as I recall, is 20 feet wide. (Fifth Street) The center of the street being here, which would mark it down to 10. As wide—the width of an automobile and a couple or three feet. I am not accurately able to tell you.

Q. Can you tell us how far the front of the Fauber car was into the intersection from the eastern line of the intersection?

A. The car, evidently, was approximately the center of the intersection.

Q. You mean the middle of the car, as you have shown here?

A. I would say the middle of the car was, approximately.

Q. The middle of the car had gotten to the middle of the intersection as it travelled to the west?

A. As the accident occurred.

Q. The Fauber car was in the right hand lane?

A. It had been up here.

Q. At the time the vehicles came together, what lane was Mr. Fauber's car in, his right lane, or the middle, or the left lane?

A. In his proper lane of travel. He had been in the right lane and his statement was that he was going to continue through this intersection.

Q. Who were the passengers in these two vehicles? Was there anyone in Mr. Fauber's car?

page 24 } A. There was a lady with him. Her name was Virginia Johnson, I believe, and Mr. Pannell had another Mr. Pannell with him, Coley Pannell, I believe, some relation of his.

Q. Was Miss Johnson injured in the accident?

A. She was taken to the hospital. I believe she remained there for some while. I am not positive.

Sergeant Boyle Orville Bateman.

Q. Was she pinned in the Fauber vehicle or not?
A. I don't know. She was out of the car when I arrived. Everyone was out of the car.

Q. Did you talk to Mr. George Pannell when you got to the scene of the accident?
A. I sure did.
Q. What did his condition seem to be?
A. Mr. Pannell was very much excited. He seemed to be upset, and when I talked to him, he didn't talk just right. He seemed like he didn't know exactly what was going on or what had happened.
Q. Was there any evidence he had been drinking or not?
A. Yes, there was some kind of alcohol on his breath like he had been drinking something.
Q. Did you question him as to whether or not he had been drinking?
A. Yes, Sir.
Q. What did he tell you?
A. He had had several beers.

page 25 } Q. Did you see any alcohol beverage container at the scene of the accident?

A. Yes, just for a moment I saw a whiskey bottle lying at the side of the automobile, lying in the street, and what happened to it, I don't know, and I don't know which car it came out of.
Q. Did you question Mr. Pannell about it?
A. I don't believe he knew anything about it.
Q. He told you he didn't know anything about the whiskey bottle?
A. Yes.
Q. When you questioned Mr. Pannell at the scene of the accident, what did he tell you about how the accident happened?
A. He was very uncertain about how it happened. As I say, he was excited or shook up and he didn't exactly know at that place what had happened. He was struck about the face and head and was bleeding.
Q. Did you question Mr. Fauber?
A. I talked to him very briefly. Officer Rexrode talked to Mr. Fauber, and I tried to determine the facts.
Q. What was the condition of Mr. Fauber, as to sobriety?
A. I could not smell alcohol on his breath, of any kind. He seemed to be perfectly sober.

page 26 } Q. Did you talk to Mr. Pannell's brother, or cousin?

Sergeant Boyle Orville Bateman.

A. His cousin.
Q. His cousin who was a passenger in his vehicle.
A. I don't believe I did. He was taken to the hospital and Miss Johnson was taken to the hospital right away.
Q. That's all. Your witness.

CROSS EXAMINATION.

Mr. Heatwole: Your Honor, we would like to offer these two photographs as Defendant's Exhibits Nos. 1 and 2.
Judge Moffett: Any objection, Mr. McPherson?
Mr. McPherson: No, Sir.
Judge Moffett: The pictures will be received in evidence and marked Defendant's Exhibits 1 and 2.

By Mr. Heatwole:
Q. Sgt. Bateman, I hand you a photograph taken at a date subsequent to the accident and from Augusta Avenue, looking south, pointing out that this is the Chesapeake and Ohio Railroad back here, and I will ask you if that fairly reflects or is actually the scene looking south on Augusta Avenue, the street across the picture being Fifth Street?
A. Yes, it is a very good picture.
page 27 } Q. Is this the utility pole, pictured here, which, in your evidence, you said the rear end of the Fauber car struck?
A. Yes.
Q. And Mr. Pannell was headed south and Mr. Fauber was proceeding on the cross street in the direction of west?
A. Yes, Mr. Pannell was proceeding to the south.
Q. Now, Sergeant, I would like to hand you another photograph and ask you if this fairly reflects the scene and is the scene at the intersection of Augusta Avenue and Fifth Street, looking north on Augusta.
A. Yes, it is.
Q. Then, in this picture or as shown in this picture, this is looking north, which would mean that the Pannell vehicle was approaching down this street, away from a van which is parked there.
A. Yes, Sir.
Q. And the Fauber vehicle would have come up and stopped about opposite this white post in this picture. Is that correct?
A. He was coming that way. I don't know where he stopped exactly.
Q. It was at the corner of the intersection?

Sergeant Boyle Orville Bateman.

A. Yes, sir.

page 28 } Q. Now, Sgt. Bateman, these two pictures show, do they not, that Mr. Fauber, in this vehicle on the board here, had a clear and unobstructed view up north on Augusta from the direction in which Mr. Pannell was coming in this car?

A. Yes, Sir.

Q. The position of the cars indicates, does it not, that Mr. Pannell, the defendant, was on the right hand of Mr. Fauber?

A. That's correct.

Q. Now, sir, you say—let me ask you, were these two roads paved at the time of the accident in 1956?

A. Yes, Fifth Street was black top, a black top street, and I think it had been there for several years or quite some time. Augusta Avenue, the street Mr. Pannell was on, hadn't been hard surfaced too long. It was gravel put down and a layer of tar on that or however they do it, and loose gravel—there were loose gravel on Augusta.

Q. Augusta was not a macadamized road?

A. No.

Q. It was loose gravel?

A. Yes.

Q. You indicated that the physical facts showed that Mr. Pannell's car, the car on Augusta Avenue, left approximately one car length of skid marks in the gravel. That's all he could leave them in, wasn't it?

A. That's right.

page 29 } Q. There were no skid marks to indicate Mr. Fauber applied his brakes?

A. No, sir.

Q. The only skid marks from the Fauber car were side skids where he turned around?

A. Yes, Sir.

Q. You interviewed both drivers at the scene?

A. More so Mr. Pannell.

Q. You told the jury that Mr. Pannell was upset, excited, and didn't seem to know what he was saying. It would be fair to say he was in a state of shock, would it not?

A. That's right.

Q. Did your investigation determine whether or not he had been thrown free of his car?

A. No, sir, I am unable to say whether he was or not.

Q. After going to the hospital where Mr. Pannell was treated, you interviewed him later, did you not?

A. I talked to him at the hospital. I took him to the hospital.

Sergeant Boyle Orville Bateman.

Q. And he told you exactly what happened at that time, did he not?

A. His memory was better, yes, Sir.

Q. He was injured in this wreck?

A. He was cut about the head and face and was
page 30 } bleeding.

Q. Indicating he had suffered a blow on the head?

A. Yes, Sir.

Q. You testified as to the center line in these two streets. There is no center line in these streets painted as such, is there?

A. I believe I made the statement, "imaginary" lines.

Q. There are no actual lines on either one?

A. No, Sir.

Q. Your fixing of the point of impact would have to be in a somewhat general area because of the gravel that was thrown and the debris and glass. You couldn't fix it specifically.

A. Not specifically.

Q. You didn't see it, did you?

A. Not happen, no.

Q. You know the accident happened and the point of impact was toward the center of the intersection of Augusta and Fifth Street?

Q. What I was going by on Augusta was the skid marks or the marks in the gravel leading up to the point of impact where the debris was left, and also where the Fauber automobile would have been coming from. He is headed toward the west where the skid marks started or the cars began to swerve.

page 31 } Q. The physical evidence of skid marks indicates that Mr. Pannell put on his brakes to avoid the accident?

A. He evidently did.

Q. Yet he was on the righthand side of Mr. Fauber?

A. He was on the righthand side, to Mr. Fauber's right.

Q. You put in some evidence about a curb line and distances between curb lines. There are no curbs, or gutters, or sidewalks there, are there?

