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Record No. 5045

In the Supreme Court of Appeals of Virginia at Richmond

VIRGINIA HENING TURNER

v.

BURFORD BUICK CORPORATION, ET AL.

FROM THE CIRCUIT COURT OF HENRICO COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5045

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 17th day of June, 1959.

VIRGINIA HENING TURNER, Plaintiff in Error,

against

BURFORD BUICK CORPORATION, ET AL., Defendants in Error.

From the Circuit Court of Henrico County

Upon the petition of Virginia Hening Turner a writ of error and *supersedeas* is awarded her to a judgment rendered by the Circuit Court of Henrico County on the 10th day of January, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Burford Buick Corporation and another were defendants; upon the petitioner, or some one for her, 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

* * * * *

Filed in the Clerk's Office the 20 day of Nov., 1957.

Teste:

HELEN D. CLEVENGER, Clerk.

MOTION FOR JUDGMENT.

To the Honorable Edmund W. Hening, Jr., Judge:

Virginia Hening Turner, hereinafter called the plaintiff, moves the Court for judgment in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) due the plaintiff by Burford Buick Corporation, hereinafter called first defendant, and Henry S. Morris, hereinafter called second defendant, and each of them, by reason of the following facts:

(1) That on or about September 14, 1956 plaintiff was riding in an automobile driven by another westwardly on Williamsburg Road, also known as Route #60, in the County of Henrico, State of Virginia, when another car owned by first defendant, and driven by second defendant, its servant, agent and employee and acting for and on its behalf, carelessly and negligently and violently collided in the rear of car in which plaintiff was riding, whereby plaintiff was seriously and permanently injured in her head, face, neck, back, and other parts of her body, and kept from and will in the future be kept from her usual affairs, and required in the past and will in the future incur large expenses for doctors and medicines, and equipment, endeavoring to be cured.

page 2 } (2) Wherefore plaintiff files this motion for judgment for said sum.

VIRGINIA HENING TURNER
By THOMAS A. WILLIAMS
Of Counsel.

* * * * *

page 3 } PROOF OF SERVICE.

* * * * *

Executed on the 21st day of November, 1957, in the City of Hampton Virginia, by delivering a true copy of the above mentioned papers attached to each other, to Henry S. Morris in person.

A. A. ANDERSON
Sgt., City of Hampton.
By JOHN W. ....., Deputy Sgt.

Returned and filed the 25 day of Nov., 1957.

Filed Nov. 25, 1957.

HELEN D. CLEVENGER, Clerk

page 4 } PROOF OF SERVICE.

• • • • •

Executed on the 21st day of November, 1957, in the City of Hampton Virginia, by delivering a true copy of the above mentioned papers attached to each other, to Willard Bauer, Secty-Treas., Burford Buick Corp. in person.

A. A. ANDERSON
Sgt., City of Hampton
By JOHN W. ..... Deputy Sgt.

Returned and filed the 25 day of Nov., 1957.

HELEN D. CLEVENGER, Clerk.

page 5 }

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PLEA AND AFFIDAVIT DENYING OPERATION AND CONTROL PURSUANT TO SECTION 8-115, 1950 CODE OF VIRGINIA, AS AMENDED.

The defendant, Burford Buick Corporation, comes and says that the automobile involved in the accident set forth in Plaintiff's Motion for Judgment was owned by it at the time of the accident and collision complained of, but the said defendant denies specifically and with particularity that said automobile was, at the time of said accident alleged, either operated or controlled by it or by or through any of its agents,

servants or employees, then acting within the scope of their employment. It specifically and with particularity denies that Henry S. Morris was acting as its servant, agent or employee or in any respect in the course of an employment for the defendant corporation at the time of said accident. And this the defendant is ready to verify.

BURFORD BUICK CORPORATION
By Counsel.

J. CALVITT CLARKE, JR.
Counsel for Burford Buick Corporation.

Received in office Dec. 26, 1957.

Teste:

M. B. BAKER, Dep. Clerk.

• • • • •

page 6 } State of Virginia,
City of Richmond: ss

This day personally appeared before me, a Notary Public in and for the State and City aforesaid, in my State and City aforesaid, J. Calvitt Clarke, Jr., to me personally known, who first being duly sworn, deposed and said that he is attorney for Burford Buick Corporation, that he has read the foregoing plea and to the best of his knowledge and belief the things therein set forth are true.

Given under my hand this 23 day of December, 1957. My commission expires: August 23, 1961.

EARNESTINE M. UPDIKE
Notary Public.

page 7 } CERTIFICATE.

I certify that the plea and affidavit denying operation and control pursuant to Section 8-115, 1950 Code of Virginia as amended, was mailed to Mr. Thomas A. Williams, counsel for the plaintiff, addressed to him at his office address, mutual Building, Richmond 19, Virginia, on December 20, 1957.

