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Record No. 5021

In the Supreme Court of Appeals of Virginia at Richmond

J. P. WONG

v.

TERMINAL CARS, INCORPORATED, ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5021

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 29th day of April, 1959.

J. P. WONG, Plaintiff in Error,

against

TERMINAL CARS, INCORPORATED, ET AL., Defendants in Error.

From the Circuit Court of the City of Norfolk

Upon the petition of J. P. Wong a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Norfolk on the 24th day of November, 1958, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Terminal Cars, Incorporated, 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 three hundred dollars, with condition as the law directs.

RECORD

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The plaintiff, J. P. Wong, hereby gives notice of appeal in the above styled case prior to the expiration of sixty (60) days after final judgment, and assigns error as follows:

1. The Court erred in finding that the plaintiff in crossing City Hall Avenue at its intersection with Metcalf Lane in the City of Norfolk was not crossing at a proper place for pedestrians to cross and thus was contributorily negligent as a matter of law.
2. The Court erred in setting aside the jury verdict in favor of plaintiff and in entering final judgment in favor of defendants on the 24th day of November, 1958.

J. P. WONG
By JAMES A. HOWARD
BREEDEN, HOWARD & MacMILLAN
612 National Bank of Commerce Bldg.
Norfolk, Virginia
His Attorneys.

Filed Jan. 5, 1959.

T. A. W. GRAY, D. C.

* * * * *

page 11 } INSTRUCTION P1.

The Court instructs the jury that if you find from the evidence that Wong, the plaintiff pedestrian, started across City Hall Avenue at the intersection of Metcalf Lane before the car driven by the defendant, Miller, reached the intersection of City Hall Avenue and Metcalf Lane, then you are instructed that he, Wong, had the right of way over the car driven by the said defendant, and it was the duty of the driver of the car to either change his course, slow down or come to a complete stop if necessary to permit Wong to safely and expeditiously make the crossing and if you find that on the occasion in question Wong was exercising due care

for his own safety and that the defendant driver, Miller, disregarded his duty as above set out, and that the same was the sole proximate cause of Wong's injury, you must find for the plaintiff.

Granted June 3, '58.

C. H. J.

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page 15 } INSTRUCTION NO. D2.

The Court instructs the jury that if you believe from the evidence that the plaintiff was guilty of any negligence which was a proximate or contributing cause of the accident then you shall find your verdict for the defendant, and this is true even though you may believe from the evidence that the defendant was also negligent.

Granted.

C. H. J.

page 16 } INSTRUCTION NO. D3.

The Court instructs the jury that when pedestrians cross streets they should use reasonable care not to interfere with the orderly passage of vehicles, they shall cross only at right angles and wherever possible only at intersections. If you believe from the evidence that the plaintiff violated any one or more of these requirements then he was guilty of negligence. And if you further believe that such negligence proximately caused or contributed to the accident, your verdict shall be for the defendants.

Granted.

C. H. J.

page 17 } INSTRUCTION NO. D4.

The Court instructs the jury that a pedestrian only has the right of way over a vehicle when crossing a highway in a business or residential district within any clearly marked crosswalk or any regular pedestrian crossing included in the

prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block.

Granted.

C. H. J.

page 18 } INSTRUCTION NO. D5.

The Court instructs the jury that the plaintiff was under the legal duty of exercising proper care for his own safety and of looking to his right for approaching vehicles while crossing City Hall Aevenue. If you believe from the evidence that the plaintiff failed to look to his right when he arrived at the center of the street or, having looked, failed to heed an obvious danger, then he was guilty of negligence and if you believe that such negligence, if any, proximately caused or contributed to the accident, you shall find for the defendant.

Granted.

C. H. J.

* * * * *

page 20 }

* * * * *

In the Circuit Court of the City of Norfolk, on the 24th day of November, in the year 1958.

This day came again the parties, by counsel, and the motion heretofore made herein having been fully heard and maturely considered by the Court is sustained and the verdict of the jury set aside. Whereupon the Court proceeding to enter such judgment as to it seems right and proper it, is considered by the Court that said plaintiff take nothing by his suit herein and that said defendants go hence without day and recover against said plaintiff their costs about their defense in this behalf expended, to which action of the Court said plaintiff, by counsel, duly excepted.

* * * * *

page 21 }

* * * * *

NORFOLK, VIRGINIA

November 24, 1958.

Honorable Clyde H. Jacob
Judge of the Circuit Court of
the City of Norfolk
Norfolk, Virginia

Re: At Law
J. P. Wong *v.* Terminal Cars, Incorporated, and
Rufus G. Miller

Dear Judge Jacob:

As understood, the sole issue in the above case and the basis for setting aside the jury verdict in favor of plaintiff's is that the plaintiff, in crossing City Hall Avenue at Metcalf Lane, was not crossing at a proper place for pedestrians to cross and thus was contributorily negligent as a matter of law.

I am forwarding a copy of this correspondence to Mr. Paul M. Lipkin and to the Clerk, and am asking that this letter be incorporated in the papers in this cause.

Very truly yours,

JAMES A. HOWARD.

JAH:dat

cc: Paul M. Lipkin, Esquire
Attorney-at-Law
813 National Bank of Commerce Bldg.
Norfolk, Virginia

W. R. Hanckel, Esquire
Clerk of the Circuit Court of
the City of Norfolk
Norfolk, Virginia

Filed Nov. 21, 1958.

C. H. J.

* * * * *

page 3 }

* * * * *

RUFUS G. MILLER,
called as an adverse witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Adv.)

page 4 } By Mr. Howard:
Q. Will you state your full name, please?
A. Rufus G. Miller.
Q. On September 29th, 1957, were you then employed by the Terminal Cars, Incorporated?
A. Yes, sir.
Q. On the night in question were you working for the Terminal Cars as their employee?
A. Yes, sir.

* * * * *

page 5 }

* * * * *

Q. What were the weather conditions on this night?
A. Raining, foggy, misty and dark.
Q. Did you have to stop at a stop light at City Hall Avenue and Church Street?
A. I was coming out, coming on, and I slowed down and the light changed to green and I came across.
Q. In what lane were you traveling crossing Church Street?
A. In the right lane all the way up.
Q. That would be the curb lane?
A. Yes.
Q. What was your speed after you crossed Church Street?
A. Fifteen to twenty miles an hour.
Q. Fifteen to twenty miles an hour?
page 6 } A. Yes.
Q. Were there any vehicles ahead of you?
A. No.
Q. Were there any vehicles coming towards you?
A. Not to my knowledge.
Q. That would be vehicles coming towards you from west to east?
A. Yes.
Q. Did you maintain your speed of fifteen to twenty miles an hour?
A. Yes.

Rufus G. Miller.

