

FILE COPY

Clerk, Supreme Court of Appeals

Richmond, Va.

Record No. 5012

In the
Supreme Court of Appeals of Virginia
at Richmond

NORWOOD B. RICHARDSON, JR.

v.

JOHN E. CHARLES

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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. 5012

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 16th day of March, 1959.

NORWOOD B. RICHARDSON, JR., Plaintiff in Error,
against

JOHN E. CHARLES, Defendant in Error.

From the Circuit Court of the City of Portsmouth

Upon the petition of Norwood B. Richardson, Jr., a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Portsmouth on the 21st day of October, 1958, in a certain motion for judgment then therein depending wherein John E. Charles was plaintiff and the petitioner and another were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of ten thousand dollars, with condition as the law directs.

RECORD

* * * * *

page 23 }

INSTRUCTION 1.

The Court instructs the jury that if they believe from the evidence that the defendant Arthur B. Graves was guilty of negligence which was the sole proximate cause of the accident, then they must find a verdict in favor of plaintiff and against the defendant, Arthur B. Graves.

If they find from the evidence that the defendant, Norwood B. Richardson, Jr. was guilty of negligence which was the sole proximate cause of the accident, then they must find a verdict in favor of plaintiff and against the defendant, Norwood B. Richardson, Jr.

If they find from the evidence that the defendant, Arthur B. Graves, and the defendant, Norwood B. Richardson, Jr., were both guilty of negligence which proximately caused or contributed to the accident, then their verdict should be in favor of plaintiff and against both defendants.

Granted.

H. W. M.

page 24 }

INSTRUCTION 2.

The Court instructs the jury that where one has received a personal injury as a result of the negligence of another and pursues due care in the selection of a physician or surgeon to treat the injuries, the person causing the original injury is liable for all the injuries proved to have been suffered by the victim, and this is true regardless of the treatment rendered by said physician or surgeon.

Granted.

H. W. M.

page 25 }

INSTRUCTION 3.

The Court instructs the jury that if they find for the plaintiff, in fixing the amount of damages to be awarded to the plaintiff, they should award him such sum as they believe

from the evidence to be fair, just and adequate, and in ascertaining such sum, they may take into consideration:

(a) Any bodily injury that he may have sustained by reason of the accident.

(b) Any physical and mental suffering that has been occasioned thereby.

(c) Any impairment of his physical condition.

(d) Any doctor, hospital and medical bills incurred as a result of the accident.

(e) Any loss of his earnings, if any.

(f) The inconvenience, discomfort and embarrassment that was caused and will probably be caused hereafter from such injuries.

And they may fix his damages at such sum which is fair, just and adequate under the evidence not to exceed the amount claimed in the motion for judgment.

Granted.

H. W. M.

page 26 }

INSTRUCTION 4.

The Court instructs the jury that the plaintiff is free of negligence as a matter of law.

Refused.

H. W. M.

page 27 }

INSTRUCTION 4A

The Court instructs the jury that the plaintiff is free of contributory negligence as a matter of law.

Refused.

H. W. M.

page 28 }

INSTRUCTION A.

The Court instructs the jury that if you believe from the evidence that the defendant Norwood B. Richardson, Jr. was

following too close on the occasion in question, he was guilty of negligence, and if you believe from the evidence that such negligence was the sole proximate cause of the accident, you must find your verdict in favor of the defendant Arthur B. Graves.

Granted.

H. W. M.

page 29 }

INSTRUCTION B.

The Court instructs the jury that if you believe from the evidence that the defendant Arthur B. Graves was operating his vehicle with ordinary care on the occasion in question you must find your verdict in behalf of the defendant Arthur B. Graves.

Granted.

H. W. M.

page 30 }

INSTRUCTION C.

The Court instructs the jury that if you believe from the evidence that the defendant Norwood B. Richardson, Jr., was not keeping a proper lookout on the occasion in question, he was guilty of negligence and if you believe from the evidence that such negligence was the sole proximate cause of the accident, you must find your verdict in favor of the defendant, Arthur B. Graves.

Granted.

H. W. M.

page 31 }

INSTRUCTION D.

The Court instructs the jury that it was the duty of the defendant, Norwood B. Richardson, Jr., to keep the vehicle driven by him under proper control on the occasion in question and if you believe from the evidence that Richardson did not have his vehicle under proper control, he was guilty of negligence and if you believe from the evidence that such negligence was the sole proximate cause of the accident, you should find your verdict in favor of the defendant, Arthur B. Graves.

Granted.

H. W. M.

page 32 }

INSTRUCTION E.

The Court instructs the jury that in arriving at your verdict, you shall not be swayed by sympathy or bias, nor base your verdict in whole or in part on speculation or conjecture but shall determine your verdict in accordance with the evidence before you and the law as set forth in these instructions.

Granted.

H. W. M.

page 33 }

INSTRUCTION F.

The Court instructs the jury that there is no evidence upon which you can base a verdict against the defendant Arthur B. Graves.

Refused.

H. W. M.

page 34 }

INSTRUCTION VII.

The Court instructs the jury that if you believe from the evidence the plaintiff and Richardson both consumed about an equal amount of alcohol, in company together, then the plaintiff assumed any risk incurred in his riding with Richardson that you find is attributable to his having drunk this alcohol; and you are further instructed that the plaintiff cannot then recover from Richardson or Graves because of the negligence, if any, caused by this drinking.

Granted.

H. W. M.

page 35 }

INSTRUCTION VIII.

The plaintiff has the duty to exercise ordinary care in attempting to minimize his damages. If you believe from the evidence that he failed in this duty, then the defendants are not responsible for the resultant aggravation of these injuries, if any, caused by such failure.

Granted.

H. W. M.

page 36 }

INSTRUCTION X.

The Court instructs the jury that if you believe from the evidence the sole proximate cause of the accident was the attempt if any, of the defendant Graves to make a right turn without first using ordinary care to see that the turn could be made in reasonable safety, then your verdict must be in favor of the plaintiff against Graves only and in favor of the defendant, Richardson.

Granted.

H. W. M.

page 37 }

INSTRUCTION I.

The Court instructs the jury that simple negligence is mere failure to exercise ordinary care but in order to become gross negligence, the act or acts complained of must be of such a degree which shows an utter disregard of prudence amounting to complete neglect of the safety of another.

Refused.

H. W. M.

page 38 }

INSTRUCTION II.

The Court instructs the jury that inasmuch as the plaintiff was riding as a guest of Richardson, then he owed to the plaintiff only the duty of slight care, and is liable only for gross negligence. Gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the *the* safety of another.

Unless the plaintiff has proven by the preponderance of the evidence that Richardson was guilty of gross negligence as above defined, then you should find for the defendant, Richardson.

And this is true, even if you believe Richardson was guilty of ordinary negligence.

Refused.

H. W. M.

page 39 }

INSTRUCTION III.

The Court instructs the jury that if you believe from the evidence that the plaintiff knew, or in the exercise of ordinary

care should have known that Richardson's driving was dangerous and despite this knowledge continued to ride in Richardson's car, then he was guilty of negligence, and if you believe that such negligence was a contributing cause of the plaintiff's injuries, then your verdict must be for the defendants.

Refused.

H. W. M.

page 40 } INSTRUCTION IV.

The Court instructs the jury that the mere fact that the plaintiff was injured in this accident does not entitle the plaintiff to a verdict against the defendant, Richardson. The basis of the plaintiff's claim against him is the alleged gross negligence of the defendant, Richardson. There is no presumption of such gross negligence just because there has been an accident, but on the contrary, the presumption is that Richardson was free from gross negligence at the time of the accident.

The burden is at all times upon the plaintiff to prove by the preponderance of the evidence that Richardson was guilty of gross negligence and further that such gross negligence was a proximate cause of the accident.

Refused.

H. W. M.

page 41 } INSTRUCTION V.

The Court instructs the jury that if you believe from the evidence this accident was caused by the simple negligence of Graves or of Richardson or of both of them, then the plaintiff cannot recover from Richardson and your verdict must be for him.

Refused.

H. W. M.

page 42 } INSTRUCTION VI.

The Court instructs the jury that if you believe from the evidence the sole proximate cause of this accident was the act

of Richardson following too closely behind the Graves vehicle, then the plaintiff cannot recover and your verdict must be for both defendants.

Refused.

H. W. M.

page 43 }

INSTRUCTION IX.

The Court instructs the jury that if you believe from the evidence the sole proximate cause of this accident was the sudden slowing or stopping by Graves of his vehicle without a proper signal then your verdict must be in favor of the plaintiff against Graves only and in favor of the defendant, Richardson.

Refused.

H. W. M.

* * * * *

page 49 }

* * * * *

The plaintiff in this case moved to set aside a jury verdict in favor of the defendant, Graves, on the ground that Instruction "VII" was improperly given. This instruction tells the jury that the plaintiff assumed any risk incurred in his riding with Richardson that the jury find is attributable to his having drunk alcohol and that the plaintiff could not recover from either Richardson or Graves on account of any negligence caused by such drinking. Whether the instruction is correct or not, the jury's verdict against Richardson and in favor of Graves shows conclusively that the jury did not attribute any negligence to the plaintiff in this regard or that he assumed any risk by riding with Richardson; otherwise the jury would have had to find in favor of the defendant, Richardson, also under this instruction. *Franklin v. Pence*, (West Virginia) 36 S. E. 2nd 505.

The defendant, Richardson, moves to set aside the verdict against him on three *grounds* which will be dealt with in the order they were argued by counsel. This defendant moved

for a mistrial when counsel for the defendant, Graves, asked the police officer whether Richardson had been convicted of reckless driving as a result of this accident, after the court had already ruled that such question was improper but that Richardson's plea of guilty in the County court could be shown. The jury were pointedly told by the court to disregard the results of any proceedings in the lower court although it does not appear from the record that the witness had answered the question. Since the witness testified that he had pleaded guilty to this charge in response to a proper question, I do not feel that the improper question prejudiced the defendant, Richardson, for he having acknowledged that he pleaded guilty, it would necessarily follow that he had been convicted of the offense.

The second objection of Richardson is that Instruction C was improperly given as there was no evidence to support it. I disagree with this conclusion for the defendant Richardson, himself, testified that he was looking at the light when he approached the intersection. Regardless of his language, the jury was in position to judge whether in looking at the light he could also properly observe the defendant, Graves', car at the same time and this alone would justify the instruction. In any event the defendant, Richardson, having pleaded guilty to reckless driving, had admitted his negligence and it could not be seriously contended that a different result would have ensued if Instruction C had not been granted.

The chief question in the case is whether the evidence showed that the plaintiff was a passenger, as distinguished from a guest, as a matter of law; otherwise error was committed in refusing instructions tendered by the defendant Richardson based upon gross negligence.

