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Record No. 5003

In the Supreme Court of Appeals of Virginia at Richmond

JOHN EDWARD BAYNE

v.

ALBERT C. THARPE

FROM THE CIRCUIT COURT OF CHARLOTTE 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. 5003

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 11th day of March, 1959.

JOHN EDWARD BAYNE, Plaintiff in Error,

against

ALBERT C. THARPE, Defendant in Error.

From the Circuit Court of Charlotte County

Upon the petition of John Edward Bayne a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Charlotte County on the 3rd day of December, 1958, in a certain motion for judgment then therein depending wherein Albert C. Tharpe was plaintiff and the petitioner was defendant; and it appearing from the certificate of the clerk of the said court that a *supersedeas* bond in the penalty of twelve thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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page 10 }

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December 3, 1958.

THIS DAY came again the plaintiff and the defendant, by their respective attorneys, and the jury sworn in this case appeared in Court in accordance with their adjournment on November 26th, and having received the instructions of the Court and heard the arguments of counsel, were sent out of Court to consider of a verdict, and after sometime returned into Court with a verdict in the words and figures following, to-wit:

"We, the jury, find for the plaintiff and fix his damages at $11,500.00."

THEREUPON, the defendant, by his attorney, moved the Court to set aside the verdict of the jury and enter up judgment for the defendant, on the grounds that it was contrary to the law and the evidence, without evidence to support it, for errors committed by the Court in granting certain instructions, refusing certain other instructions, and modifying certain instructions, or, in the alternative, to grant the defendant a new trial on all issues, which motions the Court overruled, and the defendant excepted.

UPON CONSIDERATION WHEREOF, it is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of ELEVEN THOUSAND FIVE HUN-
page 11 } DRED DOLLARS ($11,500.00), the amount awarded by the jury in their verdict, together with interest thereon at the rate of six per cent per annum from the 28th day of November, 1958, the date of the verdict, and the costs by the plaintiff expended in the prosecution of this action.

AND the defendant having indicated his opinion to apply to the Supreme Court of Appeals of Virginia for a Writ of

Error from and *supersedeas* to this judgment, on motion of the defendant, by his attorney, it is ORDERED that the execution of this judgment be, and the same is hereby, suspended for a period of sixty days from this date, and if such petition is presented within such period, the execution of said judgment is suspended thereafter until such court shall have acted on the petition, provided that the defendant, or someone for him, within twenty days from this date, shall enter into a bond in the penalty of TWELVE THOUSAND DOLLARS ($12,000.00) with security to be approved by the Clerk of this court, conditioned and payable as the law directs, according to the provisions of Section 8-477 of the Code of Virginia.

Enter.

JOEL W. FLOOD, Judge.

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page 29 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Now comes John Edward Bayne, by his counsel, and files with the Clerk of the Court in this case a notice of appeal from the judgment entered in this action on the 3rd day of December 1958, and as a basis for the appeal sets forth the following assignments of error:

1. The Court erred in overruling defendant's motion to strike the evidence and enter up judgment for the defendant made at the conclusion of the plaintiff's case, and renewed at the conclusion of the introduction of all the evidence.
2. The Court erred in overruling defendant's motion to set aside the verdict as contrary to the law and evidence, and without evidence to support it; and on the ground that said verdict was excessive.
3. The Court erred in granting any instructions on behalf of the plaintiff under the evidence and law of the case.
4. The Court erred in granting Instructions Numbered 1, 2, 5, 6 and 7 on behalf of the plaintiff.

5. The Court erred in refusing to grant defendant's Instructions Numbered E and J, as submitted.

JOHN EDWARD BAYNE
By FRANK D. HARRIS
Of Counsel for Defendant.

Filed 12/31/58.

Teste:

EDWIN H. HAY, Clerk.

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page 31 }

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ASSIGNMENT OF CROSS-ERROR.

The plaintiff, by counsel, assigns cross-error in the trial of this action as follows:

The Court erred in refusing to grant plaintiff's Instruction No. 8 on the ground that the plaintiff was entitled under the evidence of this case to have the jury instructed on the last clear chance doctrine.

ALBERT C. THARPE,
By FRANK C. MALONEY, III
ALLEN, ALLEN, ALLEN and ALLEN
4020 West Broad Street
Richmond, Virginia
Attorney for plaintiff.

Filed 1/7/58.

Teste:

EDWIN H. HAY, Clerk.

* * * * *

page 3 } ALBERT C. THARPE,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Will you state your name?

A. Albert Tharpe.

Q. How old are you, Mr. Tharpe?

A. I will be fifty-two the 15th day of September.

Q. What is your occupation?

A. Farming and trading around.

Q. How long have you been doing that sort of work?

A. All my life.

Q. Mr. Tharpe, on March 29th of this year were you leading a mule on U. S. Route 40 somewhere around 9:00 o'clock in the morning?

A. Yes, sir.

Q. Where had you left from that morning with the mule?

A. From my home down about three miles from here on the road going to Drakes Branch.

Q. Now, how had you gotten from your home up to Charlotte Court House?

A. Led the mule.

page 4 }

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Q. When you left Charlotte Court House what route did you go on?

A. On Route 40 to Phenix.

Q. What direction were you going on U. S. 40?

A. West.

Q. Will you tell the gentlemen of the jury as best you can just how the collision occurred?

A. Well, I stopped out there to light me a cigarette. I went on down the road. As I was going on down there I didn't meet no cars but over on the left-hand side down there there was two cars sitting over there. Well, I stayed all the way over on the right-hand side. Just as I got to the top of the hill at the Health office I was meeting a car and I heard behind me brakes cry out real loud and I had the mule by the bit, right by the bit when I heard the brakes cry. When I heard the brakes cry I turned to look around and that

Albert C. Tharpe.

is when the car caught the mule and it caught her left hind leg on the right-hand front bumper and she was
page 5 } trying to pull her leg from under the bumper and she fell on me and knocked me out.

Q. On which side of the road were you walking, Mr. Tharpe?

A. Walking on the right-hand side.

Q. Can you tell us whether you were walking on the hard surface or walking on the shoulder?

A. I was walking on the shoulder.

Q. Now, where was the mule?

A. The mule was up on the edge of the hard surface.

Q. Can you tell the gentlemen of the jury whether there was room for you and the mule both on the shoulder?

A. No, sir.

Q. Is that a relatively narrow shoulder there?

A. Right where the accident occurred it was.

Q. How were you holding the mule?

A. Holding her by the bit.

Q. You had the mule by the bit and the mule was up on the hard surface?

A. Yes, sir.

Q. And you were on the shoulder?

A. Yes, sir.

Q. How close was the mule to the right-hand edge of the hard surface?

page 6 } A. Just right on the edge of the tar, about a foot on the tar, I imagine.

Q. How many lanes of travel do you have there?

A. Two lanes of travel.

Q. About how wide is the road there?

A. Around twenty feet, I suppose. I don't have any idea how wide it is.

Q. Now, looking back in the direction from which the car came how far can you see?

A. If you stand back up at the old school I guess about 300 yards.

Q. So, in other words, from the old school up until the point of the collision is how far?

A. Around 300 yards.

Q. And a person traveling the same direction you were going, a westerly direction, would have a clear and unobstructed view to the west?

A. Yes, sir.

Albert C. Tharpe.

Q. And west was the way you were going?
A. Yes, sir.
Q. Now, following the collision can you describe what happened? Can you tell us how you got knocked down and where the mule ended up?
page 7 } A. I tell you gentlemen I don't know.
Q. Where did you end up?
A. Ended up out there under a bush.

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page 13 }

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Q. Going back before the accident, say along in February and March, along in there of this year, what was your state of health?
A. Fair.
Q. What sort of work were you doing then?
A. I had been raising some calves on the farm
page 14 } there.
Q. How many calves did you have there?
A. Twenty-two.
Q. Who fed the calves and looked after them?
A. I did.
Q. Who carried the water and that sort of thing for them?
A. I done it all.
Q. Who cleaned out the barn and that sort of thing?
A. Well, to tell the truth, the things run aloose.
Q. What?
A. The calves run aloose, didn't have any barn. They was out in a pasture.
Q. What were you doing along in the spring of 1958 toward getting ready for the crop that you were going to put in and that sort of thing?
A. I had cut some wood and had the plant bed ready and was going to make some tobacco.
Q. After March 29th, after you were injured, were you able to get the crop put in or anything like that?
A. I haven't done anything since I was injured.
Q. What did you do with your land and that sort of thing? Did you rent it?
A. I rented it to Mr. J. E. Barnes.

Albert C. Tharpe.

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page 17 }

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CROSS EXAMINATION.

By Mr. Harris:

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Q. What type of harness did you have on this mule to lead it by?

A. Nothing but one bridle and a rein but I had the mule by the bit.

Q. You were not using the reins?

page 18 } A. I was holding the mule by the bit because I was trying to get him over to the shoulder as close to me as I could.

Q. Mr. Tharpe, are you able to recall whether you had used the right side of the highway all the way from Drakes Branch up here or not?

A. I certainly did.

Q. You had walked all the way on that right-hand side?

A. Yes, sir.

Q. With the mule up on the surface of the road?

A. I don't know whether the mule was on the surface all the way but he was either on the surface or on the shoulder with me because I got off the tar several times.

Q. I understood you to say at the time the collision occurred out here you were still walking on the right-hand side of the road.

A. Yes, sir.

Q. Going toward Phenix?

A. Yes, sir.

Q. And at that time your evidence was that the mule was up on the hard surface of the road at least a foot?

A. Yes, sir.

Q. And you had the mule with which hand?

page 19 } A. With my left hand.

Q. You had your left hand back by part of the bridle?

A. By the bit.

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Albert C. Tharpe.

Q. Then am I correct in saying you had gotten over the crest of the hill and were on the other side at the time the accident happened?

A. Wasn't any hill there.

Q. Are you sure about that?

page 20 } A. I know it ain't no hill there. There is a little knoll, a small knoll but not any hill.

Q. Well, we will call it a knoll. You had gotten over the knoll on the other side toward Phenix?

A. Right over the knoll.

Q. Now, Mr. Tharpe, when did you see the car that was coming from Phenix toward Charlotte Court House, coming this way?

A. Just as I caught the mule by the bit. When I caught the mule by the bit is when I saw the car coming.

Q. You mean you were leading the mule by the reins before that?

A. Yes, sir, leading it by the reins before that but I caught the mule by the bit when I saw the car coming.

Q. That car was on the opposite side of the road?

A. Yes, sir, it was.

Q. It was coming meeting you?

A. Yes, sir.

Q. Now, where was that car at about the time Mr. Bayne's car struck the mule? Had it passed on by you or was it about opposite you, or where?

A. It was right at me.

Q. Right at you?

page 21 } A. Yes, sir. The accident happened so quick I couldn't say a car's length either way because I don't know but it was right at me.

Q. But your best recollection is it was right there when the accident happened. The other car was right near you.

A. Yes, sir.

Q. And it was occupying the lane on the other side of the road?

A. Yes, sir.

Q. Now, from the time you saw the other car coming toward you until the accident occurred did you look back toward Charlotte Court House?

A. Not until I heard the brakes cry on the car behind me. I heard the tires crying and I turned and that is when the mule picked me up by her front feet trying to pull away from under the right-hand front bumper.

Albert C. Tharpe.

Q. Prior to that you hadn't seen fit to look back to see whether a car was coming behind you?

A. No, sir, I never looked back until I heard the brakes cry.

Q. Now, are you familiar with that road along
page 22 } there, Mr. Tharpe?

A. Yes, sir.

Q. How is the shoulder on the left-hand side of that road going toward Phenix? Isn't the shoulder about the same on that side as it is on the right-hand side?

A. Wasn't any shoulder on the left-hand side along there to lead the mule. It is a street walk.

Q. You mean a sidewalk?

A. Yes, sir.

Q. Is the sidewalk wide enough for you to walk on and lead the mule?

A. Yes, sir, but you can't lead a mule on a sidewalk.

Q. You can't lead a mule on a sidewalk?

A. No, sir. I was leading him on the right-hand side. I thought I was supposed to be on that side. I had always led on that side.

Q. You had always led on the right side?

A. Yes, sir, when I was leading a mule down the road, and when I walk by myself I walk on the left-hand side.

Q. You know, of course, that cars coming up behind you come up on the right-hand side. They travel on the right-hand side of the road. You know that.

A. Yes, sir.

page 23 } Q. Yet you have always led your mule on the right-hand side of the road?

A. I have always led them on the right-hand side.

Q. And let the mule walk up on the edge of the hard surface?

A. No, sir, I won't say I always let him walk on the edge of the hard surface but that one was on the edge of the hard surface at that time.

Q. Now, let's go on a little bit. When this thing happened, as I understood, you were pushed over or knocked over in the ditch or on the bank.

A. I was knocked as far as from here to that stove.

Q. Did the mule actually get caught in the bumper as you say it did?

A. Her left hind leg caught under the right-hand front bumper and she set back on the car and kind of hopped along with me scuffling to get away from there and that is the time

Albert C. Tharpe.

she pulled her foot away from under the right-hand front bumper and fell and carried me as far as from here to the stove.

Q. So when the mule hit you actually the accident was over. The accident had happened and the mule hit you in scuffling to get aloose from the car. Is that right?

A. What say?

page 24 } Q. The accident had happened and was over when the mule hit you.