Q. Did you notice whether there were any street lights in the area of Cumberland Street and City Hall Avenue?
A. No.
Q. Did you notice any vehicle lights?
A. In that section it is dark. I actually didn't notice any street lights.
Q. You were in the right or curb lane?
A. At the time of the impact?
Q. No, but as you crossed Cumberland Street were you in the curb lane?
A. At that point is where City Hall makes a sort of a circle at Cumberland Street. You had to straddle the line that divides the westbound traffic from eastbound traffic. You had to straddle the line going west.
page 7 } Q. You would be astraddle the dividing line?
A. Yes.
Q. You were neither in one lane or the other?
A. Not directly, no.

By the Court:
Q. You were straddling the center line or the line that is going west?
A. Two lines going west.
Q. Not the center line?
A. No, sir.

By Mr. Howard:
Q. I show you a picture, Mr. Miller, facing west on City Hall Avenue taken from the corner of Cumberland Street, and ask you if that is the particular area where the accident occurred?
A. Yes.

Mr. Howard: I would like to introduce this, your Honor.
The Court: Plaintiff's Exhibit 1.

By Mr. Howard:
Q. On plaintiff's Exhibit 1, Mr. Miller, I ask you if you didn't see certain over head street lights directly opposite Cumberland Street and also one down here at Metcalf's Lane on the night of this accident?
A. No.
page 8 } Q. Your counsel has said in his opening statement that you first saw this pedestrian crossing the street about twenty feet ahead of you?

Rufus G. Miller.

A. Yes.
Q. Were your lights on?
A. Yes.
Q. On bright or dim?
A. Dim.
Q. How far down the road do you think your headlights would show on dim?
A. Thirty to forty feet.
Q. Thirty to forty feet?
A. On this particular night.
Q. Did you have your windshield wiper going?
A. Yes.
Q. You could see no more than thirty or forty feet down City Hall Avenue?
A. Approximately.
Q. At that time you were straddling the dividing line for westbound traffic?
A. Yes.
Q. Did you apply your *breaks* when you saw him?
A. Yes.
Q. Which lane was he in then?
A. Crossing the double line.
page 9 } Q. Will you step down here?
A. As you can see this double line on the street, the man was four or five feet, I would say, approximately in the middle of this lane, in the left west lane, crossing diagonally across Metcalf's Lane.
Q. Would you mark on your picture approximately where he was when you first saw him?
A. This picture here, the way it is taken, it is hard to place it. He was walking across here about that far up, approximately right in here (indicating on photograph).
On this picture you can't get a good place to show where he was at.
Q. We will try another picture.
A. All right.

Mr. Howard: Your Honor, I introduce this picture as plaintiff's Exhibit 2.
The Court: So marked.

By Mr. Howard:
Q. I show you plaintiff's Exhibit No. 2 which is a photograph that shows Metcalf Lane and City Hall Avenue, and

ask you to place on this photograph where he was when you first saw him.

A. This is Metcalf here. He was walking across here, this line. This is the double line and this is approximately four or five feet across this line when I saw him.

page 10 } Q. Mark on the photograph where you were.

A. Right here (indicating).

Q. Put beside that an X mark where you were on the photograph.

(Witness indicates on photograph).

Mr. Howard: For the purpose of the record, the witness, Mr. Miller, has placed an X mark in the westbound lane of City Hall Avenue to indicate where the plaintiff was when he first saw him.

By Mr. Howard:

Q. Is that correct, Mr. Miller?

A. Yes.

Mr. Howard: Such mark having been made on plaintiff's Exhibit 2.

By Mr. Howard:

Q. Now, Mr. Miller, if you will, stand around here so the Jury can see. You have placed this mark immediately north of Metcalf Lane apparently?

A. Metcalf Lane runs almost directly north and south. Whether it would be directly north or south, I don't know. This picture here shows the man was walking from this alley at a slight angle about the north side of City Hall Avenue about ten or twelve feet east of this line (indicating).

Q. You have placed a mark where you first saw

page 11 } the pedestrian?

A. Yes.

Q. Place another mark on plaintiff's exhibit 2 as to the point of impact.

A. It happened about right here.

Q. Would you place at that point the letter Y?

A. Yes.

Mr. Howard: For the record, Mr. Miller has placed a Y at the point of impact on plaintiff's exhibit No. 2.

Rufus G. Miller.

By Mr. Howard:

Q. Would you be seated up there again, Mr. Miller? You stated he was walking on somewhat of an angle. Did you first see him when he left the south side of City Hall Avenue?

A. No.

Q. How do you know he was walking on an angle?

A. You could tell by the way the man was walking when you saw him.

Q. He was not coming directly across the street, but you saw his position, and you say he was walking at an angle?

A. That is right.

Q. Are you telling us that at the point of impact you could tell he was walking on an angle?

A. You could tell he was not walking straight across.

Q. Was he walking at a ninety degree angle?

page 12 } A. No.

Q. Was he walking slow or fast?

A. Just a normal pace.

Q. This pedestrian you first saw twenty feet away?

A. Yes.

Q. Do you know how long your cab is from bumper to bumper?

A. About sixteen or seventeen feet.

Q. When you first saw him did you put on your brakes?

A. Yes.

Q. How far did you go before you stopped after the accident happened?

A. When I got out of the cab and went back the man was lying ten to twelve feet behind the cab.

Q. Where did you stop your cab?

A. Against the curb.

Q. He was behind the cab after the accident?

A. Yes, sir.

Q. At or near the north curb?

A. He was lying approximately on the dividing line of the westbound traffic.

Q. Did you back your cab up after the accident?

A. No, I didn't back it up. I didn't move it at all.

Q. You left it by the curb?

page 13 } A. I left it by the curb, yes, sir.

Q. At that time there was no traffic coming towards you?

A. No.

Q. So you had a clear view west on City Hall Avenue? Do you remember how Mr. Wong was dressed?

Rufus G. Miller.

A. The only thing I can tell you is he had on a wool sort of coat, a felt hat, and I remember it had a plastic cover on it.

Q. You tell his Honor he was walking at an angle north from Metcalf?

A. Yes.

Q. Were *you* lights in good working order?

A. The lights were on low, and it was very dark, hazy, a hazy night.

Q. At that time you were going how fast?

A. Fifteen to twenty miles.

Q. Did you immediately apply your brakes when you saw him?

A. I applied my brakes.

Q. Did you blow your horn?

A. No, sir.

Q. At what part of the cab did the accident take place?

The Court: Take a little model and point it
page 14 } out.

By Mr. Howard:

Q. This blue car represents the model.

A. He walked in the side of the cab approximately this point (indicating).

By Mr. Lipkin:

Q. Can you say that is right at the hub of the left front wheel?

A. Yes.

By Mr. Howard:

Q. What happened to Mr. Wong after the impact?

A. When he struck the side of the cab at this point it made him turn in what you would say a wheeling position like a dancer would do on the dance floor, or in a circle.

By the Court:

Q. Where was his body after the cab stopped with reference to the double center line, was it to the north or south of the center line dividing the street?