The testimony discloses no acquaintance between plaintiff and Richardson prior to a sale by Richardson to Charles of a used car on Saturday, December 7, 1957. Richardson, a salesman for Tyree-Jones Motor Company, had promised Charles that he could pick up the car on the following Monday, certain agreed painting to be done in the meantime. Charles called twice for his car, which was not ready, but was informed that he could get it the following morning. He made it clear to the defendant that he had to have it on Tuesday page 51 } to go to Virginia Beach to see about a job. On Tuesday, when he called, the car still was not ready, and Richardson offered to drive him down in a demonstrator, there also being some evidence that Richardson had some business of his own to attend to there. The parties had

at least one drink on the way; they made the call of plaintiff's first, then that of Richardson, had lunch, and were on the return trip when the accident occurred.

The law applicable is quite clear. Code Section 8-646.1 provides that no person transported "as a guest without payment for such transportation" shall recover for injury unless it is caused by gross negligence of the operator. This statute has been construed with reference to various factual situations, and it has developed as settled that the consideration need not be in cash and if a person bargains for services and the transportation is given in consideration thereof he is a paying passenger, but the services performed must be more than gratuitous gestures of reciprocal hospitality, or social amenities, extended without thought of bargaining for transportation. *Davis v. Williams*, 194 Va. 541; *Dickerson v. Mutter*, 196 Va. 659; *Hill Hardware Corporation v. Hesson*, 198 Va. 425; *Smith v. Tatum*, 199 Va. 85.

Here Richardson had sold Charles a car. It was part and parcel of the transaction that Richardson deliver possession to Charles on Monday. Richardson was in default on that day and on the day following. The transportation of plaintiff by Richardson, according to this evidence, grew solely out of Richardson's desire to relieve himself of the consequences of his breach of an existing legal obligation toward the plaintiff. Conversely, there is nothing to show that Richardson and Charles had ever had any relationship other than this business transaction, and there was no reason for Richardson to otherwise accommodate Charles.

page 52 } The relationship between Richardson and Charles being purely business and the trip having resulted from Richardson's failure to complete his bargain it is the ruling of the court that Charles had paid for his transportation and the guest statute has no application.

I think the proper rule with respect to such compensation is aptly stated in *Follansbee v. Benzenberg*, 122 California Appeals 2nd 466, 265, Pacific 2nd 183, 42 A. L. R. 832, as follows: Such compensation "is a return which may make it worth the other's while to furnish a ride. To constitute compensation it is not necessary that it be established that the compensation received by the driver was given for such ride in the sense that the rider obtained transportation for some independent purpose of his own. Where the trip was not primarily for a social purpose, it is sufficient to show that the driver was to derive a benefit from the transportation."

Under the undisputed facts in this case the plaintiff's status meets the above-quoted description, notwithstanding

the socializing and personal business of the defendant, Richardson, which also entered into the trip.

Both motions to set aside the verdict will be overruled and judgment entered on the verdict. If either party desires a stay, prompt notification must be given to the clerk to that effect.

H. W. MACKENZIE, JR.

Filed Oct. 21, 1958.

K. A. BAIN, JR., Clerk.

• • • • •

page 54 }

• • • • •

ORDER.

This cause came on this day to be heard upon the motion of the plaintiff to set aside the verdict of the jury in favor of the defendant, Graves, and award a new trial and upon the motion of the defendant, Norwood B. Richardson, Jr., to set aside the verdict in favor of the plaintiff against him and either award a new trial or enter final judgment in his favor; and the motions were argued by counsel.

Upon consideration whereof, the Court doth overrule both aforesaid motions and final judgment is entered herein in favor of the plaintiff John E. Charles against the said defendant Norwood B. Richardson, Jr. in the amount of \$9,000.00 plus costs, together with interest from June 12, 1958 and final judgment is likewise entered herein in favor of the defendant, Arthur B. Graves against the said plaintiff for the amount of the costs herein expended by the said Arthur B. Graves; to all of which action of the Court the plaintiff and the defendant, Norwood B. Richardson, Jr. duly except.

And thereupon the said defendant, Norwood B. Richardson, Jr., having indicated his intention of applying to the Supreme Coutr of Appeals of Virginia for a writ-of-error and *supersedeas* to the judgment entered against him in this cause, it is ordered that execution upon the said judgment be suspended for a period of sixty days from the date of the final judgment, upon the said defendant, Norwood B. Richardson, Jr., or someone for him, entering into and acknowledging a

page 55 } proper suspending bond in the penalty of \$10,000.00, conditioned according to law, with surety to be approved by the Clerk of this Court.

Enter 10/21/58.

H. W. M.

* * * * *

page 56 }

* * * * *

NOTICE OF APPEAL.

The defendant, Norwood B. Richardson, Jr., hereby gives notice of his intention to apply to the Supreme Court of Appeals of Virginia for a writ-of-error and *supersedeas* to a judgment heretofore entered by the Court against him, in favor of the plaintiff, John E. Charles.

ASSIGNMENTS OF ERROR.

- 1. The Court erred in failing to declare a mistrial, upon the motion of the defendant, Norwood B. Richardson, Jr.
- 2. The Court erred in overruling the motion of the defendant, Norwood B. Richardson, Jr. to strike the plaintiff's evidence, both at the conclusion of the plaintiff's evidence and at the conclusion of all of the evidence.
- 3. The Court erred in granting Instruction C, D, 2 and 3.
- 4. The Court erred in refusing Instructions I, II, III, IV, V, VI, IX.
- 5. The Court erred in ruling that, as a matter of law, the plaintiff was not a guest passenger in the vehicle of the defendant, Norwood B. Richardson, Jr.
- 6. The Court erred in refusing to allow the jury to pass on what the status of the plaintiff was at the time of the accident.
- page 57 } 7. The Court erred in overruling the motion of the defendant, Norwood B. Richardson, Jr., to set aside the verdict and either enter judgment for him or award a new trial.
- 8. The Court erred in entering final judgment for the plaintiff.

NORWOOD B. RICHARDSON, JR.
By E. PRYOR WORMINGTON
Of Counsel.

Filed Nov. 19th 1958.

D. V. M.

In the Circuit Court of the City of Portsmouth, Virginia.

John E. Charles,

Plaintiff,

v.

Norwood B. Richardson, Jr. and Arthur B. Graves,

Defendants.

TESTIMONY.

TRANSCRIPT OF TESTIMONY.

Following is stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled case, in said court, on the 12th day of June 1958 before the Honorable Henry W. MacKenzie, Jr. and a jury.

Appearances: Herbert K. Bangel, Esq., Stanley J. Bängel, Esq., Counsel for Plaintiff.

E. Pryor Wormington, Esq., (Rixey and Rixey) Counsel for Defendant Norwood B. Richardson, Jr.

Maurice Shapero, Esq., William L. Shapero, Esq., Counsel for Defendant Arthur B. Graves.

(Reporter: Madge H. Kottal)

(Reporter sworn)

page 2 } In the Circuit Court of the City of Portsmouth,
Virginia.

John E. Charles,

Plaintiff,

v.

Norwood B. Richardson, Jr., and Arthur B. Graves,

Defendants.

NOTICE OF APPEAL.

To: Herbert K. Bangel, Esq.,
 Stanley J. Bangel, Esq.,
 Counsel for Plaintiff.

PLEASE TAKE NOTE that on the 12th day of November, 1958, the undersigned will bring to the Honorable Henry W. MacKenzie, Jr., Judge of Circuit Court of the City of Portsmouth, Virginia, at the court house of said City, the stenographic report of the testimony and other proceedings of the trial, and will, on the same date, make application to the clerk of said court for a transcript of the above-entitled case for certification by said Judge, and will, on the same date, make application to the clerk of said court for a transcript of the record in said case for the purpose of presenting the same to the Supreme Court of Appeals of Virginia with a petition for a writ of error and *supersedeas* to the final judgment in the trial court in said case.

NORWOOD B. RICHARDSON, JR.

E. PRYOR WORMINGTON
 Of Counsel for the Defendant
 Norwood B. Richardson, Jr.

Legal service of the above notice is hereby accepted this 11 day of Nov., 1958.

HERBERT K. BANGEL
 Counsel for the Plaintiff.

page 2-A } Mr. Herbert Bangel moves to have Arthur B. Graves, one of the defendants, brought in judge's chambers and state the facts about the serving of the motion for judgment. Motion was overruled and excepted to.

Two pictures are objected to by Messrs. Shapero, Counsel for Defendant Graves, and motion to not allow them to be shown to the jury is joined in by Mr. Wormington. Court states admittance of pictures will be ruled on at the proper time in the trial.

page 3 } (Witnesses excluded.)

MR. NORWOOD B. RICHARDSON,
one of the Defendants, having been first duly sworn, was
called as adverse witness by Mr. Herbert Bangel, co-counsel
for the Plaintiff, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Herbert Bangel:

Q. State your name, please, sir.

A. Norwood B. Richardson, Jr.

Q. State your occupation.

A. Radio announcer.

Q. What was your occupation in December of 1957?

A. Used car salesman for Tyree-Jones.

Q. Mr. Richardson, I believe this collision occurred on the
10th day of December of 1957?

A. That is correct.

Q. Which was a Tuesday?

A. Yes.

Q. On the preceding Saturday, did you have any business
transactions with Mr. Charles?

A. Yes. I sold him a car.

Q. What kind of car was that?

A. Plymouth.

Q. 1954 Plymouth?

A. Yes; '54 Plymouth.

page 4 } Q. He didn't take the car with him on Saturday
when he bought the car?

A. No, he didn't.

Q. I believe you had to paint it?

A. Yes. We were to have it painted for him.

Q. When did you tell him he could pick the car up?

A. I think we probably told him he could pick it up Monday,
but it wasn't ready on Monday because of the weather condi-
tions.

Q. When he came back Monday, you told him it wasn't
ready and he should come back the following morning?

A. I think so.

Q. You again saw Mr. Charles on Tuesday morning, De-
cember 10, 1957?

A. Yes.

Q. He came for his car at that time?

A. That's right.

Q. And you informed him at that time that unfortunately
the car wasn't ready as you had promised?

Norwood B. Richardson.

A. I am not positive whether it wasn't ready or due to the weather conditions I suggested that he not take the newly-painted car out in the weather. Anyway, he didn't take the car out that morning.

Q. Although it had been promised to him that evening for early Tuesday morning?

A. I probably promised it to him not knowing the conditions in the paint shop. I was a salesman.
page 5 } Q. On Tuesday morning, as you stated, when he came he was unable to get the car?

A. That's right.

Q. He informed you that he had counted on having the car; that he had to go to Virginia Beach to see about a job, isn't that correct, Mr. Richardson?

