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Record No. 5027

In the Supreme Court of Appeals of Virginia at Richmond

IRMA MARY THOMPSON

v.

HAZEL KATHLEEN MANN

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

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. 5027

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 4th day of May, 1959.

IRMA MARY THOMPSON, Plaintiff in error,

against

HAZEL KATHLEEN MANN, Defendant in error.

From the Law and Equity Court of the City of Richmond

Upon the petition of Irma Mary Thompson a writ of error is awarded her to a judgment rendered by the Law and Equity Court of the City of Richmond on the 15th day of December, 1958, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Hazel Kathleen Mann was defendant; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 29 } December 15, 1958.

Wilbur C. Allen, Esq.,
Ernest G. Garrett, Jr., Esq.,
Attorneys at Law
Richmond, Virginia

In *re*: *Thompson* v. *Mann.*

Gentlemen:

I beg to advise that I have this day entered a final judgment order in the above-styled action, overruling the motion to set aside the verdict of the jury, and saving to the plaintiff her exceptions.

Beginning with *Hogan* v. *Miller,* 156 Va. 166, I think that I have read every case dealing with the question here presented. Whether a "duty to see another vehicle which is in plain view" is the exact converse of no "absolute duty to see an oncoming vehicle unless it is in such plain view that looking with reasonable care he is bound to have seen it", as this language is used in the later cases, I question with all deference. But, be that as it may, I find nothing in the cases to indicate that any special rule applies here. While the motorcycle on which the plaintiff was a passenger was in plain view of the defendant for a comparatively short time before she saw it, and while had I been hearing the case without a jury I should have found the other way, I cannot say that all fair-minded men would necessarily agree that the defendant's failure to see the motorcycle at an earlier time was the result of a failure on her part to exercise ordinary care.

Yours very truly,

RLY/e

* * * * *

page 30 }

* * * * *

In the Law and Equity Court of the City of Richmond, the 15th day of December 1958.

* * * * *

This day came again the parties, by counsel, the motion to set aside the verdict of the jury in this case having been fully argued, and the Court having taken time to consider of its decision to be rendered herein, doth overrule the same.

Therefore, it is considered by the Court that the plaintiff recover nothing of the defendant, but that the defendant recover of the plaintiff her costs by her about her defense in this behalf expended.

To all of which action of the Court the plaintiff, by counsel, objected and excepted.

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Received and filed February 12, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR.

Irma Mary Thompson, plaintiff in the above styled action, hereby gives notice of her appeal to the Supreme Court of Appeals of Virginia from the final judgment entered in this action on the 15th day of December, 1958, and duly files this, her appeal, with the following assignments of error:

1. The court erred in overruling the motion of the plaintiff to set aside the verdict of the jury as contrary to the law and evidence, inasmuch as the defendant was guilty of negligence as a matter of law which was the proximate cause of the accident;

2. The court erred in refusing to grant Instruction 1-A tendered on behalf of the plaintiff for reasons stated on pages 107-108 of the reporter's transcript;

3. The court erred in refusing to grant Instruction 1-B tendered on behalf of the plaintiff for reasons stated on page 108 of the reporter's transcript;

4. The court erred in refusing to grant Instruction 1-C tendered on behalf of the plaintiff for reasons stated on page 108 of the reporter's transcript;

5. The court erred in refusing to grant Instruction 1-D tendered on behalf of the plaintiff for reasons stated on page 109 of the reporter's transcript;

page 32 } 6. The court erred in refusing to grant Instruction 2-A tendered on behalf of the plaintiff for reasons stated on page 109 of the reporter's transcript;

7. The court erred in refusing to grant Instruction 3-A tendered on behalf of the plaintiff for reasons stated on page 109 of the reporter's transcript;

8. The court erred in granting Instrution 5 on behalf of the defendant for reasons stated on pages 109-110 of the reporter's transcript;

9. The court erred in granting Instruction 6 on behalf of the defendant for reasons stated on page 110 of the reporter's transcript;

10. The court erred in granting Instruction 7 on behalf of the defendant for reasons stated on page 110 of the reporter's transcript.

Given under my hand this 12th day of February, 1959.

IRMA MARY THOMPSON
By FRANK C. MALONEY, III
ALLEN, ALLEN, ALLEN AND ALLEN
4020 West Broad Street
Richmond, Virginia,
Attorney for plaintiff.

* * * * *

page 3 }

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HAZEL KATHLEEN MANN,
the defendant, being called as an adverse witness, first being duly sworn, testified as follows:

Irma Mary Thompson.

DIRECT EXAMINATION.

By Mr. George Allen, Sr.:
Q. Please state your full name.
A. Hazel Kathleen Mann.
Q. What kind of automobile were you driving on the day of this accident
A. '54 Ford.
Q. In good condition
A. Yes, sir.
Q. Brakes in good condition?
A. Yes, sir.
Q. Steering apparatus in good condition?
A. Yes, sir.
page 4 } Q. How fast were you traveling as you approached this intersection?
A. I was approaching between twenty and twenty-five miles.
Q. How close were you to the motorcycle when you first saw it, when you saw it the first time?
A. I saw it the first time, I was well into the intersection, and the motorcycle was approaching I would say a very short distance from me.
Q. You were well into the intersection when you first saw the motorcycle?
A. Yes, sir.
Q. And how close was the motorcycle to your automobile when you first saw it?
A. Well, I would say not over six feet.

Witness stood aside.

page 5 } IRMA MARY THOMPSON,
the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Wilbur Allen:
Q. State your name, please.
A. Mrs. Irma Thompson.
Q. How old are you?
A. 21.
Q. What is your occupation?

Irma Mary Thompson.

A. I am a waitress.

Q. Were you riding on a motorcycle operated by your husband on September 22, 1957?

A. Yes, sir.

Q. Approximately what time did you and your husband leave your home that day?

A. Around 12 o'clock.

Q. Where were you going?

A. To the State Fair.

Q. Did you attend the State Fair?

A. Yes, sir.

Q. About what time did you leave the State Fair Grounds?

A. Around 4 o'clock.

page 6 } Q. When you left did you accompany or follow behind a couple on another motorcycle?

A. Well, we met up with a couple, and we followed them to Bancroft. We turned right on Bancroft. We went for about a block, and we left them.

Q. When you left them where were you going?

A. We were heading home.

Q. Where was your home at that time?

A. 2301 West Grace Street.

Q. Do you know whether or not the motorcycle was in collision with an automobile at the intersection of Bancroft Avenue and Richmond Henrico Turnpike?

A. We were heading west on Bancroft, and we got to the intersection, and a crash occurred. The next thing I knew I was laying on the ground.

Q. Do you know how the collision occurred?

A. Not until after I had gotten up. I was trying to get up off the ground, but I couldn't. My legs were numb. I couldn't move them.

Q. The motorcycle you were riding on, is that a motorcycle built for one or two people?

A. It is built for two people.

Q. Is there a place on the motorcycle for you to hold on?

A. Yes, sir.

Q. Were you holding on?

A. Yes, sir.

page 7 } Q. Is there a place on the motorcycle for the passenger to place his or her feet?

A. Yes, sir; there is.

Q. What is that?

Irma Mary Thompson.

A. There are two rounds behind the driver's feet. They are about that far from the driver, so we won't—so the passenger cannot get in any way in the driver's way.

Q. Did you have your feet on that round?

A. Yes, sir; I kept them on there all the time.

Q. When you were riding along what position did you have your head in?

A. Well, to keep the wind from going through my hair I generally keep my head down into my husband's back, but not too hard against it because I just—just as if I put it down, because a certain amount of speed, the air will run through your hair and blow it all on your face. And I just kept it down in his back.

Q. Is that the position you had your head in when the motorcycle entered the intersection of Bancroft and Henrico Turnpike?

A. Yes, sir; I generally always keep it that way.

Q. Did you see the automobile approaching from the right which struck the motorcycle?

A. No, sir; I did not.

page 8 } Q. The first thing you knew was, I believe you said, was when you were lying on the ground?

A. Yes, sir.

* * * * *

page 18 }

* * * * *

Q. Did you have anything to do with the operation of the motorcycle you were riding on?

A. No, sir.

Q. Who did you leave the operation of the motorcycle to?

A. Left it to my husband.

Q. Is that what you were doing at the time of the collision?

A. Yes, sir; I was.

page 19 } Q. In other words, you were just riding on it?

A. Yes, sir.

Irma Mary Thompson.

CROSS EXAMINATION.

By Mr. Garrett:

* * * * *

page 20 }

* * * * *

Q. What was going on out at the State Fair that day, was the Fair on?

A. Yes, sir; the Fair was there.

page 21 } Q. What was the grandstand show that afternoon? Do you recall, was there a motorcycle race there that day?