A. No, sir. The mule got on me time the car hit the mule.

Q. Did the car hit the mule and knock the mule on you or did the mule run on you breaking aloose from the car?

A. The car hit the *mile* as she went on me and she was trying to scuffle and pull her leg away from under his front bumper when she carried me through the air. I was under the mule. If I hadn't been under the mule I never would have got hurt. She was trying to pull her foot away from under the bumper when she carried me through the air as far as from here to the stove.

Q. That is what I am getting at. When the mule broke aloose from the bumper that is when you were carried through the air.

A. Yes.

Q. And not when the car hit the mule and knocked her forward.

A. When the car hit the mule it pushed the mule on me and I was trying to get away from under her breast.

Q. Isn't it a fact when this car came down there the outside of the right front fender just barely knicked that mule on the left leg and knocked a little place off about the size of your thumb?

A. No, sir.

page 25 } Q. You say that is not correct?

A. No, sir, that is not so.

Q. Did it break the mule's leg?

A. No. She went two or three steps, I reckon, more than that trying to pull her leg away from under the front bumper. That is what caught the mule's leg.

Q. That is when you got injured when the mule was trying to do that?

A. I was up under the mule's breast, I say, and I couldn't get out and when she pulled that is when she carried me and fell on me.

Q. You say that the mule didn't end up with just a little

Albert C. Tharpe.

scratch on her left leg about the size of the end of your thumb?

A. No, the mule had a right good size knot on her leg, right up on her left hind leg right up along here (indicating the buttocks). What put it up there I don't know but it was there.

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page 28 }

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Q. Prior to this accident isn't it true you had a lot of trouble with your back?

A. Before this accident?

Q. Yes, sir.

A. I have had trouble with this part of my shoulder and right up here in the back of my neck.

Q. You had right much trouble with arthritis?

A. Yes, sir, had some trouble with arthritis.

page 29 } Q. Had trouble with arthritis in your back?

A. In the upper part of my back, not down here. I got my shoulder broke about 33 years ago, I think.

Q. What I was getting at the doctor's report shows some injury here to the 12th dorsal and first lumbar vertebra and also you had considerable arthritis about that first lumbar vertebra prior to the accident. That is up at the top. Is that correct?

A. Up at the top.

Q. Had that hindered you any in doing your work?

A. Sometimes it did.

Q. It bothered you before?

A. Yes, it bothered me. I went to take shots for it and kept on working.

Q. What kind of work did you do before this accident happened?

A. Done most everything a man could do.

Q. What was your main source of income?

A. Farming and cutting timber and trading horses, mules and cows.

Q. What did you do in '57? What was your main source of income?

Albert C. Tharpe.

A. I didn't do anything.
page 30 } Q. You didn't do anything in '57?
A. That is right.
Q. Didn't farm any?
A. No, sir.
Q. Didn't cut any timber?
A. No, sir.
Q. Didn't have any other source of income other than trading livestock?
A. It was in July of '57 I had a slight stroke and I didn't do any work. I had gotten so I could go to work. I had gotten entirely well, the doctor said, and had gotten so I could go to work.
Q. But that prevented you from working last year?
A. Yes.
Q. So you didn't earn $3,000.00 last year?
A. Didn't earn anything, I don't think.

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page 32 }

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Q. This accident didn't prevent you from selling cattle. You could still buy and trade and sell cattle.
A. Yes, sir, I can do that.
Q. So that source of your income is not eliminated. You can still do that all right.
A. Yes, sir, I can do that.
page 33 } Q. You can still deal in livestock.
A. Yes, but it takes money. I ain't got the money to do it now.
Q. Mr. Tharpe, do you ever look back when you are walking down the right-hand side of the road to see if anything is coming up behind you?
A. Yes, sir.
Q. Did you look back that morning to see if anything was coming up behind you?
A. I didn't until I heard the brakes cry out.
Q. And that was about the time the accident happened?
A. Yes, sir.
Q. Yet you knew it was a car coming meeting you?

Albert C. Tharpe.

A. Yes, sir, but didn't know who it was at the time.

Q. You didn't know who it was at the time. When you first saw that car meeting you you didn't see fit then to look behind you to see if anything was coming up behind you?

A. No, sir, because a car comes so fast. When the brakes cried that is when I looked.

Q. You were then on the other side of the knoll down next to the Health Center?

A. Yes, sir.

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page 38 }

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Q. Why didn't you look back behind you that morning to see if anybody was coming up behind you?

A. Why didn't I look back?

Q. Yes, sir.

A. Because I didn't think it was no need of looking back.

Q. In other words, you were going down the road on your right-hand side with the animal up on the hard surface not worrying about anybody coming up behind you?

page 39 } A. No, sir, I wasn't worrying about anybody coming up behind me.

Q. You didn't care about anything coming behind you?

A. Yes, sir, I cared about something coming behind me.

Q. Yet you didn't look back?

A. I didn't think it no use to look back until I heard the brakes cry and then I looked but it was too late.

Q. Do you still say to this jury there is not as much or more shoulder on the left side of the road at that point than it is on the right-hand side the way you were walking?

A. I say it ain't as much on the left as it is on the right.

Q. You say it is not as much on the left as it is on the right?

A. Yes, sir.

Q. Do you say there was not enough shoulder on the left for you to walk on with your mule that morning?

A. What you mean, all the way?

Q. Right where the accident happened.

A. I don't know.

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Dr. William E. Daner.

page 40 } RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Tharpe, do you know of any reason why an automobile approaching from the rear in the manner the defendant was approaching couldn't have slowed his vehicle down and let the oncoming car go on by and then cut out and go round you?

A. He could have done that if he had been driving carefully. Sure he could have slowed down.

Q. Isn't that the way you probably were passed a dozen times from the time you left your home on the trip to Charlotte Court House and from Charlotte Court House going on toward Phenix?

A. Sure, it happened a dozen times.

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page 41 }

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RE-CROSS EXAMINATION.

By Mr. Harris:

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page 42 } Q. Do you know, Mr. Tharpe, whether or not a man going toward Phenix in a car when coming up to that knoll had full view of you and your mule until he got right on top of the knoll?

A. You can see the mule from the school up to where it was or you could see one from here at the court house.

Q. Could you see all of the mule or just the top part?

A. Could see all the mule.

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DR. WILLIAM E. DANER,

having been first duly sworn, testifies as follows:

Dr. William E. Daner.

DIRECT EXAMINATION.

By Mr. Allen:

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page 43 }

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Q. What is your occupation or profession?
A. Physician.
Q. Where is your office?
A. Richmond, Virginia.

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page 44 }

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Q. Have you had occasion to specialize in any particular field of the medical profession?
A. I have specialized in the branch of orthopedic surgery.

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page 45 }

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Q. Do you know, Mr. Tharpe, the plaintiff in this case?
A. Yes, sir.
Q. Did you have occasion to see and treat him?
page 46 } A. I did.
Q. When and where did you first see him?
A. I first saw Mr. Tharpe in our office on the first of April, 1958.
Q. Can you tell us whether or not he was referred to your office by any other doctor?
A. Mr. Tharpe was referred to us by Dr. Ailsworth from Keysville, Virginia.

Dr. William E. Daner.

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page 47 }

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Q. What were the findings on physical examination and x-rays?

A. Upon examination I found there was considerable limitation of motion, or lack of motion, in the back with the complaint of pain on attempted motion in the back. Stating it otherwise, the complaint as far as the back was concerned was within average limits, I would say, but that was his chief complaint.

Q. How about the x-rays?

A. X-ray examination showed a fracture or break, a compression type fracture, of the 12th dorsal vertebra and the 1st lumber vertebra.

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page 48 }

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Q. Doctor, based on the history you obtained from the patient, his complaints and your physical examination and the x-rays, can you tell us what injuries, if any, were sustained by Mr. Tharpe when he was leading a mule and struck by an automobile on March 29th, 1958?

A. My diagnosis was compression fractures of the 12th dorsal vertebra and the first lumbar vertebra.

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page 53 }

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Q. Now, can you tell in Mr. Tharpe's case whether the injury he received in the accident and the aggravation you think resulted from the accident of his arthritis is a temporary

Dr. William E. Daner.

or a permanent thing?

page 54 } A. In my opinion it is permanent.

Q. Can you give us in percentages just what disability you think he has?

A. I rated Mr. Tharpe as having 20 to 25 per cent disability as a result of his injury.

Q. And is that disability permanent?

A. Yes, sir.

Q. In other words, you expect it to exist the rest of his life?

A. That is my opinion, yes, sir.

Q. How will this disability affect Mr. Tharpe in his efforts to carry on his occupation as a farmer?

A. As I understand farming, it requires considerable bending, lifting, twisting and so forth and those are the motions of the back that will be disabled. I think he will definitely have limitation of his ability to lift and stoop and squat and do the things necessary in his type of work.

Q. How about heavy lifting?

A. I feel that will be limited.

Q. What do you think about whether or not he will be able to go back to farming?

A. It is hard for me to answer that. I think

page 55 } he will probably be able to go back to farming but on a limited scale. I don't believe he will be able to lift and do a day's work as he did prior to his injury.

Q. Would he have to stop and rest and that sort of thing and get more help?

A. In my opinion, yes.

Q. Tell us what your opinion is as to whether or not this accident and these injuries he received will shorten his working days?

A. That depends considerably on how much pain Mr. Tharpe is willing to absorb in a day's work. The average person with this type injury would certainly not have the endurance they had prior to the type injury he received.

* * * * *

page 56 } CROSS EXAMINATION.

By Mr. Harris:

Q. Doctor, I have one or two questions. As I understood

your testimony, Mr. Tharpe had a general arthritic condition in his back when you x-rayed him and that was generally over the whole back area.

A. There was evidence of arthritic changes, yes, sir.

Q. I have a report here from you indicating there was considerable arthritis in the back. Would you say there was more arthritis in his back than you would normally find in the back of a person his age?

A. I think so, yes, sir.

Q. In other words, you think when you x-rayed him his was actually worse than the average person of fifty-one years of age?

A. Yes, sir.

Q. Now, I understood you to say that that type of condition does cause pain and aching of the back.

A. That is correct.

Q. Does that also, Dr. Daner, limit the use of the back?

A. There again that depends a lot on the individual. I think some people with this degree of arthritis can carry on perfectly a normal day's activities and somebody else can't. It depends a lot on the person.

page 57 } Q. Can you tell us whether or not it would limit the weight a person might pick up or the degree that he might stoop to pick up something?

A. They can do stooping if they have to do it. If they have very good hip joints and so forth they can get down fairly well to do that type of lifting. If they have good muscle power in the back and have a fairly stable back—that is, one that hasn't been injured, I think they could do heavy lifting and get along very well.

Q. Would the lifting tend to increase the pain, in your opinion?

A. If they happen to strain their back or lift in an awkward position or have a straining type injury that would cause pain.

Q. Are you able to tell us whether or not without any injury to his back this arthritic condition of Mr. Tharpe's would have continued to get worse as he grew older?

A. I believe it would have, yes, sir. I believe it would have progressed.

Q. In other words, even without an injury of any type he would have continued to have more pain and possibly more stiffness to limit the use of his back?

A. I can't say about the pain. I believe that if a series of

Dr. William E. Daner.

x-rays were made over the years we would see
page 58 } evidence of it increasing as the years increased.

Q. Then am I correct in saying that your rating of Mr. Tharpe of 20 to 25 per cent disability is taken in conjunction with the condition you found existing there?

A. The rating was made on the basis of the fractures. In my opinion, the two compression fractures in the back should be so rated.

Q. But are they not rated by you knowing that that condition was there and in relation to that condition?

A. They were rated on the basis of the patient having had an injury with compression of two vertebrae. I think if I had rated Mr. Tharpe's back on the basis of the arthritic changes possibly the rating would be more than twenty per cent.

Q. Be more than twenty per cent?

A. Yes, sir.

Q. But even if he had no injury, as I understand you, over a period of years he still could have arrived at twenty to twenty-five per cent disability due to his arthritic condition?

A. This disability is rated on loss of earning power and it would be rated on that basis. If he had progression arthritis and was unable to work and if he was rated then I think
you could possibly rate him on that basis. It is
page 59 } rated on the basis of loss of earning power.

Q. But I take it from all you say the injury did aggravate the present arthritis.

A. That is my opinion.

Q. No question about that in your mind?

A. No.

Q. Now, his present condition would not limit him from moving around where he did not have to do any particular heavy work, would it?

A. Ordinary activities I believe he will be able to carry on.

Q. You are familiar with trading and selling livestock and things of that type. Do you think it would limit his ability to do that?

A. As far as trading and selling I would think he could do that as long as it doesn't require lifting the livestock.

Q. When you refer to lifting do you mean lifting something extremely heavy?

A. I believe anything over 75 pounds he wouldn't be able to lift. I believe weight up to 50 pounds he would be able to lift but anything that requires stooping forward to lift is the type

of lifting that would cause pain, or lifting from one side to the other in a twist.

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page 62 }

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DOUGLAS MYERS, (State Trooper) having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Pettus:

Q. You are Trooper Myers, located in Charlotte County?

A. Yes, sir.

Q. Did you investigate an accident involving Mr. Tharpe leading a mule and Mr. John Edward Bayne's automobile on the 29th of March, 1958?