A. Yes. I would say that was correct. He wanted his car, yes.

Q. And he expected to receive the car that morning to make the trip?

A. I imagine so. Buying it on Saturday, he wanted it by Tuesday.

Q. It had been promised to him?

A. Probably had; yes.

Q. When the car wasn't ready and he informed you he needed the car to go to the Beach, it was at that time that you told him, "Well, I am sorry the car isn't ready but I will take you down there in my car."?

A. I was off that day and he did want to go to Virginia Beach, and the exact words I used as far as taking him, I am not positive of that; but I did take him to the Beach.

Q. And, of course, he had come there that morning expecting to get his car?

A. I presume so.

Q. You say you were off that day?

A. Yes.

Q. Of course, you try to sell automobiles any time you can?

A. When I say I was off, well, at Tyree-Jones,
page 6 } they have a "floating" day, and every salesman is off one day to do as he sees fit about calling on prospects.

Q. About selling cars and calling on prospects?

A. Yes.

Q. This particular car that you took him down to Virginia Beach in, whose car was that, sir?

A. It was one of the cars off the lot of Tyree-Jones.

Norwood B. Richardson.

Q. Demonstrator car?

A. Yes. One of the used cars.

Q. What kind of car was that?

A. '56 Ford.

Q. '57, wasn't it?

A. '56, I think.

Q. All right. '56 or '57.

A. One of the used cars off the lot.

Q. You stated that you were taking Mr. Charles to the Beach, and I believe you told him that the particular car that you were driving was a nice car and it was a car he ought to have, didn't you?

A. I don't think so, having already sold him one before.

Q. Didn't you tell him at that time that you thought this would be a nice car instead of the '54 Plymouth he had bought; that he ought to get this car?

A. I don't think so. He had paid cash for the Plymouth on Saturday. I don't think I would have tried to turn around on Tuesday and sell him another car.

page 7 } Q. You don't mean to infer to the jury that you didn't talk to him about this '56 or '57 Ford?

A. I may have but I don't think I tried to sell it to him, just having picked up one of the cars off the lot, having just sold him one.

Q. I believe this collision occurred on the way back towards town from the Beach, is that correct?

A. That's correct, yes, sir.

Q. And it occurred on Route 58 or that road which is known as Virginia Beach Boulevard?

A. That is correct.

Q. Anyone else in the car with you?

A. Mr. Charles.

Q. Just the two of you?

A. Yes.

Q. Approximately what time of the day did this collision occur?

A. We had had lunch. I would say between 2:00 and 2:30; along in that time.

Q. In the afternoon?

A. Yes.

Q. What were the weather conditions?

A. Raining. Raining very hard.

Q. There has been some mention that this collision occurred at the intersection of a road known as East Lane, is that correct?

Norwood B. Richardson.

A. I am not familiar with the name of the road but it was an intersection with a stop light there.

page 8 } Q. Traffic light there? Red, green traffic light?

A. That's right.

Q. As you were approaching this intersection, how fast were you going, Mr. Richardson?

A. Due to the weather conditions and the speed limit along there, I would say between twenty and twenty-five.

Q. Was there a car ahead of you?

A. Mr. Graves's car was ahead of me.

Q. How far ahead of you was that car?

A. I would say two car lengths.

Q. Did the Graves's vehicle change its course of travel?

A. You mean did it turn?

Q. Yes; in any direction?

A. No, not before I struck him from the rear when he stopped for the light.

Q. Did you see him stop for the light?

A. It looked to me as though he was planning to go through the light because I was watching the light myself, and I took it that he was trying to go through, and by the time he got there, the light changed and he stopped quickly, and I stopped and slid into the back of his car.

Q. Of course, you had seen his car previous to that?

A. Oh, yes. I was trailing him.

Q. And I believe you told the investigating officer you were following him a little too close and failed to stop?

A. I don't recall telling him that, but the judge said that.

page 9 } Mr. Maurice Shapero: What did he say?

Mr. Wormington: He is getting into extraneous matter, into some other trial. I object to going into that.

Mr. Maurice Shapero: May it please the Court, I think it is very material in this case in order that we not confuse what apparently is our privilege to talk until we stop, and since I don't want to take unfair advantage of anyone and I know they don't of me, I suggest, if Your Honor please, we retire to the chambers a second and let us discuss it. It is material.

(In Judge's Chambers.)

Mr. Maurice Shapero: Your Honor, what the witness said, something about the other trial, he—

The Court: He said that was what the Judge said.

Norwood B. Richardson.

Mr. Maurice Shapero: May it please the Court, we are going to attempt to show that the man was convicted for reckless driving and that he pleaded guilty. If he had not pleaded guilty and had fought it, that wouldn't be admissible but having pleaded guilty, it is admissible in this proceeding.

The Court: The plea of guilty is admissible but not what the Judge said at the trial.

Mr. Wormington: Your Honor, I have no evidence of the plea but the plea of reckless driving. He was ultimately convicted of following too close but not of reckless driving. I submit, Your Honor, that we not go into that phase of it because I think that that is—

The Court: I am not going to let you ask him page 10 } for his answer again in this thing.

Mr. Stanley Bangel: I didn't know what he said.

Mr. Wormington: That is the reason I stopped it. I didn't want it emphasized in front of the jury.

(In Court Room).

Mr. Herbert Bangel:

Q. Mr. Richardson, as you approached near the intersection where this collision occurred, tell us, if you will, what movements were made by the vehicle ahead of you and exactly what happened.

A. Mr. Bangel, we were both driving very slowly due to the weather conditions. We approached the light, as I said before. I took it that Mr. Graves was going through the light and the light changed by the time he got there and stopped. He stopped and I automatically put on my brakes and slid into him due to the slick condition of the road.

Q. It had been raining for some time?

A. Oh, yes.

Q. It was a hard rain, I believe?

A. It was a hard rain and the windows were smogged.

Q. Your windows were smogged from inside?

A. Yes. I mean, we were keeping them clear; so therefore we were driving very carefully due to the weather conditions.

Q. Mr. Richardson, was there any signal of any type given by the vehicle ahead of you just prior to its entering the intersection or as it was entering the intersection?

Norwood B. Richardson.

A. I don't recall seeing it. I was watching the page 11 } car ahead. Don't recall seeing a signal.

Q. Answer these gentlemen.

Mr. Maurice Shapero: We want to examine him also as an adverse witness.

CROSS EXAMINATION.

Examined by Mr. Maurice Shapero:

Q. Mr. Richardson, did not you tell Officer Fulgham at the scene of the collision very shortly thereafter when he was making an investigation, did not you tell the officer that Graves, this Defendant, gave a mechanical signal for his right turn and that you ran into the rear of him, applied your brakes, and that he had given the signal and you were following him too close that it was all your fault? Did not you tell the officer that?

A. I don't recall whether I told him that or not.

Q. You don't deny it, do you, sir?

A. I don't recall it, either, sir.

Q. I will frame it a little different. I intend to put Officer Fulgham on as to what you testified to and he will state that what I have stated to you, well, if it is necessary to lay a foundation, I call that as a foundation. Your answer is you do not deny saying that?

A. I do not recall it, either.

Q. Do you recall ever talking to the officer?

A. Oh, yes.

Q. He was there?

A. Oh, yes.

page 12 } Q. How much did you have to drink?

A. How much?

Q. Yes.

A. I think we had had a drink earlier that morning.

Q. Earlier that morning?

A. Yes.

Q. Where did you have that drink?

A. Here in Portsmouth.

Q. How much?

A. A drink.

Q. Whereabouts in Portsmouth?

A. I believe maybe the gas station where we stopped to get gas.

Q. I see. Did you have any alcoholic beverages in the bottle in your car at the time of the accident?

A. I don't think so.

Q. Now, Mr. Richardson, you know whether you did or not. I ask you that. Did you or not?

A. Well, we had some earlier that morning. Whether it was in the car at the time of the accident, I don't know. I don't know whether we had thrown the bottle away. It was a portion of a bottle that we had had. Whether the bottle was actually in the car, I wouldn't say "Yes" or "No."

Q. That is the bottle you all drank out of?

A. Yes, sir; earlier that morning.

Mr. Maurice Shapero: May it please the Court, I would like to have the privilege of re-examining him at a later page 13 } time in the case after the evidence develops. Lay the foundation. At this stage I doubt whether the questions I would ask would be admissible but I want to reserve the privilege of recalling him, with Your Honor's permission.

The Court: All right, sir. Any objection?

Mr. Wormington: No objection.

CROSS EXAMINATION.

Examined by Mr. Wormington:

Q. Mr. Richardson, when you all decided to go down to Virginia Beach, I believe you mentioned on direct examination that Mr. Charles had some reason for going down there. Did you have any reason to go down there also? Did you want to go to the Beach?

Mr. Stanley Bangel: Let him answer the question.

Mr. Wormington:

Q. Just answer the question.

The Court: Read it back, please.

The Reporter: "Q. Mr. Richardson, when you all decided to go down to Virginia Beach, I believe you mentioned on direct examination that Mr. Charles had some reason for going down there. Did you have any reason to go down there also? Did you want to go to the Beach?"

A. Yes, I had reason to go to the Beach, too.

Norwood B. Richardson.

Q. I don't recall whether this was brought up. After you all got to the Beach, where did you first go, sir?

A. We turned to the right there.

page 14 } Q. I don't mean the exact route. What was your first stop?

A. Some friend of Mr. Charles that he was trying to locate.

Q. After that, where did you go?

A. After that we stopped at Emrhae Motors to see a friend of mine.

Q. And that was the purpose for your wanting to go?

A. Yes. I was associated with him in the radio business and he was working there at the time.

Q. After that, where did you go?

A. Started back to Norfolk.

Q. On direct examination, I believe you mentioned having lunch?

A. Yes, sir.

Q. Where did you have lunch?

A. I don't recall. It is one of the places at the Beach and during the wintertime, it is not too much there. One of those little hot dog stands. We stopped and got something to eat.

Q. Mr. Shapero was asking you about this drinking that was done. First of all, what type of beverage was it?

A. Vodka.

Q. Where did the bottle come from?

A. Mr. Charles had it.

Q. Mr. Charles's bottle?

A. It was his bottle, yes.

Q. Did he do any drinking?

A. Yes.

page 15 } Q. Did he do any more or less or about the same as you?

A. I would say an equal amount.

Q. You all did your drinking together?

A. Yes.

Q. At the time this accident happened, what was the condition of the rain fall? Would you describe it as being a light, medium, or heavy rain fall?

A. It was raining pretty *yard*. I would say it was heavy at the time it happened.

Q. I believe you mentioned on direct examination that the windows were steamed up or tended to steam up?

Norwood B. Richardson.