A. Yes, sir.

Q. And you all attended the motorcycle race, is that right?

A. Yes, sir. We did.

Q. That was sort of annual gathering of all the motorcycle enthusiasts, I guess, isn't it?

A. Well, that is the first one we had been to.

Q. After the race was over you and this other couple were riding together for some distance, I believe you said?

A. After we left the Fairgrounds we met up with this other couple.

Q. Then you left them on Bancroft and went your own way?

A. Yes, sir; we did.

Q. Do I understand that you did not see anything of Miss Mann's car until the accident had occurred?

A. Yes, sir.

Q. You had your head down behind your husband's back to keep the wind from blowing your hair?

A. Yes, sir.

page 22 } Q. That was the situation at the moment of collision?

A. I believe so, because I did not see her coming.

Q. Well, then I would take it, Mrs. Thompson, that the motorcycle was moving at a speed enough to create a little wind there then, is that the general idea?

A. Well, if you have a car going the same speed if you have the windows open, why your hair will blow around, too.

Irma Mary Thompson.

Q. Do you have any idea of the speed of your motorcycle?
A. No, sir; I don't.
Q. But it was blowing hard enough that you had to duck your head down?
A. I always—The passenger, unless he is taller than what the driver is cannot see over the driver.
Q. You were moving, though, at a sufficient speed that you wanted to put your head down at your husband's back, as I understand it?
A. I always ride with my head down in his back, no matter whether he is going five miles an hour or what, I can't control the motorcycle.
Q. When you make a turn or something, don't you have to lean with the motorcycle just as your husband does
page 23 } to kind of keep the thing from rolling or something?
A. Well, that is why you take and lean your body to the driver. You have your rims back here (indicating), and you sit with your head down. And you have the rounds which you put your feet on. And that way, you go the same way as the motorcycle does.
Q. Do you try to coordinate your leaning with the leaning of your husband?
A. I do as the motorcycle goes.
Q. (Indicating) Could you tell me, Mrs. Thompson, if that is a picture of your motorcycle? First let me ask you this. Who owns the motorcycle, you or your husband, or do you all own it jointly?
A. My husband owns it.
Q. Is this (indicating) your motorcycle, your husband's motorcycle?
A. Yes, sir; it is.
Q. Did I understand you to say it was a two-seater motorcycle?
A. Yes, sir; it is. It has not got two seats on it but it rides for two passengers.
Q. You call it a two-seater motorcycle if it is large enough for two people to sit on it, is that what you mean?
A. It sits two people. If you let me, I will show
page 24 } you.

Note: Said picture now marked and filed as Defendant Exhibit A.

Donald Edward Thompson.

Q. Is that (indicating) another view of the same machine?
A. Yes, sir; it is.

Note: Said picture now marked and filed as Defendant Exhibit B.

Q. I believe you were going to tell us something about the seat now.
A. Yes, sir.
Q. Step over here and tell the jury. This is Defendant Exhibit A. Now what were you telling us about?
A. You see how this seat is right here. This is a spring which holds it back up. The driver sits on this part of the seat, right here. The passenger sits on the back seat, which where this spring is it brings the seat down level.
Q. But both of you were on the one seat?
A. Yes, sir. That is the way it is made.
Q. Is that what you wanted to tell us?
A. Yes, sir.
Q. How high is that motorcycle?
A. I have not the slightest idea.
page 25 } Q. They don't measure them by hands like they do horses? Would it be a 36-inch motorcycle?
A. All I know it is a '49 Harley Davidson 74.
Q. You hold on back here (indicating) as I understand you?
A. Yes, sir.
Q. You do not hold on around your husband?
A. No, sir. You are not supposed to.

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page 27 }

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Witness stood aside.

page 28 } DONALD EDWARD THOMPSON,
a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Wilbur Allen:
Q. State your full name, please.

Donald Edward Thompson.

A. Donald Edward Thompson.
Q. How old are you?
A. 23.
Q. What is your occupation?
A. Machine operator for E. R. Carpenter Company.
Q. Were you operating a motorcycle, and your wife was riding with you on September 22, 1957?
A. Yes, sir; I was.
Q. Had you all been to the motorcycle races at the State Fair on that day?
A. Yes, sir; we had.
Q. And then I believe the testimony is that you dropped some friend off on Bancroft Avenue or left them off?
A. Yes, sir; we did.
Q. And you proceeded to go on home then?
A. Yes, sir.
page 29 } Q. Wasn't your motorcycle involved in a collision with an automobile at the intersection of Bancroft Avenue and Richmond Henrico Turnpike?
A. Yes, sir; it was.
Q. About what time was the collision?
A. Somewhere around 4:30. I don't know exactly.
Q. In the afternoon?
A. Yes, sir.
Q. Which direction were you going and on what street?
A. We were headed west on Bancroft.
Q. Which direction was the automobile headed, and on what street?
A. Headed south on Richmond Henrico Turnpike.
Q. As you approached the intersection approximately how fast were you operating the motorcycle?
A. Approximately 20 miles an hour.
Q. Tell the gentlemen of the jury how the collission occurred.
A. We were headed west on Bancroft; about forty feet or two and a half car lengths from the intersection I looked to my right and there were no cars coming. I looked back to my left, and there was nothing coming from that way. By that time I was entering the intersection. And looked back to my right again. There was this car about 10 or
page 30 } 15 feet from me. And I went to curve to the left to get out of the way of the car, but just as I did that she hit me on the right-hand side.
Q. What portion of the motorcycle did she hit?
A. The rear part of the motorcycle.

Donald Edward Thompson.

Q. The rear part of your motorcycle on the right side?
A. Yes, sir.
Q. What happened to the motorcycle when she hit it?
A. It turned around in the street and landed on the southwest corner against the sidewalk.
Q. What happened to your wife?
A. She was thrown approximately ten to fifteen feet further than the motorcycle under—up in the grass there.
Q. I believe you said that you were about two and a half car lengths from the intersection. And you looked to your right?
A. Yes, sir; I did.
Q. And I think that is about forty feet?
A. Approximately forty feet; yes, sir.
Q. Can you tell us how far you could see up the Richmond Henrico Turnpike to your right?
A. From forty feet you mean?
Q. Yes.
page 31 } A. Approximately 50 feet.
Q. Anything within that 50 feet?
A. No, sir: there was not.
Q. Then what did you do?
A. I looked to my left and just kept on going. And we entered the intersection, I looked back to the right again, and there she was.
Q. About how far was she from you?
A. Approximately ten or fifteen feet.
Q. Can you tell us whether or not she had entered the intersection at the time that you saw her?
A. Yes, sir.
Q. Were you in the intersection?
A. Yes, sir.
Q. Tell us about how fast she was going?
A. She was going approximately twenty-five or thirty miles per hour.

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page 32 }

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Q. Now the motorcycle that you were operating, can you tell us whether that was a motorcycle built for one or two people?
A. Built for two.

Donald Edward Thompson.

Q. I have here a title from the Motor Vehicle Department, and will ask you if that is the application and the title of which was issued for the operation of that motorcycle to you?

Note: Mr. Garrett examines said paper.

Mr. Garrett: Your Honor, this apparently was made out by Mr. Thompson. To that extent it would be merely self-serving on the question of whether this was a one or two seater motorcycle.

The Court: I would have to hear some evidence on that.

Mr. Garrett: I do not question the proof of the
page 33 } title.

The Court: I know. I do not imagine there is any controversy about ownership.

Mr. Allen: I want to introduce the application and the title which were made at the time the title was issued to him, to show that the application was made and the title was issued for the two-seated motorcycle. I think that is relevant and I would like to introduce it in evidence.

The Court: Is there any law on it? Are they required to do that by some statute?

Mr. Allen: The statute is that two people cannot ride on a motorcycle which is made for one. So when you register the motorcycle you have to register it for either seating of one or two people.

The Court: Let the jury step out for a few minutes.

Jury out.

By the Court:

Q. Who made this out?

A. I guess Pinnell made it out. I only saw it the day I sold it. The bank had it until then, I guess.

page 34 } Q. Did you get a bill of sale with the machine when you bought it?

A. Yes, sir; I did.

Q. You don't have it with you, do you?

A. No, sir.

The Court: Mr. Garrett, apparently what happened was that Pinnell made this out for this man, and he never really saw it, the bank had it. He just signed it at Pinnell's. He had to file it.

Mr. Garrett: Well, Your Honor, it is his. I write deeds

for my clients but that does not make me responsible for the property, sir.

The Court: Can you put your hand on the statute which deals with these things?