A. That is right.

* * * * *

page 63 }

* * * * *

Q. Will you turn to the jury, please, and relate what your investigation revealed of this accident on the 29th of March?

A. This was an accident case I investigated on the 29th day of March. It happened in the Town of Charlotte Court House on Route 40 and according to the driver of the vehicle and Mr. Tharpe at the time I arrived the accident happened around 9:35 in the morning. The place it happened the road there has got a little rise in it just before you get to the point of the collision. When it happened it was daylight and the road was mostly dry—had a few wet spots on it. Traffic lanes were marked at that particular location and the speed limit was marked "35 miles an hour." The vehicle involved was a 1957 Ford four-door sedan being driven by John Edward Bayne of Chase City which had struck a mule being led along the highway by Mr. Albert C. Tharpe.

Q. Which side of the highway was Mr. Tharpe on?

A. He was on the right-hand side going toward Phenix.

Douglas Myers.

Q. Was passing permitted at that particular point?

A. At the particular point apparently from what they showed me on the highway there passing started just prior to that.

Q. How wide is the highway at that point?

A. The hard surface is 20 feet at that particular
page 64 } location.

Q. How wide is the shoulder of the road for a man to walk on at that point on the right-hand side or the side Mr. Tharpe was on?

A. The shoulder on which he was walking there, from the edge of the hard surface to where the road breaks down into the ditch, it is around 2 feet, 6 inches. The distance from the hard surface down into the ditch to the far side of the ditch was 4 feet.

Q. From the edge of the hard surface to the far side of the ditch was 4 feet?

A. Yes, sir.

* * * * *

Mr. Pettus: I will withdraw the question.

Q. At the point of impact how far could a car going in a westerly direction see Mr. Tharpe and the mule before he reached him?

A. From the point there where the accident hap-
page 65 } pened looking back toward Charlotte Court House over the slight rise there a person standing up there can see possibly 300 yards.

Q. 300 yards, or 900 feet?

A. Around 900 feet.

Q. Is the rise high enough to prevent anyone from seeing Mr. Tharpe, if he were looking, and the mule?

A. No, sir, I don't think it would be high enough to prevent him from being seen.

Q. At the time you investigated the accident did you notice any skid marks in the road?

A. Yes, sir. After I arrived at the scene and was talking to Mr. Bayne and Mr. Tharpe they pointed out the location of the accident there and there were tire marks which they said were made by Mr. Bayne's vehicle, which started back from the point of collision, as pointed out there, and from the point of collision back to where I could trace them back was a distance of 50 feet.

Douglas Myers.

Q. 50 feet of tire marks?

A. Yes, sir.

Q. Are you confident they came from Mr. Bayne's vehicle?

A. They were pointed out to me by Mr. Bayne and Mr. Tharpe. I talked to them and they said they were the tire marks of the car.

page 66 } Q. What do you mean by "tire marks"?

A. Well, these marks indicated to me they were brake marks where the man applied his brakes and was skidding on the surface of the road. At the point they started they were kind of light and the further they went the darker they got—right heavy marks.

Q. In which direction did the tire marks go?

A. The tire marks started toward the center of the road. The left wheels were near the center line and they led over toward the right shoulder. They were all on the hard surface but at the end of the tire marks they were rather close to the edge of the hard surface, the right wheel was.

Q. You say they ran from the center line over toward the edge of the road?

A. The tire marks started closer to the center of the road and as they continued along they were leading toward the right edge of the road.

Q. Where did the marks begin that allow passing in a westerly direction with regard to where these skid marks began?

A. The skid marks started prior to where the line breaks to permit passing.

Q. Where the skid marks begun you could not pass?

A. No, sir.

page 67 } Q. And they continued on for 50 feet until they got over to the edge of the road?

A. Yes, sir.

Q. With regard to the shoulder of the road, can you compare the shoulder on the side Mr. Tharpe was on to the shoulder on the opposite side and tell how the two compare?

A. Well, on the right side the shoulder is considerably narrower there. On the left side it is a ditch that is rounded out. It does not go right down to a point.

Q. Any more shoulder on one side than on the other?

A. On the left side at that particular point there was more shoulder.

Q. How about further back up the road?

A. Further back up the road the shoulder gets narrow on that particular side back toward Charlotte Court House.

Douglas Myers.

Q. On which side?

A. On the opposite side from which the accident happened.

Q. Coming back toward the court house from the point of accident toward the court house which is the widest side of the road, the side the accident happened on or the side opposite where the accident happened?

page 68 } A. The side on which the accident happened the shoulder would be a little wider on back from the point of collision. Of course, on the opposite side of the highway there was a sidewalk.

Q. Do you have a diagram you drew at the time of the accident?

A. Yes, sir.

Q. Can you superimpose that diagram on that board up there? I have some chalk here.

A. Yes, sir, I can put it up there. (Witness draws diagram on a green steel-covered board with a piece of chalk.)

Q. Will you put the point of impact and the skid marks on that diagram?

A. Yes, sir. (witness does as requested.)

Q. What do these lines represent?

A. These lines here would represent the tire marks which the vehicle left.

Q. Will you put this little vehicle in the place where the vehicle was parked at the point of impact?

A. The point of impact pointed out to me by the driver of the vehicle would be at this location.

Q. Will you put on there East and West?

A. Yes, sir. This is east and this is west.

page 69 } Q. East is back toward the court house?

A. Yes, sir, and west is back here toward Phenix.

Q. What is this entrance?

A. This is the entrance to the Health Center located just west of the accident.

Q. I believe you have testified these tire marks were 50 feet?

A. 50 feet from where they started to where they stopped. This line here would indicate the solid line in the highway and these dotted lines indicate the broken lines.

Q. He could not pass then until he passed the end of that solid line?

A. That is right. He would have to get about the location here where the accident occurred before he could start to pass.

Q. Will you write down how far back from here back this way east this man could see before he got to Mr. Tharpe?

Douglas Myers.

Note: The witness writes on the board as follows: "Tire marks 50 feet" and "Vision east approximately 300 yards".

Q. Is it your testimony the driver could see 300 yards, could see the man 300 yards away before he struck him?
A. Yes, sir, I think he could see the man 300 yards before he struck him.

page 70 } CROSS EXAMINATION.

By Mr. Harris:

* * * * *

Q. Does the road curve at all near the scene of that accident?
A. Around the scene there just after you go ever the rise the road starts to curve to the left when traveling in a westward direction.
Q. Curves to the left if you are going toward Phenix?
A. Yes, sir.
Q. Now, back east from the scene of that accident is there a knoll or crest in the road at all?
page 71 } A. Yes, sir. Just east of the point of collision there is a rise in the road.
Q. Back in this direction?
A. Yes, sir.
Q. Are you able to tell the jury how far it was from this point right here where you place the point of impact back to the very crest of that knoll? Have you measured that distance?
A. Yes, sir. From the point of collision back to the top of the rise in the road would be around 105 feet.
Q. Would you take your chalk and draw something across here to indicate the crest on the road and then show the distance by an arrow?

Note: The witness draws a line across the highway shown on the diagram.

You say from the point you have indicated there as being the crest of the hill from that point to the point of impact you measured to be 105 feet?
A. Yes, sir.
Q. Now, you have further indicated that visibility back east toward the court house is about 300 yards.

Douglas Myers.

A. Yes, sir.

Q. Are you able to tell the jury whether or not you can see all of a man, all of a person from the bottom of his
page 72 } feet to the top of his head, and all of a mule from the bottom of his feet to the top of his back for 300 yards?

A. You could not see all of a person. I believe you could see an average person probably from his waist up or something like that. That would be about all you could see back in that location.

Q. That is due to the crest of the hill. Is that correct?

A. Yes, sir.

Q. Then a car would have to travel some distance or about up here to the crest of the hill before all of a person or all of a mule would be visible?

A. Yes, sir.

Q. Did you in your investigation ascertain where the mule was at the time of collision?

A. In talking to the driver of the vehicle there, and I don't know if Mr. Tharpe indicated it to me or not, the mule was on the edge of the hard surface traveling in a westerly direction.

Q. Did you see any indication on the shoulder that the mule had been walking out there prior to the collision?

A. No, sir. I checked the shoulder back up to the rise in the road and I didn't see any indication of mule tracks. The only tracks I was able to locate was right at the point of collision.

page 73 } Q. They were tracks made after the collision?

A. They were on the right shoulder at that point.

* * * * *

Q. Are you able to tell the gentlemen of the jury, Trooper, if a car was traveling away from the court house in a westerly direction and a car was traveling east when would a car traveling west be able to see a car coming east approximately? Where would that car traveling west have to be in the road in relation to the accident to be able to see this car coming east here?

A. That would be kind of hard to say because the vehicle coming in an easterly direction here would be coming around a curve and it would have to get around the curve far enough in order for the driver of the other car to see it.

Douglas Myers.

Q. This vehicle coming east would have to come around this curve far enough to become visible?

A. Yes, sir.

page 74 } Q. And this one going west would have to clear the crest of the hill before he could see the vehicle coming east?

A. I think you could see over the crest of the knoll but that vehicle going east would have to be along in here in order to see it. I don't see how you could see it further around the curve.

Q. You testified you measured the shoulder on the left-hand side and that it was about 2½ feet to where the ditch started rounding out and then about 4 feet over to the bank.

A. That was the right-hand shoulder.

Q. Did you measure the one on the left-hand side?

A. Right opposite from where the point of collision was it would be 8 feet from the edge of the hard surface to the edge of the sidewalk. The ditch is rounded out on the side and a portion of it could be traveled.

Q. I hand you what has been labeled "Defendant's Exhibit No. 1" and ask you if you can identify that photograph.

A. Yes, sir. I know this location shown in the photograph.

Q. What does that picture show, Trooper Myers?

A. In this direction it shows the highway traveling in a westerly direction. If you were traveling west this would be the way you are looking at it.

Q. If you were traveling toward Phenix this is

page 75 } what you would see at that point?

A. Yes, sir.

Q. This curve shown down here is the curve you indicated. Is that correct?

A. Yes, sir.

Q. And of course, the knoll in the road is not shown in this photograph. It was taken just slightly over the knoll or on the knoll?

A. Yes, sir.

Q. Is this the shoulder on the left that you referred to and the sidewalk?

A. Yes, sir.

Q. And you say it is eight feet from the sidewalk to the hard surface?

A. Yes, sir.

Q. Is that a fairly level or flat area there?

Douglas Myers.

A. It is fairly level. There is a drainage ditch running on that side there.

Q. Is the drainage ditch there comparable to the one over on the right side or about the same as the one on the right side?

A. The right-hand ditch would be a little deeper. This one is more rounded out.

page 76 } Q. Would you say it is a better walking area over on this shoulder on the left than over on the right side?

A. I don't know. It would be pretty hard to say which would be the best. Of course, over there on the left when you walked you could walk on the sidewalk but this shoulder here gets narrower back toward the crest of the little rise there.

Q. But it is 8 feet from the sidewalk to the hard surface at this point?

A. Yes, sir.

Q. Trooper Myers, I hand you a photograph labeled "Defendant's Exhibit No. 2" and ask you if you can identify that?

A. This would be a photograph of the highway looking in an easterly direction just west of the point of accident.

Q. This driveway where these vehicles are sitting here represents the driveway into the Health Center?

A. Yes, sir.

Q. This is taken from toward Phenix looking toward Charlotte Court House?

A. Yes, sir.

Q. Does that show the shoulder on the left-hand side of the road as Mr. Tharpe was traveling?

A. Yes, sir.

page 77 } Q. Trooper Myers, what is the speed limit in that area there?

A. The posted speed limit in this particular area is 35 miles per hour.

* * * * *

Q. Did you examine Mr. Bayne's car after the accident for damage?

A. Yes, sir, I checked his vehicle there at the scene. The only damage I could locate there would be a dent on top of the right front fender just back of the headlight and above over the front wheel.

page 78 } Q. Along here. (indicating on toy automobile)

A. Somewhere in that location.

Douglas Myers.

Q. Did you see any damage to the bumper or headlight or anything up in front, up in this area here?

A. No, sir, I didn't see any damage up on the front of the vehicle.

Q. You say you saw one dent there?

A. One dent which was on top of the fender.

Q. Did you examine the mule or see the mule?

A. The mule was there and I saw him from a distance of a few feet.

Q. Did you look at its left leg?

A. I looked at the left leg and the only injury I saw was where the skin was broken. There was a place on its left leg above the knee where a little piece of skin was knocked off.

Q. About how large was that place?

A. It looked to me to be about the size of a half-dollar, or something like that. It wasn't too large.

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page 79 }

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Q. Trooper, I hand you herewith a table set up for stopping distances for automobiles at various speeds. Would you read from that table, sir, and tell the jury what the braking distance is and what the complete stopping distance is for an automobile traveling at 35 miles an hour?

A. You just want me to read this?

Q. Just the braking distance and stopping distance.

A. Apparently after you had applied your brakes at 35 miles an hour you would travel 63 feet.

Q. What is the reaction time to get your foot
page 80 } from the gas to the brake and apply the brakes?

A. The reaction time would be 38 feet.

Q. And what does that give for a total stopping distance at 35 miles an hour?

A. For a car traveling at 35 miles per hour the total stopping distance would be 101 feet.

Q. The braking distance was 63 feet Now, at 30 miles per hour what is the actual braking distance and stopping distance?

A. At 30 miles an hour it would be 47 feet.

Q. What is the total stopping distance?

Douglas Myers.