A. It was raining so hard, we had to keep the windows up which automatically made it steam up, yes.

Q. What action did you take to alleviate that steaming up or did Mr. Charles take any?

A. We were both wiping the window shields to see the road.

Q. He on his side and you on your's?

A. Yes. We were keeping it clear.

Q. At the time this accident happened or perhaps a slight second before, what was Mr. Charles doing?

A. You mean his position in the car?

Q. Yes.

A. He was leaning over to pick up something off the floor and at the moment of impact was when he hit his head on the dash in front of the car.

page 16 } Q. He had leaned down to pick up something?

A. Yes.

Q. As I understood, on direct examination, you said you had been following along behind the car driven by Graves and that you were approximately two car lengths behind him?

A. Yes, sir.

Q. Before anything at all happened, had you both been going along about the same speed or had your speed varied to any extent, your's or his?

A. I think we were both driving at approximately the same speed, which was slow, due to the weather conditions and the speed limit there at that particular location.

Q. You mentioned also on direct examination that it was your thought or belief that he was going on through this intersection, through the traffic light, but did not?

A. Yes.

Q. And that he stopped or started to stop?

A. That's right.

Q. In slowing down or stopping, in movement did he—

Mr. Maurice Shapero: One minute. I don't want to interfere with the procedure but I think he is leading him continually. Object to the leading questions.

Mr. Wormington: Which questions specifically? Or, do you want me to finish the question?

page 17 } Mr. Maurice Shapero: Finish and I will object to it.

Mr. Wormington: Did you wish me to rephrase

Norwood B. Richardson.

the question, Your Honor? I hadn't finished the question.
The Court: You said enough to be leading.

Mr. Wormington:

Q. Would you describe the manner of his stopping as to rapidity or slowness?

Mr. Maurice Shapero: He is leading.

The Court: You are technically right, but I will let him answer it.

Mr. Wormington:

Q. Did you understand my question?

A. May I have it repeated?

Mr. Wormington: Please read the question.

The Reporter: "Q. Would you describe the manner of his stopping as to rapidity or slowness?"

A. We were both traveling about the same speed and he appeared to be going through the light and as he got to the intersection or just as the intersection, the light changed and he stopped.

Mr. Wormington:

Q. As I understand it, well, I want to know what type of stop he made. Would you describe it?

A. Yes. I would say it was quick. The light changed and he stopped.

Q. When he did that, what did you do, sir?

A. Automatically put on brakes.

Q. You put them on medium, hard, or how did you put them on?

A. When he stopped in front of me, I am sure
page 18 } I put them on pretty hard.

Q. What did your car do after you jammed on the brakes like that?

A. Skidded into the wet cement, the wet street.

Q. At the time he stopped there at the light and you applied your brakes, at that moment, were you then about the same distance behind him that you had been or had that interval changed any?

Norwood B. Richardson.

Mr. Maurice Shapero: Object to the question as leading.

Mr. Wormington: Strike the question.

Mr. Maurice Shapero: I am sure the Court will agree with me as to these leading questions and I object to them. I objected and the Court sustained me. He has then put words in the mouth of his witness. He should frame his questions so that they are not leading or the effect of my objection is of no consequence whatsoever.

The Court: I think your point is well taken, Mr. Shapero.

Mr. Wormington: All right, Your Honor.

Q. At the time you applied your brakes, what was the approximate interval between your car and that of the one ahead of you? Don't answer it.

Mr. Wormington: Is that question all right, Your Honor?

The Court: If he has not objection to it.

Mr. Wormington:

Q. All right, sir.

A. You mean the distance between the two cars, approximately two car lengths; about that.

Q. It is my understanding in answer to Mr. page 19 } Shapero's question that you stated that you had spoken to the police officer after the accident, is that correct?

A. Yes.

Q. Will you describe what you said, as best you can recall, to him? Describe what you said in answer to his questions as to how the accident happened, as best you can recall.

A. I am sure I told him like I told you here this morning as to what happened; that I was trailing along behind Mr. Graves's car a few car lengths behind and that he started through the light and stopped and I automatically stopped and slid into him. I am sure that is what I told the officer who investigated it.

Q. Did you notice the condition of the windows on Graves's car? Can you describe in what position they were, if you noticed them?

A. I don't recall noticing them. With the weather conditions being like it was, I am sure they were up, his windows. I don't recall seeing the windows.

Q. That's all.

Norwood B. Richardson.

CROSS EXAMINATION (resumed)

Examined by Mr. Maurice Shapero:

Q. Mr. Richardson, what was the color of the signal light as Graves approached it? As Graves approached the intersection, what was the color of the signal light?

A. You mean the highway light?

Q. Yes. You were following Graves?

A. I was following and the light was green. We page 20 } were going through it.

Q. Then what did it do?

A. It changed and we stopped.

Q. It changed to what?

A. It changed to "Stop."

Q. Mr. Richardson, don't you know it goes from green to amber to red?

A. That's right.

Q. How could it change to "Stop"?

A. Well, it changed to amber then, and we all go through amber lights but he stopped and before he got there, it changed to red.

Q. Before he what?

A. Before he went to it, it changed to red and he didn't go through it.

Q. How much time elapsed for all this to take place?

A. I don't know the time of those signals. It was green when we both approached it.

Q. As a matter of fact, your condition of sobriety was such that you don't remember much about any of it?

A. No, sir. No, sir, that is not so.

Q. How is it that you recall the details of what transpired and yet you cannot remember what you told the police officer, using your words, "I don't recall." That is the language that you used.

A. Mr. Shapero, that was the first accident I have ever had in my years of driving and I am sure that being the first case, I was rather upset.

page 21 } Q. But you do recall—

Mr. Wormington: Let him explain. You asked for the answer. Let him give it.

A. I am sure I was rather upset and nervous about the fact that Mr. Charles had gotten hurt.

Arthur Graves.

Mr. Shapero:

Q. I see. Have you done with your answer?

A. Yes, sir.

Q. But you weren't so nervous that you recall the details of the lights and so forth which you have just explained here?

A. That was before the accident. Afterwards, I was; very much so.

Q. That's all now. I want to call you back later.

ARTHUR GRAVES,

one of the Defendants, having been first duly sworn, was called as adverse witness by Mr. Herbert Bangel, co-counsel for the Plaintiff, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Herbert Bangel:

Q. State your name, please.

A. Arthur B. Graves.

Q. Where do you live?

A. Oceana, Virginia.

Q. On the 10th day of December, 1957, were you operating your automobile when it was involved in a collision with an automobile that was operated by the Defendant
page 22 } here, Richardson, the gentleman that just left the stand?

A. Yes, I was. At least, my station wagon was.

Q. It was your motor vehicle?

A. That's right.

Q. In what direction were you going?

A. Traveling west on Route 58.

Q. If you will, please give us the benefit of what occurred as you were proceeding along west on Route 58. Tell his Honor and the ladies and gentlemen of the jury what happened.

A. I was approaching East Lane, driving along Route 58.

Q. By East Lane, is that the name of the intersecting street?

A. Yes, sir.

Q. Is it called East Lane Street or is it just East Lane?

A. It is called East Lane. I was to make a right turn, going north on East Lane and the light was green, of course, and so I *showed* down to make this turn and just as I turned my wheel, this car rammed me in back. It knocked me into

Arthur Graves.

East Lane just about a length of a car in the lane. What happened, I had my feet already applied on the brake. As I began to make my turn, when this car hit me, it threw my pressure right over on the brakes and it just stopped with a start. It knocked me about the length of a car into East Lane.

Q. Was it a violent blow? Hit you real hard in the rear?

A. Yes. It hit me real hard. It had a tendency to pick the back of the car up. I thought somebody, something, had happened in the front. I seen myself sitting up in the
page 23 } back and down in the front. I thought maybe
somebody knocked my front end down. I found
out this car had run into my back end had a tendency to pick
me up.

Q. You didn't see the car?

A. No, I didn't see the car. Didn't know what had happened.

Q. All right.

CROSS EXAMINATION.

Examined by Mr. Wormington:

Q. The weather at that time was extremely bad?

A. Yes, it was.

Q. Mr. Richardson described it reasonably correct, has he not, in that it was raining very hard?

A. Yes.

Q. And, of course, the roads were flooded and wet and slippery, were they not?

A. That's right.

Q. You did not see or know of Mr. Richardson's car being behind you until the accident, did you?

A. That's right. Didn't know anyone was behind me.

Q. You knew that you were going to make this turn there, didn't you?

A. That's right.

Q. Was the light green at all times during this thing or did it turn to caution before the accident?

A. No. It was green. When I went to make my turn, it was green. I had got plumb under it and went to make my turn.

The front end was under it.

page 24 } Q. Still green then?

A. Green when I went to make my turn.

Q. Where were you in East Lane when you started to slow down to make the turn?

Arthur Graves.

A. Where was I?

Q. Yes. You knew you were going to turn ahead of time?

A. I was about 150 feet of this red light when I knew I was going to make the turn. I put on my blinker about 150 feet from the green light.

Q. Which was it? You said it was red a few moments ago and now you say it is green.

A. Green light.

Q. And you were about 150 feet from the light when you turned on your blinker signals?

A. That's right.

Q. It was raining so hard you could hardly see, could you?

A. That's right.

Q. Did you look behind you in your rear view mirror or turn around and look in any way to see if any cars were behind you?

A. No, I didn't look. It was raining and everything was damp and foggy. Nothing clear but the front, the windshield.

Q. You didn't know what was going on behind you?

A. No. It was raining. All I know is it was just pouring down rain.

Q. You didn't know any cars were anywhere but up ahead of you; only place you could see?

A. That's right. Right in front of me.

page 25 } Q. You say you started slowing down for the
burn about 150 feet from the light?

A. Well, I put on my signal light. I was already approximately between twenty and twenty-five feet that I had driven.

Q. You weren't going that speed when you tried to make the turn?

A. No. I was going about seven miles when I began to make the turn; from five to seven miles, approximately.

Q. And you had been before that time going about twenty or twenty-five?

A. About twenty or twenty-five. I put on my signal lights and I began to slow down and time I began to make this turn, I had come down to between five and seven.

Q. You don't know whether Mr. Richardson at the time you started slowing down or started making your turn was two feet behind you; two miles, or where he was?

A. No, I didn't know. All I know is something struck me in the back. That's all.

Q. All right.

Arthur Graves.

CROSS EXAMINATION.

Admitted to books 111

Examined by Mr. Shapero: (Mr. Maurice Shapero)

Q. Graves, immediately after the accident or within, we will say, ten minutes, who, if anyone, was there? Name the parties.