A. For east and west traffic?

Q. Yes.

A. He was lying on the line that would divide the west-

bound traffic, which would be approximately ten feet north of the double line.

By Mr. Howard:

Q. Was there any indentation on the cab or
page 15 } damage to the cab?

A. No sir. I inspected that after we took the man to the hospital. The only thing that I could find that had been damaged to the cab was this rear view mirrow mounted at the left front door. That was knocked loose.

Q. Do you know whether it came from this accident?

A. I can't say definitely.

Q. You say your headlights, that you could see thirty to forty feet ahead on low beam with?

A. Yes.

Q. When you first saw Mr. Wong could you have blown your horn?

A. I may have but didn't because I was trying to maneuver the cab to get away from him.

Q. If he was walking at a slow pace, and I believe you said a normal pace, can you tell us why you didn't see him before he reached the center of City Hall Avenue?

A. Because it was dark and he had on dark clothes.

Q. There was plenty of light there?

A. No sir, not on this particular night on account of rain, it being wet, foggy and misty.

Q. To get this clear, when you saw him, you saw him at the point marked X?

A. Yes.

Q. And the point of impact was in the right
page 16 } hand westbound lane on City Hall Avenue?

A. Yes.

Q. Which meant he had gotten over half or nearly three-quarters of the way across the street?

A. Yes.

Q. Is that right?

A. Yes.

* * * * *

page 33 } J. P. WONG,

the plaintiff, called as a witness in his own behalf, being duly sworn and examined through the interpreter in the Chinese language, testified as follows:

J. P. Wong.

DIRECT EXAMINATION.

By Mr. Howard:

Q. Would you have the witness identify himself, and where he lives in Norfolk.

The Interpreter for the Record: May I make a statement as to our procedure?

The Court: The witness now on the stand, the plaintiff, is unable to speak English and is to be examined through an interpreter who is duly sworn and duly qualified to interpret.

Counsel may proceed to direct questions to the interpreter who, in turn, will repeat the question in Chinese, and interpret his answers in English.

By Mr. Howard:

Q. Will you get Mr. Wong to state his full name, age, and where he lives?

A. J. P. Wong.

page 34 } Q. J. P. Wong?

A. Yes, 3259 Bank Street, Norfolk, Virginia.

Q. What does he do for a living now?

A. I am retired right now.

Q. On the night of the accident, where had he been before the accident occurred?

A. I was at the On Leong Merchants Association.

Q. Had he been there to do anything, or was he drinking?

A. I haven't drinked. I just went over there to see some friends.

Q. Where was he, where was he heading back to?

A. I left the Merchants Association and I am going back to where I live on Bank Street.

Q. After leaving the Chinese Merchants Association on which streets did he walk?

A. I am from Church Street coming close to L. Snyder's, and then going back to where I live.

Q. Did he cross City Hall Avenue?

A. Yes, I crossed City Hall Avenue.

Q. Where did he cross City Hall Avenue?

A. I was from Church Street walking across at Snyder's and then from Snyder's to the alley, at the corner of the alley, and then went across City Hall Avenue.

Q. What is the name of the alley?

page 35 } A. I just know it was an alley. I don't know the name.

J. P. Wong.

Q. Show the witness plaintiff's exhibit 1 and ask him on said exhibit to show where he crossed from the alley, and identify the alley on the picture.

Excuse me, have him step down and point it out to the jury, and interpret it for him.

The Court: He doesn't have to interpret his pointing it out. He should point it out himself.

The Interpreter: He don't know where the alley is.

The Court: You can point that out to him.

The Interpreter: He say he can't place it right away.

By Mr. Howard:

Q. Show the witness plaintiff's exhibit 2 and see if he can recognize it from the photograph here.

A. I was crossing on this corner and then to the middle of the street.

Q. What did he do when he got to the middle of the street?

A. When I was coming to the middle of the street I see a car coming and I stand there still.

page 36 } Q. Before leaving the corner of the alley and City Hall Avenue were there any cars coming from his left?

A. Before I cross I didn't see any car coming from either direction until I got to the middle of the street, and I saw a car coming.

Q. What did he do when he got to the middle of the street?

A. When I see the car coming I am standing still.

Q. How far was the car coming from him when he first saw it and stood still?

A. About forty to fifty feet away.

Q. Was that the car with which the accident was had?

A. Yes.

Q. Was it a Terminal car, cab, passenger car or what?

Mr. Lipkin: I object to that.

The Court: Objection sustained.

Mr. Howard: Just a minute, don't ask him that question.

By Mr. Howard:

Q. Can he tell us whether the car that he saw was the one with which the accident was had?

A. Yes.

Q. Did the car blow its horn?

J. P. Wong.

The Court: There is no need to ask him that because the driver said he didn't.

page 37 } By Mr. Howard:

Q. What was the speed of the car?

A. I don't know how fast the car was coming but after the car hit me it pushed me off around four or five feet, pushed me off.

Q. Did the car slow up any?

A. No, only when he stopped, that's all.

Q. Does he know how fast the car was going when the accident took place?

The Court: He has already said he didn't know.

Mr. Howard: All right.

By Mr. Howard:

Q. Did he move at any time from the place he was standing in the center of City Hall Avenue before the accident took place?

The Interpreter: I didn't get that.

By Mr. Howard:

Q. Had he moved at all from the center of City Hall Avenue when the accident took place?

A. No.

Q. Can he tell us whether or not he walked in a straight line from the south side of City Hall Avenue from the alley to the center of City Hall?

A. Yes.

page 38 } The Court: Ask him in what manner he crossed.

By Mr. Howard:

Q. In what way did he cross from the alley to the center of City Hall Avenue?

Mr. Lipkin: I don't know what the interpreter is saying besides what he is supposed to say. If the witness doesn't understand it it is up to Mr. Howard to straighten it out.

The Court: Don't state what the witness should say, but tell him what the lawyer said.

The Interpreter: I asked him to make it short. He wants to make a long story.

J. P. Wong.

By Mr. Howard:

Q. In what manner did he cross City Hall Avenue from the alley towards the north side of City Hall Avenue?

A. I walked across this way, across the street.

Q. What were the weather conditions?

A. It was raining.

Q. After the accident what did he observe the driver of the car doing?

A. After I laid down and he stopped the car he come down and looked at me, that's all.

Q. Did the driver of the car go back to the car and look at any equipment on it?

page 39 } Mr. Lipkin: I think that is a leading question. He said he stopped the car and came back to him, and that is all.

The Court: Objection sustained.

By Mr. Howard:

Q. Did the cab driver get back into the cab?

Mr. Lipkin: I object to that as a leading question.

The Court: Ask him what he did, what the cab driver did.

By Mr. Howard:

Q. What did the cab driver do after he left Mr. Wong on the street?

Mr. Lipkin: No one has said he left him on the street.

By Mr. Howard:

Q. After he departed from where he was—

The Court: Ask him what he did after he saw him.