A. At 30 miles an hour 80 feet would be the total stopping distance.

Q. You have indicated at 35 miles an hour the stopping distance is 63 feet and you indicated here there were 50 feet of skid marks?

A. Yes, sir.

Q. And the braking distance at 30 miles an hour is 47 feet and you indicated here the skid marks were 50 feet?

A. Yes, sir.

Q. And you say the speed limit is 35 miles an hour?

A. 35 miles an hour, yes, sir.

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page 81 } RE-DIRECT EXAMINATION.

By Mr. Pettus:

Q. Mr. Myers, according to your answer to his question if this man had been looking at the point where he could have seen the whole mule or man, which you testified was 105 feet back, could he not have stopped before he got to Mr. Tharpe?

A. Well, the total stopping distance at 35 miles an hour would be 101 feet and from where it happened to where he could have seen the whole mule at the top of the knoll was 105 feet.

Q. And therefore he would have stopped before he hit Mr. Tharpe's mule?

A. Yes, sir.

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page 83 }

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Q. What speed did Mr. Bayne tell you he was going at the time you investigated this accident?

A. According to my notes here he stated that before the accident he was traveling at 35 miles per hour.

Q. Will you mark here on this diagram where the mule tracks were you saw on the road or off the road? Put little dots or something on there to show the mule tracks.

A. They went up in this direction.

Q. Will you put some marks there?

A. Yes, sir. (witness does as requested.)

Douglas Myers.

Q. Those are the marks made by the mule right there?
A. Yes, sir.
Q. In regard to this braking, if you apply your brakes prior to the time the skid marks begin wouldn't that slow you down some before you actually started skidding?
A. Yes, sir.

page 84 } Q. Isn't it true you actually slow down some before you start skidding when you apply your brakes?

A. Yes, sir, I think you would slow down some before you would start skidding.
Q. Your testimony was that at the time he started skidding he was going that speed?
A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Harris:

* * * * *

Q. You say from right here where you have designated the crest of this hill, from that point to the point of impact is 105 feet?
A. 105 feet.
Q. And you measured that with a tape measure?
A. Yes, sir.
Q. And you have testified his over-all stopping distance was 101 feet?

page 85 } A. 101 feet, yes, sir.

Q. And I believe you further testified from the crest of the hill you couldn't see a car around here until it had cleared this curve coming east.
A. Yes, sir. The car would have to come into the curve there and it would depend on the location of both vehicles. If this vehicle was down further the driver could see further but the further this vehicle was back the more in the curve the other vehicle would have to be to be seen.
Q. But it is a sufficient curve to block the view of cars coming around the curve?
A. Yes, sir.

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page 86 }

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DR. R. D. AILSWORTH,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Allen:

* * * * *

Q. What is your profession?
A. Physician.
Q. Where is your office?
A. Keysville, Virginia.

* * * * *

Q. Doctor, did you see the plaintiff, Mr. Albert C. Tharpe, following the injury he sustained on March 29th this year?
A. Yes, I did.
Q. Can you tell us the first day on which you saw him?
A. March 29th.
page 87 } Q. At that time did you obtain from him what his complaints were?
A. Yes, sir. He had severe back pains, pain in his left leg, and general aches and soreness from his recent injuries.
Q. Did you attain a case history?
A. Yes, sir.
Q. What was that?
A. He said he was leading a mule at Charlotte Court House and the mule was struck by a car and the mule fell on him.
Q. Did you examine him?
A. I did.
Q. Did you make x-rays in your office?
A. Yes, I did.
Q. What did the x-rays and your examination disclose?
A. Well, he had a lot of tenderness in his back and had muscle spasms. I took x-ray of his lower spine but it did not show a fracture at that time. I though it was a bad sprain. He was having a lot of pain and discomfort so I treated him for his pain, strapped his back and sent him home. That is the first day. Shall I go ahead?
Q. Yes, go ahead.
A. I told him to return if he didn't feel better.
page 88 } He got worse and I saw him again on the 31st of March, at which time I x-rayed his back higher and

Dr. R. D. Ailsworth.

saw two compressed vertebrae, and I hurried him to Dr. Butterworth and Dr. Daner in Richmond.

Q. You referred him to Dr. Butterworth and Dr. Daner in Richmond?

A. Yes, sir.

Q. You mentioned the words "muscle spasm" when you examined him the first day. What are muscle spasms?

A. Well, you know what muscles are. The muscles were very rigid and would not relax.

Q. Is that a very painful condition?

A. The muscle spasm is a contraction of the muscles to protect his back. The spasm denotes pain and the muscles are trying to hold his back in a rigid position.

Q. Doctor, taking into consideration the injuries you found from your examination and the x-rays of Mr. Tharpe tell us whether in your opinion the injury is temporary or permanent in nature?

A. Well, the fracture, of course, will heal in time but it is not a complete healing and you would have a permanent residual with a man this man's age.

Q. In percentages how would you rate his disability?

page 89 } A. I would say approximately 25% disability. He can not do any heavy lifting and no prolonged standing, if he does it will cause back pains. The compression fractures affect the weight bearing alignment of the body and it will cause a strain and discomfort if he stands for any length of time or does any heavy lifting.

Q. How about his ability to carry on his farm work and heavy duties of that type?

A. That would call for heavy labor so it would curtail that kind of occupation at least 25%

Q. It would curtail his activity in farming at least 25%?

A. At least that because, in my opinion, farming requires a lot of heavy work and that occupation would be affected probably more than some others.

Q. On the x-rays you took in your office did you notice whether or not there was any signs of arthritis in his back?

A. Yes, sir, there was some osteoarthritis, the old age wear type arthritis.

Q. Is that the sort of arthritis everybody gets as they grow older?

A. Yes, sir. due to old age. Some have it to a greater degree than others depending upon the amount of activity and the different types of work they do.

Dr. R. D. Ailsworth.

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page 90 }

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Q. Now, when a person has an injury or a fracture superimposed upon an arthritic condition like that how does that affect the arthritis?

A. It aggravates the arthritis. The preexisting arthritis is aggravated by the injury and strain. In a compressed fracture such as this it re-aligns the spine and the chips and spurs he has cause more pain.

Q. Assuming a man has been able to carry on his regular duties of a farmer although he had this arthritis due to old age can an accident aggravate that arthritis to the extent he can't work his farm like he formerly did?

A. Yes. He can also develop arthritis following the accident. Sometimes people have that.

Q. In other words, the injury itself can cause arthritis?

A. Yes, sir.

Q. This arthritis is basically a sort of stiffening process that takes place in the back?

A. Partially stiffening or the wearing away of the cushions between the bones and also a growth of new bone.

Q. It makes the spine less pliable and you can't
page 91 } move as easily?

A. That is true.

Q. When you superimpose an injury on it that makes the situation a whole lot worse, as I understand?

A. That is correct. Another thing, you have to immobilize an injury such as this and keep it in a cast and the immobilization will also aggravate arthritis.

* * * * *

CROSS EXAMINATION.

By Mr Harris:

Q. Doctor, I have only one or two questions. The arthritis itself without any injury or anything else could curtail a man's activities as he goes on through the years, could it not?

A. It is possible.

Mrs. Julian Vassar.

Q. Are you able to tell us whether or not the arthritis such as Mr. Tharpe had was greater than that found in the average person of fifty-one years of age?

A. With his type of work, build and size I would say no.

page 92 } Q. Does not the medical profession prescribe activities for a man of this type to make himself better rather than to limit his activities?

A. That is a difficult question to answer. When they have acute pains you have to put them at rest.

Q. For preliminary treatment you do but now in the time we have reached don't you prescribe activity for him to get himself back to normal?

A. Limited activity.

Q. And you continue to increase that?

A. Not vigorous activity. I would say you have to limit it because he can't stand vigorous activity. We don't want him to have a stiff back and we want him to do as much as he can. We want him to use it some.

Q. And as time goes along he will use it more and more to work it back into its normal condition?

A. I don't think anybody with this type injury will ever get back on a normal basis.

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page 92-B } MRS. JULIAN VASSAR,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Pettus:

* * * * *

Q. Did you see an accident in which Mr. Albert C. Tharpe was injured?

A. Yes, sir.

Q. Where was that accident?

A. Well, it was just near the Health Center down here.

Q. What were you doing at the time of the accident?

A. Well, I was driving by.

page 92-C } Q. Yours was the car that met the car that ran into Mr. Tharpe's mule?

A. Yes, sir.

* * * * *

Mrs. Julian Vassar.

Q. Yours was the vehicle meeting Mr. John Bayne?
A. Yes, sir.
Q. When did you first see Mr. Bayne?
A. About the time I was even with Mr. Tharpe his car came up over the hill and I noticed he was getting pretty close to Mr. Tharpe and I didn't think he could pass Mr. Tharpe.
Q. What was Mr. Bayne doing when you first noticed him?
A. He had his head turned toward the boy in the car with him and then he turned around and applied his brakes and they were crying and, of course, I had gone by then and I didn't see the car actually touch the mule but then I went on about three car lengths and I looked in my mirror in the car and could see Mr. Tharpe laying up on the bank, so I backed up and asked the boy was he hurt and told him he ought to take him to the doctor. He reached down and helped him up.

page 93 } I told him again he ought to take him to the doctor and Mr. Tharpe said he wasn't hurt, just had the wind knocked out of him.

Q. Did he appear to be hurt?
A. Yes, he did.

* * * * *

Q. Where was Mr. Tharpe when you first saw him?
A. He was leading the mule.
Q. Were was he in relation to the highway?
A. On the side of the road, on the left-hand side of the road.
Q. Can you elaborate on that a little bit? I wish you would tell us as near as you can where Mr. Tharpe was.
A. Well, he was just above the Health Center, that little curve just before you go into the driveway, right on that corner—just a fraction up there.
Q. Was he in the road?
A. No, he wasn't in the road.
Q. Where was he if he was not in the road?
A. He was on the side of the road.

page 94 } Q. Where was the mule?
A. He was over as far as he could get.
Q. You say he was over as far as he could get? Where was the mule in relation to Mr. Tharpe?
A. Was right behind him.
Q. Did he appear to be in the lane of travel of the boy meeting you?
A. In the lane of travel?
Q. Did he appear to be in Mr. Bayne's lane of travel?

Mrs. Julian Vassar.

A. No. He was out of the road. I don't know whether he was completely off the pavement—I mean the tar—but if he wan't off of it he was just almost because he was over as far as I could see he could get when I seen him.

Q. Why couldn't he get over further?

A. Was not no place else to go, just a ditch there and then the bank.

Q. How fast were you driving?

A. About 15 miles an hour.

Q. How fast was Mr. Bayne driving?

A. I couldn't say how fast Mr. Bayne was driving.

Q. How did he appear to be driving?

A. Well, I would say a little rapid.

Q. Why do you say that?

page 95 } A. Well, I don't know. He was going faster than I was.

Q. How much faster?

A. How much faster? I don't know how much faster he was going than I was but he was going right much faster than I was and I know I was going 15.

Q. How could you tell that?

A. The way the car was moving. I could see it was coming right fast.

Q. When you first saw Mr. Tharpe where were you?

A. Well, I was just about at the high school, I would say about 150 yards from Mr. Tharpe.

Q. You were about 150 yards from him when you first saw him?

A. Yes.

Q. What did you then do?

A. I drove on, just continued on the way I was going but I noticed the mule and him.

Q. Did the mule appear to be wild and kick at the car or anything of the sort?

A. I didn't see him kick at no car. He was just walking along when I seen him.

Q. Just prior to the time the car hit the mule did the mule jump into the road or not?

page 96 } A. I didn't see the mule jump into the road.

Q. You said you thought the boy was going to hit the mule. Why did you think that?

A. He was close to him when he come up over that hill and he was getting right on him and the tires began crying and I realized or thought he was going to hit him. I didn't see how he could miss him.

Mrs. Julian Vassar.

Q. What was your speed at the time?
A. About 15 miles an hour.
Q. Did he slow his speed down like you had slowed yours?
A. I didn't see him slow down.
Q. Why were you driving so slowly?
A. Well, it was near the school and I just always come through about that speed.
Q. Did seeing Mr. Tharpe and the mule have any effect on your speed?
A. Well, yes.
Q. What did you do when you saw a man leading a mule?
A. I always slow down when anything like that is in the road.
Q. Had you slowed down on this occasion for the mule and the school zone?

page 97 } A. I always slow down at the corporate limits. I always drive through there slow and I noticed him and the mule he was leading.

• • • • •

Q. Do you know whether or not he was talking to the boy next to him?
A. No. I just seen his head turned like this and then he turned around and looked like he applied his brakes as he glanced around and the tires started crying.
Q. What was the passenger doing at the time?
A. He was looking toward the boy talking to him.
Q. The two were looking at each other?
A. Yes, sir.
Q. That was at the top of the hill before he applied his brakes?
A. Yes, sir.

Mr. Pettus: I believe that is all.

page 98 } CROSS EXAMINATION.

By Mr. Harris:
Q. Mrs. Vassar, you were coming in from toward Phenix coming in to the court house?
A. Yes, sir.
Q. You were traveling at a rate of about 15 miles per hour?
A. Yes, sir.

Mrs. Julian Vassar.

Q. I understood you to say you had reduced your speed at the corporate limits down on 40 to about 15 miles an hour, or approximately that.