A. My son, Nathaniel and his wife. They drove up.

Q. Who else, if anyone?

A. No other ones appeared there. Nobody but page 26 } those two.

Q. When did the police officer come?

A. After my son, Nathaniel, arrived. He went and called the police and he came shortly after the call.

Q. Your son called the police?

A. That's right.

Q. And the police came?

A. That's right.

Q. At that time when the police were there, you were there and where was Mr. Richardson?

A. He was out walking around with us.

Q. Did you hear any conversation between Mr. Richardson and the police officer?

A. Yes. Mr. Richardson told the police officer it was all his fault; that he was trailing behind me and he was trailing a little too close and when I went to make my turn, he noticed that my blinger light was on but he was too close, and he put on his brakes and slid into me.

Q. Who was there when Mr. Richardson made that statement to the police officer?

A. My son, Nathaniel, heard him make that statement also. He didn't make it only one time but continued to say it. Made it several times. Said it was all his fault. All his fault, that he was just driving a little too close and the condition of the weather, well, when I put on my signal lights, he seen it but he was just too close and he slammed on his brakes and bumped right into it, into me. He acknowledged that it was all his fault.

page 27 } Q. What did the police officer do, if anything?

Mr. Worthington: If Your Honor please, I think we are getting into matters that are extraneous. Don't have any objection to his asking what conversation took place at the scene or what physical action the officer took. I think that is proper. Beyond that, I think we are going too far afield to ask a *carte blanche* question.

Officer Shepherd L. Fulgham.

The Court: I think your objection is well taken. If you want to take it up out of the presence of the jury—

Mr. Maurice Shapero: It is going to raise the same thing I thought might develop.

(In Judge's Chambers).

Mr. Maurice Shapero: Your Honor, my purpose in asking that question is to develop that the police officer arrested and took Richardson in his car with him down to Princess Anne Court. A warrant was sworn out. I am going to further show that at the hearing on a reckless driving charge, that was the nature of the warrant, that Richardson in the presence of Graves, who was at the hearing with Officer Fulgham, Richardson pleaded guilty to reckless driving on this charge.

The Court: You can show he pleaded guilty to reckless driving but you can't show his being arrested and taken to Princess Anne Court.

(In Court Room).

* * * * *

page 55 }

OFFICER SHEPHERD L. FULGHAM,
a witness called by co-counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Stanley Bangel:

Q. State your name, please, sir.

A. Shepherd L. Fulgham.

Q. What is your occupation?

A. Princess Anne Police Department patrolman.

Q. You have been an officer there for sometime, have you not?

A. Yes, sir.

Q. Were you called upon to examine an accident which occurred on the 10th day of December 1957 on Route 58, commonly known as Virginia Beach Boulevard?

A. Yes, sir.

Officer Shepherd L. Fulgham.

Q. Tell, if you will, what were the weather conditions at that time.

A. It had rained just enough to make the road slick.

Q. What time did you arrive at the accident?

A. Around 2:30.

Q. What were the weather conditions at that page 56 } time?

A. The road was wet.

Q. Was it a downpour?

A. Wasn't raining. It was wet.

Q. What did you find when you arrived at the scene?

A. You mean the positions of the cars?

Q. Yes.

A. Mr. Graves's car was on 615, pulled off on the side. Mr. Richardson's car was headed west on 58, just opposite 615.

Q. By 615, I presume you are referring to an intersection of 58? Is that sometimes known as East Lane?

A. I have heard that mentioned, yes.

Q. Any traffic controls at that intersection?

A. Yes, sir. Traffic light; red, caution, green.

Q. That is the order in which it works, is it not, Officer?

A. Yes, sir.

Q. Red to caution to green?

A. It comes green, caution, red.

Q. I am sorry. I confused you. Green, caution, and red. With reference to that intersection, where was the automobile operated by Mr. Richardson?

A. Past the intersection of 615 on 58.

Q. In which direction past?

A. It would be west.

Q. Away from Virginia Beach?

A. That's right. Virginia Beach is east. Norfolk } folk, west. The Boulevard runs east and west.

Q. Where was the automobile operated by Graves?

A. It was on East Lane on the east side headed north.

Q. Where was the damage to the vehicle, sir?

A. On Graves's car?

Q. Yes.

A. On Graves's car, it was the bumper, rear lights. I have my record here. May I get that?

Q. Yes, you certainly may.

A. It has been so long ago. On Mr. Graves's car, trunk lid, rear bumper.

Officer Shepherd L. Fulgham.

Q. How about the automobile operated by Mr. Richardson?

A. Right front fender, bumper and grill.

Q. Were any statements made to you by either driver?

A. Yes, sir.

Q. Tell His Honor and the lady and gentlemen of the jury what they said.

A. When I arrived at the scene of the accident, Mr. Richardson told me he was following too close on Mr. Graves. He saw the signal of Mr. Graves's car, giving directions for a right turn and they both had the green light and Mr. Richardson said he was just following too close. When he put on his brakes he slid right into the back end of Graves's car.

Q. Go ahead.

A. He also stated that he would take full responsibility for the accident; it was his fault.

page 58 }

CROSS EXAMINATION.

Examined by Mr. Wormington:

Q. Mr. Fulgham, both Mr. Richardson and Mr. Charles had had something to drink, hadn't they?

A. I asked Mr. Richardson, "Have you been drinking?" He said, "Yes, we had a drink."

Q. He said, "We had a drink." Meaning who? Mr. Charles?

A. That's right.

Q. Did Mr. Charles deny it?

A. I saw Mr. Charles when he was in the hospital and the doctors were treating him. I was close enough to him to smell it. He had an odor of alcohol.

Q. There was an odor of alcohol on Mr. Charles?

A. Yes. I found about this much in a bottle in his car, in Mr. Richardson's car. (Witness measures about an inch with fingers.)

Q. When Mr. Richardson was explaining to you how the accident happened, he indicated he had been following too close and he told you, did he not, that the road was slick and that was the cause of him sliding into the rear of the car when he tried to put on brakes?

A. That's true.

Q. That's all.

Officer Shepherd L. Fulgham.

CROSS EXAMINATION.

Examined by Mr. Maurice Shapero:

Q. Did you attend a criminal hearing involving a reckless driving charge that you placed against Mr. Richardson in I don't know what court.

page 59 } A. Princess Anne. Yes, sir.

Q. Did that involve this particular accident?

A. Yes, sir.

Q. Was or was not Mr. Richardson convicted of reckless driving?

A. Yes, sir.

Mr. Wormington: Objection.

The Court: Sustained.

Mr. Wormington: I move for a mistrial. No evidence whatsoever any connection up to this moment of the necessity for going into the criminal hearing and the civil end of this case. Move for a mistrial.

Mr. Maurice Shapero: May it please the Court, I am going to show—

The Court: I am ruling on your question, Mr. Shapero. First I am going to rule on the motion for a mistrial. I am going to overrule it. I have sustained the objection to your question. I think it was highly improper. I think you knew better and I am going to ask the jury to disregard anything in connection with it.

Mr. Shapero: I am reluctant to ask the question because I feel that Your Honor—

The Court: If there is any doubt about a question you want to ask, we will take it up out of the presence of the jury.

Mr. Shapero: I trust you will believe me when I tell you that it was not my desire to ask an improper question because you know from our conversations back there what I intended to develop by it.

The Court: And I told you what questions you could ask, too.

Mr. Shapero: Would Your Honor step back in page 60 } chambers? I won't ask an improper question.

(Mr. Shapero, Mr. Wormington and the Court retire to Chambers.)

(Back in court room.)

John E. Charles.

Mr. Wormington: May I let the record show, Your Honor, that I note an exception to your overruling my motion for a mistrial.

Mr. M. Shapero:

Q. Officer, in that proceeding that I discussed with you, do you know what plea, if any, Mr. Richardson entered?

A. Yes, sir; guilty.

Q. That's all.

CROSS EXAMINATION (resumed).

Examined by Mr. Wormington:

Q. He pleaded guilty to following too closely?

A. Yes, sir. I gave him a summons for reckless driving, following too close.

Q. And he was convicted not of reckless driving but following too closely, is that correct?

A. He was convicted on a reckless driving ticket, following too closely.

Mr Stanley Bangel: I don't think Mr. Wormington ought to keep going over it.

The Court: The officer testified the charge was placed against him and he pleaded guilty to the charge that he had placed against him.

(1:10 P. M. Recess for lunch. Court admonishes page 61 } jury not to discuss trial with anyone during lunch recess.)

(Reconvened at 2:10 P. M.)

MR. JOHN E. CHARLES,
Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Herbert Bangel:

Q. State your name, please.

A. John E. Charles.

Q. Where do you live, Mr. Charles?

A. On Huron; Norport Homes, No. 8.

John E. Charles.

Q. Here in Portsmouth?

A. Yes.

Q. How old are you, sir?

A. 52 years old.

Q. Did you have occasion on Saturday, December 7, 1957 to have any business dealings with Mr. Richardson?

A. Yes, sir, I did.

Q. What were they?

A. I bought a Plymouth Savoy, 1954 model.

Q. You purchased an automobile from Mr. Richardson?

A. Yes, sir.

Q. Did you take the automobile with you when you left?

A. No, sir, I did not.

Q. Why not, sir?

page 62 } A. They had to paint it.

Q. What did Mr. Richardson tell you with reference to picking the car up?

A. Told me I could get it Monday night.

Q. Did you go back Monday?

A. I went back there twice Monday. Went back there during the day and looked at the automobile and back Monday afternoon about 5:00 o'clock.

Q. Did you get your car?

A. No, sir, I did not; wasn't ready.

Q. Did you have any discussion with Mr. Richardson about it?

A. He told me I could get it the next morning.

Q. Did you go back the next morning?

A. The next morning I was there.

Q. That would be Tuesday, December 10, 1957?

A. That's right.

Q. Did you get your car then, sir?

A. No, sir, wasn't finished.

Q. Did you have any conversation with Mr. Richardson?

A. Yes, sir. I said, "You know, I need the automobile because I want to go to Virginia Beach to see about a job." He said, "I know it and I am sorry the car is not ready and you bought one from me." He said, "I will take you there."

Q. What type of car did he use to take you down there?

A. It was a Ford. I don't know if it was a 1957 or 1956.

I understood it was a '57.

page 63 } Q. How did you understand that?

A. On the way down there, we were talking about the automobile and he said, "This is a nice car, too." He

John E. Charles.

said, "And you got a nice one." I said, "It rides good." He said, "Why don't you buy it?"