Mr. Garrett: You understand, sir, I am not making any point of the authenticity of the title.

The Court: You just say that the typed figure "2" in there is self-serving.

Mr. Garrett: Yes, sir.

Mr. Allen: The statute, sir, is 46-183.1.

page 35 } Note: The objection is argued at length in Chambers.

The Court: Well, I guess the only way it comes in here is that motorcycle is a motor vehicle within the general registration laws.

Mr. Allen: In addition to that it cannot come under the laws of self-serving statements because the application is a part of the title. The title is issued on the application. Therefore you show the application in the title to show that the title was issued for a two-seated vehicle.

The Court: I will sustain the objection to it for the time being. Personally I am inclined to think it is admissible, but I want an opportunity to look it up. I will give you an opportunity before you rest to raise the question again.

Mr. Garrett: All right, sir.

Note: Counsel return to the Courtroom, and the jury returns to the box.

Jury in.

By Mr. Allen: (Continued)

Q. I hand you four photographs and ask you if these are photographs of the intersection of the Richmond
page 36 } Henrico Turnpike and Bancroft Avenue, and if they reasonably represent the locality as it existed at the time of the collision.

A. Yes, sir. It looks the same to me, all except these cars parked here on the right-hand side of Bancroft Avenue.

Q. Except in other words, for the position of the parked cars or lack of them on the photograph, the general locality is the same?

Donald Edward Thompson.

A. Yes, sir; it is. There were cars parked there at the time, but not on the picture.

Mr. Allen: We would like to introduce these pictures as the next exhibits, sir.

Note: Said pictures are now marked and filed as Plaintiff's Exhibits 3, 4, 5 and 6.

Q. I hand you Plaintiff Exhibit No. 3, and ask you if you will point out on this picture which street is Bancroft Avenue and which is Richmond Henrico Turnpike?
A. The one going this way is Bancroft Avenue, and the one crossing is Richmond Henrico Turnpike (indicating)
Q. Is this the area to your right over which you said you looked? (indicating)
A. Yes, sir; it is.
Q. And does this depict the shrubbery and so on page 37 } the way it was at the time of the collision?
A. Yes, sir. That is all except for the cars along in here (indicating).
Q. How close was a vehicle parked to the corner here along the area there which you were referring to?
A. Approximately right in front of the house here (indicating).

Mr. Garrett: This is No. 3 here.

Q. About how far would the automobile be from the corner approximately?
A. About thirty or forty feet.
Q. I now hand you Plaintiff Exhibit No. 4, and ask you which direction the camera was looking in that photograph, along what street?
A. The camera was looking north on Richmond Henrico Turnpike.
Q. Show us Bancroft Avenue?
A. This way (indicating).
Q. Show us in that picture which direction the motorcycle was traveling on Bancroft.
A. The motorcycle was traveling in a westward direction.
Q. Which direction was the car traveling?
A. This way here (indicating).

Donald Edward Thompson.

Q. This is the same corner you pointed out in page 38 } Plaintiff Exhibit No. 3?

A. Yes, sir it is.

Q. I now hand you Plaintiff Exhibit No. 5, and ask you what that is a photograph of?

A. Richmond Henrico Turnpike and Bancroft Avenue.

Q. Which direction is the camera looking there?

A. The camera is looking south.

Q. Along what street?

A. Richmond Henrico Turnpike.

Q. Which way was Mrs. Mann going in that picture?

A. She was going south.

Q. Which way were you traveling?

A. Traveling west on Bancroft.

Q. I now hand you Plaintiff's Exhibit No. 6, and ask you which direction the camera was looking in that picture?

A. Looking west on Bancroft.

Q. Which direction were you traveling in that photograph?

A. Traveling west, coming this way (indicating).

Q. The photograph would be looking east then, the opposite way you were traveling, is that right?

A. Yes, yes.

Q. Looking east on Bancroft then?

page 39 } A. Yes, sir.

Q. You were traveling which way?

A. Traveling west.

Q. Show us which way west is on the photograph.

A. (Indicating) Coming this way.

Q. Which way was Miss Mann going?

A. This way, right here (indicating).

Q. What about the size of the motorcycle, that is compared to other motorcycles? Would it be considered small, average, large, or what?

A. It is the large motorcycle.

Q. The large one?

A. Yes, sir; it is.

Q. When you were traveling west on Bancroft, approximately how far out were you from the curb of the street there?

A. About eight to ten feet.

Q. That would be the north curb, you were about eight to ten feet from the north curb?

A. Yes, sir.

Donald Edward Thompson.

Q. When you sit on that motorcycle can you tell us whether or not your head is below or the same, or above the height of a car?
A. A little above the height of a car.

By the Court:
Q. What point on the car?
page 40 } A. The top of it.
Q. Did you go out to this intersection with Mr. Fleet and attempt to place yourself at about the same height you were in riding the motorcycle, and allow him to make certain sight measurements?
A. Yes, sir; I did.

CROSS EXAMINATION.

By Mr. Garrett:
Q. Mr. Thompson, as I understand it, when you approached the intersection you looked to your right first?
A. Yes, sir.
Q. Miss Mann was on your right?
A. Yes, sir.
Q. And you looked in that direction first?
A. Yes, sir; I did.
Q. And then looked to the left?
A. Yes, sir.
Q. And when you again looked, glanced around, I believe you said she was entering the intersection?
A. Yes, sir.
Q. Well, how far was her car apart from your motorcycle at that moment?
A. I would say approximately ten or fifteen feet.
Q. Had you then entered the intersection?
page 41 } A. Yes, sir; I had.
Q. So at the point you saw her both of you had entered the intersection?
A. Yes, sir; we had.
Q. In the little space that remained there, Mr. Thompson, you could hardly testify that she was going—as to exactly what speed she was going, could you?
A. I said approximately. I don't know for sure, no.
Q. You would not want to pin-point it down to either 25 or 30, is that what you are saying?
A. No, sir; I would not.

Donald Edward Thompson.

Q. What time did you leave the motorcycle races that day?

A. Approximately four o'clock.

Q. The Fairgrounds are not too far from this intersection, are they? As a matter of fact, I think a lot of folks go out the Turnpike to go to the Fairgrounds, don't they?

A. I think they do, sir.

Q. You and your companion motorcycle had taken some other circular route, I imagine, or something to get there, but just where had you gone?

A. I don't know the name of the street that we took down to make a right-hand turn off of that road to go

page 42 } up Bancroft Avenue.

Q. Were you familiar with this intersection? Had you ever been across there before?

A. No, sir; not as I remember.

Q. Never been there before?

A. Not as I remember.

Q. When you saw that her car was entering the intersection and your motorcycle was entering the intersection, what did you then do? You said something about the fact that you curved to the left?

A. I tried to, yes.

Q. Did you apply your brakes?

A. I did not have time.

Q. I want to show you this photograph, Defendant's Exhibit B. That is your motorcycle?

A. Yes, sir.

Q. This also is your motorcycle, this Defendant's Exhibit A?

A. Yes, sir; it is.

Q. Now can you tell us how high that motorcycle is?

A. What part of it?

Q. Well, at the seat?

A. Approximately 35 or 36 inches tall. I don't know for sure.

Q. And you tell us, sir, that you can look over-

page 43 } top of the main part of an automobile sitting on your motorcycle?

A. Yes, sir; you can.

Q. After the collision, do you deny, sir, that you struck partially the left part of the bumper of Miss Mann's car?

A. I don't know what part we hit.

Q. If she said that the left side was damaged, you would not quarrel with that, would you?

A. I don't know. I didn't look at her car. I don't know what side it was on.

Q. After you struck you went over to the curb, that is where the motorcycle stopped?

A. Yes, sir.

Q. Then you were thrown off, and how far did you go beyond that?

A. Approximately ten or fifteen feet, somewhere along there.

Q. Did your wife go further than you did?

A. Yes, sir; she did.

Q. How far would you say she went?

A. Approximately 20 feet, 15 or 20, something like that.

Q. When there is a person riding behind you on this seat, do I understand that they have to sort of lean with the motorcycle as you do to make your turns and so forth?

page 44 } A. Yes, sir; they do.

Q. So that helps control the motorcycle, I take it?

A. Yes, sir.

Q. And I believe that you said that just before the collision you attempted to curve to the left?

A. Yes, sir; I did.

Q. Which is a turn?

A. Yes, sir.

Q. Now who determines whether this is a motorcycle for one person or two persons? It is really a matter of choice for the person who is riding, isn't it?

A. No, sir; it isn't.

Q. How would a one-person motorcycle be designed?

A. Well, one thing, the seat is not as large as one built for two persons. And it does not have the places for to put your feet on the one-seated motorcycle.