A. I usually drive about 35 until I get up close to the high school and always go through there about 15 miles an hour.

Q. You reduced your speed from approximately 35 miles an hour down to 15 miles an hour at the high school?

A. Yes, sir.

Q. You did not reduce your speed any when you saw Mr. Tharpe?

A. Yes, sir.

Q. Then you were not driving 15 when you saw Mr. Tharpe?

A. Probably I wasn't driving quite 15 then.

Q. Mr. Pettus said it was around 9:00 o'clock. This was around 9:30, wasn't it?

A. Around 9:00.

page 99 } Q. Was school in session?

A. Yes, sir.

Q. All the children had gone in?

A. Yes, sir.

Q. No children outside?

A. I didn't see any.

Q. Didn't see any walking on the road?

A. No, sir.

Q. No recess or anything as far as you could see?

A. No, sir.

Q. No children out at all?

A. No, sir.

Q. Now, as you came on there is a curve as you come on in to town, isn't it, the way you were traveling?

A. Yes, sir, a slight curve.

Q. And that curves which way, to your right or left as you were coming in?

A. To the right.

Q. Mrs. Vassar, I want you to think now very carefully. Where was your car when you first saw Mr. Bayne's car?

A. My car was just almost even with Mr. Tharpe. I was just almost even with him.

page 100 } Q. And at that time Mr. Bayne was coming up over the knoll?

A. Yes, sir.

Q. It is in evidence here that the knoll is about 105 feet back from where the accident happened. You continued on toward Charlotte Court House?

Mrs. Julian Vassar.

A. Yes, sir.

Q. Where were you when the accident happened? Do you know?

A. Well, I was about three or four car lengths up when I looked in the mirror and seen him on the bank.

Q. Was there another car behind you or do you know?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir. I looked before I stopped.

Q. Now, I want to ask you this: You saw the mule you say walking on the surface of the road?

A. I don't know whether he was on the surface or not.

Q. I am not trying to cross you up but I understand you to say they were right along the edge. It is in evidence here I think by all of the evidence that the mule was up on the hard surfaced part of the road. You have told the jury that you paid particular attention to this car that was meeting you.

page 101

A. Not particular attention but I noticed it.

Q. And you have told the jury, as I understand you, that you thought the accident was going to happen.

A. Well, he just popped up over the hill and I knew the mule was right there on the side of the road and I glanced at him and he had his head turned and then just in a second the tires were crying and by that time I had got up a little ways from Mr. Tharpe.

Q. You knew, didn't you, Mrs. Vassar, that Mr. Tharpe and that mule were in the road and that car was coming over there and that mule being in the road that the car was likely to hit him. Am I right or wrong? I am not trying to cross you up but just asking you a straight question.

A. Well, not by him being in the road. He wasn't exactly in the road.

Q. Mr. Bayne's car didn't go off the hard surface and strike the mule, did it?

A. I don't know. I didn't get out to look and see if he went off the hard surface to hit it.

Q. If the mule had been completely off the hard surface over on the shoulder then Mr. Bayne had a 10-foot lane to go on through, did he not?

page 102

A. Yes, sir.

Q. Then to get back to my question. You knew that mule was in a position that when the car came over that hill an accident was likely to happen. Am I right?

A. Yes.

Mrs. Julian Vassar.

Q. That is what you saw. That is what stuck in your mind when you saw that mule. You knew the mule was there when you saw the car come up over the hill.

A. The mule was on the side of the road and the car could hit it.

Q. The mule was in a position that the car was likely to strike it. Was that what registered in your mind?

A. Yes.

Q. And that is what caused you to apply your brakes and stop actually, isn't it?

A. I stopped after I passed and after I heard his tires making a fuss and after I looked to see if he did hit the mule.

Q. And at that time you were occupying the left lane of the road and Mr. Bayne couldn't go to his left or he would have collided with you. Is that correct?

A. Well, I don't know whether I had got up far enough for him to pass without hitting the mule or not. It was just in a second.

Q. It was so close you just don't know?

page 103 } A. It was close.

* * * * *

A. I didn't take no notice of what kind of car he was driving. I glanced in the windshield at the boy. I didn't look to see what kind of car he was driving. I was concerned with which way he was going. I was going to see if he was going to hit me or not.

Q. You knew because of the situation that existed he had been placed in some kind of emergency and something was going to happen. Is that right?

A. Might be.

Q. Mrs. Vassar, do you know the posted speed limit along there?

A. 35 miles an hour.

Q. And you testified no children were out anywhere when you came by?

A. I didn't see any.

page 104 } Q. Now, you testified you were running about 15 miles per hour?

A. Yes, sir.

Q. And Mr. Bayne was running faster than you?

A. Yes, sir.

J. W. Jennings.

Q. Would you say he was running twice as fast as you were?
A. Yes, sir, and maybe more.
Q. You think that would be his speed?
A. Maybe more.
Q. How much more?
A. I don't know. I don't say how fast he was going because I don't know how fast he was going.
Q. Did Mr. Tharpe ever look back behind him any time during the time you saw him?
A. I didn't see him look back.

* * * * *

page 105 } Q. You don't know anything about the shoulder on the left-hand side of the road going toward Phenix, do you?
A. I have looked at it. I have noticed it.
Q. Was it wider than the one on the right?
A. About the same.

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page 106 }

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J. W. JENNINGS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Pettus:
Q. I believe you are Mr. J. W. Jennings.
A. Yes, sir.
Q. What is your occupation?
A. Drive a school bus.
Q. Where were you the morning of this accident, March 29th?
A. I don't remember the date but I was coming from down around the school.
Q. Did you see Mr. Tharpe that morning?
A. Yes, sir.
Q. Where did you see Mr. Tharpe?

J. W. Jennings.

A. Just this side of the Health Center. He was down there leading a mule.

Q. I might describe the road there as having a slight knoll before you get to the Health Center. On which side of that knoll was he when you saw him?

page 107 } A. This side.

Q. Where was he and the mule located at the time you saw him?

A. On the shoulder of the road. He was leading him.

Q. How far back from the top of the hill was he when you saw him?

A. I don't remember exactly how far. I just saw him.

Q. Where had you been?

A. Down to Randolph Henry and was coming back.

Q. Was school open that day?

A. Yes, sir.

Q. About what time was it?

A. I don't know. I don't know whether I went down to the shop and got gas or whether I had come back from the school. I get gas every other day and I don't remember whether I got gas that day or not. I don't remember what time it was.

Q. Can you tell whether or not school had opened or if it was in session?

A. I had carried the school children down there and unloaded them and I came on back.

Q. How long generally does it take you to unload the children before you start back?

page 108 } A. Not very long unless I have to go to the shop before I come back.

Q. Estimate it in minutes assuming you went after gas. How long would it take you to go there?

A. If nobody is waiting ahead of me it don't take more than ten minutes. It depends on who is ahead of me. I never thought anything about what time I left or anything. I just know I met Mr. Tharpe and shook my hand at him.

* * * * *

Q. Was he on the shoulder or on the hard surface at the time you saw him?

A. He was on the shoulder leading the mule.

Q. Where was the mule at the time you saw him?

A. Following right behind him.

Walter Harris.

Q. Was the mule on the shoulder or on the hard surface?
A. He was on the shoulder of the road right behind him.
Q. Both on the shoulder at that time?
A. Yes, sir.

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page 116 }

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WALTER HARRIS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Pettus:
Q. You are Mr. Walter Harris?
A. Yes, sir.
Q. You run a service station between here and
page 117 } Phenix?
A. Yes, sir.
Q. Would you please talk loud enough for the jury to hear you? Did you see Mr. Tharpe on the morning of the 29th of March right after he had been hit by a car?
A. Yes, sir.
Q. Where did you see him?
A. I saw him coming down the hill with the mule and I was putting in some gas and he come on down with the mule. I could tell was something wrong with him but I didn't know what it was. He came on down and tied the mule and told me a car had hit the mule.

* * * * *

Q. You saw blood on the mule?
A. Had some skin knocked off the mule's hip and had mud all over him and the mule.
page 118 } Q. Where was the skin knocked off of the mule?
A. Off of his hip.
Q. Anywhere else?
A. I didn't notice any anywhere else.
Q. How much skin was knocked off his hip?

Walter Harris.

A.. A place about the size of your hand.

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page 119 }

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CROSS EXAMINATION.

By Mr. Harris:

Q. You say you saw him coming down the road toward your service station?

A. Yes, sir.

Q. Of course, you didn't know who it was at that time.

A. Yes, sir.

Q. What side of the road was he leading the mule on?

A. The opposite side from the service station. It would have been on his right side.

Q. Still on the right-hand side of the road?

A. Yes, sir.

* * * * *

page 120 } Mr. Harris: If your Honor please, at this time at the conclusion of the plaintiff's evidence, I would like to make a motion in the absence of the jury.

The Court: You gentlemen of the jury will step outside.

(Jury out).

Mr. Harris: May it please the court, at the conclusion of the plaintiff's evidence the defendant, by counsel, moves the court to strike the evidence on the ground that the evidence has revealed clearly that the plaintiff was a pedestrian leading a mule, and not riding it at the time this collision took place; that at the time and prior to that time, and even subsequent to the time of the accident, the plaintiff was walking and leading the animal on the right-hand side of the road. The evidence is clear and undisputed, even admitted by the plaintiff, that the animal was occupying the hard-surfaced portion of the road. The evidence shows that there was abundant room, measured to be twice the distance, on the left-hand side of the road available to the plaintiff to use and

under our law there is no question about the
page 121 } fact that our law states that pedestrians shall not
use the highways or streets other than the sidewalks thereof for travel except when necessary to do so because of absence of sidewalks reasonably suitable and passable for their use, in which case they shall keep as near as reasonably possible to the extreme left side or edge of the highways or streets, and we submit to the court that the evidence here shows that the plaintiff, to be most charitable to him, was guilty of negligence that caused this accident. I think his negligence was the sole negligence and that being true he can not recover and we move the court to strike the evidence at this point.

(The court having heard arguments of counsel in support of and in opposition to the foregoing motion took a view of the scene of accident and made the following observations in ruling on said motion.)

The Court: Gentlemen, I have taken a view of the scene and I observed there is a sidewalk on the left side of the street
opposite where the accident is said to have oc-
page 122 } curred but it would be impossible to walk on that
sidewalk and lead a mule because the light poles are right up against the concrete sidewalk and the mule would have to go down the concrete walk, and there is pole after pole in that position. If he was a pedestrian he should have been on the sidewalk and in my opinion he was a pedestrian but he couldn't walk on the sidewalk and lead the mule. I am overruling your motion. Bring the jury back.

Mr. Harris: If your Honor please, the defendant, by counsel, objects and excepts to the ruling of the court on the motion to strike the evidence for the reasons stated.

(Jury in).

Evidence for the defense.

DOUGLAS MYERS, (State Trooper)
recalled as a witness on behalf of the defendant, testifies as follows:

Douglas Myers (State Trooper).

DIRECT EXAMINATION.

By Mr. Harris:

Q. Trooper Myers, I want to clear up one point with you. You testified this morning that the posted speed page 123 } limit in the area of this collision was 35 miles per hour. There was some question about a school zone sign along here and further down markings across the road down here designated "SCHOOL ZONE." What is the speed limit in a school zone?

A. The speed limit in the school zone at this particular time here was 15 miles per hour, which would have been during the time school was taking in and during recess and when school was letting out.

Q. In other words, if I understand you correctly, it is restricted to 15 miles per hour during the time children are going in the school, during recess, and when the school is letting out.

A. Yes, sir.

Q. Now, it is in evidence here by a witness for the plaintiff that she passed the school and no children were out at that time. Did you see any children present when you went down to do your investigating?

A. No, sir, I did not.

Q. Now, at other times when those things are not present, when children are not going to and from school and when the school is not in recess what would the speed limit be here?

A. The speed limit would be 35 miles per hour.

Q. It reverts back to the posted speed limit? page 124 } A. That is correct. The school zone speed limit would not apply.

* * * * *

Q. I hand you herewith a photograph, Defendant's Exhibit No. 4, and ask you if you can identify that and tell the jury in which direction it is looking?

A. Looking toward Phenix—no, back toward Charlotte Court House.

Q. Looking over the crest of the hill around the curve?

A. Yes, sir.

Q. Is there a sign on the right there?

A. Yes, sir.

Q. What does the sign say?
A. "School Zone."
Q. Can you see anything on the road down here, any markings that would indicate a school zone?
A. Yes, sir, these markings across the road down past the driveway.
Q. And they are the markings you referred to and they pertain to the high school on around this curve out here, back in this section, do they not?
page 125 } A. Yes, sir.

* * * * *

page 127 } C. T. BENNINGTON (State Trooper) having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Harris:

* * * * *

Q. The jury has seen most of these photographs and I hand you herewith photographs numbered Defendant's Exhibits 1, 2, 3, 4 and 5 and ask you to look at them and tell the jury whether or not you made those pictures.
A. I did, sir.

* * * * *

page 129 } RALPH HOWERTON, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Harris:

* * * * *

Q. Were you riding in the automobile operated by John Edward Bayne on March 29th, 1958 when he had a little accident out here?
A. Yes, sir.
Q. Where were you sitting in the automobile?
A. Sitting on the right-hand front seat.

Ralph Howerton.