Q. What car was he talking about?

A. About the Ford. I said, "When I go back, I will see what kind of arrangements I can make with mine and that."

Q. Did you go to Virginia Beach?

A. Yes, sir.

Q. Did the accident occur on the way down or the way back?

A. On the way back.

Q. Why did you go to the Beach?

A. To see if I couldn't get a job.

Q. What time did this accident occur, Mr. Charles?

A. Between 2:00 and 2:30, I think. I didn't have my watch with me. I don't know. Approximately.

Q. In what direction were you heading at the time?

A. When we had the accident we were heading back this way.

Q. Coming back from the Beach?

A. Yes, sir.

Q. What were the weather conditions?

A. It was raining hard. I mean it was raining hard, too.

Q. Just prior to reaching the scene of this collision, what, if anything did you do or what happened?

A. I had a cigarette in my mouth and I got the page 64 } matches out and dropped them down on the floor
and I bent down to pick them up and he said, "Look out" and instead of looking out, I raised my head up and what it hit, I don't know.

Q. Was it a light impact or a severe impact?

A. I couldn't tell you because it stunned me.

Q. What happened to you after the impact occurred?

A. This colored lady come over there where I was and I got out of the automobile and the man she said was her husband, well, I said, "Will—"

Q. Where were you taken, Mr. Charles?

A. Virginia Beach Hospital.

Q. You were taken there?

A. Yes, sir.

Q. What, if anything did they do? What was your condition?

A. My head was laying wide open and I was as bloody as I could be and they sewed it up; tied it: put the bandages all around my head and told me to go home.

John E. Charles.

Q. Did you later contact your family physician, Dr. Hargrove?

A. I did, and this doctor down at Virginia Beach told me to wait until the following Monday, and I got so I couldn't wait that long.

Q. Why not?

A. Got to hurting me so bad the second day after the 10th; I think it was the 10th.

Q. What was your condition?

A. I had such a headache that my head was about to bust open.

Q. What did you do?

page 65 } A. I went across the street about 5:00 o'clock in the morning and I got the lady across the street to call Dr. Hargrove for me and I talked with him and told him what happened. I said,—

Q. You can't testify as to the conversation you had with him; but as a result of talking with him, where did you go?

A. Hospital; Maryview.

Q. Did you just go there for a visit or were you taken in as a patient?

A. As a patient.

Q. What was the condition, your condition, at that time?

A. Still had the headaches.

Q. What was the condition of your eyes?

A. I couldn't see out of my right one. It was swollen so bad.

Q. What did they do for you when you were admitted to the hospital?

A. They gave me some kind of pills.

Q. Please talk a little louder, sir. The jury wants to hear you testify. What did they do for you while you were there at the hospital?

A. They kept on putting something on my head and compresses.

Q. Can you talk a little louder?

A. They kept putting compresses on my head and rebandaging it every other day; about every other day; sometimes twice a day.

Q. What was wrong with your head?

A. It was busted open. It was leaking. Blood was running out of it.

Q. What was that?

John E. Charles.

page 66 } A. Blood was running all down.
 } Q. How long did you remain in the hospital?
 } A. Around ten or twelve days.

Q. After you were discharged from the hospital, state whether or not you had to be readmitted at a later time.

A. Yes, sir.

Q. How long did you remain the second time?

A. About the same time; about ten days.

Q. What did they do for you the second time at the hospital?

A. That is when Dr. Campbell treated me and I went in the operating room and he opened up my head again and cleaned it all up.

Q. He operated on you, didn't he?

A. Yes, sir.

Q. Were these injuries painful?

A. I mean they were.

Q. Could you describe it to us? What was bothering you? What was hurting you, if anything?

A. My head was bothering me and my neck; I could hardly turn my neck. It hurt about thirty days before I got rid of that.

Q. What was that?

A. My neck.

Q. What color was your neck immediately after the accident?

A. About the color of that gentleman's coat over there.

Q. You are pointing to a blue coat?

A. Yes, sir.

page 67 } Q. Over what area of your body did this blue-
 } ness appear?

A. From my head all the way down along here.

Q. You are indicating your mid-chest line, shall we say?

Mr. William Shapero: Upper abdomen.

Mr. Herbert Bangel:

Q. How long did that take before it cleared up?

A. About thirty days.

Q. What about the condition of your head?

A. That got better after Dr. Hargrove operated on it.

Q. Dr. Hargrove or Dr. Campbell?

A. I'm sorry; Dr. Campbell.

John E. Charles.

Q. What is your condition today, Mr. Charles, with reference to your injured area?

A. I keep a headache all the time and I stay nervous all the time.

Q. What do you do for these headaches?

A. Sometimes I take a Bufferin or something like that but it don't do no good.

Q. Can you describe the type headache you have or the feeling?

A. It starts right here. (Witness touches forehead.) It feels like it is dead here and back in here and this side of my head, you hit on it and it feels like you are hitting on a base drum and this side you hit on it and it feels solid.

Q. This numbness you spoke of, do you still have that?

A. Yes, sir.

Q. Would you indicate where that numbness is?

A. It starts from back here and goes all the way
page 68 } down along here.

Q. You are pointing to your right eyebrow and running from the right eyebrow where?

A. Right on back here.

Q. All right.

Mr. Herbert Bangel: Can we say the entire right side of the head, gentlemen, for the purposes of the record?

Mr. Maurice Shapiro: Yes.

Mr. Wormington: Yes.

Mr. Herbert Bangel:

Q. What, if anything, has the condition of your wound been, the area where you were hurt with reference to draining?

A. I got a little place up there now somewhere and every morning when I wake up, there is a little tear of blood. All I have to do is hit it and knock it right off.

Q. That condition still exists?

A. Yes, sir.

Q. While you were in Maryview Hospital during one of your confinements there, state whether or not an eye doctor came to check your eyes.

A. Yes, sir, he did.

Q. Was that Dr. Joseph McPhail?

A. Yes, sir.

Q. Mr. Charles, I hand you a receipt dated December 10,

John E. Charles.

1957 from the Virginia Beach Hospital in the amount of \$20.00. What is that, sir? Was that for the emergency treatment you received there?

page 69 } A. Yes, sir.

Mr. Herbert Bangel: If Your Honor please, we offer this in evidence.

The Court: "Plaintiff's Exhibit A."

Mr. Herbert Bangel:

Q. Mr. Charles, I hand you a statement from Dr. Joseph C. McPhail marked "Plaintiff's Exhibit B," addressed to you for eye examination, in the sum of \$20.00. *What* that a statement you received from Dr. McPhail?

A. Yes. That's the one I got from the eye doctor.

Mr. Herbert Bangel: Your Honor, we offer this in evidence.

The Court: "Plaintiff's Exhibit B."

Mr. Herbert Bangel:

Q. I hand you four yellow pages, Mr. Charles, indicating a statement from Maryview Hospital, covering hospitalization period December 12th through December 21st, 1957 and January 4th, 1958 through January 15th, 1958 and also an x-ray bill, the total amount being \$391.65, and ask you if this represents the Maryview Hospital bill?

A. That's right.

Mr. Herbert Bangel: We offer this, if Your Honor please, as "Plaintiff's Exhibit C."

The Court: Received. So marked.

Mr. Herbert Bangel:

Q. Mr. Charles, were you employed at the time of this accident?

A. No, sir; not right then.

page 70 } Q. Since the accident occurred, have you been able to return to work?

Mr. Wormington: Object. No evidence he was working.

The Court: Mr. Bangel—

Mr. Wormington: He just finished saying he was not employed.

John E. Charles.

Mr. Herbert Bangel: I will rephrase that.

Q. Mr. Charles, since the accident, have you been able to work?

A. A day and a half; a day and six hours.

Q. Were you able to continue working?

A. No, sir. I couldn't stay there.

Q. Why?

A. I got so nervous because the saws were running and it made me so nervous. I was working for a boat shop on Perry Street.

Q. How much were you earning there?

A. \$2.00 an hour.

Q. When was that?

A. I couldn't tell you the exact date to save my life right now.

Q. Do you have any training in boat work?

A. Yes, sir; eighteen years. Not eighteen years because I have been working on boats practically all my life. That was what I did before I left the job I was on.

Q. Are you able to work now?

A. I don't know. I keep the headache all the time and I get nervous. The least little thing makes me so nervous I can hardly walk.

Q. Answer these gentlemen.

page 71 } CROSS EXAMINATION.

Examined by Mr. Wormington:

Q. Mr. Charles, you had been working for years at the Navy Yard?

A. Yes, sir.

Q. And you voluntarily quit your job there, didn't you?

A. Yes, sir, and went into business for myself.

Q. And you paid cash for this automobile?

A. Yes, sir.

Q. How much was that?

A. \$600.00.

Q. Mr. Charles, when it was determined that you couldn't get the car the day of the accident, you told Mr. Richardson about wanting to go down to Virginia Beach, didn't you?

A. I told him I had to go down there.

Q. And he told you that he would be glad to take you and as a matter of fact, that he had some business down there that he wanted to tend to?

John E. Charles.

A. He told me the car wasn't ready and he was sorry. He said he had some business down there and being as my car wasn't ready and he was sorry about it that he would take me down there.

Q. As a result of that, you went down there, the two of you?

A. That's right.

Q. And you tended to your business and he tended to his business?

A. That's right.

Q. And you all had lunch and you were on the page 72 } way back when the accident occurred, isn't that right?

A. Yes, sir.

Q. And you had had a bottle of vodka with you that morning, didn't you?

A. No, sir.

Q. Have anything to drink with you?

A. I had one drink.

Q. Of what?

A. I don't know. We stopped at the gas station and Mr. Richardson handed me the bottle. It was white. I don't know whether it was vodka or what?

Q. Where did the bottle come from?

A. I don't know. He is the one that handed me the bottle.

Q. That's all you had had to drink?

A. Yes, sir.

Q. And that is all he had?

A. As far as I know.

Q. As far as you *know* each of you had that one drink there?

A. Yes, sir. At the gas station we had that one drink.

Q. I believe that's all.

CROSS EXAMINATION.

Mr. Shapero: We have no questions.

Mr. Herbert Bangel: We rest, if Your Honor please.

page 73 } (In Judge's Chambers).

Mr. Wormington: Your Honor, the Defendant Richardson moves to strike the evidence as to him on the ground that the testimony as presented by the Plaintiff shows a guest-passenger relationship, which, in fact, was alleged

by the Plaintiff in his pleading. This was a trip to Virginia Beach for apparently mutual benefit. Whether it was a matter of courtesy extended to this man as a result of his being a customer or not is immaterial as far as the guest-passenger relationship is concerned and as such, gross negligence would apply as the test and the evidence presented by the Plaintiff has shown no act of negligence on the part of the Defendant Richardson whatsoever with the exception of the fact that he followed too closely behind the car of the other Defendant; Graves; and when that car stopped or slowed down, that he ran into the rear of it. There is no evidence of excessive speed. No evidence of lack of look out, but there is evidence that the Plaintiff and Richardson had had something to drink.