* * * * *

page 45 }

* * * * *

Witness stood aside.

page 46 } HERBERT E. BOOMHOWER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Herbert E. Boomhower.

DIRECT EXAMINATION.

By Mr. Wilbur Allen:

Q. Would you state your name, please?

A. Herbert E. Boomhower.

Q. How old are you?

A. 29.

Q. Occupation?

A. Motorcycle dealer.

Q. What make of motorcycle?

A. Harley-Davidson.

Q. Did you sell a motorcycle to Mr. Thompson?

A. Yes, sir.

Q. The plaintiff's husband in this case?

A. Yes, sir.

Q. I believe it is a Harley-Davidson 49, No. 74?

A. Yes, sir.

Q. I hand you Defendant's Exhibits A and B and ask you if they are pictures of that motorcycle?

A. Yes, sir, they appear to be.

Q. Could you tell us whether or not that motorcycle is manufactured for two people to ride on it or

page 47 } manufactured for one?

A. All motorcycles of this type are basically manufactured the same. It is the equipment which is installed which determines whether it is to be ridden by one or two. If it be any good to you at all, I brought this down with me (exhibiting folder).

You see, the two on the left are solo machines. The large pictured one is the dual machine. That is the buddy seat equipment machine. You notice the two small ones on the side over there, equipped with a very small seat, no facilities for a passenger's feet.

Q. Is the motorcycle shown in the picture equipped along the same lines, the motorcycle with two people on it, as the motorcycle you see in Defendant's Exhibits A and B?

A. Yes, sir, it is equipped for two people.

Q. It is equipped for two people?

A. Yes, sir.

Mr. Allen: I would like to offer this as Plaintiff's Exhibit 7.

Note: Filed and marked accordingly.

Herbert E. Boomhower.

Q. Mr. Boomhower, would you come over here and show to the jury the motorcycle in the picture which has the same equipment as the motorcycle shown you in Defendant's Exhibits A and B?

page 48 } A. This picture here with the dual equipment.

Q. What equipment does that motorcycle have, for example, that the one which is owned, designed and equipped for one person does not have?

A. Note the long dual buddy seat, we call it, and the solo saddle here and this footrest here is an additional item which is not on this solo standard machine.

Q. Is this motorcycle here with the equipment as shown on it designed for two people?

A. Yes, sir.

Mr. Garrett: My objection is the same, self-serving. As I said, it is self-serving.

The Court: We will take it up later.

Q. I hand you an application, Mr. Boomhower. I believe your signature is on here as a notary public, and ask you if this is the application and title for the motorcycle shown in Defendant's Exhibits A and B?

The Court: Who made it out, too, please.

A. The actual filling out of the form I supplied the information and filled the form out and the place of authority that is signed here is signed by my assistant, John Wiley, and I notarized it in the three places that it had to be, and

page 49 } it states here: passenger vehicle, seating capacity—

Mr. Garrett: Just a minute now. That is the very thing we object to. My same objection, Your Honor.

The Court: I overrule the objection.

Mr. Garrett: Exception.

Q. Go ahead then and just state what you were going to state.

A. Well, when I was approached Mr. Thompson asked me about the same thing. I told him that form 17 it seems to me that it would be self-satisfying here that it is equipped for two people, on the application. That is all I meant to offer by what I said then. I didn't mean to upset anything.

Herbert E. Boomhower.

Q. In other words, the application itself shows that it was equipped for two?
A. Yes, sir.

The Court: He said he made it out.

Note: Filed and marked Plaintiff's Exhibit No. 8.

Q. What is the height of that motorcycle, could you tell us approximately, your sitting height? The height of the seat from the ground, I mean, approximately.
A. It would vary a couple of inches, but in the neighborhood of 35 inches.
page 50 } Q. Could you tell us whether that is higher or lower or the same as say a seat in a modern new automobile?
A. I am not too familiar with the new automobiles. I would say from my automobile the seat position would be higher on a motorcycle. In my own automobile I sit down in it; in this I sit up .

CROSS EXAMINATION.

By Mr. Garrett:
Q. I looked at the literature there to see just what the height was and all I could see was the fact it was low hung. Does that mean it is lower than other motorcycles?
A. That means the frame itself is low hung to attain a lower center of gravity for better handling.
Q. Would the seat be 35 inches high when someone is sitting on it?
A. That is why I said it would vary slightly, maybe a couple of inches either way from hitting a bump. The spring travel on that buddy seat is about 2½ inches.

By Mr. Allen:
Q. A heavy man would weight the seat down a little more than a light one, for example?
A. Yes, sir.

Witness stood aside.

• • • • •

page 62 } CHARLES H. FLEET,
a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Wilbur Allen:

Q. Would you state your name, age, and occupation, please, sir.

A. Charles H. Fleet. Civil Engineer and surveyor. I am 70 years old.

Q. Mr. Fleet, would you tell us what education and training you have had to qualify you as a civil engineer and surveyor?

Mr. Garrett: I will admit Mr. Fleet's qualifications.

Q. Mr. Fleet, at our request have you gone to the intersection of Bancroft Avenue and Richmond Henrico Turnpike and made a survey?

A. I did.

Q. And have you made a map based on that survey?

A. I did.

Q. I hand you a map and ask you if that is a copy of the map you made? (Indicating)

A. That's right.

page 63 } Mr. Allen: I would like to put this up on the board here, if I may have it marked as the next Plaintiff's Exhibit, and then question him about it, sir, so that the jury can see it.

The Court: All right, Mr. Allen.

Q. Is that the map you made?

A. This is the map that I made on April 23, 1958.

Q. What is the scale of that map?

A. The scale is one inch equals twenty feet. This, you see, is Bancroft Avenue. The driving space in there is, on the east of Richmond Henrico Turnpike, is 30.15 feet wide. Over on the other side it is 30 feet wide. The driving space, the hard surface—there is no curbing on Richmond Henrico Turnpike. The hard surface there is 17 feet wide.

Q. Generally which direction does Bancroft Avenue run?

A. What would be called east and west.

Charles H. Fleet.

Q. How about Richmond Henrico Turnpike?

A. That would be north and south.

Q. Have you made another map, an enlargement of that intersection?

A. This (indicating) is a portion of that map there, only on a much larger scale.

page 64 } Note: Said two plats are now marked and filed accordingly as Plaintiff's Exhibits Nos. 9 and 10.

Q. Mr. Fleet, would you point out what, if anything, might constitute an obstruction to traffic on the northeast corner of this intersection?

A. This tree, this sign post here, street signs, mailbax, this tree here, this pole here, shrubbery in here (indicating). Now that is too far back there, but this hedge right here (indicating).

Q. Can you tell me generally if traffic traveling west on Bancroft and traffic traveling south on Richmond Henrico Turnpike, as to whether or not they would have a clear view of each other as they approached the intersection say within 60 feet of each other?

A. Neither Richmond Henrico Turnpike or Bancroft, or back on Bancroft, a moving vehicle would be visible at those points. Now of course, if someone were standing behind a pole, but if he is walking you would see him.

Q. First, traveling in a westerly direction on Bancroft, that is approximately eight to ten feet out in the street from the north curbing line there, at a distance of 60 feet, how far could a person see to his right?

A. A person traveling down here, Bancroft here,
page 65 } at 60 feet from this line of the intersection here, back here, could see up this road here, up the Turnpike 68 feet.

Q. At approximately 40 feet how far could he see?

A. At 40 feet back here he could see 48 feet up here on the Turnpike.

Q. And twenty feet?

A. At twenty feet on Bancroft he could see 100 feet up there. Those distances are by actual measurements on the ground at those different points.

Q. An automobile traveling in the right-hand lane headed south on Richmond Henrico Turnpike, what sort of vision would that person have to their left of traffic approaching

Charles H. Fleet.

west, or moving in a westwardly direction along Bancroft Avenue, say first at 60 feet?

A. At 60 feet an automobile back here could see about 68 feet up here (indicating).

Q. How about at 40 feet?

A. At 40 feet here on the Turnpike, a person could see 106 feet up this road, up Bancroft (indicating).

Q. How about at 20 feet?

A. At 20 feet they have, well, certainly, a 300-foot visibility up there. At 20 feet back I could see dogs crossing the street back towards the next square.

Q. How can you account for the fact at 40 feet and 20 feet a person moving in a southerly direction on Rich-
page 66 } mond Henrico Turnpike had approximately two times or better the vision a person traveling west here would have at 20 and 40 feet?