Q. Who was in the automobile besides yourself?
A. Bayne.
Q. Mr. Bayne was driving the car?
A. Yes, sir.

* * * * *

page 132 }

* * * * *

Q. Of course, you were riding as a passenger in the car. Did you see Mr. Tharpe or the mule prior to the accident?
A. I didn't see it until he hit it.
Q. Are you able to tell the jury where they were at the time the mule was struck? In other words, where was the mule and Mr. Tharpe at the time the car struck the mule?
A. The mule was right there on the side of the road. I saw it hit the mule.
Q. When you say on the side of the road do you mean on the hard surfaced portion or on the shoulder of the road?
A. Edge of the surface.
Q. On the edge of the hard surface?
A. Yes, sir.
Q. There is evidence here that your car laid down some skid marks, or the car you were riding in.
A. Yes, sir.
Q. Did those skid marks go off the road or did they all stay on the tar?
A. I think they all stayed on the tar the best I could see.

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page 133 }

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Q. Did you look at the car to see what damage
page 134 } was done to it?
A. Yes, sir, I looked at the car.
Q. Where was the damage on it?
A. Up on the front of the fender on the right-hand side.
Q. There is some evidence here, Mr. Howerton, that Mr. Tharpe was leading the mule along the road and Mr. Bayne was riding along looking at you when you all came over the

hill and apparently you all were engaged in some type of conversation. Are you able to tell the jury what your position was, how you were sitting in the car?

A. I was sitting like this with my arm up on the back of the seat facing Mr. Bayne.

Q. Were you all talking about anything?

A. I think we were, a little bit. We were talking but I can't say we were talking right then. We had been talking.

Q. Had Mr. Bayne been driving properly prior to that time?

A. Yes, sir.

Q. Did you notice anything improper about his driving there?

A. No.

Q. Did you know anything about his speed?

A. No, I didn't glance at the speedometer.

Q. You know anything about the speed of the

page 135 } other car that you were meeting?

A. No, sir.

* * * * *

JOHN EDWARD BAYNE,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Harris:

Q. State your name.

A. John Edward Bayne.

Q. Where do you live, Mr. Bayne?

A. I live five miles north of Chase City on Route 49.

Q. How old are you?

A. Twenty.

Q. Were you the driver of the automobile involved in this accident on March 29th?

A. I was.

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page 136 }

* * * * *

John Edward Bayne.

Q. What were the weather conditions that morning?
A. To the best of my knowledge it was raining when I left home but it had stopped on the way up here.
Q. Was the road dry or wet?
A. It was wet in spots.

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page 137 }

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Q. Were your brakes holding all right?
A. Yes, sir, I had good brakes.

* * * * *

Q. As you were traveling along toward Phenix did you or did you not see a mule and a man going along in that direction?
A. I did see the mule, or rather the top half of it, and glimpsed the man. I knew it was a man in front of the mule.
Q. Where was the man with relation to the mule?
A. He was on the right-hand side of the mule.
Q. To the front or to the rear of the mule?
A. To the front of the mule.
Q. Could you tell where the man and mule were located on the road?
page 138 } A. No, sir, I could not tell where they were.
Q. Where did they appear to you to be?
A. To my knowledge they were on the dirt part when I was going up the hill there.
Q. Which side of the road, your left side or your right side?
A. They were on my right side.
Q. When you first saw them, Mr. Bayne, are you able to tell the jury about what speed you were running?
A. I was running around 30 to 35. I wasn't looking at the speedometer. I wasn't staring at my speedometer.
Q. Did you slow down any when you saw them?
A. I knew I was under the speed limit so I didn't see any point in slowing down to 10 or 15 miles an hour.

John Edward Bayne.

Q. Why didn't you slow down when you saw them?
A. Well, I assumed they were off the tar and on the dirt.
Q. And you continued on up the little grade to the crest of the hill?
A. Yes, sir, I did.
Q. It is in evidence it is about 105 feet from this point here at the crest of the hill down to where the point of impact took place. Have you stepped that distance off your-
page 139 } self?
A. Yes, sir, I have been up there and stepped it off.
Q. Is that about correct, 105 feet?
A. I stepped 34 steps.
Q. Let me ask you this: As you came on up here when was the first time that you got into a position that you could see the feet and lower part of the mule and Mr. Tharpe?
A I was 34 steps from the mule when I could see his feet plainly.
Q. That is right at the crest of the hill?
A. Yes, sir, right on top of the hill.
Q. At that time did you see anything else on the road?
A. As soon as I saw his feet I glanced to the left of me and I reckon I had gone five or six more feet when I saw the other car and then I slammed on my brakes.
Q. You mean then you saw the car that was meeting you?
A. The car that was meeting us coming from Phenix.
Q. When you first saw that car can you tell us where it was? (indicating on diagram) This is the driveway into the Health Center and there is where it has been designated as the point of impact, and here is the crest of the hill. Can you tell the jury about where that car was when you first saw it?
A. You mean the first point I saw the car?
Q. Yes.
page 140 } A. I saw it just before it got to Mr. Tharpe and the mule. I couldn't say the exact point but somewhere along in there. It was somewhere the other side of the edge or beginning of the road that comes out from the Health Center. It was right at that road or just below it.
Q. So it would have been somewhere along about this point on this diagram?
A. Yes, sir.
Q. You say you saw that car. You got to this point at the

John Edward Bayne.

crest of the hill and saw the lower part of the mule and Mr. Tharpe?

A. Yes, sir.

Q. And I believe you testified that the mule was up on the hard surface at that time.

A. He was probably a foot on the hard surface.

Q. Then you say you glanced to your left and saw this car coming down here?

A. Yes, sir.

Q. Then what did you do?

A. Wasn't nothing I could do. I couldn't go to the left because I knew a lady was driving that Chevrolet car. There was no way possible to go to my left or to my right so I slammed on my brakes the same instant I saw the

page 141 } car.

Q. And it is in evidence you slid, according to what this trooper has put here, something in that fashion for about 50 feet. Is that correct?

A. Yes, sir. I was right near the white line and I gradually pulled over to the side.

Q. Are you able to tell the jury what part of your car came into contact with what part of the mule?

A. Yes, sir, the right side of my fender—you know a '58 Ford has got an eyesight, a little ornament setting on top of the fender in the direct center, and I had put those on this '57 car and it hit about six inches back. The eyesight hit the mule on his left flank or hip of the mule.

Q. The thing you are talking about is sitting up on top of the headlight?

A. Yes, sir. The mule broke that off.

Q. And you say there was a place on your fender back of that about six inches?

A. Yes, sir.

Q. Was any damage done to the headlight or to the bumper or the front end of your car?

A. The mule never did hit my grill, headlight, parking light or bumper.

page 142 } Q. Did you have that damage to your car repaired?

A. Yes, sir. A week or two weeks later I had it repaired.

Q. What did it cost you?

A. $12.50, I believe. It was somewhere in the neighborhood of $13.00.

Q. That is all the damage that was done to your car?

John Edward Bayne.

A. Yes, sir.
Q. Did you look at the mule?
A. Yes, sir. I helped catch the mule and looked at him.
Q. How much damage was done to the mule?
A. Damage?
Q. How much injury was done to the mule?
A. All I could see was a piece of skin knocked off no bigger than a silver dollar at the biggest, and no smaller than a quarter.
Q. On the mule's left flank?
A. Yes, sir. That is where he hit the eyesight on my fender. That is what broke it off.
Q. Now, from the time you first saw the mule and Mr. Tharpe up to the time of the accident are you able to tell the jury whether Mr. Tharpe was actually himself on the surface of the road or was he over on the dirt?
page 143 } A. I didn't understand the question.
Q. Was Mr. Tharpe walking on the hard surface or was he walking on the dirt during the time you saw him?
A. You mean before the accident?
Q. Before the accident.
A. I couldn't really say. I knew he was in front of the mule but what position he was I couldn't tell you.
Q. Where was the mule when you first saw it?
A. I saw the mule when I was coming up the hill there but he was on the road when I got a complete view of his feet.
Q. His feet were on the hard surface?
A. Yes, sir.
Q. You tell the jury when you were coming up that hill you were running 30 to 35 miles an hour?
A. Around that speed, not over it.
Q. When you cleared this point right here then you saw the full view of the mule and Mr. Tharpe?
A. Yes, sir.
Q. And you glanced to your left and this car was coming down here. Why didn't you cut to your left to go around on this side of Mr. Tharpe?
A. I would have hit the lady in the Chevrolet
page 144 } head-on or would have gone right into her front door or the side of her car.
Q. If the mule had been over on the shoulder could you have gone on through?
A. If the mule had been on the dirt I could have gone

through. The lady wasn't over the white line but she had her side occupied. She left my ten feet open.

* * * * *

page 145 }

* * * * *

Q. Mr. Bayne, I hand you herewith a photograph marked "Defendant's Exhibit No. 5" and ask you if you recognize that picture?

A. I do. This is looking from Charlotte Court House toward Phenix.

Q. Now, there are several men in this picture. Who are they?

A. That is me right there.

Q. Who is that?

A. That is you.

Q. Now, at this point where were you standing?

A. This is showing where I first got a complete view of Mr. Tharpe's mule and where his feet were on the road.

Q. Was it at that time along in that same area you saw the car coming from the other way?

A. Just a second. I would say in about a second after I saw the mule's feet I glanced across the road and seen the car. I was a few feet further then.

page 146 } Q. The road curves and the car was down below this driveway here?

A. Yes, sir.

* * * * *

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Bayne, when you first saw the mule before you got a complete view of the mule about how far were you from the mule at that time?

A. It would be hard to really say. I will say a thousand feet—maybe 900 feet.

Q. Approximately 900 feet you could see the mule?

A. The top of the mule.

Q. Could you see the man at that time?

John Edward Bayne.

A. I wouldn't say whether I could see him or couldn't see him but as I got closer to the mule I knew a man was leading the mule.

Q. When you got within 500 feet you knew the man was leading the mule at that time?

A. I might have seen it back there. If I did I just could glimpse the top of the man, but I was positive a man was with the mule before I got to it.

page 147 } Q. Is it fair to say certainly when you were within 500 feet of the man and mule you could see that a man was leading the mule—at least that distance, and maybe more?

A. Yes, sir, I could see that.

Q. As I understand it, you did not know whether the man and mule were on the hard surface or off the hard surface; that you couldn't tell?

A. No, but to my knowledge they were off of it.

* * * * *

Q. Let's go back to the 900 feet when you first saw the mule. Maybe you were talking about that time. At 900 feet you did not know whether they were on the hard surface or off. Is that true?

A. I assumed it was off.

Q. Did you testify a little earlier in response to Mr. Harris' question you didn't know whether the mule was on the hard surface or off?

A. I couldn't say now what I told him.

Q. You say you assumed it was off. Does that page 148 } mean you don't know whether it was on or off? What do you mean by the word "assume"?

A. To my knowledge it was off. The curve would bear to the left. The mule was on the right-hand side and to my knowledge it was off.

Q. The road just begins to curve there about the time you reach the point of collision, doesn't it? Isn't the road relatively straight from the point of collision back east?

A. It starts to curve there at that point and when you look there over the top of the knoll you look straight.

Q. So as you proceeded down and got within 500 feet then you realized a man was leading a mule. At that time did you know they were on the hard surface?

John Edward Bayne.

A. To my knowledge they were off.

Q. Did it appear to you they were over close to the hard surface?

A. They were on the shoulder. They weren't down in the woods. They were on the shoulder of the road.

Q. It appeared to you they were on the shoulder of the road and if they weren't on the surface they were close to it?

A. To my knowledge they were on the shoulder.

Q. But close to the hard surface at any rate?

page 149 } A. That is right, right close.

Q. Yet you continued on and maintained your speed at 30 or 35 miles an hour right up until you got within approximately 100 feet of the mule?

A. Until I could see a clear view of the mule.

Q. Then when you got within 100 feet of him you realized the mule was on the hard surface. Is that right?

A. It was a little bit more than 100 feet the time I saw the complete mule.

Q. Listen to me carefully and see if this is what happened. You saw the mule and the man. You drove on down the highway westward and when you got within close proximity to the man and mule didn't you then intend to cut out and go around the man and mule and you saw a lady going in the opposite direction and when you couldn't cut out and realized you were in an emergency you cut back to your right and jammed on your brakes and hit the mule? Isn't that what happened?

A. I did not cut back to my right. The car kind of swayed from the brakes. When you push the brakes on hard you very seldom will pull straight.

Q. You saw the skid marks the officer has drawn. The left mark begins almost at the center of the road

page 150 } and the right mark goes right to the edge of the road with the right wheel ending up about on the edge of the road at the point of impact.

A. You call it near the center. It was about a foot and a half from the center.

Q. The way the officer has got the marks drawn here is that the way the marks were?

A. Repeat that again.

Q. Are the marks the way the officer has drawn them on the blackboard the way they were on the highway immediately following this accident? In other words, has he drawn them correctly?

John Edward Bayne.

A. Well, I couldn't tell whether they are exactly correct but they are close to it, really close to it.

Q. Didn't your marks begin near the center of the road and continue over toward the right-hand edge in the fashion the officer has drawn them?

A. Yes, sir, in a fashion.

Q. Didn't that occur when you saw this automobile was coming in the opposite direction and you realized you couldn't pass and you cut back and isn't that the explanation of why the marks begin close to the center of the road and go to the right?