There is no evidence that that in any way affected Richardson's driving. The Plaintiff has not so alleged in his motion, in his Bill of Particulars. Certainly falls far short of showing an utter disregard of prudence amounting to complete neglect of the safety of another and I submit the evidence as to the Defendant Richardson should be struck.

The Court: Where is the gross negligence, Mr. Bangel?

Mr. Herbert Bangel: If Your Honor please, there is ample gross negligence there and if the Court wants it, I have plenty of authorities I can bring in now to show the Court page 74 } under the facts of this case that it is not necessary that there be gross negligence. That is No. 1. Now 2, that the evidence is clear that there is a jury question that there is gross negligence as a matter of law, and I can bring in the authorities, as I said, right now, if the Court likes.

The Court: Your notice of motion was based on gross negligence.

Mr. Herbert Bangel: I alleged as a result of gross negligence of the Defendant Richardson. I can allege a greater degree of negligence and if I am not required to prove it, I don't have to prove it.

Mr. Wormington: My point, insofar as your pleading is concerned. He alleged, Your Honor, that this man was a passenger in the car with the plaintiff.

Mr. Herbert Bangel: The authorities state that the distinction is between a passenger and a guest. Every treatise—

The Court: I agree with you. I think it is a jury question. Overrule your motion at this time.

Mr. Wormington: Exception.

Mr. Maurice Shapero: The Defendant Graves moves to strike the evidence of the Plaintiff on the ground there isn't a cintilla of evidence here on the part of Graves whatsoever.

Arthur B. Graves.

The Court: I am going to overrule the motion temporarily. See what the jury does.

Mr. Maurice Shapero: Note an exception.

page 75 }

ARTHUR B. GRAVES,
one of the Defendants, having been previously sworn, was recalled to witness stand as adverse witness by Mr. Wormington, Counsel for Defendant Richardson.

DIRECT EXAMINATION.

Examined by Mr. Wormington:

Q. I believe you stated, Graves, you lived a few blocks from where the accident happened?

A. Yes, sir.

Q. And I take it you are familiar with the scene? You are familiar with the road where the accident happened?

A. Yes, sir.

Q. And the speed limit there is 45 miles an hour, is it not?

A. I think it is about 35. I am not sure.

Q. You don't know which it is? Either 35 or 45?

A. Yes, sir.

Q. You are sure that it is either 35 or 45?

A. Yes, sir.

Mr. Wormington: We rest.

.

page 79 }

.

Mr. Maurice Shapero: That is our case, may it please the Court.

Mr. Herbert Bangel: We have no rebuttal, Your Honor.

Mr. Wormington: We rest, Your Honor.

(In Judge's Chambers).

Mr. William Shapero: Your Honor, may we renew our motion to strike the evidence of the Plaintiff on behalf of Defendant Graves?

Mr. Wormington: And we also do so, sir, for Defendant Richardson for the reasons heretofore stated.

The Court: Both overruled.

Mr. Wormington: Exception.

Mr. William Shapero: Exception, Your Honor.
page 80 } We would like to note our exception to the Court's ruling on behalf of the Defendant Graves and adopt as our reasons therefor our reasons stated during the argument at the conclusion of the Plaintiff's evidence, with the Court's permission.

(Off the record discussion).

The Court: I am going to exclude for the purpose of these instructions the idea of this man being a guest. As I rule, his status was a status of a passenger as distinguished from a guest or guest-passenger.

(Off the record discussion).

Mr. William Shapero: We would like to object and except to Instruction No. I on the ground there is no evidence to sustain it insofar as the Defendant Graves is concerned. Also there is a blanket statement concerning Graves which makes no definition of negligence or makes any reference to any specific items. Doesn't give the jury any information. The jury can go wild on this instruction.

Mr. Wormington: Under the cintilla argument, it's not a proper instruction; cintilla doctrine.

Mr. Maurice Shapero: No evidence to sustain this instruction and it is contrary to the evidence. No basis for it. Misleading. Permits the jury to bring in a verdict against Graves without any evidence to sustain it.

The Court: I am going to give the instruction because I think it is proper in differentiating the verdicts that the jury can render. The definition of negligence can be taken care of in other instructions.

Mr. Wormington: We object to it, Your Honor. We object on two grounds. One is the cintilla doctrine which we have mentioned and the other is we think that gross negligence is the criterion. You ruled on that. I wanted to make known my objection. Note my exception.

Mr. William Shapero: May it please the Court,
page 81 } the Defendant Arthur B. Graves objects and excepts to the ruling of the Court on this instruction and adopts as his ground therefor that which was just stated in opposition to the granting of the instruction.

Mr. Wormington: The Defendant Richardson objects and excepts to the action of the Court in granting Instruction I on the ground that it adopts the cintilla rule and is thereby an incorrect instruction on that basis, and in addition, thereto, the Defendant Richardson alleges and claims, that the relationship between him and the Plaintiff was that of guest and host driver and as such, the criterion of gross negligence should apply.

Mr. William Shapero: Instruction No. 2 is objected to. While Dr. Campbell intimated that he, himself, would probably have handled the treatment differently, he did not say that the original physician who sutured the wound at Virginia Beach Hospital was negligent or had aggravated the injury.

The Court: I don't like the tone of it because of the overall intimation that there was negligent treatment on the part of the first physician, which the jury does not have to accept.

Mr. Stanley Bangel: Would Your Honor instruct the jury that as a matter of law there was no negligent treatment at Virginia Beach Hospital?

The Court: No, sir.

Mr. Stanley Bangel: In view of that, this instruction would be proper because it doesn't say there was negligent treatment. It covers up the situation when Mr. Wormpage 82 } ington should argue that in his opinion the evidence in the case disclosed negligent treatment, and if the jury believes it was, the instruction here would be applicable.

(Instruction 2 withdrawn.)

Mr. Maurice Shapero: If you want the instruction, you draw it.

The Court: Exactly.

Mr. Wormington: And I make no condition on this argument.

On Instruction 3, I object to sub-paragraph E in its entirety and in sub-paragraph F to embarrassment. No evidence of Plaintiff undergoing embarrassment. As far as diminution of earning capacity, there is no evidence of that. Both doctors, as I recall, or certainly one of them said he had no occasion to limit his physical activities; that this thing on the head didn't bother the man from pursuing normal activities.

The Court: Is there any evidence to support that?

Mr. Stanley Bangel: Yes, Your Honor. We have evidence here that the man had this severe injury to his head and suffers from these severe headaches. He is dizzy. He suffers

from nervousness as a result of it, and this does not tell the jury that he is going to have definite loss of earning capacity forever. It tells the jury that they should award him damages for any diminution of his earning capacity, if any. He hasn't been able to go back to work.

As for the future, the jury may hold he may be able to go back to work tomorrow. This instruction doesn't tell them it is forever. His earning capacity may be diminished for one day.

Mr. Wormington: That is not the meaning of the phrase.

Mr. Stanley Bangel: We will take the word "capacity" out, if it will help, Your Honor.

page 83 } The Court: I think that will do it.

Mr. Herbert Bangel: We will change it.

Mr. Wormington: The Defendant Richardson objects and excepts to the action of the Court in refusing to delete in subparagraph F as an element of damages any embarrassment that might be caused the Plaintiff as a result of this injury on the ground that there is absolutely no testimony that any such embarrassment was caused and, too, without such evidence, the jury would be indulging in speculation as to the existence of such element of damage.

Mr. William Shapero: We object to Instruction 2 written with pencil on yellow paper. We object to the granting of that instruction, No. 2, on the ground that there is no evidence in this case to sustain it. There is no evidence whatsoever that there was any negligence of, rather, no negligence on the part of any doctor in the treatment in this case.

Mr. Wormington: I object to the whole business all the way through.

Mr. William Shapero: Your Honor, we object to the granting of Instruction No. 2 for the Plaintiff which is written in pencil on a yellow piece of paper and except to the Court's ruling in granting such instruction and with the Court's permission adopt as our ground therefor the reasons heretofore stated in the argument in opposition to the granting of the instruction.

Mr. Wormington: The Defendant Richardson objects and excepts to the Court in granting Instruction 2 and adopts the argument, as set forth by the counsel for the Defendant Graves, and in addition, states that there is absolutely no evidence of negligence in the treatment of the
 page 84 } Plaintiff's injuries and it is our contention that the basis of any principal involved in this case necessarily stems from the inferences and assumptions of negligent treatment by a doctor or doctors concerned.

(Instructions I, II, III, V and VI offered by Mr. Wormington, Counsel for Defendant Richardson refused on the basis of gross negligence.)

Mr. Stanley Bangel: I think it is stipulated that instructions numbered with Roman numerals I through VI are offered by Mr. Wormington on the gross negligence and in view of Your Honor's previous ruling, they are refused, is that correct?

The Court: Yes.

Mr. Wormington: Your Honor, I note my exception to the Court's refusal to grant those instructions based on the reasons heretofore stated in motion to strike.

The Court: No. VII is not based on negligence.

Mr. Herbert Bangel: Mr. Wormington remarked there wasn't enough alcohol consumed to make any difference in the case and that this instruction would be improper under the evidence presented in that clearly there is no risk assumed by the Plaintiff in reference to riding with Richardson that might be attributable to his having drunk this alcohol.

There is no evidence that any or all alcohol consumed by Defendant Richardson had any effect on him to the knowledge of the Plaintiff. No evidence that any alcoholic beverages consumed by the Defendant Richardson affected him to the knowledge of the Plaintiff Charles.

The Court: I will grant this one.

Mr. Maurice Shapero: I think this instruction is improper unless you are going further and take care of the page 85 } other Defendant because if he assumed the risk as to having drunk alcoholic beverages with Richardson, Richardson's negligence would be imputed to Charles and Richardson would be guilty of contributory negligence as to us. He couldn't recover from us to save his life. Got to add that to it.

Mr. Wormington: I think that is correct. I have no objection if you want to put this instruction "to recover from Richardson or Graves." Would that satisfy you all?

Mr. William Shapero: Yes.

Mr. Stanley Bangel: I hate to dwell on it, but I think it would be a reversible error to grant this instruction. This instruction holds as a matter of law that the Plaintiff assumed the risk if he drank alcohol, an equal amount of alcohol, in company together with Richardson, and therefore it is clearly erroneous.

The Court: I don't read it that way.

Mr. Stanley Bangel: We object to Your Honor granting Instruction VII on the grounds heretofore stated.

Mr. Maurice Shapero: We do not want Grave's name in that instruction. We do not think it is a proper instruction.

Mr. Wormington: I submit, Your Honor, to keep it proper, it should be left in.

Mr. William Shapero: Object, Your Honor, to our name being put in there. We don't feel it is a proper instruction under the law and we don't want our name in it. If it is reversed, we will be reversed on it, also.