A. After he went back to the car he was standing on the front at the door and then he puts his hand inside and then he see the windshield wiper won't start, and then the windshield wiper begins to move.

By Mr. Howard:

Q. Ask him whether it was a light or black

page 40 } night, dark?

J. P. Wong.

The Interpreter: Yes, I asked him is his automobile lights bright, or not, and he said yes.

Mr. Lipkin: That was not the question the Judge asked him.

The Court: I didn't ask him about the lights but about the weather conditions, a dark night or a light night?

By Mr. Lipkin:

Q. What did he say?

A. He asked me—the automobile light is very bright and the street is light, the street light is still light but not very much.

By Mr. Howard:

Q. After the accident, did the cab back up?

Mr. Lipkin: I object to that.

Mr. Howard: I will change it.

The Court: What did the cab do?

By Mr. Howard:

Q. What did the cab do after the accident?

A. After he hit me then the car was backed up a little bit and then the policeman got there and asked me questions.

By Mr. Howard:

page 41 } Q. Was it raining when the police got there?

A. Yes.

Q. Where was Mr. Wong taken after the accident, where did he go?

The Interpreter: He explained the whole story this way:

"After the policeman see me there he asked me many questions where was—my name and where I lived and then he took me to the hospital.

By Mr. Howard:

Q. How long was he in the hospital?

Mr. Lipkin: We have testimony on that.

The Court: Yes.

Mr. Howard: All right.

J. P. Wong.

By Mr. Howard:
Q. Does he have to walk with any aid, a cane or crutch?

Mr. Lipkin: That is suggesting an answer.

By Mr. Howard:
Q. How does he walk today?
A. I had to use my cane, otherwise my leg was shaky and I can't walk good.
Q. At this time is his leg giving him any trouble or how does it feel today?
A. Any time it rains my leg is still shaky, vi-
page 42 } brating.
Q. Does he have any pain in the leg?
A. A little bit.
Q. Did the cab stop before the accident took place?
A. The car knocked me down.
Q. Was he knocked down before the cab stopped?
A. Yes.
Q. What part of the cab came in contact with the body of Mr. Wong?
A. I don't know exactly which part of the car was that hit me, but it crossed in front of me and knocked me down and that is how I got hurt, my head and leg.

The Court: Did he say it crossed in front of him?
The Interpreter: Right in front, over here (indicating).

By Mr. Howard:
Q. Was Mr. Wong standing still when the cab struck him?
A. Yes.
Q. Where was he standing at that time?
A. Just off, about one foot off from the center line.
Q. Will you ask Mr. Wong if this is his hospital bill (handing paper to interpreter)?

Mr. Lipkin: We will stipulate that.
Mr. Howard: I introduce that.
page 43 } The Court: Plaintiff's exhibit 5.
Mr. Howard: Answer Mr. Lipkin.

CROSS EXAMINATION.

By Mr. Lipkin:
Q. Ask Mr. Wong how old he is?

J. P. Wong.

A. Seventy-eight.
Q. He was seventy-seven at the time of the accident?
A. Yes.
Q. The Chinese Merchants Association is on what side of Church Street?
A. Across from L. Snyder.
Q. Ask Mr. Wong did he cross Church Street at the light at Church Street, at Church Street and City Hall?
A. Yes, crossed with the traffic light.
Q. Ask him if he crossed between the while lines marked for pedestrians?

Mr. Howard: This is Church Street (indicating).
The Court: It doesn't make any difference how he crossed there. He may have jumped over.

By Mr. Lipkin:
page 44 } Q. Ask him if he crossed City Hall Avenue at Church Street?

The Court: That is not material until he get to the place of the accident.

By Mr. Lipkin:
Q. Ask him if he crossed at Cumberland and City Hall?

Mr. Howard: That is not the place he was injuried.
Mr. Lipkin: I think I can ask him that.
The Court: Does the evidence show it is in line with Cumberland Street?
Mr. Lipkin: No sir. I would like to ask him if he crossed there.
The Court: He could have crossed anywhere.

By Mr. Lipkin:
Q. Ask him if he could have crossed at Cumberland and City Hall?
A. No. I was crossing from the alley about two or three feet.
Q. Did he pass Cumberland Street to get to the alley?
A. Yes. Cumberland is way up.
Q. Ask him if there are any lines for pedestrians to cross where he did cross?

J. P. Wong.

Mr. Howard: Whether there are any lines
page 45 } there? I don't see any on this picture. It is immaterial.

The Court: The statute defines intersections and lines.

Mr. Howard: I don't think the photograph shows.

The Court: He can ask him whether there were, or not.

Mr. Lipkin: Let him answer the question.

A. He says there is not line that shows straight but the line shows crossways.

By Mr. Lipkin:

Q. Ask him if he can show us what line he means on this picture.

A. That is the line (indicating).

Q. There were no lines for pedestrians to walk through or cross the street on, were there?

A. No.

Q. Ask him if he was within the extension of that line crossing the street when he was struck?

Mr. Howard: I don't understand that question.

The Court: You can ask him whether there was a line there.

By Mr. Lipkin:

Q. Was he within the prolongation of the east
page 46 } and west boundaries if it extended across City Hall Avenue? Was he directly north of the alley, or not, when he was struck?

The Interpreter: I don't quite understand what you mean.

By Mr. Lipkin:

Q. All I want to know is if he was directly north of this alley or to the east or west of the alley when he was crossing the street, to the left or right of the alley?

A. He says he was crossing right here and then across this alley and got to right here, this way (indicating).

Q. Street crossing?

A. Street crossing.

Q. He testified that when he got to the center of the street he stopped. Ask him where he was standing when he first saw the cab that hit him.

J. P. Wong.

A. Just about one foot off from the center line.
Q. On which side of the center line?
A. Across the center line one foot.
Q. I want to know on which side of the center line he was standing?
A. He was standing here and crossed the center line one foot.
Q. Ask him to mark an X on this plaintiff's exhibit no. 1 where he was standing when he first saw the taxicab?
A. He can't figure it on this picture exactly.
page 47 } Maybe you can draw a picture for him.

Mr. Lipkin: Will you mark this as an exhibit, your Honor? That is my first exhibit.
The Court: Defendant's exhibit 1.

By Mr. Lipkin:
Q. Show him this picture and ask him if he can mark on the picture where he was first standing when he saw the taxi cab. First ask him if he can identify that picture?
A. Yes. Part of this is the V. E. P. Building.
Q. Tell him this is Metcalf Lane which is looking across the street and ask him if he can show on the piture where he was standing when he first saw the cab.
A. He don't know.
Q. Let's forget it then. Did I understand that he said he was one foot on the side of the line from which the car was coming?
A. Yes.
Q. He testified that the car pushed him for four or five feet. Ask him in what direction the car pushed him.
A. He don't know what direction it is but, "I was crossing the street and the car was coming from Cumberland Street and come down and hit me."
Q. Does he know what part of the car hit him?