A. No, Sir.

Q. It just sort of blends off into a yard, does it not?

A. What I was going by was the hard surface, the approximate width of it.

Q. You did testify that there are no stop signs there?

A. There are no stop signs there.

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Q. No traffic control of any type?
A. No traffic control.
Q. What is the condition as to the neighborhood along Augusta Avenue, with specific instance as to the number of houses along the street.
A. From Fourth down to Augusta?
Q. Actually between Fourth and Fifth on Augusta.
A. On the corner of Fourth and Augusta, the
page 32 } northwest corner, there is a large—a fairly large brick building used for storage by Basic-Witz, I believe, and continuing from the north, from Fourth Street, on down there, I believe there are approximately three houses, two or three houses on the right, and on the left, four or five.
Q. It is sparsely built up in that block, isn't it? They are scattered?
A. About two-thirds of the lots are vacant, I suppose.
Q. Under the present laws, that is a 35 mile speed limit there, is it not?
A. Well—

Mr. McPherson: I object to that; the only question is what the speed limit was at the time of the accident. The Officer testified it was 25 miles an hour.
Judge Moffett: I understood the Officer to testify 25 miles an hour at the time of his examination. We are limited to the speed limit at the time of the accident.
Mr. Heatwole: I will withdraw the question.

Q. You testified at some length here of the interviewing of Mr. Pannell at the scene. Did you also interview Mr. Fauber at the scene?
A. I did, but Officer Rexrode did more so than I did. I talked to Mr. Pannell, and Rexrode talked to Mr. Fauber. We wanted to get it cleared up as soon as possible. Mr. Pannell
page 33 } was hurt—you could see he was—and we wanted to get him to the hospital and also take Mr. Fauber and see if he was hurt. Officer Rexrode took Mr. Fauber to the police car and talked to him, and took some information for the police report, and I talked to Mr. Pannell and got some information for my report so we could compile some of the information for the accident report. I didn't have much luck with Mr. Pannell at the time. I got more later at the hospital.
Q. Did you talk to Mr. Fauber?
A. Yes.
Q. Did he tell you how the accident happened?

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A. Yes, he did. According to what he thought happened.
Q. What did he say?
A. He said that he had pulled up, coming down the slight incline on Fifth Street, and stopped at the intersection of Augusta Avenue and looked in both directions, and he saw the car up the street, which evidently, was Mr. Pannell's car, and he thought he had time to cross the intersection, and started to cross, and the next time he looked, Mr. Pannell's car was almost on top of him. He accelerated his car to try to get out of the intersection, but it was too late.
Q. You say Mr. Fauber had accelerated?
A. Yes, Sir.
Q. That is his own statement?
page 34 } A. Yes, sir.
Q. In other words, he pulled up and stopped and saw Mr. Pannell's car up the street and thought he had time to cross the intersection and got in the intersection and didn't have time and the accident occurred?
A. Yes, Sir.
Q. He actually told you he estimated Mr. Pannell's car as seven or eight car lengths away, did he not?
A. I believe he told me Mr. Pannell's car was approximately half way of the block, he thought.
Q. I want you to recall very carefully, Sgt. Bateman. Are you sure of that?
A. Yes, Sir.
Q. Do you recall testifying in the Circuit Court of the City of Waynesboro?
A. Yes, Sir.
Q. You know what you testified to there?
A. Yes, Sir.
Q. What was your statement there?
A. The same as here.
Q. Did he tell you that he stopped and saw the car coming?
A. Yes, Sir.
Q. And pulled out in front of the car and accelerated and tried to get away?
A. Yes, Sir.
Q. That's all.

page 35 } RE-DIRECT EXAMINATION.

By Mr. McPherson:
Q. Can you give us an estimate of the distance from Fourth Street—Fourth and Fifth are parallel—can you give us the

Sergeant Boyle Orville Bateman.

distance from this intersection of Fifth and Augusta to Fourth Street?

A. Approximately 400 feet. I am not sure. Approximately 400 feet.

Mr. Branaman: Did you bring your Plat Book?
Mr. McPherson: No, it's down here, page 110.
Mr. Branaman: Did you look it up?
Mr. McPherson: Sir?
Mr. Branaman: Maybe we could agree on the distance between Fourth and Fifth. You didn't like my looking, I can tell you.

By Mr. McPherson:

Q. Anyway, Mr. Fauber told you that he stopped here at this intersection, and he told you the Pannell *bechile* was about half way down the street. Is that correct?

A. He said he thought it was down the street a way, probably a half a block and he thought he had time to cross.

Q. Did you testify he told you then he came on out here and he told you he saw the Pannell car getting closer to him?

A. Yes, Sir.

page 36 } Q. What did he say about the speed of the Pannell car, the second time he looked?

A. He said the Pannell car was almost up to him and he knew there was going to be an accident.

Q. What did he say about the speed?

A. He said he thought it was speeding.

Q. Did he give you any indication about how fast it was going?

A. "Tremendous speed," I believe he said.

Q. He didn't use any figures according to your recollection, he said it was a tremendous speed?

A. I believe he said 50 or 60 miles an hour, or something like that, which I didn't pay too much attention to that.

Q. You didn't make any notes of that?

A. No, sir.

Q. Did he tell you he was already in the intersection when he saw the Pannell car the second time?

A. Yes, Sir.

Q. He was in the intersection and the Pannell car was approaching?

A. He was in the intersection and the Pannell car was almost at him.

Sergeant Boyle Orville Bateman.

Q. A while ago, you testified as to an imaginary distance from the curb line—

A. No.

Q. A distance—the distance you were testifying
page 37 } to was if there had been a curb there at the edge of the hard surface?

A. Yes, Sir.

Q. You were testifying about Mr. Pannell's condition. You testified, on direct examination, that he was drinking, or smelled of alcohol, and on cross examination, you testified that he had been hit in the head, or had some bruises on the head, and testified as to what his condition was. Are you prepared to say what this condition came from?

A. No, sir, I am not.

Q. All right, that's all.

A. However, there was a smell of alcohol on his breath, and he had been hurt in this accident.

RE-CROSS EXAMINATION.

By Mr. Heatwole:

Q. Sgt. Bateman, you interviewed Mr. Fauber and he told you he saw a car half way down the street and that he did say he estimated it at great speed at the time he saw it?

A. No, Sir.

Q. What did he say the speed of the car was at the time he saw it?

A. He said he thought he had plenty of time to cross the intersection.

page 38 } Q. He said when he saw the car again it was at great speed?

A. The second time.

Q. When it was right on top of him?

A. Yes, Sir.

Q. Did you ask him why he pulled out in front of a car he had yielded the right-of-way for?

Mr. McPherson: I object to that question. It is more in the nature of argument than a factual question.

The Witness: I would like to change one thing. I believe I was asked how old I was, and I said 37. It's 36, this being 1958. I was born in 1922.

Judge Moffett: Yes. You don't want to push that age any more than you have to. Let's proceed.

Sergeant Boyle Orville Bateman.

Mr. Heatwole: I would like to recall Sgt. Bateman for several more questions, cross examination questions.

By Mr. Heatwole:
Q. Sergeant, I believe you testified that to your recollection, at the scene Mr. Fauber said he saw the Pannell car approximately half way down the block. Is that correct?
A. That is correct, Sir.
Q. Did you hear him testify under oath in the Circuit Court of the City of Waynesboro?
A. Yes, I did.
Q. What was his statement under oath at that page 39 } time?

Mr. McPherson: I think the record will show that he had already been asked what the plaintiff said at the scene and what he said at the trial, that he said the same thing. You can go back in the record.
Mr. Branaman: That was what he testified to.
Judge Moffett: Mrs. Baylor, will you read that part of his testimony?
Court Reporter: "Q. Do you recall testifying in the Circuit Court of the City of Waynesboro?

A. Yes, Sir.
Q. You know what you testified to there?
A. Yes, Sir.
Q. What was your statement there?
A. The same as here."

Mr. McPherson: I stand corrected. That was the Officer's testimony.

By Mr. Heatwole:
Q. What was that testimony of Mr. Fauber's?
A. That Mr. Fauber testified to in the other Court?
Q. Yes.
A. I believe Mr. Fauber said that he estimated—this was under examination I believe in Waynesboro—that they tried to get the exact distance as to how far the Pannell car was from the intersection, and Mr. Fauber estimated page 40 } at one time between eight and ten car lengths away.
Q. You said at one time?

By Mr. McPherson:

Q. Did he make more than one estimate?

A. I am not positive who was asking Mr. Fauber these questions. I believe it was Mr. Heatwole. I am not sure. He was trying to get the exact location as to where the Pannell car was between Fifth Street, where the accident occurred, and Fourth Street. He was trying to get the exact point where the Pannell car was when he saw it. It happened that he said half a block first—Mr. Fauber said he saw the car half way up the block, and whoever was examining Mr. Fauber was trying to get it in feet.

Q. Was he trying to show how far half way up the block was, trying to translate half way up the block?

A. Yes, he was trying to get it in feet how far half way up the block was, and then I think he got it down to car lengths.