The Court: I will leave it in there. You state page 86 } your objection.

Mr. William Shapero: May it please the Court, I object and except to the granting of Instruction VII and for my ground of exception would adopt what I have just stated as my argument in opposition to the granting of the instruction and in opposition to the putting of the names "Graves" in the instruction.

Mr. Stanley Bangel: The Plaintiff objects and excepts to the instruction further on the ground that the reasons heretofore stated, and I am dealing with VII, are equally applicable to the Defendant Graves and adopts them as though re-stated.

Mr. Wormington: Your Honor, Instruction VIII is based on the testimony of Dr. Campbell who stated that certainly to some extent he would not follow instructions, the Plaintiff, that is, and that to a far lesser extent, in his opinion, the botched-up job at Virginia Beach which to some extent affected the prolongation of his injuries or aggravated it.

Mr. Stanley Bangel: We object to the Instruction VIII on the ground that it does not correctly state the law. The general law is that a person is under duty to minimize or litigate his damages. Certainly this instruction is misleading to the jury and it tells the jury that if the Plaintiff in any way whatsoever failed to do anything which may have aggravated his injury in the slightest, then the Defendant is not responsible for the resultant damages from the accident.

Mr. Wormington: And such is the law.

The Court: I don't think it is clear as it is page 87 } written.

Mr. Wormington: "The Plaintiff has the duty to exercise ordinary care in attempting to minimize his damages. If you believe from the evidence he failed in this duty then the defendants are not responsible for the resultant aggravation of these injuries, if any, caused by such failure."

Mr. Herbert Bangel: Plaintiff objects and excepts to the Court's granting Instruction VIII on the ground that there is no evidence that the Plaintiff through any conduct of his own aggravated the injuries, the only evidence being that the

doctor thought that to a minimum point, it is possible that the condition of the Plaintiff may have been bettered had he done certain things and there is no evidence of any resultant aggravation caused by any action of the Plaintiff.

Mr. Maurice Shapero: As to Roman numeral IX, Defendant Graves objects to it on the ground that there is no evidence to sustain it and contrary there is direct evidence against the theory of the proposition of law as set out in this instruction. Firstly, Richardson said that Graves stopped at a red light. If he stopped at a red light, he had a perfect right to do it suddenly or otherwise.

He was obligated under the law to stop there. Consequently, sudden stopping would not be material if he stopped at a red light. The evidence to the contrary is that it was a green light.

No evidence whatsoever that a proper signal wasn't given. The only evidence on the subject is that Graves said he did give a proper signal and the negative testimony of Mr. Richardson I do not recall.

Mr. Wormington: It was his manner of stoppage 88 } ping that was bad.

The Court: I can't go along with you on that, Mr. Wormington. Richardson can't rise any higher than his own testimony. I can't see anything consistent with his testimony as a whole that would warrant the granting of this instruction.

(Court reads Instruction X aloud.)

Mr. Maurice Shapero: No evidence of any failure to exercise care whatsoever.

The Court: If he is entitled to go to the jury in this case against Graves, he is entitled to this instruction. Conversely, if he is not entitled to this instruction, the evidence ought to have been struck.

Mr. Maurice Shapero: We still feel it ought to have been struck.

The Court: I am going to maintain consistency on this thing, anyway. If the jury returns a verdict against Graves, the consideration of this and the motion to strike will be the same thing.

Mr. William Shapero: Object to the granting of Instruction X and except thereto and state for our grounds for objection that which we have stated in our argument in opposition to the granting of the instruction, with the Court's permission.

Mr. Herbert Bangel: I want to state for the record, possibly

in legal terms, on Instruction VII: I would like to take exception to the Court's granting this instruction because the instruction makes the Plaintiff an insurer of his own safety if he had consumed a drink of alcohol or an equal amount of alcohol with the Defendant regardless of whether it had any effect on the Defendant or if the Plaintiff had any knowledge or should have had knowledge of the alcohol affecting the defendant's ability to drive.

page 89 } instruction instructs the jury that as a matter of law, under such circumstances, the Plaintiff assumes the risk and, therefore, makes him an insurer of his own safety.

Mr. Maurice Shapero: We object to the name of "Graves" being put in that instruction at all. We adopt the ground that Mr. Bangel also stated.

Mr. Stanley Bangel: This instruction, in my opinion, is wrong, I respectfully submit for reasons heretofore stated and now the Defendant Graves admits that it is wrong yet Your Honor is saying as to them, "We will give you an out on a wrong instruction." They are saying, "Don't give us an out on the wrong instruction."

If the jury should find against our client, based on this instruction, we would have a right of appeal as to both parties, I would say, because—

The Court: "Graves" was inserted by the man who drew the instruction.

Mr. William Shapero: Which was Mr. Wormington. Counsel for Graves does not want Graves' name in there.

Mr. Stanley Bangel: Whether they want it or don't want it, the jury would have it, and as a matter of fact, it would be error for the jury to find against either party based on this instruction. Certainly we would be entitled to an appeal if it is error as to both parties.

(Mr. William Shapero reads aloud Instruction 1 offered by Defendant Arthur B. Graves.)

Mr. Wormington: No objection.

page 90 } Mr. Stanley Bangel: No objection.

(Mr. William Shapero reads aloud Graves' Instruction B.)

Mr. Maurice Shapero: We think this is an instruction on Graves' theory of the case based on the evidence in the case.

Mr. William Shapero: Plenty of other instructions to cover that.

Mr. Herbert Bangel: Other instructions refer to it both

ways. This instruction should follow the continuity of it.

The Court: These instructions have no continuity.

Mr. Herbert Bangel: I mean by that, if the accident as set forth is the sole proximate cause, what you should tell the jury I think should find against the Defendant Graves and the other Defendant.

The Court: This was offered by that defendant who objects to the amendment. I am going to grant it like it is.

Mr. Herbert Bangel: We save the point for the reasons heretofore stated.

(Mr. William Shapero reads next instruction for Defendant Arthur B. Graves.) (Instruction C.)

Mr. Wormington: He said he was riding along behind the car and and it stopped.

The Court: Said he didn't see any signal on the back end of the car because he was looking at the light.

Mr. Wormington: That is the basis of my objection.

The Court: I think it is evidence they can carry the question of lookout to the jury.

Mr. Wormington: The Defendant Richardson objects and excepts to the action of the Court in granting In-
page 91 } struction C on the ground that there is no evidence
before the jury of any lack of lookout or proper
lookout, rather, on the part of Defendant Richardson. I object to this one for the same reason on the part of Defendant Richardson.

The Court: There is ample evidence in this case that he couldn't stop his car in time to avoid the collision.

Mr. Wormington: The Defendant Richardson objects and excepts to the action of the Court in granting Instruction D on the same ground as set forth in the exceptions and excepts to the granting of Instruction C.

Mr. Herbert Bangel: Plaintiff objects and excepts to the Court's granting Instruction O and D as written without the further qualifications and against the Defendant Norwood B. Richardson, Jr. since in each of those instructions it sets forth the action of the Defendant Richardson as the sole proximate cause of the accident. It should follow that the verdict should be against the Defendant Richardson.

The Court: I will grant this Instruction E.

(Off the record discussion regarding length of time for closing argument.)

The Court: I will give you thirty minutes a side.

Mr. Stanley Bangel: I have one instruction I would like to offer. "The Court instructs the jury that the Plaintiff is free of negligence as a matter of law."

Mr. Wormington: Object because of the instruction VII which was granted.

Mr. William Shapero: We think we should give page 92 } one, too, on that.

The Court: You all have your instructions in. We have got to put a stop to this thing sometime.

Mr. Stanley Bangel: This is one instruction that is conceded in all other instructions of the Court, and I think it is proper.

Mr. William Shapero: This is nothing but a reiteration of our motion to strike. May it please the Court, Defendant Arthur B. Graves would like to offer instruction which reads, "The Court instructs the jury that there is no evidence upon which you can base a verdict against the Defendant Arthur B. Graves."

The Court: We will refuse that.

Mr. Stanley Bangel: "Four. The Court instructs the jury that the Plaintiff is free of negligence as a matter of law."

Mr. Wormington: My objection, Your Honor, was based on the granting of the Instruction VII.

The Court: Refused. I have given one on the assumption of risk.

Mr. Stanley Bangel: No. 4A: "The Court instructs the jury that the Plaintiff is free of contributory negligence as a matter of law."

The Court: Refused.

Mr. Stanley Bangel: Plaintiff objects and excepts to the Court's refusal to grant Instruction 4A on the ground it correctly states the law. The burden proving negligence on the part of the Plaintiff is on the Defendant and there is no evidence in this case to that effect.

Mr. Wormington: I object to that.

Mr. Stanley Bangel: The Plaintiff objects and excepts to the Court's refusal to grant Instruction 4A on the page 93 } ground that the burden of proving contributory negligence is on the defendant and there is no evidence whatsoever in this case the jury could find the Plaintiff guilty of contributory negligence, the defendants utterly failing to carry such burden.

page 94 } JUDGE'S CERTIFICATE.

I, Henry W. Mackenzie, Jr., Judge of the Circuit Court of

the City of Portsmouth, Virginia; who presided over the foregoing trial in the case of John E. Charles v. Norwood B. Richardson, Jr. and Arthur B. Graves, tried in said court in Portsmouth, Virginia, on the 12th day of June 1958, do certify that the foregoing is a true and correct report of all the evidence, together with all motions, objections, and exceptions on the part of the respective parties, the action of the Court, all exhibits, and all other proceedings of said trial. I do further certify that the exhibits offered in evidence, as described by the foregoing record and designated as Plaintiff's Exhibits A, B, and C are all the exhibits offered upon said trial and the originals thereof have been initialed by me for the purpose of identification.

I further certify that said transcript was presented to me for certification and signed within sixty days after the final order in said cause and that the attorneys for the Plaintiff and for the Defendants had reasonable notice in writing of the place at which the same would be tendered for certification.

Given under my hand this 12th day of November, 1958.

H. W. MACKENZIE, JR.
Judge.

A Copy—Teste:

.....
Judge.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and <i>Supersedeas</i> Awarded	1
Record	2
Instructions	2
Opinion	8
Judgment—October 21, 1958	11
Notice of Appeals and Assignments of Error	12
Proceedings	13, 14, 18, 31, 43, 45
Notice	14
Witnesses:	
Norwood B. Richardson	15
Arthur Graves	27, 45
Officer Shepherd L. Fulgham	31
John E. Charles	35
Judge's Certificate	54

CLERK
SUPREME COURT OF APPEALS

RECEIVED

AUG 4 1959

RECEIVED
RICHMOND, VIRGINIA