A. Well, Richmond Henrico Turnpike is slightly higher than Bancroft. That gives them the advantage, and they look over this hedge and can see up through here (indicating). And also Bancroft Avenue comes up. As you go east it is slightly downgrade. As you come back—If you travel westwardly slightly downgrade. And back here to the east it is upgrade (indicating). This is also downgrade (indicating) and back here you can look over here and see pretty plainly (indicating).

Q. How about the crown of the road? How does that affect visibility on Bancroft?

A. Well, out in the road slightly higher than you would be up at the curb. It is a crown in the road about six to eight inches above the gutter here on each side (indicating).

Q. Can you tell us whether or not you made those sight measurements with automobiles parked along the north curbing line of Bancroft Avenue, and if so, about where the automobiles would have been?

A. The automobile was back about 40,—or 48 feet from the intersection, parked along the curb here (indicating). And I also made the same measurements and observa-
page 67 } tions.

Q. Have you taken into consideration the height a person would be sitting on a motorcycle in making your measurements?

A. Yes, sir. I had Mr. Thompson demonstrate to me how high his head would be if he were on a motorcycle. Now he could do that very well, I think, because when you sit on the seat of a motorcycle your feet have got to touch the pave-

Charles H. Fleet.

ment. In doing that he demonstrated the height that he would be on the motorcycle. And his head was visible, or some of his body was visible over the top of the car.

Q. Can you tell us whether or not Mr. Thompson placed the automobile parked along the curbing line where it was at the time of the accident?

A. He stood there and got us to move the car, and said that that was where the car stood.

Q. Did you then maesure the distance from that automobile to the curbing line of Richmond Henrico Turnpike?

A. I did, about 48 feet, to the west end of it.

Q. I have some cars here. Would you place an automobile in about the position he put it in on your map?

A. (Witness doing same).

Q. Draw a line about where the car would be.

A. (Witness doing same).

page 68 } Q. On Richmond Henrico Turnpike place an automobile at first 60 feet in the right-hand lane of the Turnpike, if you would.

A. (Witness doing same).

Q. Also while you are there, measure that 40 feet and 20 feet, if you would?

A. Yes, sir (witness doing same).

Q. Would you draw a circle around the car, first in the 60-foot position.

A. Yes, sir.

Q. Now put inside that circle the distance he could see at 60 feet, if you will, please.

A. (Witness doing same).

Q. Now do the same thing for 40 feet and 20 feet.

A. (Witness doing same).

Q. I ask you if in looking from the 20 foot and the 40 foot position if you can see over top of the automobiles clearly which are parked along the north side of Bancroft Avenue?

A. At which now, 40 or 20?

Q. Say at 20 feet.

A. Yes, sir; you can see over it.

Q. In other words, the Richmond Henrico Turnpike is high enough so that you can see over top of the cars?

page 69 } A. It cuts off some view, but you still can see over it.

Q. I believe you said you could see dogs in the street?

A. At 20 feet back it would not have any effect back here (indicating). Of course it would right down through here.

Q. Would you indicate the position of the motorcycle at 20,

Charles H. Fleet.

40 and 60 feet, and then put what he could see inside of the little area there?

A. (Witness doing same) This is the motorcycle at 20 feet, 40 feet, and at 60. This is the car at 20, 40, and 60 feet back. And in those measurements it was taken from the lines of the driveway, which is I think considered the intersection.

Q. These sight measurements, were they made by you being out at the intersection and looking?

A. Made on the ground at this location, the Richmond Henrico Turnpike and Bancroft Avenue. And those distances were measured.

Q. At 60 feet would each of the individuals have a clear view of the other as they approached the intersection?

A. They were—They would be plainly visible, if I may answer it that way.

page 70 } Q. Mr. Fleet, I hand you Exhibit No. 3 for the Plaintiff, and ask you whether or not taking into consideration the condition of the shrubbery, as shown in that photograph, which has been testified to as being the condition at the time of the collision, whether you would have as good or a better view out there when you made your measurements?

A. Visibility at the time this picture was taken was better than it is today. The reason I say that is that you can see the bottom of that siding or shingle, the white shingles on the house, right along in through there where this hedge would affect your vision. And when I got out in the road and lined up this post with the porch, and got in the same position the camera was in—and that hedge today you cannot see from this tree back towards the rear of the house (indicating). You can't see the bottom of that weatherboarding and siding at all. The hedge is higher now than it was when this picture was taken.

CROSS EXAMINATION.

By Mr. Garrett:

Q. I want you to explain to me again how you can see further one way than you can the other. As I understand it now, you say at one point up here, if you are coming south on Henrico Turnpike you can see at 20 feet, I believe you said that you can see a dog 100 feet down the street here, sir (indicating)?

page 71 } A. At 20 feet I said I could see dogs up here practically 300 feet. (Indicating).

Charles H. Fleet.

Q. Why couldn't the dogs see you?

A. I don't know. Might not have been looking that way.

Q. If he is up there he can look right back at you, can't he?

A. Yes, that's right. At 300 feet back up in here you could see a car at 20 feet back (indicating).

Q. That is exactly it, isn't it?

A. Yes, sir.

Q. And at 60 feet then why couldn't you see? I can't quite follow you on that? Someone looking from 60 feet at someone over here, whether it is 30, 60, or 90, why that person up there could not look right back at that person? (Indicating)

A. If you notice here, Mr. Garrett, at 60 feet back here his vision is 68 feet up here (indicating) and—

Q. Stop right there now—

A. At 60 feet back here the vision is 68 feet up here (indicating). They are both the same.

Q. That is what I mean, no difference in either one of them, one of them has no more opportunity to see the other than the other one has to see him, isn't that right?

A. It is a slight advantage on the Richmond
page 72 } Henrico Turnpike. It is a little above it, and you
can look over the hedge a great deal better.

Q. This is looking up the Richmond Henrico Turnpike to the north, that is Plaintiff's Exhibit No. 4, is that right, that is looking north?

A. Yes, sir.

Q. There is a bank there, is there not?

A. As indicated here—

Q. You show here there is a three-foot bank?

A. Correct.

Q. Then you have a hedge, you have it marked three and one half feet high?

A. Right.

Q. Is that right?

A. Yes, sir.

Q. So that the six and one half foot obstruction, that obtained right up to the corner, doesn't it, Mr. Fleet, up to the corner of the property line?

A. No, sir. I would say it was three and one half feet above the ground, because this is a mound in here three feet high (indicating).

Charles H. Fleet.

Q. Does not the picture show the bank going straight on up?

A. The bank is slightly up from the road, yes, but when you look across this way—now wait a minute, across
page 73 } this way your road here is almost level with this bank (indicating), and the only obstruction would be down at the lower part of the car, the top is visible.

I did not say that you could see all of the car completely, or the roadway at that point. I said a car approaching would be visible, a motor cycle approaching would be visible, the man riding it would.

Q. The driver is—now I am speaking of the driver of the motorcycle, his head is the highest point, isn't it, Mr. Fleet?

A. Correct.

Q. So also it would probably be higher than the driver in an automobile?

A. I would say that it demonstrated that way, yes, sir.

Q. Then I cannot understand why if someone is in a car on the Turnpike and can see someone down here on Bancroft (indicating) at a given point why that person cannot look right back and see this automobile approaching?

A. Well, at 60 feet they are both equal. Now at 40 feet I went back on both sides and measured the distance. And at 40 feet back on the picture he could see 106 feet back. And at 40 feet back here (indicating) he could see 48 feet up here on the Turnpike.

page 74 } Q. And the fellow up there could see him, isn't that right?

A. Oh yes. When you see one you see the other, of course.

Q. Those were measurements taken after that picture was taken. Let me get one thing straight now. He pointed out to you this automobile, is that right, that is Mr. Thompson?

A. Correct.

Q. And he said that is where his motorcycle was?

A. No, he said that is where the automobile was parked there.

Q. The parked car?

A. Correct.

Q. From that point how far can you see up the Turnpike?

A. From the front of it you could see up there 48 feet, from the front.

Q. That is when the automobile has no interference whatsoever with this point here (indicating), 40 feet back, at 40 feet

he could see 48 feet, you mean?

A. Correct.

Q. And someone at 48 feet could only—well, at page 75 } 40—

A. Mr. Garrett, at 40 feet up there (indicating) they could see 106 feet up here (indicating).

Q. Which would include the place where he was?

A. That's correct.

Q. Have you been out there since April?

A. Yes, sir.

Q. You said the hedge is higher now than it was when the pictures were taken?

A. Yes, sir.

Q. You have it on your map as a three and a half foot hedge?

A. That was in April.

Q. You don't know what the height of it was, you were not out there in September of last year?

A. No. But I do know it was much better visibility at that time than there is now.

Q. Because the hedge has grown higher?

A. Yes, the hedge and some of the other shrubbery.

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page 76 }

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Witness stood aside.