The Court: He answered that question, I think.
page 48 } Mr. Lipkin: He said the left side.
The Court: He was asked what part of the car hit him and he said he didn't know, but it passed in front of him.
Mr. Lipkin: He also testified it pushed him for four or five feet.

J. P. Wong.

By Mr. Lipkin:
Q. From the point where he was struck, where did he hit the ground?

The Interpreter: I think a good idea would be to let him have the car so he can demonstrate with it.

By Mr. Lipkin:
Q. Use this car and show us how you were struck.
A. He hit me right in front and then I laid down in front of the car—in front of the car, and after he hit me and knocked me down my foot was facing the car and then my head was heading back in the Bank Street direction.
Q. Did the cab pass Mr. Wong after hitting him?
A. After he hit me about four or five feet.
Q. Was the cab completely past Mr. Wong?

The Interpreter: In other words, let me explain to you—
Mr. Howard: Ask him the question again.

By Mr. Lipkin:
page 49 } Q. I want to know if the car went completely by him?
A. No.
Q. No.
A. No.
Q. How far was he lying from the cab?
A. My feet is very close to the car but my head is back away from it.
Q. Ask him where the cab backed up to?
A. The car was backed up not very far.
Q. Ask him if he remembers another cab coming up?
A. I don't know.
Q. Ask him how close to the solid white line he was lying after he was hit?
A. After he hit me I didn't remember.
Q. He doesn't know where?
A. No.
Q. Ask him if he was knocked backwards?
A. All I know is I am standing and he knocked me down.
Q. Ask him if he could have stepped back at the time he saw the cab, from the time he saw the cab until he was struck?

Officer S. E. Cherry.

Mr. Howard: There was no duty on him to step back in the eastbound lane of traffic. He was looking to the right when he saw this cab coming and stopped, and had he
page 50 } stepped back he would have been in the eastbound lane of traffic.

The Court: Objection overruled.

Mr. Howard: Exception.

Mr. Lipkin: Ask him to answer the question.

A. I don't know what to do. As the car come down he hit me and I have no chance to back up or go forward.

Q. He does know the car crossed in front of him; is that correct?

The Court: He has said that.

• • • • •

OFFICER S. E. CHERRY,

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

DIRECT EXAMINATION.

page 51 } By Mr. Lipkin:

Q. State you name and occupation.

A. S. E. Cherry, and I am a member of the Norfolk Police Department.

Q. What department are you in?

A. The investigation department.

Q. How long have you been on the police force?

A. Approximately nine years.

Q. Were you on duty the night of September 29th, 1957?

A. I was.

Q. Did you have occasion to investigate an accident in City Hall Avenue near the police station at around 7:30 P.M.?

A. I did.

Q. How long after you received the call did you arrive on the scene?

A. I don't remember the exact time but a very few minutes, a short time, I will say, because it was given to me as an accident, someone injured, and I went over there immediately.

Q. Were you alone at the time?

Officer S. E. Cherry.

A. Yes.
Q. You were in an ambulance car?
A. Yes.
page 52 } Q. What kind of night was it?
A. It had been raining hard and was at the time of the accident.
Q. Was there good visability, or poor?
A. I would say medium in this section where it has little light.
Q. When you arrived at the scene what did you see?
A. When I arrived at the scene there was a 1955 Plymouth Sedan Taxi belonging to the Terminal Cars, Incorporated, on the north side of City Hall Avenue headed west, stopped, and there was a man, Rufus Miller, the driver of the cab, there, and he said to me that he wasn't—

Mr. Howard: I object to his saying what Mr. Miller said. It would be self-serving, anything Mr. Miller may have said to the police officer.
The Court: Objection sustained.

By the Court:
Q. What did you find or see?
A. There was this car and the man who had been injuried.

By Mr. Lipkin:
Q. Where was the car?
A. Parked on City Hall Avenue headed west on City Hall Avenue in the lane next to the curb.
page 53 } Q. Was that the cab?
A. Yes.
Q. Did Mr. Miller state he was driving the cab?
A. Yes sir.
Q. How far was that from the man who was struck?
A. I am unable to recall because my immediate attention was given to the man.
Q. Where was the man who was injuried?
A. I am unable to recall exactly where I picked him up in his condition. He had lacerations on his head.
Q. Do you know where in the street he was lying?

Mr. Howard: He said he didn't.

Officer S. E. Cherry.

By Mr. Lipkin:

Q. How is City Hall Avenue there? Describe the width of it and the conditions there.

A. City Hall Avenue at the particular spot has two lanes of travel east and two lanes west. It is a four lane street.

Q. Are there any lines there?

A. Yes, it is marked off.

Q. I show you a picture marked plaintiff's exhibit 2 and ask you if you can identify that picture?

A. This is a picture of City Hall Avenue taken from the west side of Cumberland.

Q. Can you show on that picture where the cab
page 54 } was when you got to the scene of the accident?

Mr. Howard: I understood him to say he didn't know where it was, that he was interested in the injuried party.

A. Yes. I don't recall exactly how the injuried party was when I arrived. It was raining hard. My main concern was to get the person away.

By Mr. Lipkin:

Q. Can you show where the cab was?

A. Approximately opposite of this driveway on the north side of City Hall Avenue.

Q. Look at the defendant's exhibit 1 and see if you can also point out on that picture where you say the taxi cab was?

A. Approximately in back of this position by this driveway.

Q. Do you recall if there was a second cab that came there, or not?

A. No.

Q. Is it impossible for you to place the plaintiff's body in relation to the line on the street?

A. No, I could not.

Q. From your investigation were you able to tell the point of collision in the street?

A. No.

page 55 } Q. Were you able to tell the point of collision on the vehicle?

A. No. Only what the driver said to me.

Q. Did you talk to Mr. Wong?

Officer S. E. Cherry.

A. I tried to but I was unable to understand him at the hospital.
Q. Are there any pedestrian walks in that area?
A. No.

Mr. Howard: I question the relevancy of that question. There are any number of streets in the City that don't use any crosswalks.
Mr. Lipkin: I think Mr. Howard is arguing the case.
The Court: I think it is immaterial.

By Mr. Lipkin:
Q. Are you familiar with this area?
A. Yes.
Q. Can you state whether or not there is a regular pedestrian crossing in that area?

Mr. Howard: I object to that.
The Court: I think he testified there was no crossing lane or line.
Mr. Lipkin: The statute provides for it.

By the Court:
Q. Was there a crosswalk by the police station page 56 } at Avon Street marked across the street?
A. I don't think it is.
Q. You pass it everyday.
A. Yes. I am certain there is no crosswalk laid off at Court and City Hall.

By Mr. Lipkin:
Q. My question was was this a regular pedestrian crossing?

Mr. Howard: I object to that question. We are in the same position. It is a matter of law as to where a pedestrian can cross.
The Court: It is a guess on his part. I sustain the objection.
Mr. Lipkin: I would like, if I can, to take it up out of the presence of the jury. I would like to pursue it.