By Mr. Heatwole:

Q. He fixed it to be eight or ten car lengths, to the best of your recollection?

A. Yes, Sir.

Q. Was he figuring what he thought the middle of the block was, eight or ten car lengths?

A. I am not sure about that.

Q. That's all.

Witness leaves the stand.

page 41 } MISS VIRGINIA JOHNSON,
the second witness, being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. McPherson:

Q. Miss Johnson, please state your full name, age, and residence.

A. Mirth Virginia Johnson, age 25; I live at 1423 Madison Avenue.

Q. In Waynesboro?

A. In Waynesboro.

Q. What is your occupation?

A. Waitress.

A. Where do you work?

A. Colonial Grill.

Virginia Johnson.

Q. The restaurant Mr. Fauber runs?
A. Yes.
Q. The day Mr. Fauber had this accident, there was a collision between Mr. Fauber's and Mr. Pannell's car. Were you in the Fauber vehicle?
A. Yes.
Q. How long had you been in this car?
A. Not more than five minutes.
Q. Do you live now where you lived at the time of the accident?
A. No, sir.
page 42 } Q. Did you live in the vicinity where the accident occurred?
A. At Fourth and Augusta Street.
Q. You lived on Fourth and Augusta Street?
A. Yes, sir.
Q. And had Mr. Fauber picked you up there to take you to work?
A. Yes, sir.
Q. Where were you sitting in the car?
A. On the right-hand side.
Q. In the front seat?
A. The front seat.
Q. Was there anyone else in the car?
A. Mr. Fauber.
Q. Do you drive, yourself, Miss Johnson?
A. No, sir.
Q. You don't drive?
A. No, sir.
Q. As Mr. Fauber was driving his car down Fifth Street toward Augusta, did he stop at Augusta Avenue?
A. We did it every day, and he pulled up there and did stop and looked to the left and then to the right—I don't remember which side first, but both ways. I seen the car, myself; it was at least half way back in the block.
Q. The car approaching on the right, the Pannell car?
A. Yes.
page 43 } Q. And you thought it was half way back—in the middle of the block?
A. Yes, sir.
Q. What did Mr. Fauber do then?
A. What I could see by looking, anyone would have had plenty of time to have went on.
Q. What did Mr. Fauber do then?

Virginia Johnson.

A. Looked and pulled out. He was middle ways back of the block.

Q. You mean he entered the intersection.

A. Yes, and looked again, and this car was right up on us, and I throwed my hand to my face and screamed, and Mr. Fauber stepped on the accelerator to try to get out of the way in time, but didn't make it.

Q. When you looked up and saw the Pannell car the second time, you were in the middle of the intersection?

A. Yes, sir.

Q. How far back was the Pannell car from the intersection?

A. Mid ways of the block.

Q. The second time you looked, I mean.

A. Right up on us at the time.

Q. What did you notice about his speed, if anything?

A. By looking the first time when we started out, it looked like we had plenty of time, it didn't look like he was going too fast, but the second time, he was speeding. He

page 44 } was going too fast for that block.

Q. Were you injured in this wreck?

A. My back was injured, the right-hand side of my back.

Q. Were you taken to the hospital?

A. Yes. I stayed three and a half days, I believe.

Q. That's all, thank you.

CROSS EXAMINATION.

By Mr. Heatwole:

Q. Miss Johnson,—it is "Miss" Johnson, is it not?

A. Yes.

Q. You work at the Colonial Grill?

A. Yes.

Q. Which is owned by Mr. Fauber?

A. Yes.

Q. You work for Mr. Fauber?

A. Yes.

Q. You, also, are Mr. Fauber's girl friend, aren't you?

A. Now, I am.

Mr. McPherson: I object to that question. I don't think that has anything to do with this case.

page 45 } Mr. Heatwole: I have a perfect right to show interest in the case and interest in the witness.

Virginia Johnson.

Judge Moffett: I think your question is right, Mr. Heatwole.
Mr. McPherson: I except to the ruling of the Court.

Mr. Heatwole:
Q. You did not testify in the Circuit Court for the City of Waynesboro, did you?
A. No, sir.
Q. You were a passenger seated on the right-hand side of the front seat of the Fauber car?
A. Yes, sir.
Q. When you stopped at the intersection of Fifth Street and Augusta Avenue, you fixed the Pannell car at approximately half way down the block?
A. Yes.
Q. Driving at what appeared to be to you at a reasonable rate of speed?
A. I don't drive. I don't know exactly the speed. All I can say is that he was going plenty fast.
Q. You just testified that when you saw him down the block, he wasn't going too fast, in your words.
A. When we first saw him.
Q. When you saw him right up on you, he appeared to be going real fast?
A. When I looked the second time, when he started out, he appeared to be going fast. I screamed.
Q. Your perception of speed is that it is in-
page 46 } creasing as it gets closer to you, isn't it?
A. Yes, it gets faster.
Q. When you had a chance to see it, when you were at a stopped position, you say the Pannell car wasn't going too fast?
A. No, sir, not at first.
Q. And, as you say, when you saw it again, you, personally, saw it again, it was right up on you?
A. Yes, sir.
Q. Were you talking to Mr. Fauber at the time?
A. No, sir.
Q. So you took your eyes off the Pannell car—
A. When he started out. I didn't see no sense in watching. If I had been driving, I still would have had the same idea, to go on, that we had plenty of time.
Q. It's true, is it not, Miss Johnson, that when you started out into the intersection, when Mr. Fauber started out into

the intersection and realized that he was out there, that there could be a wreck, he put his car into a scat gear, all the way to the floorboard?

A. Yes, he tried to get out of the way.

Q. And the wheels on the car spun, didn't they?

A. I don't remember that.

Q. The Pannell car was on your right?

A. Yes.

page 47 } Q. There is no stop sign or traffic control at all there, is there?

A. No, sir.

Q. And you had stopped?

A. Yes, we stopped.

Q. Do you know why you didn't stay there when you saw the car approaching?

A. Mr. Fauber?

Q. Yes.

A. Because he thought he had plenty of time to go on.

Q. He was wrong?

A. I wouldn't say he was wrong. If I had been driving, I would have done the same thing.

Q. There was an accident?

A. Yes, sir.

Q. And the accident happened because your car pulled out there?

A. Yes.

Q. That's all.

RE-DIRECT EXAMINATION.

By Mr. McPherson:

Q. Of course, if the Pannell car hadn't been coming down there, you wouldn't have had an accident, either, would you?

A. No, sir.

page 48 } Q. That's all.

Witness leaves the stand.

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page 57 }

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HERSEY W. FAUBER,
the Plaintiff, being the fourth witness, and being first duly sworn, testified:

DIRECT EXAMINATION.

By Mr. McPherson:

Q. You were sworn before, weren't you, Mr. Fauber?
A. Yes, sir.
Q. State your full name, age, and residence.
A. Hersey William Fauber, 329 Florence Avenue, forty-three.
Q. What is your occupation?
A. I operate a restaurant.
Q. What is the name of your restaurant?
A. Colonial Grill.
Q. There in Waynesboro?
page 58 } A. Main Street, Waynesboro.
Q. On the day Mr. Pannell and you had this accident, tell the jury where you had been.
A. I had driven from my home on Florence Avenue, and I came and picked up Miss Johnson and was on my way back to work.
Q. To take Miss Johnson to your place of business?
A. That's correct.
Q. What time, approximately, did this accident happen?
A. Approximately 6:00 o'clock.
Q. As you came down Fifth Street, approaching Augusta, tell the jury what you did.
A. I stopped when I came to the intersection.
Q. You stopped when you reached the intersection?
A. Yes, sir.
Q. Come over here and indicate on the board, Mr. Fauber. This is your car and you were coming down here, and you stopped?
A. Yes, sir.
Q. Tell the jury what you saw when you stopped there.
A. I saw Mr. Pannell's car approximately half way—the middle of the block.
Q. The middle of the block between Fourth
page 59 } and Fifth Streets?
A. That's right.
Q. Coming south on Augusta?
A. Yes, sir.
Q. Have you had occasion to step off the distance between Fourth and Fifth Streets?

Hersey W. Fauber.