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page 77 } MRS. CLARA L. WALKER,

called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Wilbur Allen:

Q. Will you state your name, please?

A. Clara L. Walker.

Q. Your age?

A. 42.

Q. Occupation?

Clara L. Walker.

A. I am a machine operator.
Q. What is your address?
A. 500 Bancroft Avenue.
Q. Mrs. Walker, I believe you live in the house that is shown in Plaintiff's Exhibit No. 3?
A. Yes, I do.
Q. Were you at home on Sunday, September 22nd, around 4 o'clock in the afternoon?
A. I was.

* * * * *

page 79 }

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Q. With reference to this hedge which appears in Plaintiff's Exhibit No. 3 along the side of your house, describe that hedge to us.
A. Well, is isn't very much of a hedge. It is just a little old straggly—it is supposed to be a hedge, but it isn't thick or anything and the view is all right in my estimation because I think it was a city ordinance or something, they wrote us a letter—I have it on file at home—to keep it trimmed back so there would not be any difficulty in the motorist's sight. So we try to keep that cut back and which I want to remove it. We tried to—you know, this side of the hedge is the city property, but we keep it cut down. It is trees and all that will grow up, but we keep that cleaned off ourselves, but as far as the hedge it doesn't block the view.

CROSS EXAMINATION.

By Mr. Garrett:
Q. I understand you want to remove the hedge?
A. Well, I always said if it did cause trouble
page 80 } well, I think it would be a little bit better sight to remove it.
Q. It would improve the sight?
A. Yes, sir.
Q. You mean the sight of people meeting at that corner?
A. Oh, yes.

Witness stood aside.

L. E. Stott.

Mr. Allen: I believe that is all, Your Honor. I believe the lady testified she was 21 years old. At age 21 she would have a life expectancy of 45.66 years.

The plaintiff rests.

page 81 } L. E. STOTT,

City Police Officer, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Garrett:

Q. State your name, please, sir.

A. Lynwood Everett Stott.

Q. You are a Police Officer of the City of Richmond?

A. Correct.

Q. How long have you been with the Police Department?

A. Three years.

Q. Did you investigate the accident that we are here litigating today?

A. Yes, sir; I did.

Q. Do you know what time you arrived at the scene of this accident?

A. I received a call by Police radio at 4:27, and I would estimate my arrival to be about four or five minutes later.

Q. Tell us what you found when you arrived at the scene of the accident?

A. Yes, sir. As I previously stated I received
page 82 } a call at 4:27, on the 22nd of September, 1957, to proceed to the intersection of Bancroft and Richmond Henrico Turnpike, to investigate an accident which resulted in personal injury.

Upon arriving at the scene, the injured party, Mrs. Thompson, had been carried to the hospital. At least she was en route to the hospital, by city ambulance.

I found that the collision was a two-vehicle collision which occurred between an automobile owned and operated by Miss Hazel Kathleen Mann, traveling south on Richmond Henrico Turnpike, and that of a '49 two-wheel Harley Davidson motorcycle, owned and operated by Donald Edward Thompson.

It seems that the Tompson vehicle was also occupied by the injured party, who I understand was sitting behind the driver. There are no traffic controls at that intersection. By that I mean no signs of any nature.

L. E. Stott.

The intersection measurements that I took with a tape at that time, they showed the intersection of Bancroft Avenue at Richmond Henrico Turnpike to be thirty feet wide. The Turnpike at Bancroft is 17 feet 10 inches, according to my measurements.

The westbound motorcycle, according to the measurements that I made on the scene, I put the point of impact page 83 } to be from the easternmost part of Richmond Henrico Turnpike into the intersection to be 7 foot 6 inches. That was the portion of the motorcycle which was collided, the right rear side.

The left front of the southbound automobile operated by Miss Mann had at the point of impact entered the 30-foot intersection 16 feet.

I was not able to determine any skid marks by the motorcycle, but I found that the Mann vehicle left 6 feet of skid marks.

I interviewed both of the operators not in the presence of each other.

Q. As I understand it, Miss Mann had thirty feet of distance to cross the intersection, and she had traveled you say 16 feet of that distance—

Mr. Allen: The point of impact I believe he said was 16 feet.

Q. Well, the point of impact. The distance she traveled to the point of impact was 16 feet, I understood you to say?

A. From the northern side of Bancroft Avenue, that's right.

By the Court:

Q. From the curbline?

A. I don't recall it was a curb, but the edge page 84 } of the hard surface.

By Mr. Garrett: (Continued)

Q. Then she had gotten past the midpoint of crossing the intersection, had she not?

A. From my observation of the scene of the accident I would say that the front of the vehicle had crossed the center.

Q. The motorcycle had to go 17 feet I believe you said, to go across the intersection, is that right?

L. E. Stott.

A. The intersection of the Richmond Henrico Turnpike is 17 feet 10 inches.

Q. How much of that distance had the motorcycle gone?

A. The point of impact of the motorcycle, inflicted by the extreme left-hand side of Miss Mann's vehicle was 7 feet 6 inches, from the eastern curb to that left skid mark of her front tires.

CROSS EXAMINATION.

By Mr. Allen:

Q. Officer Stott, the motorcycle was struck on the right rear side, I believe?

A. That's right.

Q. In other words, the automobile ran into the right rear side of the motorcycle?

page 85 } Mr. Garrett: I object to Mr. Allen's saying who ran into who.

The Court: Well, it isn't very important. I believe it is up to the jury to say.

Q. Describe the damage to the motorcycle.

A. The damage to the motorcycle, I have it as to an estimate in dollars and cents. I figured it to be—

Q. No, I didn't mean that. Tell us where the damage was located on the vehicle?

A. Right rear.

Q. And the damage I believe you have already testified was on the extreme left-hand side of Miss Mann's car?

A. I have in my notes that it was the full front.

Q. Full front?

A. Yes, sir.

Q. Do you recall what you said about "the extreme left-hand side"? I just made a note of those words when you went through your testimony.

A. I think I was referring to the portion of the vehicle which struck the—rather part of the damage to the motorcycle inflicted by the extreme left-hand front of the car. That is where I got the measurement of 7 feet 6 inches.

page 86 } Q. The point of impact I believe you testified was 7 feet 6 inches into Richmond Henrico Turnpike from Bancroft Avenue?

A. That is right.

Q. And that according to your measurements Richmond Henrico Turnpike is 17 feet 10 inches?

L. E. Stott.

A. Yes, sir.

Q. It is difficult to tell exactly, in other words, not having curblines, the exact width of the road, isn't it? In other words, it breaks off on the end there and probably is a little different width at different points?

A. It isn't exactly uniform, no.

Q. Now if his vehicle at the time of the impact was struck on the left rear, which was 7 feet 6 inches in the Richmond Henrico Turnpike, then her automobile at the time was on its left-hand side of the road, wasn't it?

A. That was struck on the right rear.

Q. So that the Mann vehicle at that point was on the left-hand side of the road, was it not?

A. Let's see (Pause) The left front skid marks of the Mann vehicle, that portion of the car which struck the motorcycle was 7 feet 6 inches from the eastern curb-
page 87 } line. That would put her over the center of the street.

Q. In other words, half of the highway would be almost, in other words 7 feet 10 inches, it would lack— nine feet lacking one inch of being nine feet?

A. That's right.

Q. So the point of impact was 7 feet 6 inches; then it would lack approximately, it would be a foot and three inches on the wrong side of the road, that is her automobile at the time of the impact?

A. Judging by that, I would say yes, that's right.

Q. That is true, is it not?

A. That's right.

Q. Where was the front part of the motorcycle at that time?

A. I was unable to determine that from the evidence at the scene.

Q. The front part of the motorcycle is bound to have been ahead of the rear, though?

A. That's correct.

Q. In talking to Mr. Thompson did he tell you what, if anything, he did to try to avoid the collision?

A. Mr. Thompson stated to me at the hospital that he was traveling—I will go through the entire statement if you like?

page 88 } Q. All right, sir.

A. He was traveling west on Bancroft Avenue. As he entered the intersection he saw vehicle No. 1 on his right. Mr. Thompson stated to me he was traveling at a

speed of approximately twenty miles per hour. He said he saw this vehicle on his right and he attempted to pull his motorcycle to the left in an attempt to avoid the collision. He said he did not have time to apply the hand or foot brake.