By the Court:
Q. Is there a line on the opposite side of City Hall Avenue going from the north side to the south side? There is a lane there.

Officer S. E. Cherry.

A. Yes.
Q. Does it continue over directly?
A. No. Cumberland doesn't continue across City Hall Avenue.

By Mr. Lipkin:
page 57 } Q. How far was the scene of the accident from Cumberland Street?
A. I estimate it approximately one hundred and fifty foot west of Cumberland.
Q. The accident was west of Cumberland Street approximately one hundred and fifty feet?
A. Yes.

Mr. Howard: He said Cumberland Street was one hundred and fifty feet from City Hall, I think.
The Witness: On my entry here I have the accident occurred approximately one hundred and fifty feet west of Cumberland Street.

Q. You just answered on direct examination that you didn't know where the point of impact was.

Mr. Lipkin: I think he ought to wait for cross examination.
The Court: He is referring to his own memorandum now and says it was one hundred and fifty feet.

By Mr. Lipkin:
Q. Will you estimate how far west of Cumberland Street Metcalf Lane is?
A. No, I wouldn't be able to say.
Q. Can you say whether it is more or less than
page 58 } one hundred and fifty feet?
A. It is more than one hundred and fifty feet.

• • • • •

CROSS EXAMINATION.

By Mr. Howard:
Q. How soon after the accident was it before you got there?
A. A short time. The police department was called immediately and as soon as they gave me the message there was

someone injured I immediately proceeded with a red light and siren.

Q. Metcalf Lane which I show you on defendant's exhibit 1 goes all the way over to Plume Street.

A. Yes. It runs from City Hall to Plume Street.

Q. It is regularly used by traffic of this City going from City Hall Avenue to Plume Street?

A. To my knowledge it is not a regular thoroughfare. From my observation it is used mostly by police cars that come around into the police station. I have seen a few regular automobiles there.

Q. The police department and their cars use it?

page 59 } A. Yes.

By The Court:

Q. Is it open for travel?

A. Yes sir, it is open.

Mr. Howard: I have no further questions.

C. F. TURNER,

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

DIRECT EXAMINATION.

By Mr. Lipkin:

Q. State your name and occupation, please.

A. Charles F. Turner, Supervisor for Terminal Cars, Incorporated.

Q. Were you working on the night of the accident on September 29th, 1957?

A. Yes.

page 60 } Q. When Rufus Miller had an accident?

A. Yes.

Q. How soon after the accident was reported did you arrive at the scene?

A. Just a few minutes because I was in the area. I arrived before the police accident car did.

Q. Were you in a cab, or not?

A. Yes.

Q. Where did you pull up to?

A. I was going east on City Hall and pulled into Cumberland Street, turned around and headed back towards Bank Street and parked where Mr. Wong was lying.

C. F. Turner.

Q. Where was Mr. Wong lying in the street?

A. Approximately on the line of the westbound lane of City Hall Avenue.

Q. I show you plaintiff's exhibit 2 and ask you if you can point out on that where you saw Mr. Wong lying when you got there.

A. Approximately here (indicating).

Q. Where is "here"?

A. You see the ink marks. It is on this line here.

Q. You are pointing to the ink mark of Y.

A. Yes.

Mr. Howard: Let him show you.

page 61 } A. Here is the curb, where the break in the curb is. Looking at this angle you see where the break in the curb is, and it is this line approximately here (indicating on photograph). The cab was approximately here and I came down here and parked my taxi.

By Mr. Lipkin:

Q. You were in the center of the street?

A. Yes. The other cab was approximately in this—about a car length ahead of Mr. Wong.

Q. Which lane was it in?

A. Against the curb.

Q. Did you see any marks on the curb from the cab?

A. I took my flashlight and went around on the other side of the cab and his tires were up right against the curb. The curb is rather high. It was up against the curb. Unless you were away from it you couldn't climb it.

Q. How far ahead of Mr. Wong's body was the cab?

A. Approximately ten or twelve feet.

Q. With reference to the lane which is on the south side of City Hall Avenue, using this picture, defendant's exhibit 1, can you come down here and show us where his body was?

A. Lying approximately here. You can't see this other line. It was approximately in an angle from this street where the curb breaks. In the other one you can't see it.

page 62 } Q. Take this pen and make a mark on this picture with an X where his body was.

A. You can't see the center line coming down here. This is the center line of the westbound lane. It was approximately here.

Q. He was on the center line of the westbound lane?

C. F. Turner.

A. Yes.
Q. Can you show in what direction, by looking at the picture, Cumberland Street is?
A. Certainly. It is right—it is to the right.
Q. Can you estimate how far that was from Cumberland Street, where his body was lying when you got there?
A. It is hard to say, but one hundred and twenty five to one hundred and fifty feet.
Q. Can you estimate how far east was this lane from where you estimate his body to be?
A. I imagine around fifteen or twenty feet, if you drew a line directly across.

Mr. Lipkin: Take the stand and answer Mr. Howard's questions.

CROSS EXAMINATION.

By Mr. Howard:
page 63 } Q. Let's take defendant's exhibit 1 or plaintiff's exhibit 2 and mark on there where the body was when you got there after the accident.
A. On both of them?
Q. Please.
A. This is about approximately like the taxi was sitting, here at an angle from this doorway. It is an angle, and he was against the curb along here.
Q. It is your drawing indicating from bumper to bumper?
A. Yes, approximately.
Q. Put the letter C on this.

(Witness indicates on photograph)

Q. And the same on the other one?
A. About here.

Mr. Howard: For the record, the witness places the letter C on plaintiff's exhibit 2 and on defendant's exhibit 1 to indicate the position of the cab.

By Mr. Howard:
Q. What is your job with the taxi cab company?
A. Supervisor.
Q. Where were you when you received the call?

C. F. Turner.

A. I can't recall the exact location.

Q. How did you receive it?

page 64 } A. Over the radio.

Q. Which meant the word had to be sent by Mr. Miller to headquarters?

A. Yes.

Q. You have no idea how far you were from the scene at the time?

A. No. It was just a few minutes before I got there. Like I say, I was there before Officer Cherry. It was not but a few minutes after I got there before he got there.

Q. Do you just take care of maintenance of vehicles?

A. No, just Supervisor, supervisory capacities, on the street.

Q. Are you an officer of the corporation?

A. No.

Q. Is Mr. Miller an officer of the corporation?

A. No.

Q. Was it raining when you got there?

A. Yes.

Q. Did you notice the sufficiency of the street lights in the area?

A. I don't believe it is too well lighted.

Q. Are there any street lamps around?

A. I couldn't recall.

Q. Have you ever regularly driven for this company?

A. Yes.

page 65 } Q. How far will *you* headlights show down the road?

Mr. Lipkin: I object to that.

The Court: Objection sustained.