A. It is a little over 600 feet.
Q. It is a little over 600 feet?
A. Yes, sir.
Q. When you first looked and saw Mr. Pannell, he was coming down that street?
A. Yes, about the middle of the block. To the best of my judgment he was.
Q. What did you notice about the speed of his vehicle at that time?
A. At that time I couldn't tell he was driving at more than an ordinary rate of speed.
Q. Tell the jury what you did after you stopped and saw Mr. Pannell coming down that block.
A. I looked both ways.
Q. Which way did you look first?
A. Right, and then I checked left, and then I pulled out and was half way, approximately half way across the intersection when I realized he was close on me.
Q. Indicate with the cars where you were when you saw him the second time.
A. Approximately here.
Q. Where was he?
page 60 } A. Here.
Q. How far would you estimate Mr. Pannell's car was from the intersection the second occasion when you looked, when you were in the middle of the intersection?
A. The second time, 10 to 15 feet from my car.
Q. What did you notice about his speed at that time?
A. It was a terrific rate of speed and there wasn't any chance of his stopping.
Q. Do you have any idea how fast he has going?
A. Between 60 and 65 miles an hour.
Q. What did you do when you looked up and saw him the second time 10 to 15 feet from you?
A. I couldn't stop; I would have been right in front of him, and I gave it all the gas I could in order to get away, to keep him from hitting me.
Q. Where were you when he hit you?
A. Just a little beyond half way of the intersection, a little past half way, when he hit me.
Q. Indicate with the cars where the cars came to rest.
A. My car stopped like this and his, like this, maybe a little more this way.
Q. What part of your car was struck, Mr. Fauber?

Hersey W. Fauber.

A. Right between the two doors, right in the
page 61 } post between the two doors.

Q. When you started across this intersection, you started from a stopped position. Is that correct?

A. That's right.

Q. Do you have any idea how fast you were going when you next saw him?

A. Not over between 5 and 10 miles an hour.

Q. Now, your car was pushed sideways, around, and back and rammed into that pole.

A. He knocked me completely around and the back end was knocked into the pole.

Q. Were you in any way injured in this accident?

A. I am taking treatment for a whiplash injury to my back.

Q. Did you talk to the driver of the other vehicle?

A. No; he made a few remarks that he didn't know how it happened.

Q. Who was he making the remarks to?

A. He was talking to me.

Q. You weren't addressing any remarks to him, but he did say a few remarks to you?

A. Yes, sir.

Q. What did he say?

A. He didn't know how it happened or why it happened, or anything. He didn't seem to have any idea
page 62 } how it happened or anything about the wreck.

Q. Were you close to him when he was talking to you?

A. Yes, I was.

Q. How did he act.

A. He acted, to me, as if he had been drinking.

Q. What made you think that?

A. Well, not right there, but after I got to the hospital. I smelled it in the car going up there.

Q. How did you go to the hospital?

A. With Mr. Bateman.

Q. In Sgt. Bateman's car?

A. Yes, sir.

Q. Where were you sitting in the car?

A. In the back seat.

Q. Where was Mr. Pannell?

A. In the back seat.

Q. With you?

A. Yes, sir.

Hersey W. Fauber.

Q. And while you were in there, you could smell alcohol on his breath?
A. Yes, sir.
Q. Was Mr. Pannell rational at the scene of the accident, or was he confused?
A. He seemed to be confused.
Q. What?
page 63 } A. Confused. He didn't seem to know anything about what happened. He seemed to be in a daze.
Q. Did you see any—did you question Mr. Pannell about his drinking?
A. No, sir, I didn't.
Q. Did you hear the officers question him?
A. Yes, I did.
Q. Whom did you hear?
A. Sergeant Bateman.
Q. What did he tell Sgt. Bateman?
A. As well as I remember, he told him that he had been drinking some beer.
Q. Did you see any signs of any alcoholic beverages at the scene of the accident?
A. Yes, a pint bottle, approximately half full of whiskey.
Q. Where did you see that?
A. Right beside his car.
Q. Do you know what happened to that pint bottle?
A. Some truck driver picked it up. I saw him pick it up right before the policemen got there.
Q. At the time that you saw Mr. Pannell the second time, I believe you testified the middle of your car was half way across the intersection. Is that correct?
A. Yes, sir.
page 64 } Q. At the time that his car hit the side of your car, where was the front of your car?
A. When he hit my car?
Q. When he hit the side of your car.
A. Just leaving the intersection, going out.
Q. Your witness.

CROSS EXAMINATION.

By Mr. Heatwole:
Q. Mr. Fauber, I understood you to say you came down Fifth Street and stopped before entering the intersection.
A. Yes, sir.

Hersey W. Fauber.

Q. You came to a complete stop?
A. Yes, sir.
Q. You looked to your right and saw Mr. Pannell?
A. Yes, sir.
Q. And then looked to your left?
A. Yes, sir.
Q. Before starting to move, you were aware of a car to your right?
A. That's correct.
Q. Did you ever look back to your right again?
A. Not until Miss Johnson hollered and he
page 65 } was right on me.
Q. Tell me why you didn't look back when you already were aware of a car approaching.
A. Yes. If he had been driving at a normal rate of speed, I had plenty of time to cross.
Q. I believe you testified when you saw him, he was travelling at a normal rate of speed.
A. Yes, sir.
Q. A car travelling at 25 miles an hour will travel 40 feet per second, do you realize that?
A. I didn't realize it, no.
Q. Would you like to have it mathematically proved to you?
A. Not necessarily.
Q. And if it travels 40 feet per second, it would travel 200 feet in 5 seconds. 40 times 5 is 200, isn't it?
A. That's right.
Q. But you did not—ever—look back until you were out in the intersection, and then the only reason you looked back was because Miss Johnson screamed or hollered. Is that correct?
A. That's right, sir.
Q. And you testify here that you saw the car approximately half way up the block?
A. Yes, sir.
Q. Did you not testify under oath as a witness
page 66 } in the City of Waynesboro that you saw this car
some seven or eight car lengths away from the intersection?
A. I don't remember of that. I remember telling that to the best of my knowledge, it was in the center of the block.
Q. Do you deny that you testified under oath in the Circuit

Hersey W. Fauber.

Court of the City of Waynesboro that when you saw this car, it was approximately eight car lengths away?

A. Eight to ten car lengths away?

Q. Yes.

A. I don't deny it, no, sir.

Q. You don't deny you testified there that you saw this car eight to ten car lengths away?

A. No, sir.

Q. You say you saw a bottle lying in the road?

A. Yes, sir.

Q. And you saw a truck driver pick up this bottle, you say?

A. Yes, sir, that's right.

Q. Before the police got there?

A. Yes, sir.

Q. Were you in the Courtroom this morning?

A. Yes, sir.

Q. And did you hear Sgt. Bateman testify that he saw the bottle lying between the cars?

A. Yes, sir.

page 67 } Q. Did he pick it up and put it back down there?

A. Sgt. Bateman?

Q. No, the truck driver.

A. That I don't know. I saw him pick it up. It was the Wilson Trucking Company truck he was driving.

Q. Before the police arrived?

A. As far as I know, it was.

Q. But Sgt. Bateman testified he saw it and didn't know where it came from.

A. Miss Johnson was lying there on a stretcher, and I was interested in getting her to the hospital.

Q. Would you like to change your testimony?

A. No, sir.

Q. You still say it was before the police arrived?

A. As far as I remember it was.

Q. You were at this intersection and started off. Now, when you realized you were in a position of danger, did you accelerate to the maximum?

A. I wouldn't say to the maximum.

Q. Did you put the accelerator to the floor? Did you put it in scat gear?

A. I don't know whether.

Hersey W. Fauber.

Q. You made every effort to get out of there?
A. Yes, sir.
page 68 } Q. And the second time you looked, this car, which was on your right, you say was travelling at a great rate of speed?
A. Yes, sir.
Q. You are aware that a moving vehicle, approaching you, close to you, gives the impression of greatly increased speed, aren't you?
A. That is probably so, yes, sir.
Q. Did you, after having stopped at the intersection, knowing this car was on your right and approaching at a reasonable rate of speed—did you sound your horn or give any indication that you were going to pull out in front of him?
A. No, sir.
Q. Mr. Fauber, did you forget the car was there?
A. No, sir. As much as I travel those streets, I stop both ways, regardless of where I am going, whether there's any stop sign whatever.
Q. Every street?
A. Yes, sir, where there is no sign, unless it is Main Street.
Q. On this street, you stopped at Baird Avenue?
A. Did I stop at Baird going up?
Q. Bringing Miss Johnson to work.
A. I always stop where there is no signal.
page 69 } Q. You stopped at Fourth Street?
A. Yes, sir.
Q. And at Fifth and Augusta?
A. Yes, sir.
Q. Did you measure this block by stepping it off, and found it to be slightly in excess of 600 feet?
A. Yes, sir.
Q. And if you saw him half way up the block, that is approximately 300 feet?
A. Yes, sir.
Q. And you admit that there was an elapse of only a few seconds until the impact happened?
A. Yes, sir.
Q. You were at a standstill?
A. I stopped before going across the intersection.
Q. And you started off in an ordinary, safe manner?
A. That's right.
Q. But in an effort to get away, you did all you could to get your car out of it?