Q. Did you also take a statement from Mrs. Thompson?

A. Yes.

Q. What did she tell you?

A. Mrs. Thompson stated to me that she was traveling south on Richmond Henrico Turnpike. Rather I mean Miss Mann—I believe we said Thompson—

Q. Yes, Miss Mann, I mean.

A. She stated to me that she was traveling south on Richmond Henrico Turnpike. I asked her the speed she was traveling, and she said she did not know, but not fast. She stated to me she entered the intersection. She approached the intersection in a manner that she considered cautiously. And vehicle No. 2 was suddenly right in front of her. She stated she applied the brakes but was unable to avoid striking the motorcycle.

page 89 } Q. In other words, when she entered the intersection the motorcycle was right in front of her?

A. She said the motorcycle was sitting right in front of her.

Q. When she entered the intersection?

A. Yes, sir.

Q. She was unable to avoid hitting it?

A. That is what she said.

Q. I hand you a photograph, and ask you if you can identify that photograph, and those marks in it as being the marks made by Miss Mann which you measured?

A. This appears to be the intersection all right, but I could not absolutely identify these marks as being the same that I saw that day, I don't believe.

Q. Can you tell us whether those marks appear to be about the same length, and in about the same position and so forth as the marks you saw there that day?

A. They seem, as well as I can recall, to be approximately the same.

Mr. Allen: I would like to offer that as the next Plaintiff's Exhibit.

Mr. Garrett: Your Honor, Mr. Stott is rather indefinite about this. I feel that we should have more proof. He says

he does not know whether they are the marks or
page 90 } not.

Mr. Allen: Your Honor—

Mr. Garrett: Oh, all right. Go ahead.

Note: Said picture now marked and filed as Plaintiff Exhibit 11.

Q. Officer Stott, can you look at this other picture and tell us whether those marks in that picture look like the marks that you saw there at the time you investigated the accident?

A. There again, I have to say they resemble those I saw that day. I could not absolutely say these are the same marks.

Q. In other words, you found some marks there?

A. Yes.

Q. And those marks, are they about the same place as the marks you found?

A. I would say they would be about the same place; yes, sir.

Q. Do they look like the marks you saw there?

A. As well as I can remember.

Mr. Allen: I offer that as the next plaintiff's exhibit.

Note: Said picture is marked and filed as Plaintiff Exhibit 12.

Q. What were the weather conditions?

A. The weather was clear; the street surface
page 91 } of course was blacktop. It was dry.

RE-DIRECT EXAMINATION

By Mr. Garrett:

Q. Mr. Allen says that by reason of the motorcycle having entered 7 feet 6 inches at the time of the collision that—

Mr. Allen: I did not say that it entered.

The Court: Point of impact.

Q. —point of impact 7 feet 6 inches. That that indicates that Mrs. Mann's car was not entirely on the right-hand side

of the precise center line of the street. Well now, if she had gone 16 feet when the impact occurred it would likewise follow that the motorcycle was not on its right-hand side of the street, wouldn't it, sir?

A. That's right.

Q. So that apparently both of them were somewhat on the wrong side of the center line of the street. Now Mr. Stott, can you tell us, step over here a minute, and I will ask you on Defendant's Exhibit No. 11, that is a plat of the scene, this is north and south, east and west (indicating), can you tell me if these two manhole covers are the same two that page 92 } show in the center of that intersection?

A. I imagine it would be. I did not take particular notice of them that day.

Q. These skid marks are to the west of this second manhole, the sewer manhole, is that correct?

A. They are west of those, yes, sir.

Q. And apparently south of them also?

A. Yes, sir.

Q. And that indicates the same thing, does it?

A. I think so.

Q. That is Plaintiff Exhibit No. 12 we are talking about here?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Allen:

Q. Officer Stott, I hand you Plaintiff Exhibit No. 11, and ask you if you can point out on this exhibit the point to which you measured the 7 feet 6 inches and the 16 feet?

A. Yes. I measured the 7 foot—(Pause)

Q. The point to which you made those measurements?

A. This is the best that I recall (marking on page 93 } diagram). Oh, excuse me, I may have made a mistake on that one. I could not be sure about this one—(Pause) I would hesitate to say concerning that for sure. I am quite confident that we measured from here where the tracks started to curve, to change direction (indicating). I am not sure about the 16-foot one.

Q. You are not sure exactly where you measured from to reach the 16 feet?

A. Not by that picture, no, sir.

Hazel Kathleen Mann.

Q. Do you know what made her marks curve to the right like that?
A. I couldn't say for sure, no.

Witness stood aside.

page 94 } HAZEL KATHLEEN MANN,
the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Garrett:
Q. State your full name, please, ma'am.
A. Hazel Kathleen Mann.
Q. What is your occupation?
A. I am a registered nurse. I work for three doctors at the Mechanicsville Medical Center.
Q. Where do you live?
A. I live at Ellerson, Virginia.
Q. In Hanover?
A. Yes, sir.
Q. This was a Sunday, were you working that day?
A. No, sir.
Q. Where had you left from immediately before you came to the scene of this accident?
A. My home.
Q. Ellerson?
A. Home, Ellerson, yes, sir.
Q. What route did you take from your home to
page 95 } the scene?
A. From my home to the scene I took Meadow Bridge Road.
Q. Where did you come onto the Richmond Henrico Turnpike?
A. Coming in on Meadow Bridge there in front of the Fairgrounds, and then the Henrico Turnpike goes through where that intersection is there in front of the Fairgrounds.
Q. Where were you going, Miss Mann?
A. I was going to the Eastern Star Home, on the corner of Chamberlayne and Brookland Park Boulevard.
Q. What was your purpose in going there?
A. I was going to deliver some birthday presents to some

of the guests there. I was chairman of that committee in our Eastern Star Chapter at Mechanicsville, and I had the duty of seeing about these old ladies' birthdays, just to make them happy. That was where I was going.

Q. What I want to know now, is did you have any particular time you had to get there?

A. No, sir.

Q. How fast were you going as you approached this intersection?

page 96 } A. Well, I travel that road frequently going to that same place. I would say my speed was between 20 and 25 miles an hour.

Q. Tell us as you approached the intersection just what you did with reference to looking and so forth?

A. As I approached that intersection I slowed down my speed, as I usually do, and I looked left. I looked left and I saw nothing, and I looked right and I proceeded ahead.

Q. How far could you see to your left?

A. To my left as well as I can remember I would say the distance of two houses. That is houses sitting on two lots.

Q. Had you then entered the intersection, or were you yet approaching it?

A. Well, I was approaching the intersection.

Q. After you looked to your left what did you then do with reference to lookout?

A. I looked to my left, and then I looked to my right.

Q. What next occurred?

A. I looked straight ahead and proceeded. And I had gotten —(Pause)

Q. Go ahead and tell us exactly how the accident happened.

page 97 } A. I saw nothing from my right or my left. And I had gotten well into the intersection when I realized that it was a motorcycle right at me. And I knew that we were going to have to collide. I applied brakes and stopped.

Q. Where were you with reference to the intersection when you first saw the motorcycle?

A. I was well into the intersection, and I felt that the motorcycle was about six feet from me when I realized it was there.

Q. Had the motorcycle entered the intersection when you first saw it?

A. To my knowledge I don't think it had entered it, but I had the feeling that they were turning to avoid me, going around the front of my car.

Hazel Kathleen Mann.

Q. I believe you said that you applied your brakes?
A. Applied my brakes and stopped.
Q. Were you moving or were you stopped when the actual collision occurred?
A. Now that I don't know. I applied my brakes and stopped. I knew—when I realized that we had hit like that my car was choked out, and I had to start it up again to get off the street. I felt as though I stopped right in my tracks when I applied my brakes.

page 98 } Q. Could you tell the speed of the motorcycle?
A. No, sir.

Q. I believe you said that you moved your car after you saw that—
A. Yes, sir.
Q. Where did you move your car?
A. To the right curbing.
Q. What did you do then?
A. Well, before I moved my car I saw that Mrs. Thompson had been thrown from the motorcycle. I saw her thrown, and she turned over like that (indicating) on this person's lawn. I realized someone was hurt. So I moved my car and immediately went over to offer aid.

* * * * *

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* * * * *

Q. Can you tell me whether or not these skid marks are the ones which were left there? (indicating on Exhibit No. 12). Can you tell me whether or not they are the skid marks or do you know?
A. No, sir. I could not tell you if these are the skid marks.
Q. You do not deny that they were, but you just don't know?
A. I don't know whether they are or not; no, sir.
Q. And the same as to Plaintiff Exhibit No. 11?
A. That is true.

CROSS EXAMINATION.

By Mr. Allen:
Q. Miss Mann, you know that you did leave skid marks, do you not?

Hazel Kathleen Mann.

A. The Officer said that I did; yes, sir.

page 100 } Q. Did you see any skid marks yourself there at the scene of the accident?