By Mr. Howard:

Q. You are familiar with the downtown area of Norfolk?

A. Yes.

Q. Are you familiar with Metcalf Lane?

A. Some of those lanes, but I don't know the names. They are not generally traveled.

Q. You know where Metcalf Lane is in respect to the accident, and Cumberland Street?

A. Metcalf runs—I would not definitely say.

Q. Let me show you plaintiff's exhibit no. 2. Do you recognize Metcalf Lane there?

Rufus G. Miller.

A. If it is Metcalf Lane, yes.
Q. Have you ever used it to go to Plume Street?
A. No.
Q. Are you familiar with that lane at all?
A. Not all the way through.
Q. Where did you park *you* cab, Mr. Turner?
A. I went up to Cumberland Street. I was going east on City Hall and I went to Cumberland Street and turned around and parked in the middle lane going west and turned the blinker on and went to where Mr. Miller was.
Q. You were there when Officer Cherry arrived?
page 66 } A. Yes.
Q. Did you assist him in placing Mr. Wong in his car?
A. Yes.
Q. You did?
A. Yes sir.

Mr. Howard: Thank you. No further questions.

RUFUS G. MILLER,
a witness herein, having been previously sworn and examined, was recalled for further examination and testified as follows:

DIRECT EXAMINATION.

By Mr. Lipkin:
Q. Mr. Miller, there were two passengers in your cab at the time of the accident, were there not?
A. Yes sir.
Q. Do you know anything about those passengers?
A. I know they were Merchant Seamen, and
page 67 } that is all. I don't know their nationality.
Q. When the accident occurred where was your cab?
A. Give me the question again.
Q. When the accident occurred, in relation to the lanes of traffic, where was your cab?
A. My cab—about the time the man walked into the side of my cab, my cab had struck the curb.
Q. In which lane of traffic?
A. The right lane going west on City Hall Avenue.
Q. Where was Mr. Wong's body after the accident?
A. Mr. Wong's body was lying on the dividing line for west lane of traffic on City Hall Avenue.

Rufus G. Miller.

Q. How far from *you* cab was it when you stopped?
A. My cab was between ten and twelve feet past Mr. Wong.
Q. At the time of the accident did you have your windshield wipers on?
A. Yes.
Q. Could you have seen without them?
A. I don't think so.
Q. What was the first thing you did after the accident?
A. Jumped out of the cab and ran back to Mr. Wong. I didn't want him to be moved or get hit by oncoming traffic that would be coming up from behind.
page 68 } Q. Then what did you do?
A. I would say in fifteen or twenty seconds a car came up and stopped and flagged traffic to keep anybody from running over him.
When the car stopped I ran back to the radio and called the dispatcher to send help, that I had had an accident.
I wouldn't leave the man, but asked one of the cabs to take the fares, my passengers.
Q. Who arrived first, Officer Cherry or Mr. Turner?
A. Mr. Turner.
Q. Where did he place his cab.
A. It was sort of straddling the line.
Q. Did you move your cab anytime after you pulled over?
A. No.
Q. Did you back up any?
A. No, sir.
Q. Did you go over and turn on any windshield wipers after the accident?
A. No, sir.

Mr. Lipkin: No further questions.

CROSS EXAMINATION.

page 69} By Mr. Howard:
Q. Mr. Miller, these seamen in your cab, did they speak English?
A. Just maybe enough to let you know where they wanted to go.
Q. Where did they say they wanted to go?
A. To the Post Office.
Q. Where did you pick them up?
A. On Brambleton Avenue and Rose Avenue.

Rufus G. Miller.

Q. There was nothing to obscure your vision, was there?
A. Nothing to obscure my vision except it was rainy, foggy, and hazy night, and your visibility is not good.
Q. There were no cars behind you or in front of you when you saw Mr. Wong was slowly walking out at a normal pace? Did you see him stop?
A. No, sir.
Q. Do you know whether he stopped?
A. To my knowledge, he didn't stop.
Q. If he said he did stop, you would have no reason to doubt it?
A. I said, to my knowledge, he didn't stop.
Q. Did you keep your eyes on him all the way across the street?
A. I didn't have to.
page 70 } Q. Why do you say you didn't have to?
A. I had my headlights on, but you couldn't see but so far.
Q. How far could you see, ten feet?

Mr. Lipkin: Your Honor admonished me about going beyond the testimony.
The Court: Yes.
Mr. Howard: I don't think he testified to this.
The Court: I think he answered the question.

By Mr. Howard:
Q. Are you telling the members of the jury that Mr. Wong proceeded to walk into the side of your cab without stopping?
A. Yes.
Q. Can you tell us why you were straddling the middle of the westbound line?
A. May I have one of the pictures to show you?
Q. Yes.
A. There is a curve—

By the Court:
Q. Show it to the jury.
A. This is City Hall—this is Church Street and this is City Hall here. This is City Hall and it makes a curve, slight curve, around Cumberland Street in this di-
page 71 } rection.
In this lane there was nothing coming and I straddled this line.

Rufus G. Miller.

By Mr. Howard:

Q. You were still straddling that line when you saw Mr. Wong?

A. Yes. When I saw Mr. Wong I was straddling it and tried to get away from the man by turning my cab sharply to the right.

Q. Had you not been straddling that line you would have been in the right lane all along?

A. Yes.

Mr. Howard: That is all.

RE-DIRECT EXAMINATION.

By Mr. Lipkin:

Q. Was there any obstruction between you and Mr. Wong so he could not have seen your cab?

A. No.

Q. When you saw him was he looking at you?

A. No.

Q. What was he doing?

A. Walking across the street with his coat up page 72 } around his neck and his hat down.

RE-CROSS EXAMINATION.

By Mr. Howard:

Q. You saw him with his hat down and his collar turned up. You observed that for how long a time?

A. Within seconds.

Q. Did you immediately put on brakes?

A. Yes.

Q. Did the cab skid?

A. Yes.

Q. You were going fifteen or twenty miles an hour?

A. Yes.

Q. How far did the cab skid?

A. It hit the curb and went fifteen feet past the man.

Q. Did the curb stop the car?

A. No. It could have helped.

Q. You still went fifteen or twenty feet after striking the curb?

A. I went ten or fifteen feet after striking him.

Mr. Howard: That is all.

By Mr. Lipkin:

page 73 } Q. Did you hit the curb straight?

A. No, because I was too close to the curb.

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page 74 }

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CHARLES E. BROWNING,

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

DIRECT EXAMINATION.

By Mr. Howard:

Q. State your full name, please.

A. Charles E. Browning.

Q. Where are you employed?

A. By the City of Norfolk.

Q. In what department?

A. Department of Public Works.

page 75 } Q. Can you tell us whether or not Metcalf Lane is used for the purpose of travel?

A. Yes.

Q. Can you tell us what type of construction the buildings are located on the north side of City Hall Avenue in the vicinity of Metcalf Lane?