A. I never did cut back. That was not anything I done to the wheel. That was done by the brakes.

page 151 } Q. If you had slowed your automobile down as you were approaching this man and mule anywhere within 1,000 or 500 feet you say you saw them, had slowed your vehicle down and fallen in behind the man and mule the car could have gone on by and you could have cut out and passed and there wouldn't have been any accident. That is true, isn't it?

A. If the mule was over on the shoulder, yes.

Q. I am talking about if the mule was on the hard surface and if you had slowed down and fallen in behind.

A. To my knowledge he was all the way off the road so what was the point driving 10 miles an hour when the speed limit was 35?

Q. Have you ever had any experience with farm animals?

A. Yes, sir, I was raised on a farm.

Q. Occasionally when you get opposite an animal it will shy into a car and that sort of thing?

A. He couldn't see the car so he couldn't shy from it.

Q. Even though you are passing a mule you don't know whether on the hard surface or not you maintain your speed of 30 or 35 miles an hour and run right on by him?

A. To a point where I could see the mule.

Q. And when you see a mule along the edge of the road and a man leading the mule you don't slow your

page 152 } vehicle down?

A. When I see the mule is in the road I slow down.

Q. You operate your vehicle at the maximum allowed by law right on into a situation like that?

A. Sir?

Q. I say you operate your vehicle at the maximum speed

John Edward Bayne.

allowed by law right on into a situation like this, a man leading a mule there.

A. I operated my car at 30 or 35 until I saw where the mule was.

Q. And when you didn't know where the mule was then you operated the car only at the maximum speed?

A. When I didn't know where the mule was?

Q. That is right.

A. To my knowledge he wasn't on the road.

Q. But it turned out to be on the road?

A. Yes, sir.

Q. And you heard Mr. Tharpe testify he was walking at the mule's head along the edge of the hard surface on the shoulder.

A. To my knowledge he was off the road.

Q. You know that the mule didn't get on the road immediately in front of the car, don't you?

A. I wouldn't say he jumped out in front of the car, no, sir.

page 153 } Mr. Allen: I have no further questions.

The witness stands aside.

Mr. Harris: The defense rests.

If your Honor please, it is just a short distance and while we are prepering the instructions I would like for you to let the jury slip out there and view the scene. I think it would be helpful.

Mr. Pettus: The plaintiff joins in that motion.

The Court: Is there any further evidence?

Mr. Allen: We have no further evidence.

(Note: At this point the jury was taken to view the scene of accident and the court and counsel retired to chambers.)

page 154 } Mr. Harris: At this point the defendant, by counsel, at the conclusion of the whole case renews the motion to strike the evidence on the grounds previously stated, and in addition to that I would like to add under the law governing a pedestrian and where he should walk the law requires the pedestrian first to use the sidewalk and in the absence of sidewalks that are reasonably suitable and passable for their use the law then requires that

pedestrian to walk to the extreme left side or edge of the highway or street, and to cover one additional point which has been submitted by the plaintiff, that of last clear chance, we submit that the doctrine of last clear chance is not applicable here due to the fact that the plaintiff at all times had a last clear chance to remove himself from the right-hand side of the road, the area of danger in which he was walking, and having that chance and it being a last clear chance then the defendant can not be burdened with the last clear chance doctrine. What we are saying is that the plaintiff was in a position which our courts have held, if not directly certainly by inference, that a violation of the pedestrian page 155 } statute is negligence as a matter of law, and his being in that position the plaintiff had at all times the presence of mind and the means with which to extricate himself from that negligent position and he didn't do so; therefore the defendant has no last clear chance and should not be required to carry that burden here.

The evidence clearly substantiates these points and at this time we move the court to strike the evidence on those grounds.

The Court: Do you gentlemen want to be heard?

Mr. Allen: Does your Honor want to hear us?

The Court: No, frankly I do not. I feel as I did before. In my opinion he was a pedestrian but he was hung on to that mule. Now, he couldn't have walked on the sidewalk with the mule because the poles were too close to the sidewalk. Where he was when he was struck he was leading the mule with his left hand but if he had been on the other side of the street he would have been leading him with his right page 156 } hand.

Mr. Harris: The statute is twofold. First of all he is required to use the sidewalk if a sidewalk is available, and I respect your Honor's position in that your Honor feels he couldn't have led the mule there. It was probably physically impossible, according to your Honor's opinion.

Now, the second phase of the statute is if that sidewalk is not available and suitable—we will exclude it under suitability—if it wasn't suitable even then he is required to keep as near as reasonably possible to the extreme left side or edge of the highway or street. Now, that would get him—and we think it is applicable here, that that duty was clearly on to travel on the left side—that would get him to the left side of the highway and if he had led the mule with his left hand as he was doing on the right side it would have put the mule on the shoulder.

The Court: He couldn't have walked on this side and led the mule with his left hand. He would have had to lead him with his right hand. I will have to overrule your
page 157 } motion.

Mr. Harris: The defendant, by counsel, objects and excepts to the ruling of the court in overruling the motion to strike the evidence made at the conclusion of the plaintiff's evidence and renewed and enlarged at the conclusion of all of the evidence for the reasons stated.

* * * * *

page 158 } Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in granting any instruction on behalf of the plaintiff for the reasons previously stated in the record when the defendant moved the court to strike the evidence at the conclusion of the plaintiff's evidence and again at the conclusion of all of the evidence. Also the evidence clearly reveals that the plaintiff was a pedestrian under the law at the time of the accident in question and being so he was governed by the existing rules covering pedestrians which required them first to utilize sidewalks if such are available and suitable for their use and if sidewalks are not available and suitable then a pedestrian is required to walk to the extreme left side or edge of the highway or street. The evidence in this case shows that the plaintiff failed to observe these duties and his failure to do so amounted to negligence as a matter of law and precludes any recovery on his part.

page 159 } *Plaintiff's Instruction No. 1 (Granted)*:

"The Court instructs the jury that the plaintiff, Tharpe, while proceeding along the highway leading his mule, had equal rights with the defendant in his automobile, and if the jury shall believe from the evidence that the plaintiff was proceeding on his right side of the highway on the shoulder thereof and the mule on the hard surface, he was proceeding where he had a right to proceed with his mule. And, it was the duty of the defendant to exercise reasonable care to avoid overtaking and striking the plaintiff and his mule; and if the jury shall believe from the evidence that the defendant failed to perform this duty, then the defendant was *negligenct*, and if the jury shall further believe that such negligence was the proximate cause of the plaintiff's injury, then the jury must find for the plaintiff and assess his damages in accordance with the instructions on damages."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in granting Plaintiff's Instruction No. 1 on the ground that the instruction is contrary to the existing laws in the State of Virginia and to the facts of this case wherein the plaintiff was a pedestrian and page 160 } should have followed the pedestrian laws, and the instruction is contrary to those laws when it grants to the plaintiff the same right to use the right side of the highway as the defendant had in his automobile. This instruction is contrary to the statutory law provided under Section 46-247 of the Code of Virginia of 1950, as amended, and is contrary to the decided case under this section.

Plaintiff's Instruction No. 2 (Granted):

"The Court instructs the jury that while the plaintiff was required to be on the lookout for dangers ahead of him, he was not required, while on his proper side of the highway, to maintain such a lookout as to vehicles coming up from the rear. He owed no duty to the car in the rear except to use the road in the manner provided by law. Until he had been made aware of the presence of a vehicle coming up from the rear, by signal or otherwise, he had the right to assume either that there was no vehicle in the rear, or that, if there was one, it was under such control as not to interfere with his free use of the road in any lawful manner."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in granting Plaintiff's Instruction No. 2 on the ground that this page 161 } instruction only requires the plaintiff to keep a lookout for vehicles meeting him when the general law requires the plaintiff to maintain a proper and reasonable lookout for his own safety. This instruction is in conflict with Defendant's Instruction D which states the proper law as to the duties incumbent upon the plaintiff in this case.

Plaintiff's Instruction No. 3 (Refused):

"The Court instructs the jury that it was the duty of the defendant, in overtaking the plaintiff leading his mule along the right-hand edge of the highway, to turn to the defendant's left and pass at least two feet to the left of them and not to turn back to the defendant's right side of the road until safely clear of the plaintiff and his mule. If there was a motor vehicle approaching from the opposite direction, it was the duty of the defendant not to undertake to pass the

plaintiff and his mule unless the motor vehicle was a sufficient distance away to enable the defendant to pass the plaintiff and his mule with reasonable safety. If the jury shall believe from a preponderance of the evidence that the defendant violated one or more of these rules of the road, then such violation was negligence; and if they shall further
page 162 } believe that such negligence was the proximate cause of the collision, resulting in injuries to the plaintiff, then the jury must find for the plaintiff and assess his damages in accordance with the instruction on damages."

The Court: The court is refusing this Instruction No. 3 because the evidence in this case clearly shows, and this evidence comes from the driver of the car which was approaching the defendant, that if the defendant had not pulled to the right he would have collided with the oncoming car so therefore it would be misleading, in the court's opinion, to give this instruction.

* * * * *

Mr. Allen: The plaintiff, by counsel, moves the court to strike the defendant's evidence on the ground that the defendant is guilty of negligence as a matter of law
page 163 } and that the plaintiff is free of contributory negligence as a matter of law and the jury should be concerned only with the awarding of damages.

The Court: This motion will be overruled.

Mr. Harris: The plaintiff excepts on the ground that the evidence fully justifies the motion.

Counsel for the plaintiff excepts to the action of the court in refusing to grant Instruction No. 3 offered by the plaintiff on the ground that the duty of the defendant in overtaking the plaintiff was that in passing him he should pass at least two feet to the left of him and not turn back to the right side of the road until he had safely cleared the plaintiff. If there was a motor vehicle approaching from the opposite direction it was the duty of the defendant not to undertake to pass but to slow his vehicle down sufficiently to fall in behind the plaintiff and his mule, and these are statutory duties imposed by law upon the defendant and the court should have instructed the jury as to them.

page 164 } *Plaintiff's Instruction No.* 4 (*Refused*):

"The Court instructs the jury that it was the duty of the

defendant, John E. Bayne, to make reasonable allowance for the natural characteristics of a mule before attempting to pass."

The Court: Instruction No. 4 is refused because to begin with it does not appear from the evidence that the defendant should have been aware that the animal being led by the plaintiff was a mule and secondly there is no evidence that he knew what the characteristics of a mule are. The court was born and raised on a farm and have been operating one for years where mules and horses are used and I know of no characteristics of a mule that is different from the characteristics of a horse in a situation of this kind and therefore the instruction is refused.

Mr. Allen: The plaintiff, by counsel, objects to the failure of the court to grant Instruction No. 4 on the ground that where there is an animal involved such as a horse or a mule that it becomes the duty of the defendant upon page 165 } seeing the same to recognize the fact that the natural characteristics of such animals are not like those of a motor vehicle and he should get his car under control and the failure of the court to grant Instruction No. 4 fails to put this principle before the jury and this instruction was approved in the case of *Clay* v. *Bishop,* 182 Va. 746.

Plaintiff's Instruction No. 5 (Granted):

"The Court instructs the jury that if you find your verdict for the plaintiff, it will then become your duty to assess damages and in so doing, you may take the following into consideration:

"1. Any monies expended for medical attention and therapeutic appliances as a result of his injuries;

"2. Any monies he has lost from his farming operation by reason of his not being able to work because of his injuries sustained in the accident, taking into consideration the amount earned before his injury and his diminished earning capacity resulting from his injury, if any:

"3. The nature and extent of his injuries;

"4. Physical pain and mental suffering endured by the plaintiff, Albert C. Tharpe, as a result of his injuries and such as he may be reasonably expected to endure in the page 166 } future;

"5. The effect of the injuries upon his health, if

any, according to the degree and probable duration of the same;

"6. Any money the plaintiff may reasonably be expected to lose in the future from his diminished capacity for earning money throughout his life expectancy as a result of his injuries, if any; and from these as proven by the evidence, assess such damages as will fairly and justly compensate the plaintiff for any injuries suffered in the accident in question, not to exceed the amount sued for in the Motion for Judgment."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in giving Plaintiff's Instruction No. 5 on the grounds previously stated in the general objections and exceptions to the giving of any instructions on behalf of the plaintiff, and on the further ground that this instruction does not properly set forth the elements to be considered by the jury in awarding damages under the facts of this case.