Hersey W. Fauber.

A. After I saw he wasn't going to stop, or couldn't stop.
Q. He was on your right, wasn't he, Mr. Fauber?
A. Yes, sir.
Q. The physical marks indicate that Mr. Pannell did try to stop.
page 70 } A. That's probably so, but he was going so fast, he couldn't.
Q. When you had a chance, from a standstill position, to observe the car down the street, you tell the Court he was driving at an ordinary rate of speed?
A. As far as I could tell, he was.
Q. And at 25 miles an hour, he would travel some 200 feet in some five seconds?
A. I don't know.
Q. Other than figuring you had a chance to get across there, was there any other reason you would pull out in front of this car?
A. No, sir, no other reason.
Q. If you had not been mistaken in your judgment, there would have no accident?
A. I was mistaken in the speed he was going.
Q. It was a mistake in judgment?
A. Yes, sir.
Q. It was a mistake in your judgment that caused the accident?
A. It was his speed.

Mr. McPherson: That is a question for the jury to determine. He has testified to the facts.
Judge Moffett: That is a question for the jury, Gentlemen.

Mr. Heatwole:
Q. One final question, Mr. Fauber. This was a
page 71 } no traffic sign control intersection—no signs or lights of any type?
A. That's right.

RE-DIRECT EXAMINATION.

By Mr. McPherson:
Q. When you first looked, this car was in the middle of the block, approaching?
A. At least that far, in my knowledge.

Hersey W. Fauber.

Q. And you assumed he was going at a lawful rate of speed at that time?
A. Yes, Sir
Q. And you started out, and when he got nearer the intersection, you say he was not?
A. Yes, Sir.
Q. And at this hearing in Waynesboro, you say you told the jury or the Court, or whoever it was, that the car was in the middle of the block?
A. Yes, Sir.
Q. Then what happened? Where did this car length come up? Were you being cross-examined by Mr. Heatwole?
A. Yes, Sir, that's right.
Q. Were you trying to indicate how many feet it was to the middle of the block?
A. How many feet, the best way I knew how to describe it.

page 72 } RE-CROSS EXAMINATION.

By Mr. Heatwole:
Q. Mr. Fauber, you—I show you a picture taken from Augusta Avenue, looking north on Augusta, and ask you if that is the scene of the accident.
A. It appears to be. Yes, sir.
Q. Was your car stopped at approximately the position where this white post is in the picture here?
A. Approximately. A little farther back.
Q. Within a few feet?
A. Yes.
Q. Then your view down the street toward where the van is in this picture, looking north, was unobstructed?
A. Yes, Sir.
Q. You could see all the way?
A. Yes, Sir.
Q. Without any trouble?
A. Yes, Sir.

Mr. Heatwole: While this witness is on the stand, I would like to retire to chambers for a moment.
Judge Moffett: Before you do, Gentlemen, I understand that the amount of the damages alleged here is agreed upon, but for the sake of the record, don't you think we should have this witness put it on record?

Hersey W. Fauber.

By Mr. McPherson:

page 73 } Q. Mr. Fauber, you have sued Mr. Pannell for $1,935.50. Is that the amount of damages suffered by your automobile in this collision.

Witness shakes head.

Q. Do you remember the exact amount?
A. It was more than that. It was a total loss.

Mr. McPherson: Your Honor please, we—Mr. Branaman and I—have agreed on the amount. It was a total loss, but there was some salvage for parts.

Mr. Branaman: We agreed in the opening statement that that was the amount.

Judge Moffett: Let the record show that the amount sued for, $1935.50, was agreed upon, and it is so stipulated.

IN CHAMBERS.

Mr. Branaman: Your Honor, I would like to introduce into evidence the papers filed in the Circuit Court of Augusta County, this Court, in Case No. 576, under the nomenclature of Fauber v. Pannell, in which a motion for judgment against George M. Pannell is in the amount of $1,350.00, and in which the plaintiff, the same identical plaintiff we have here, admits negligence through his pleadings, and I would like to ask him the question, whether or not he is the same party, Hersey W. Fauber, and if this suit is in his name.

Mr. McPherson: I objected to the question this morning,

page 74 } and the record will show that this man was questioned and the suit was brought in his name, and the attorney who was attempting to represent Mr. Fauber gave evidence which shows that Mr. Fauber did not obtain this attorney, Mr. Timberlake, had never talked to him, did not know the suit was pending. The man who is litigating was not speaking for him, and, accordingly, could not bind him. The evidence on that point was uncontradicted, and I object to any questions to Mr. Fauber asking him about what is alleged in the pleadings inasmuch as he is not responsible for what is in them.

Mr. Heatwole: I would like to correct one statement of learned counsel, that the evidence is not contradicted. We

maintain the general subrogation right under the standard liability policy permits this, and the policy holder authorizes the institution of such a suit under the statute of the 1950 Code of Virginia, as amended. And we offer these identical copies as exhibits.

Judge Moffett: Gentlemen, it is obvious this suit of which you gentlemen speak was brought by the insurance carrier, and the allegations appearing in the motion for judgment are those of the insurance carrier although appearing under the name of Mr. Fauber. It was brought without any consultation with him, and I feel it would be improper to in any way bring this suit into this case, and I will initial them (Copies offered as exhibits), so you can save the point for the record.

page 75 } Mr. Branaman: To which Counsel for the defendant excepts on the grounds that the suit is pending in this Court between the same parties and shows conclusively that the plaintiff was guilty of negligence, such negligence that his insurance carrier paid Coley Pannell $2700.00, and now the suit seeks to recover part, or one-half of the $2700.00, or $1350.50, from the defendant, George M. Pannell; that the admissions in the notice of motion specifically sets out that there was negligence on the part of Mr. Fauber, and he settled, or his insurance carrier settled for him, to the guest passenger in the amount of $2700.00. And therefore, the admissions in the pleadings are binding on Mr. Fauber as they are both authorized by his insurance policy and also in the subrogation assignments.

IN THE COURTROOM.

Mr. Fauber still on the stand.

Mr. Heatwole's Cross Examination continues:

Q. As I understand it, your position here is that you saw this car approaching, approximately half way down the block?

A. Yes, Sir.

Q. You will not deny you testified under oath that you saw it and fixed the distance some eight or ten car lengths away,

page 76 } A. I don't deny it.

That's all.

Witness leaves the stand.

George M. Pannell.

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page 89 } IN CHAMBERS.

Mr. Branaman: We move the Court that this section of Fauber *v.* Pannell, now being heard by Your Honor and the jury, be dismissed. That is to say, that the evidence of the plaintiff be stricken for the reason that it appears without question that if this plaintiff was not guilty—the sole proximate cause in this case, then he was certainly guilty of contributory negligence as is so shown by his own evidence, his own admissions before Your Honor and the jury. There is a case, a recent one, of *Shelton* v. *Detamore,* 198 Virginia, 220, which went to the Court of Appeals—as I recall it—from Albemarle County. It had been before Judge Waddell. It's on all fours with this case. Detamore was driving west on a street in the City of Charlottesville, and *Detamore* was driving north. There was a collision in the intersection, exactly as has been portrayed in this case, save only that one of the drivers had his view partially obstructed, to the extent of 138 or 140 feet.

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Mr. Branaman: To which action of the Court, the defendant excepts on the ground that the evidence plainly indicates the plaintiff was guilty of primary negligence and that his negligence was the sole proximate cause of the accident, or else he is guilty of contributory negligence as a matter of law.

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page 100 }

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GEORGE M. PANNELL,
the Defendant, being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. Heatwole:
Q. Please state your full name.
A. George Melvin Pannell.

George M. Pannell.

Q. Where do you live, Mr. Pannell?
A. Sherando.
Q. And how old are you and where do you work?
A. 41. Dawborn Brothers.
Q. At the time of this accident in 1956, where did you live?
A. Sherando. The same place.
Q. And where were you working at that time?
A. For Moore Brothers, on the by-pass.
Q. On the construction of the by-pass?
A. That's right.

Q. Now, Sir, on the 23rd day of April, in 1956,
page 101 } were you the operator of a motor vehicle involved in an accident with Hersey Fauber?