A. Business district.

Q. Can you tell us whether or not the business district has been improved, Church Street and City Hall Avenue?

A. Yes.

Mr. Howard: That is all.

CROSS EXAMINATION.

By Mr. Lipkin:

Q. What is your name?

A. Charles E. Browning.

Q. How long have you been with the City?

A. Eleven years.

Charles E. Browning.

Q. What department are you in?
A. Public Works.
Q. That lane is adjacent to the police garage, and that is a solid wall there?
page 76 } A. Yes.
Q. On the other side there is a retaining wall?
A. Yes.
Q. About eleven feet wide?
A. About that.
Q. The lane is just wide enough for one vehicle to go through?
A. Yes.
Q. There is no pedestrian walkway is there?
A. No.
Q. Do you know whether there are any crosswalks for pedestrians in that vicinity?

Mr. Howard: If my friend is speaking of a crosswalk at this particular point, it is not there. From Bank Street to Church Street there are a number of streets that don't have them.
Mr. Lipkin: He is arguing the case again.
The Court: Objection sustained.

By Mr. Lipkin:
Q. Do you know whether there is a regular pedestrian crossing there, or not?

Mr. Howard: That is a question of law, and I object.
The Court: Objection sustained. Both sides rest?

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* * * * *

(Court and counsel retire to chambers).

Mr. Lipkin: If your Honor please, I would like to make a motion to strike the evidence of the plaintiff on the grounds that the evidence does not show any negligence on the part of the defendant and, number two, it shows contributory negligence on the part of the plaintiff.

I would like to point out to your Honor that the only evidence as to how he was struck was from the driver. He testi-

fied he walked into the side of the car. The plaintiff says he doesn't know how he was struck except he said the cab crossed in front of him and he doesn't know what part of the cab hit him.

The positive testimony of Mr. Miller was that he struck the left front fender and it spun him around, and that is how it happened.

The evidence of the plaintiff was to the effect
page 78 } that he was in the lane of traffic for westbound travel and he saw the cab some forty or fifty feet away, and he stood there and did nothing. Certainly, under those circumstances, he had the duty of protecting himself. He did nothing, and on that basis I say the plaintiff's own testimony shows he was guilty of contributory negligence.

I would like to rely on the case of *Hodgson* v. *McCall,* 197 Va. 52, which has to do with the case involving an accident at Virginia Beach. There the plaintiff was crossing—I will read the head note.

"After dark on a rainy night plaintiff undertook to cross a City street between two intersections at which there were traffic lights. She stopped at the center line to allow traffic from her right to pass, turning her back to traffic which might come from her left because the light at the intersection was red. While in this position she was struck by defendant's car. On these facts both parties had equal opportunity to avoid the accident, but plaintiff had the greater duty of care because she was crossing improperly.
page 79 } The doctrine of last clear chance was inapplicable and plaintiff's evidence was properly struck."

The Court: There is only one point I want to inquire of you on. This case at Virginia Beach involved an accident that happened between two intersections. Apparently this lane constitutes an intersection.

Mr. Howard: That is correct.

The Court: If one highway intersects another highway, that is an intersection. The fact that it doesn't cross over is one thing that worries me.

Mr. Lipkin: If your Honor please, the statute relating to intersections is in the same statute relating to where pedestrians can cross.

The Court: Read the section on the pedestrian's right to cross.

Mr. Lipkin: Section 46-243 reads as follows:

"Pedestrians crossing streets.—When crossing highways or streets within incorporated towns and cities, pedestrians shall not carelessly or maliciously interfere with the orderly passage of vehicles. They shall cross wherever possible only at intersections. They shall cross only at right
page 80 } angles. Pedestrians crossing highways or streets at intersections shall at all times have the right of way over vehicles making turns into the highways or streets being crossed by the pedestrians."

Section 46-244 reads:

"Right of way of pedestrians.—The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices.

"No pedestrian shall enter or cross an intersection regardless of approaching traffic."

"The drivers of vehicles entering, crossing or turning at intersections shall change their course, slow down or come to a complete stop if necessary to permit pedestrians to safely and expeditiously cross such intersection."

That was the basis of my testimony in asking
page 81 } the question whether this was a regular pedestrian crossing.

The Court: There is a case in which the proposition was laid down that when crossing at an intersection you shall step from the sidewalk to the street, look to the left, continue looking to the left, until you reach the center of the street, at which time you shall pause, stop, and look to the right and hold that position in spite of the statute giving the pedestrian the right of way, and if he does not comply with these rules he cannot recover if injured.

The plaintiff's own testimony was that he got to the center line and stopped at the center line, and was run over.

Mr. Lipkin: He said he was over the center line.

The Court: Then he violated the rule. He saw the car approaching thirty, forty or fifty feet away, but did nothing to protect himself.

Mr. Lipkin: He was over the center line.

The Court: He was on or over the center line, and if he could have gotten away from the peril and he didn't, he can't recover.

The Court is going to sustain the motion to
page 82 } strike.

Mr. Howard: Your Honor hasn't given me an opportunity to argue it yet.

The Court: I thought you were acquiescing in it.

Mr. Howard: No. Here is a Chinese man walking across City Hall Avenue and before leaving the curb he looked to the left and headed toward the center of the street. He says he may have been a foot over the center, and he looked to the right and saw a cab forty or fifty feet away, and he stopped and the cab struck him. He had the right of way, and had gotten almost across the street and stopped and the cab struck him.

The Court: If he had been struck by the front bumper it would be different. Where he was struck was to the front. I am going to let it go to the jury, but I am pretty sure I will set aside any verdict for the plaintiff.

Let me see your instructions.

Mr. Lipkin: If your Honor please, I except to the granting of plaintiff's instruction 1 on the grounds that this was not an intersection within the meaning of the stat-
page 83 } ute where a pedestrian would have the right of way in crossing.

Mr. Howard: I want to move the Court strike the defendant's evidence because he is guilty of negligence as a matter of law because he didn't see the plaintiff until he was twenty feet away.

I move the Court to hold as a matter of law that the defendant was guilty of negligence, namely, he was driving on the east and west boundary lane and—

The Court: He was straddling the western lane. I asked that. He was straddling in both the westbound lanes.

Mr. Howard: I move the Court to strike the defendant's evidence on the further grounds that the defendant driver was straddling both lanes of City Hall Avenue, heading in a westerly direction,that the lanes of City Hall Avenue headed in a westerly direction were plainly marked by two white lines, and the driver was traveling astraddle the lines by his own testimony, when the law does require him to be in the curb lane or right lane, and secondly the cab driver admitted he didn't see the pedestrian until he was some
page 84 } twenty feet away, and he was driving with his lights on dim.

The Court: As required by statute.

Mr. Howard: But the law requires his lights to reflect a certain distance, and he said they would probably reflect forty to fifty feet, and the law requires them to reflect more than twenty feet.

The Court: I overrule your motion, to which action you except.

Mr. Howard: We except.

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A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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