Plaintiff's Instruction No. 6 (*Granted*):

"The Court instructs the jury that while a defendant is not liable for any condition of the plaintiff existing page 167 } before the accident, or for anything that would have resulted to him from his condition independently of the accident, yet, if the jury shall believe from the evidence that the defendant negligently inflicted personal injury on the plaintiff, the defendant is responsible for all the ill effects which naturally and necessarily flowed from such injuries, considering the condition of the health of the plaintiff when he sustained the injuries, if any. The defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been free of arthritis and the result thereof, or that the injuries sustained in the accident were aggravated and rendered more difficult to cure by reason of the fact that the plaintiff had arthritis. So, where the injuries sustained in the accident, if any, aggravated the pre-existing arthritis and thereby greatly increased the damages, such increased or added damages may be recovered."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in granting Plaintiff's Instruction No. 6 for the reasons previously stated relating to all instructions and for the further reason that the rules covered

in this instruction have been previously covered in Instruction No. 5 and are therefore superfluous.

page 168 } *Plaintiff's Instruction No. 7 (Granted)*:

"The Court instructs the jury that if the defendant relies upon contributory negligence on the part of the plaintiff to defeat a recovery by the plaintiff, that the burden is upon the defendant to prove it, unless such negligence is disclosed by the evidence of the plaintiff or might be fairly inferred from all the circumstances. The Court further instructs the jury that in order for contributory negligence on the part of the plaintiff to defeat his recovery in this case, it would have to be the proximate cause of the accident in question."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in granting Plaintiff's Instruction No. 7 on the grounds previously stated as to all instructions, and on the further ground that the instruction does not properly state the law applicable to the facts of this case in that the instruction should carry the words "efficient cause" rather than the words "proximate cause," and further that the granting of this instruction is in conflict with the wording used in defendant's instructions wherein the word "efficient" has been employed.

page 169 } *Plaintiff's Instruction No. 8 (Refused)*:

"The Court instructs the jury that even if they believe from the preponderance of the evidence that Albert C. Tharpe may have been guilty of contributory negligence, and although that negligence may have in fact contributed to the accident, yet, if the jury shall also believe from the evidence that the defendant, the operator of the automobile, could, after he discovered the peril of said Tharpe, by the exercise of ordinary care and due diligence, have avoided the accident which happened, then the negligence of Tharpe, if any, will not excuse the defendant from liability in this case."

Mr. Allen: The plaintiff, by counsel, objects and excepts to the action of the court in refusing to grant Instruction No. 8 on the ground that if the court was going to submit the issue of contributory negligence of the plaintiff to the jury then the plaintiff should have been entitled to an instruction on last clear chance. There was evidence to the effect that the plaintiff was on the shoulder and the mule was on the hard

surface and there wasn't sufficient room on the shoulder for the plaintiff and the mule. This placed the plain-
page 170 } tiff in a position of peril from which, according to his own evidence, he could not extricate himself, and that the defendant, in view of his statement that he saw the mule a distance of 900 feet, and the plaintiff leading the mule at a distance of 500 feet, had ample opportunity to avoid the collision with the mule; therefore it was error for the court to fail to instruction the jury on last clear chance and in failing to give Instruction No. 8.

Defendant's Instruction A (Granted):

"The Court instructs the Jury that the burden of proof is on the plaintiff, Albert Tharpe, to prove his case in every essential particular by a preponderance of the evidence. The mere happening of an accident places no responsibility on anyone, and the plaintiff can only recover from the defendant by proving by a preponderance of the evidence that the defendant was guilty of negligence proximately causing the accident."

Mr. Allen: Plaintiff, by counsel, excepts to the action of the court in granting any instructions in regard to primary negligence of the defendant or contributory negligence of the plaintiff upon the grounds stated in the motion to strike the defendant's evidence.

page 171 } *Defendant's Instruction B (Granted)*:

"The Court instructs the Jury that by a preponderance of the evidence is meant that evidence which is the most convincing and of a greater weight to the mind of the jurors.

"In determining the weight of the evidence, the jury may consider all of the evidence of the several witnesses, all the physical facts and evidence of the case, and all other circumstances relating to the happening of the collision in question, as disclosed by the evidence."

Defendant's Instruction C (Granted):

"The Court instructs the jury that every person operating a motor vehicle upon the public highway has the right to assume that other persons, including pedestrians, using the public highway will observe the law until the contrary in the exercise of reasonable care should be apparent."

Mr. Allen: Without waiving the exception to the giving of any instructions on behalf of the defendant counsel for the plaintiff objects and excepts to the action of the court in granting Instruction C on the ground that there was no violation of any law on behalf of the plaintiff shown page 172 } and therefore this Instruction C is not applicable.

Defendant's Instruction D (Granted):

"The Court instructs the Jury that a pedestrian walking on the highway owes the duty to exercise ordinary care at all times and to take reasonable precaution to protect himself from an on-coming vehicle and obvious danger, and the observation to maintain a proper lookout, and if the jury believe that the plaintiff failed to exercise ordinary care and prudence for his own protection and safety, then the plaintiff was negligent, and if the jury believe that such negligence contributed to the accident complained of, they should find their verdict for the defendant."

Mr. Allen: Counsel for the plaintiff excepts to the action of the court in granting Instruction D on the ground that it is in conflict with Instruction No. 2 granted on behalf of the plaintiff and that it would tend to confuse the jury as to the responsibility of lookout that was upon the plaintiff.

Defendant's Instruction E (Refused):

"The Court instructs the Jury that at the time of the accident in question the plaintiff, Albert Tharpe and page 173 } the mule he was leading, was a pedestrian under our law.

"In this connection, you are instructed that a pedestrian is required to obey the following laws:

"1. To use the sidewalk if one is available that is reasonable suitable and passable for his use;

"2. If no such sidewalk is available, a pedestrian must keep as near as reasonable possible to the extreme left side or edge of the highway or street, or to walk and lead the mule on either shoulder thereof, if they are suitable for such use.

"You are further instructed that if the plaintiff, Albert Tharpe, was not walking according to the above requirements he is negligent as a matter of law, and if the jury believe that his negligence efficiently caused or contributed to cause the

collision in question and the injuries complained of, they should find a verdict for the defendant, John Edward Bayne."

Note: At the direction of the court the following was typed on the bottom of Instruction E:

"Memorandum by the Court:

"Instruction E is refused because the Court has taken a view which discloses that the man and the mule, passing through the Town of Charlotte Court House at the
page 174 } point of collision between the car driven by the defendant and the mule led by the plaintiff for a considerable distance before it occurred, there is a sidewalk on the other side of the street, but the telephone poles are so closely set to the edge of the sidewalk that, in the Court's opinion, it would have been impossible for the plaintiff to have walked on the sidewalk and led the mule, or to have traveled on the left shoulder without the mule being on the hard surface on the street which would have created a more dangerous situation than was created by the plaintiff walking on the other side of the street, himself being entirely off of the hard surface and the mule on the edge of the hard surface.

"J. W. F."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in refusing to grant Defendant's Instruction E as submitted on the ground that this instruction properly sets forth the law applicable to the facts of this case and is a proper instruction covering a pedestrian using the highways. The evidence in this case shows clearly, and has not been refuted in any way, that there was a sidewalk available on the left-hand side of the road which could have been utilized by the plaintiff, and in addition to
page 175 } said sidewalk the evidence shows beyond question that there was a shoulder and walking area on the left side of the road eight feet in width which was some three and a half to four feet wider than the shoulder on the right on which the plaintiff was walking, and the evidence further shows from the plaintiff himself hat he could have moved to the left side of the road at any time he so desired and thus brought himself within the purview of this law. Further, the court in refusing this instruction has used and relies on the provisions set forth in Section 46-183 of the Code of Virgniia of 1950, amended, and is removing the plaintiff from the pe-

destrian category, all of which is contrary to the evidence and the law applicable to this case. The court is further overlooking the fact that the pedestrian statute grants and has a two-fold condition, either of which the plaintiff is required to follow.

Defendant's Instruction F (Granted):

"The Court instructs the jury that if the defendant through no negligence of his own was suddenly confronted page 176 } by an emergency and was compelled to act instantly in an effort to avoid the accident, he was not guilty of negligence if he made such choice as a person of ordinary prudence placed in such a position might have made, even though the defendant did not make the wisest choice."

Mr. Allen: Counsel for the plaintiff excepts to the action of the court in granting Instruction F on behalf of the defendant on the ground that whereas the instruction appears to be a correct statement of the law nevertheless the defendant having been negligent as a matter of law in the manner in which he approached the plaintiff and his mule from the rear thereof would be the creator in part of the emergency and therefore would not be able to take the benefit of this doctrine of sudden emergency and therefore the instruction is inapplicable and erroneous.

Defendant's Instruction G (Granted):

"The Court instructs the jury that unless school is in recess, or children are going to or leaving school, the posted speed limit is controlling, and unless you believe that school was in recess, or that children were going to or leaving school at the time of the accident in question, then the posted speed limit of 35 miles per hour was in effect at the time page 177 } and place of the accident."

Defendant's Instruction I (Granted):

"The Court instructs the Jury that if you believe from the evidence that the accident was caused by the efficient concurring negligencce of both John Edward Bayne and Albert Tharpe, then you must find for the defendant, John Edward Bayne, and this is so even though you may believe that John Edward Bayne was more negligent than Albert Tharpe."

Defendant's Instruction J (Refused):

"The Court instructs the Jury that at the time of the collision in question the following Virginia statute was in effect:

"§46-247. *Pedestrians not to use highways except when necessary; keeping to left:*

"Pedestrians shall not use the highways or street, other than the sidewalk thereof for travel, except when necessary to do so because of absence of sidewalks, reasonably suitable and passable for their use, in which case they shall keep as near as reasonably possible to the extreme left side or edge of the highways or streets, or to walk and lead the mule on either shoulder thereof, if shoulders are available and of sufficient width for such use."

Note: The following memorandum was typed on the bottom of this instruction at the request of the court:

"Memorandum by the Court:

page 178 } "Instruction J is refused by the Court because the Code Section is given and the title thereof and the instruction is taken verbatim from this section. It is the opinion of the Court that it is improper to insert it in this instruction.

"J. W. F."

Mr. Harris: The defendant, by counsel, objects and excepts to the action of the court in refusing to grant Defendant's Instruction J on the ground that this instruction accurately sets forth the statutory law covering the usage of the highways by pedestrians and this instruction is fully supported by the facts and evidence in this case and should have been granted to cover the defendant's theory of the case. The court has previously determined that the plaintiff was a pedestrian and the court's decision to change this determination is based solely on Section 46-183 of the Code of Virginia of 1950, amended.

The Court: The court deems that it is unnecessary for it to at this time make any statement to be included in the record

page 179 } in view of the memorandum made by the court on Instruction E offered by the defendant and also a memorandum made and initialed by the court as the court's reasons for rejecting Instruction J offered by the defendant and refused.

* * * * *

page 181 }

* * * * *

Mr. Allen: We failed to state our exceptions to Instruction I.

The plaintiff, by counsel, excepts to the action of the court in granting Instruction I on the ground that there was no negligence on behalf of the plaintiff which could have contributed to the occurrence and therefore the instruction is inapplicable.

We understand Instruction H was withdrawn.

The plaintiff, by counsel, objects and excepts to the action of the court in granting any instructions on behalf of the defendant that relate to liability or contributory negligence of the plaintiff on the ground that the evidence doesn't justify the same.

The Court: The court feels that this is a jury case that should be decided by the jury, In addition to hearing the evidence in the case the jury took a view of the street in the Town of Charlotte Court House where the collision occurred.

page 182 } Note: The jury after due deliberation having returned a verdict for the plaintiff in the sum of $11,500.00 the following motion was made:

Mr. Harris: May it please the court, the defendant, by counsel, moves the court to set aside the verdict of the jury as rendered in favor of the plaintiff and to enter up judgment for the defendant on the grounds that the verdict rendered is contrary to the law and the evidence in the case and is without evidence to support it, and on the additional ground that the verdict is excessive.

I would further like to state that in addition to the verdict being contrary to the law and the evidence that the defendant relies on the fact that the evidence here clearly shows that the plaintiff was a pedestrian at the time under our law when this accident occurred and that this case should have been governed by the laws covering pedestrians in this state at that time. In this light the evidence shows clearly that the plaintiff was negligent as a matter of law and was or should have been precluded from a recovery and the case should
page 183 } never have been submitted to the jury and the court was in error submitting it on the instruc-

tions as submitted, and further; that the Code section 46-183 under which the case was submitted to the jury clearly has no applicability in this case as the plaintiff was not riding or driving this animal when this collision occurred but was leading him and was therefore a pedestrian, all of which has been clearly shown and all of which governs the case and leads the motion of the defendant to set aside the verdict.

In addition, we submit that the verdict is excessive due to the fact that the evidence showed that the plaintiff had no earnings for 1957 and only about $1200.00 for the year 1958, and for prior years thereto the only evidence introduced was the plaintiff's own statement as to his earnings without any additional evidence to support that, and on the statement of the plaintiff that he had sold his farm and is no longer engaged in farming operations therefore he would be deprived of no income in that light, and on those grounds we feel that the verdict is excessive.

page 184 } The Court: The motion is overruled. You will recall I went into this matter fully with counsel when passing on instructions and, in my opinion, it was a jury question. The jury not only heard the evidence in the case but in addition the jury took a view of the street in Charlotte Court House where the collision occurred. It was for the jury to believe or disbelieve the witnesses and to give their testimony such weight as they thought it was entitled to and it is, in my opinion, a jury case.

Mr. Harris: If your Honor please, the defendant, by counsel, excepts to your Honor's ruling. I don't know how long it will take to have the evidence transcribed but we want to prepare an order and want to have the order properly drawn for an appeal in this case and we will post the necessary bond.

* * * * *

A Copy—Teste:

H. G. Turner, Clerk.

INDEX TO RECORD

Page

Writ of Error and *Supersedeas* Awarded 1

Record 2

Judgment—December 3, 1958 2

Notice of Appeal and Assignments of Error 3

Assignment of Cross-Error 4

Witnesses:

Albert C. Tharpe 5

Dr. William E. Daner 15

Trooper Douglas Myers 21, 46

Dr. R. D. Ailsworth 32

Mrs. Julian Vassar 35

J. W. Jennings 42

Walter Harris 44

Trooper C. T. Bennington 48

Ralph Howerton 48

John Edward Bayne 50

Proceedings 45, 59, 72

Instructions 61

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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