A. I was.
Q. Tell me, please, Sir, just what you did on that day and how you happened to be in the City of Waynesboro?
A. To start out with, I got off from my regular job to do some work in the garden at home, and just before I got done working, my first cousin came over and I asked him to go with me to take the tractor back to Dooms.
Q. Who is your first cousin?
A. Coley Pannell.
Q. All right, go ahead.
A. We loaded the tractor in the trailer and went up the road to George Miller's and unloaded it and put it in the shop where he keeps it and started back home and we came to Waynesboro—as far as the streets are concerned, I can't name them, but I can tell you the way I went. I came to the railroad and turned to the right there and started to go down there four blocks, but I turned on the second block and I was going on through to make my turn right to come out at Paul Freed's. I dealt with Charlie Hicks for gas and I was going that way to fill up the car, and I got to the intersection and saw this car coming down there.
Q. Is this the intersection of Fifth Street and Augusta Avenue, where the accident occurred?

A. Yes, Sir, and I saw Mr. Fauber's car. Of
page 102 } course, I didn't know who he was at the time, but I saw his car coming down and he came to a stop; so, I was watching when he came down to see if he was going to stop, and he came to a stop, and there was a house on the right, and I turned my head to see that nothing was coming up that way, when I was close enough to see nothing was coming, up close to the intersection, and I turned my head back, like that, and here come Mr. Fauber's car in front of me.

George M. Pannell.

Q. Did you apply your brakes?

A. I slammed my foot on the brakes, and that's all I know until I came to in the hospital, talking to Mr. Bateman over there.

Q. What kind of car were you driving?

A. A '49 Ford.

Q. What was your speed as you came down Augusta?

A. I didn't check it, but I know it was not better than 25.

Q. Who was in the car with you?

A. No one but Coley Pannell.

Q. Where was he in the car?

A. On the righthand side. I was driving, and he was sitting on the righthand side.

Q. Did I understand you saw the Fauber vehicle approach and come to a stop?

A. Yes, I did.

page 103 } Q. How far, to the best of your knowledge, how far back were you at the time when you saw the Fauber vehicle start off into the intersection and you put on your brakes?

A. I didn't see him start off in the intersection. He had done started when I saw him, and I would say I was the length of the car from the intersection after he had started. I saw him come to a stop and he was sitting there, and, naturally, I figured on going on, that he was going to let me through, and I looked to the right to see nothing was coming, that way, and when I looked back, he was right in front of me.

Q. At the point you saw him stop at the intersection, how far back were you at that point?

A. 7 or 8 lengths of the car back. I couldn't say exactly.

Q. Was he at a standstill then?

A. He pulled up and come to a standstill, yes, Sir.

Q. Now, there has been some evidence here concerning whether or not you were drinking. Had you had anything in the way of alcoholic beverages during April 23?

A. Yes, I had. I drank a can of beer after I had my lunch, a little after 12:00.

Q. What time did the accident happen?

A. 6:05, or that is when it was marked up for.

page 104 } Q. Had you had anything in the way of alcoholic beverages to drink between the time you had this beer after your lunch or with your lunch until the accident?

A. No, Sir, I had not.

Q. In a lapse of five or six hours?

George M. Pannell.

A. Right close to it. It was 12:00 or close to it when I had my lunch. I wouldn't say to the minute, but it was somewhere right in there.

Q. Mr. Pannell, as you were approaching the intersection, and then when you realized Mr. Fauber was coming into the intersection, did you hear the sound of a horn or a signal of any type?

A. No sound or nothing whatsoever.

Q. As I understand you, you say that you do not remember anything from the time of the impact until you came to in the hospital. Is that correct?

A. Yes. I have been told I was thrown in the street. The back of my head was cut and my head here, here are the scars on my forehead—I was told my head went through the windshield and I was told the door flew open and I was thrown on the street.

Q. Do you recall talking to the officers at the scene of the accident?

A. No, the first I recall was in the hospital, talking to Bateman.

Q. Did you remain in the hospital?

A. No, Sir, not at that time. I had to go back, but I didn't stay there.

Q. How about Coley Pannell? Did he have to
page 105 } stay in the hospital?

A. Yes, eleven days, I think it was, or maybe more.

Q. There has been some evidence here also that there was a bottle of whiskey at the scene of the accident. Did you have any whiskey in your car?

A. No, Sir, I did not.

Q. Did this bottle seen at the scene of the accident in the road belong to you?

A. No, Sir, it wasn't mine. It wasn't in my car.

Q. How about Coley? Did Coley have any whiskey with him?

A. No, Sir. He doesn't even drink. He hasn't drank anything in over ten years.

Q. Your witness.

CROSS EXAMINATION.

By Mr. McPherson:

Q. Mr. Pannell, had you been at this intersection before, on this particular day, at any time?

George M. Pannell.

A. No, Sir.
Q. This was the first time you had come along there?
A. Yes, sir.
Q. You hadn't been there fifteen minutes before?
A. No, Sir.
page 106 } Q. As you were coming down the street did you see Mr. Fauber come up and stop or was he stopped when you saw him?
A. I saw him coming down the grade and stop.
Q. You saw him coming down the grade and saw him stop?
A. Yes, Sir.
Q. And then you turned to the right?
A. No.
Q. You turned your head to the right, not your automobile.
A. After I saw him come to a stop, I looked to the right.
Q. And you didn't turn your head back from the right any more until Mr. Fauber was into the intersection?
A. Until I got up far enough to see nothing was coming.
Q. How many feet were you going, looking right?
A. I don't know.
Q. Do you have any idea?
A. No. I couldn't say just how many feet it was.
Q. You don't have any idea how far back from the intersection you were when you first saw Mr. Fauber?
page 107 } A. I saw it 7 or 8 lengths of the car back.
Q. Is that when you first turned your head to the right?
A. I watched him until I seen him stop, and I looked to the right to see nothing was coming the other way.
Q. Do you know how many car lengths back you were when you first saw Mr. Fauber?
A. I don't know.
Q. How many car lengths back were you when you looked to the right?
A. I don't know.
Q. You did say on the other one.
A. I say 7 or 8 car lengths back.
Q. In that instances, you are just estimating?
A. Yes, I didn't measure it. I didn't have no way to measure it.
Q. You say you don't know how fast you were going?
A. I said around 25 miles an hour.
Q. I understood you to say you didn't know how fast, but you had the idea it was no more than 25.
A. I didn't look, but it was no better than that.

George M. Pannell.

Q. Did you look at your speedometer while you were in Waynesboro that day?

page 108 } A. I don't know, I doubt I did.

Q. You didn't look at the speedometer as you came down this street?

A. No, Sir, not when I had that wreck, I can't say I did.

Q. Where were you when you looked up and looked ahead of you and saw Mr. Fauber in the intersection?

A. Mr. Fauber's car was coming down here and stopped, and I was coming down this way.

Q. Then you looked to the right?

A. Yes, Sir, and the house is there and I had to watch around this house.

Q. That house is sitting at the northwest corner of the intersection close to the street?

A. Not too awful close, approximately right here. I don't know just how many feet it would be.

Q. Is it true you had to look to the right to see around this house until you got right up to the intersection?

A. Probably. Say here.

Q. How many feet back from the intersection did you look ahead the second time, looked straight ahead?

A. A length of the car or a length and a half.

Q. Back from the intersection?

A. Back from the intersection.

Q. And at that time, Mr. Fauber was in the intersection?

page 109 } A. Coming in, on down in the intersection, and I slammed on the brakes.

Q. Would you say he was in the middle of the intersection?

A. It happened too fast. I couldn't tell you.

Q. You couldn't say whether the car was or was not in the center of the intersection, and you looked ahead, after looking to the right, and Mr.Fauber was well into the intersection and you were back a length or length and a half of the car.

A. I—he was coming like this, and I stomped on the brakes.

Q. He wasn't going very fast?

A. I couldn't set his speed. I couldn't say how fast he was going.

Q. You could tell he was not going fast, couldn't you?

A. I know he started out from a stop.

Q. You assume he was not going very fast?

A. If he was, he must have been giving it all he had to go.

Q. You say you were going 25 miles an hour.

George M. Pannell.