A. I did not go back to look at any of that. I left it all to the Officer who appeared on the scene.

Q. So you don't know whether you left any skid marks or not, of your own knowledge?

A. No, sir.

Q. How fast would you say you were going?

A. Twenty to twenty-five miles an hour.

Q. Did you hear the Officer say that he asked you how fast you were going, and you told him you didn't know? Do you feel like you can give that better here today than you could when talking to the Officer right after the accident?

A. I feel that what I am telling you today is what I did there at the time. I don't feel that I could have stopped as I did had I been going any faster than I stated.

Q. You understand that the Police Officer was talking to you relative to investigating the accident to ascertain the facts?

A. Yes, sir.

Q. And one of the things he asked you was how fast you were going, and you told him you did not know, that is true, isn't it?

page 101 } A. It is true if I told him so, and he has it.

Q. As I understand it, when you saw the motorcycle it was six feet from you?

A. I would say approximately that.

Q. Approximately six feet to your left?

A. I felt as though it was going around me this way (indicating).

Q. But it was six feet from you when—

A. I would say approximately so, yes.

Q. At that time was your automobile in its righthand lane, or in the center of the street?

A. I would say I was more in the center of the street.

Q. In other words, your car was—

A. That is a narrow street, and I do drive more I think to the center of it.

Q. So you were entering and running into the intersection with part of your vehicle on the wrong side of the street?

Mr. Garrett: I don't know that there is any duty upon

anyone to stay precisely on the righthand side as to intersecting traffic. If we had a headon collision here
page 102 } that would be a different matter. But for Mr. Allen to keep on saying "the wrong side of the street"—

The Court: Find out where she was. Then I will instruct the jury as to where she is supposed to be.

Q. Miss Mann, as I understand it, a portion of your automobile was over on the wrong side of the street as you—

The Court: That is the objection. I think probably it is well taken.

Q. Were you on the left of the center line of the street as you approached and entered the intersection?

A. I guess two of my wheels were. If I were driving in the center of the street, the approximate center, two wheels would be on the left.

Q. The motorcycle, you have testified, was approximately six feet from you. You heard the officer state that the point of impact was 7 feet 6 inches into Richmond Henrico Turnpike, did you not?

A. Yes, sir.

Q. So if the motorcycle was six feet from you then he is bound to have been into the intersection when you first saw it, wasn't he?

A. No, sir.

page 103 } Q. If he only had to run six feet to the point of impact, and if the point of impact was 7 feet 6 inches into the intersection, then he would have been one foot six inches into the intersection when you saw him, would he not?

A. I couldn't tell you what distance that was.

Q. Anyway, you did not see him until it was too late for you to avoid hitting him, that is true, is it not?

A. That's right.

Q. Now you say that when you approached the intersection you looked to your left, and you could see approximately two houses to your left up the street?

A. That's right.

Q. But would you say the lots there are around the neighborhood of 75 feet each?

Hazel Kathleen Mann.

A. Sir, I don't know anything about distance like that, relative to land.

Q. Could you see as much as say 100 feet to the left?

A. I saw the distance of those two lots.

Q. Both of the lots look about the same?

A. I have not examined them that closely.

Q. There is not any great discrepancy in the
page 104 } length of the lots, is there?

A. I would not think so, in a neighborhood of that sort.

Witness stood aside.

Mr. Garrett: That is our case, Your Honor.

Mr. Allen: No rebuttal, sir.

page 105 } IN CHAMBERS.

Mr. Garrett: Your Honor, the plaintiff testified, if you will recall, that she was not keeping any lookout at all, and that she had to lean with the motorcycle when he made the turns. Her husband testified that a passenger leaning with the motorcycle helps to control it in a turn. He went on to say that at the time of the accident he was trying to turn in order to avoid the accident. You recall, too, she said she was not even looking. She had her head ducked down. Now Your Honor, my position is this: That she was partially in control of that vehicle, and under those circumstances she is bound by the same rules of lookout and control as the driver is.

That is touched on, sir, in the case of the *Virginia Transit Company* v. *Simmons,* 198 Va. at 122. They mention two points there. One is on the theory of joint enterprise; and the other one on the theory of partial control and contributory negligence. I desire to base my motion to strike on both
theories. That Transit Company case—the opin-
page 106 } ion was given by Judge Miller—that case involved
a trip in the wife's car out to Arkansas for medical treatment. Coming back, while coming down one of the streets here in Richmond, they had an accident with a Virginia Transit Company bus. The wife, who was a passenger in the car, was injured.

The Transit Company defended on the ground it was a joint enterprise. But Judge Fletcher heard the case, and he refused

to instruct on joint enterprise, or contributory negligence. The Court of Appeals held that was proper in that case. But they base it on the fact that the plaintiff was exercising no control over the vehicle. They make the statement: "Does the evidence justify a finding that plaintiff, who was exercising no control over the vehicle was guilty of contributory negligence in failing to see the bus sooner than she did and to warn her husband of its approach in time for him to avoid the collision?" That is not the case you have here, Judge. This woman here is partially in control of this motorcycle. Under those circumstances, sir, I think a motion to strike
page 107 } is well taken, even on the idea of joint enterprise, or on contributory negligence. They are so interrelated it is hard to say which is entirely proper ground, but it would be both of them on the theory of contributory negligence.

The Court: Well, I will overrule the motion.

Mr. Garrett: We respectfully except, sir.

Note: At this time the Court hears argument on instructions. The following objections and exceptions were made:

Mr. Allen: The plaintiff objects and excepts to the failure of the Court to grant Instruction No. 1A on the ground that it is a proper statement of the law, in light of the case of *Virginia Electric and Power Company* v. *Vellines,* 162 Va. at 671, which states: "If, without more, two automobiles traveling upon intersecting highways, were to run into each other at the point of intersection, plainly there could be no recovery by either driver. The rights of each would have been
page 108 } equal and their negligence the same."

This principle was also held in the case of *Hogan* v. *Miller*, 156 Va. at 166, and other cases. It is particularly applicable to the evidence here because if the defendant Hazel Kathleen Mann did not see the motorcycle operated by Donald Thompson, which according to the engineer, Mr. Fleet, was in plain view, then she was guilty of negligence. The plaintiff then offered Instruction No. 1B as an alternative, on the ground that it correctly states the law.

Counsel for the plaintiff objects and excepts to the failure of the Court to grant Instruction No. 10 on the ground that where two motor vehicles collide in an open intersection at right angles, on level ground, in broad daylight, with good visibility, and in plain sight of each other, and with no intervening traffic, both are guilty of negligence. This is a correct

statement of the law and is peculiarly applicable to the facts in this case, and it should have been granted.

page 109 } Instruction No. 1D which was offered should have been given, because it, too, correctly states the law in regard to lookout and was peculiarly applicable to the facts in this case.

Plaintiff objects to the Court's failure to grant Instruction No. 2A on the ground that the jury should be specifically told that the negligence, if any, of the husband Donald Thompson, could not be imputed to the plaintiff. Although this principle might be indirectly stated in Instruction No. 2 granted by the Court, nevertheless it is not specifically stated.

Counsel for the plaintiff objects and excepts to the failure of the Court to give Instruction No. 3A which tells the jury that even though the defendant may have had the right of way under the right of way rule, nevertheless it was her duty to look to her left, and her failure to do so would be negligence.

page 110 } Counsel for the plaintiff objects and excepts to the granting of any instructions on behalf of the defendant on the grounds that the evidence shows that the defendant was negligent as a matter of law by her own testimony, to the effect that she did not see the motorcycle until she was six feet from it, when the evidence by the engineer, which was uncontradicted, was to the effect that at a distance of 60 feet she could have seen 300 feet or more, at a distance of 40 feet she could have seen 106 feet, and that the intersecting corner with the shrubbery was not any deterrent to reasonable vision.

Plaintiff further objects and excepts to the use of the language in Instruction 6 and 7, to the effect that the husband of the plaintiff Thompson was guilty of negligence which could be the sole proximate cause of the accident, when the uncontradicted facts show it was a case, if anything, of concurring negligence.

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page 115 }

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October 1, 1958.

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page 116 }

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Note: The jury retires at 11:53; returning at 12:40 with the following verdict:

"We, the jury, on the issue joined, find for the defendant.

(Signed)
CHARLES G. CREEKMUR,
foreman."

Jury out.

Mr. Allen: Your Honor, we would like to move that the verdict be set aside as contrary to the law and the evidence, and for misdirection by the Court in the giving of its instructions to the jury, and for any other errors assigned during the course of the trial.

Note: The motion is set down for argument, at a time to be agreed upon by counsel and the Court.

Court adjourned.

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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