A. I stomped on my brakes.
Q. And slid a little bit.
A. That's all I know.
Q. The front of your car went into the side of Mr. Fauber's car?
page 110 } A. That's what they tell me. I didn't see it.
Q. You don't know where. You heard the officers' testimony that his car came over and hit this pole, but you don't know, yourself?
A. No, Sir.
Q. This exhibit, No. 5, shows the front of your car.
A. That's the front of my car.
Q. Is that an accurate portrayal of the way your car looked?
A. It's sitting at home like that now. Anyone can see it.
Q. You say you were coming in there and you put on your brakes and you were not exceeding 25 miles an hour when you put them on?
A. That's right.
Q. This is Plaintiff's Exhibit No. 3. That is a picture of the side of Mr. Fauber's car, and you say that all that damage was done to his car and you were not going over 25 miles an hour?
A. I don't know. I didn't see it.
Q. In any event, no matter what damage was done there, your car was not going over 25 when the two cars came together?
A. No, sir.
Q. You say you hadn't had but one beer that day?
A. One beer.
page 111 } Q. You hadn't had any whiskey?
A. No, Sir.
Q. You heard the officers say they could smell alcohol on your breath. Do you think they could still smell that one beer you say you had with your noon meal?
A. It was 12:00 or later, after I had my meal that I was drinking it. Whatever I am going to drink coffee, or beer, or whatever it may be, I drink it after my meal, not while I'm eating it.
Q. Did you hear the officers testify they could smell something on your breath?
A. I did.
Q. Do you think they could still smell the one beer you had that day?
A. If they could smell anything, they had to smell it.

George M. Pannell.

Q. You can't dispute the evidence. My recollection of your testimony is that you said several beers—

A. I can't remember that. I don't know what I told them.

Q. When it happened, at the scene of the accident, or going to the hospital.

A. I don't know anything about it.

Q. That's all. Just a moment. Did you sound your horn? You didn't sound your horn, did you?

A. No, Sir. All I could do was stomp the brakes.

page 112 } RE-DIRECT EXAMINATION.

By Mr. Heatwole:

Q. Do you recall talking to Sgt. Bateman at the hospital?

A. Yes, Sir.

Q. Did he question you at that time as to whether or not you had had anything to drink?

A. He asked me what I had been drinking, and I told him a beer.

Q. Did he question you—

A. He said, "Is that all you drank?" and I said if there was any question about how much I had drank, I was willing to take a blood test, and Mr. Bateman said that wouldn't be necessary.

Q. I want to show you these pictures. This picture is a picture of the scene looking in the direction in which you were going, Defendant's Exhibit No. 1. This is the way in which you were going. Point out there with relation to where it was that you saw the Fauber car stop.

A. Right over in here. I was travelling in here, and there was a house—you can just barely see the shrubbery—and that's where I was.

Q. On this picture, Defendant's Exhibit No. 2, which is a picture looking north on Augusta Street, the di-
page 113 } rection from which you had come—you were coming down this way, which is looking north, show them on this picture where it was you saw Mr. Fauber's car.

A. His car was right over in here.

Q. Next to the white post in the picture?

A. Yes, Sir, and I was right in here.

Q. That's all.

Witness leaves the stand.

COLEY PANNELL,
the second witness, being duly sworn, testified:

DIRECT EXAMINATION.

By Mr. Heatwole:
Q. State your name, please, Sir.
A. Coley Pannell.
Q. Where do you live?
A. Lyndhurst.
Q. How old are you?
A. 46.
Q. On April 23, 1956, the date of this accident, were you in the car of Mr. George Pannell?
A. Yes, Sir.
Q. On that day, the day of the accident, that is, tell me where you first met up with George.
page 114 } A. At his home.
Q. What time was that?
A. A little after noon.
Q. What did you do, Mr. Pannell, after you were at his home?
A. Well, I helped him take a garden plow down to Dooms, to George Miller's around about 5:00 o'clock.
Q. Then what did you do?
A. Taken the garden plow and loaded it off and then come on back and come on up and across the bridge and come on down to this street and on down to the intersection. I don't know the name of the streets, and I saw this car stop and I thought he was going to stay still.
Q. You say you saw a car stop. Is that the car you were in the wreck with?
A. Yes, Sir.
Q. How far back were you when you saw the car stop on Fifth Street?
A. I figure about 5 or 6 lengths of a car.
Q. How fast were you going in your car, Mr. Pannell?
A. Around about 25.
Q. Do you drive an automobile?
A. Yes, sir.
Q. You are able to judge speed then, are you not?
A. Yes, Sir.
page 115 } Q. And that is what you fixed as his speed?
A. Yes, Sir.
Q. You weren't looking at the speedometer?

Coley Pannell.

A. No, Sir.

Q. Now, did you suffer any injury in the accident?

A. Yes, Sir, I got this eye cut and my nose was broke, and my leg was broke, and my collarbone was broke and it took a chunk out of that leg, knocked it out.

Q. Do you remember being at the scene after the accident?

A. No, Sir, I don't remember anything about it.

Q. How long did you stay in the hospital?

A. Eleven days.

Q. Now, Mr. Pannell, you say as you approached, you saw this Fauber car stop. Tell me what happened.

A. Well, I looked around to the right, and the next thing I knowed, this here car just shot right into us. That's all I remember.

Q. And you say you would estimate you were 5 or 6 car lengths back when you saw it stop?

A. Yes, Sir, that's right.

Q. Did you ever hear any horn sound or anything?

A. No, Sir.

page 116 } Q. There has been some evidence here as to whether or not George Pannell was drinking. First, let me ask you this. Do you drink?

A. No, Sir.

Q. Was George drinking that afternoon?

A. No, Sir. I didn't see him drink anything.

Q. Could you tell whether or not he was drinking?

A. No, Sir.

Q. Did he have anything to drink in your presence?

A. No, Sir.

Q. What time did you get with him?

A. A little after noon. I don't know exactly what time it was.

Q. After he had finished eating his lunch?

A. Yes, Sir.

Q. Were you with him all afternoon, from then on?

A. Yes, Sir.

Q. There is some evidence about a purported bottle of whiskey in the road. Did that come out of the car you were in?

A. No, Sir, not the car we was in.

Q. Did you ever see any bottle of whiskey?

A. No, Sir.

page 117 } Q. Did you ever hear at the time of the impact, or just before the impacet, any horn or see any signal of any type from Mr. Fauber?

Coley Pannell.

A. No, Sir.
Q. Were there any other cars on the road there at the time?
A. No, Sir.
Q. Your witness.

CROSS EXAMINATION.

By Mr. McPherson:
Q. What is your occupation, Mr. Pannell?
A. Labor work.
Q. Who are you working for?
A. Now?
Q. Yes.
A. I ain't working anywhere right now. I did work at Wayne Veneering, but it's too bad to work right now.
Q. You say you had been with your brother all afternoon?
A. My cousin.
Q. What time did you join him?
A. A little after noon. I don't remember exactly the time.
Q. You don't drink, yourself?
page 118 } A. No, sir.
Q. And you couldn't smell anything on his breath?
A. No, Sir.
Q. You were sitting in the car with him?
A. Yes, Sir.
Q. Did you hear the police testify that they smelled something on his breath after the accident?
A. Sure did.
Q. You were with him all afternoon and you didn't smell anything?
A. No, Sir.
Q. You didn't see him drink anything?
A. Never seen him drink a thing.
Q. Had you all come through this intersection shortly before this accident, or was that the first time you had gone through that way?
A. That was the first time.
Q. You weren't looking at the speedometer, you say?
A. No. I judged we was going around 25.
Q. You couldn't possibly have been going 26?
A. No, Sir.
Q. What makes you so positive of that? Did you look at the speedometer at any time while you were in Waynesboro?

Coley Pannell.

A. No, Sir. No, Sir.

page 119 } Q. After you saw this car come down and stop. you looked to the right and didn't look back?

A. Right.

Q. And when you did look back in front of you, you weren't in the intersection, were you? Your Car wasn't in the intersection when you looked back and saw Mr. Fauber's car in the intersection, was it?

A. To tell you the truth, I don't remember too much about the thing, it happened too quick.

Q. You don't remember too much?

A. When I looked, he was pulling right into us.

Q. Did he hit your car?

A. No, I don't think so.

Q. Your car hit his car, didn't it, Mr. Pannell?

A. From the looks of it, it did.

Q. Can you tell me from your recollection of it if that is the way it happened?

A. That's the way I think it happened.

Q. That your car hit his car. That's the way you think it happened?

A. It had to happen that way.

Q. What are you judging by, the pictures you have seen here today?

A. I haven't seen the pictures.

Q. Mr. Fauber was well out in the intersection

page 120 } before you got to the intersection, wasn't he?

A. I wouldn't say that. He was parked at the intersection.

Q. When you looked back and saw him, was he out in the intersection then?

A. Just before we hit him, he was in the intersection, but I can't tell you how far.

Q. You were a good ways back.

A. No, not too far. We wouldn't have hit.

Q. You have no idea how far back you were from the intersection when you looked up and saw him in the intersection. Is that right?

A. That's correct.

Q. That's all.

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IN CHAMBERS.

Mr. Branaman: May it please the Court, since all of the evidence has been concluded and the instructions are ready for presentation to the Court, we renew our motion to strike the evidence on the grounds that it is a clear case of negligence on the part of the plaintiff, both primary and secondary, and the sole proximate cause of the accident was
page 130 } the negligence of the plaintiff, himself, by his own admissions and his failure to yield the right-of-way as the law requires; and if he were not the sole—solely responsible for the collision, then his negligence definitely contributed to the collision as a matter of law, and the case should not go to the jury. Moreover, we offered in this case the record of the same plaintiff against the same defendant, whereby he, the plaintiff, admitted his negligence, in settling with the guest passenger in the Pannell car, paid him $2700.00, and we would point out that this is certainly very plainly indicative of the fact that this plaintiff was guilty of negligence, primary and secondary, and certainly he was guilty of contributory negligence as a matter of law. And we further move that the evidence, as a whole, shows no negligence on the part of our client, Pannell.

Mr. McPherson: We oppose the motion of the defendant on the ground that the evidence clearly shows negligence on the part of the defendant in some particulars, such as not keeping a proper lookout, as a matter of law, and other particulars which are a question for the jury. The evidence of the plaintiff shows no contributory negligence. The other action supposedly between the same parties was precluded from the evidence; and for these reasons and the reasons stated in the argument opposing the motion to strike the evidence at the end of the plaintiff's case, it clearly shows that the issues should go to the jury, and the motion should not be granted.

page 131 } Judge Moffett: The motion is overruled.

Mr. Branaman: To which the defendant, by counsel, excepts.

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INSTRUCTION NO. 1

The Court instructs the jury that if they believe from the evidence that the plaintiff, Fauber, had approached, entered, and was passing through the street intersection ahead of and before the defendant, Pannell, reached said intersection, then

it was the duty of Mr. Pannell to yield the right-of-way to Mr. Fauber and if he failed so to do, he was guilty of
page 132 } negligence and if the jury believe that such negligence was the proximate cause of the accident, they shall find for the plaintiff, Fauber, and fix his damages in the amount of $1,935.50 unless they further believe from the evidence that the plaintiff, Fauber, is guilty of negligence which proximately caused or contributed to cause the accident complained of.

Mr. Heatwole: We object to Instruction No. 1 on the grounds that it would make—as it is stated—it would make Mr. Pannell an insurer, whatever Mr. Fauber might choose to do. It ignores the rule of the road that when two vehicles approach or enter an intersection at approximately the same time, the car on the right shall have the right of way. It ignores the rule of the road that once a car stops at an intersection, it yields the right-of-way to oncoming traffic. It further ignores the duty placed on Fauber by stopping at the intersection that he should see and heed oncoming traffic.

Mr. McPherson: If the Court please, the Waynesboro Code section is exactly like the statute and it says if two vehicles are approaching the intersection at approximately the same time, the vehicle on the right shall have the right-of-way, but it is generally the law that the vehicle which has approached and entered the intersection and is passing through the intersection, as stated in this instruction, does have the right-of-way; and that is a correct statement of the law applicable to the case.

page 133 } INSTRUCTION NO. 2

The Court instructs the jury that if they believe from the evidence that the defendant, Pannell, was travelling in excess of twenty-five miles per hour as he approached and entered the intersection, then the plaintiff, Fauber, had the right-of-way at said intersection and it was the duty of Mr. Pannell to yield the right-of-way to Mr. Fauber and if he failed to do so he was guilty of negligence and if the jury believe that such negligence was the proximate cause of the accident they shall find for the plaintiff, Fauber, and fix his damages in the amount of $1,935.50 unless they further believe from the evidence that the plaintiff, Fauber, is guilty of negligence which proximately caused or contributed to cause the accident complained of.

Mr. Heatwole: We object to Instruction No. 2 on the ground that if taken literally, it would permit blind driving

on the part of the plaintiff. It again ignores the duty placed on Fauber to yield the right-of-way after stopping and to heed oncoming traffic, and in each of these instructions discussed so far, they tend to be a finding instruction, telling the jury to find for the plaintiff, and adding as an afterthought, "unless Fauber is guilty of negligence," and it does not come up with a corresponding finding instruction which would tell the jury to find a verdict of not guilty.

page 134 } Mr. McPherson: The applicable statute says that anyone exceeding the speed limit forfeits any right-of-way he might have. That is worded right after the statute. If the defendant has exceeded the speed limit, he forfeits any right-of-way he might have unless the plaintiff is guilty of contributory negligence.

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INSTRUCTION NO. F

page 149 } The Court instructs the jury that if they believe from the evidence that the plaintiff, Fauber, drove his automobile west on 5th Street and stopped at and before entering the Augusta Avenue intersection, as the defendant, Pannell, approached and neared the intersection travelling south on Augusta Avenue, and that the defendant, Pannell, looked and saw the plaintiff's automobile stopped and standing on 5th Street at the said intersection, then the defendant, Pannell, had the right to assume and to act upon the assumption, until it otherwise appeared in the exercise of reasonable care, that the plaintiff, Fauber, would not undertake to drive into and pass through the said intersection immediately ahead of the defendant, Pannell, and not yield the right of way.

Mr. McPherson: Is that based on any particular statute, Mr. Branaman?

Mr. Branaman: Of course. There is an assumption there. When you see a man standing there with his car at a standstill, and you come up and he makes no motion or gives no warning that he is going to enter the intersection and you are nearing the intersection, you have a right to assume he is going to remain in a safe place instead of driving out immediately ahead of you and causing a collision as your man did in violation of the law.

Judge Moffett: Any authority on this?

Mr. Heatwole: *Von Roy* v. *Whitescarver*, 197 page 150 } Virginia, 384, quoting from *Hopson* v. *Goolsby*, "But if a person having a duty to look carelessly undertakes to cross without looking, or if looking, fails to see or heed traffic that is obvious and in dangerous proximity and continues on into its path, he is guilty of negligence as a matter of law," plus many other citations.

Mr. Branaman: Let them look at how they have emphasized that and pointed that up. They have italicized that part of it.

Mr. McPherson: I object to Instruction F as it does not set out to correct principle of the law; that the defendant had no right to assume that Fauber would not come out into the intersection from a stop when Fauber did have that right if a reasonable, prudent man would think he was able to cross in front of the defendant if the defendant was obeying the speed law, and that this instruction is directly contrary to that principle of law.

INSTRUCTION No. G

The Court instructs the jury that the law is when two automobiles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right of way to the vehicle on the right, therefore, if the jury believe from the evidence the defend- page 151 } ant, Pannell, in the exercise of reasonable care on his part, approached or entered the intersection from the right at approximately the same time as the plaintiff, then the plaintiff, Fauber, was required to yield the right of way to the defendant, Pannell, and if the failure so to do on the part of Fauber caused the collision between the two automobiles, or efficiently contributed thereto, Fauber cannot recover, and the jury should return its verdict for the defendant.

Mr. McPherson: Instruction G states a correct principle of law, but I feel it is already covered by defendant's Instruction No. A, and it would only be confusing if both instructions were granted.

Mr. Branaman: There's no conflict between A and G. A sets out specific duties the plaintiff, Fauber, was to perform, and if he didn't perform them in the exercise of reasonable care, he was guilty of negligence and couldn't recover if it efficiently contributed to the collision or was the sole proximate cause.

Mr. Heatwole: G sets out the normal rule of the road of the driver on the right.

Judge Moffett: If there is any evidence that the two vehicles approached the intersection at approximately the same time.

Mr. Heatwole: The statutory words are "approach or enter." They entered at approximately the same time. To rule otherwise would permit a person to come to
page 152 } an intersection and sit there and charge out when he could get 3 or 4 or 5 feet, wherever we draw the line of the car on the right. It is not a measurement of who goes in or a split time, but approximately the same time, and obviously it was approximately the same time, and Fauber applied no brakes but accelerated to the maximum of the automobile, and Pannell did apply his brakes, leaving skid marks of one car's length which slowed his progress.

Mr. McPherson: The plaintiff feels from the evidence of the plaintiff and defendant that the plaintiff was well out in the intersection when the defendant was back a car length or length and a half, by the defendant's own testimony, and plaintiff was passing through the intersection before the defendant and had the right of way; and the instruction, while a correct statement of the law, does not suit this case.

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Mr. McPherson: Counsel for the plaintiff objects to the Court's not granting the last portion of the original Instruction No. 4, and objects to the granting of defendant's Instructions A, B, C, D, E, and H for the reasons stated in the argument on those instructions, and Counsel hereby incorporates those reasons as part of his objection.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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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.

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