J. CALVITT CLARKE, JR.

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VIRGINIA

SUPREME COURT OF APPEALS

To All to Whom These Presents Shall Come—Greeting:

Know Ye, That I, Willis D. Miller Justice of the Supreme Court of Appeals of Virginia, by virtue of authority vested in me by law, do hereby designate—

Honorable Lewis Jones Judge of the Thirteenth Judicial Circuit to preside in the Circuit Court of the County of Henrico in the case of Virginia Hening Turner *v.* Burford Buick Corporation, to be heard on a date set by the Judge, in the place of The Honorable Edmund W. Hening, Jr., Judge of said Court, who is so situated as to render it improper, in his opinion, for him to preside at the trial of the said case.

Given under my hand and seal this 6th day of January, 1958.

WILLIS D. MILLER (Seal)
Justice of the Supreme Court of Appeals of Virginia.

C-L-O-39
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page 11 }

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ORDER.

This day came the defendants and moved the court to extend the time within which they be allowed to file their Grounds of Defense, and for good cause shown the time for filing of the Grounds of Defense is hereby extended to this day and the said Grounds of Defense of both defendants having been tendered to court today it is ordered that said Grounds of Defense be filed herein.

Enter this Order:

Enter 9/11/58.

LEWIS JONES, Judge Designate.

I ask for this:

J. CALVITT CLARKE, JR.
Counsel for defendants.

Seen and objected to as the defense is not a verity.

THOMAS A. WILLIAMS
Counsel for Plaintiff.

* * * * *

page 12 }

* * * * *

Filed Sept. 11, 1958.

GROUNDS OF DEFENSE.

1. The defendants admit that on or about September 14, 1956, the defendant, Henry S. Morris, was driving an automobile owned by Burford Buick Corporation in a westerly direction on Williamsburg Road, also known as U. S. Route 60, in Henrico County, Virginia, when it was involved in an accident with another vehicle. Both defendants deny all other allegations of the Motion for Judgment.

2. The defendants specifically deny that the defendant, Henry S. Morris, was acting as agent, servant or employee or acting in behalf of the defendant, Burford Buick Corporation at the time of said accident.

3. The defendants have no knowledge of whether Virginia Hening Turner was a passenger in the vehicle with which the vehicle owned by the defendant, Burford Buick Corporation, and driven by the defendant, Henry S. Morris, was in collision. The defendants therefore deny this allegation and call for strict proof of same.

4. The defendants have no knowledge of the allegations of injuries and damages set forth in the Motion for Judgment and therefore deny same and call for strict proof of

page 13 } same.

5. The defendants affirmatively allege and charge that the accident and injuries and damages, if any, complained of were caused solely by the negligence of the operator of the vehicle in which plaintiff was riding.

6. In the alternative, and without admitting any negligence but specifically denying same the defendants allege and charge

that the plaintiff by her own act or acts or by the act or acts of another which were chargeable and imputable to her, was guilty of negligence which efficiently contributed to cause the accident.

7. In the further alternative, the defendants allege and charge that the accident and injuries and damages, if any, complained of were unavoidable and were nôt caused by the negligence of anyone.

BURFORD BUICK CORPORATION
HENRY S. MORRIS
By Counsel.

J. CALVITT CLARKE, JR.
901 Mutual Building
Richmond, Virginia
Counsel for Defendants.

• • • • •

page 14 } INSTRUCTION NO. A.

The Court instructs the jury that the Burden of proof is upon the plaintiff to prove every aspect of her case on which she relies for a recovery by a preponderance of the evidence. This burden is on her not only in connection with proving the defendant's negligence but also each item of the damages and injuries for which she seeks recovery. Preponderance of the evidence means the greater weight of the evidence and does not necessarily mean the greater number of witnesses. One witness that you rely upon may be sufficient to furnish such preponderance of the evidence.

G.

L. J.

Given Sept. 11, 1958.

page 15 } INSTRUCTION NO. C.

The Court instructs the jury that you are the sole judges of the weight of the evidence and the credibility of the witnesses, and you have the right to discard or accept the testimony, or any part thereof, of any witness which you regard proper to discard or accept when considered in connection with the whole evidence in the case. And, in determining the

credibility of witnesses and the weight to be given their testimony, you may take into consideration the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor and frankness, their bias, if any, their apparent intelligence or lack of intelligence, their opportunity to observe the matters about which they testify, the reasonableness of their testimony, and, from all the other facts and circumstances appearing in the case, determine which witnesses are more worthy of credit and give credit accordingly.

G.

L. J.

Given Sept. 11, 1958.

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page 16 } INSTRUCTION NO. D1.

The Court instructs the jury that in order for the jury to bring in a verdict against the defendant, Burford Buick Corporation, you must find from a preponderance of the evidence that Hensy S. Morris, at the time of the accident, was operating the automobile owned by Burford Buick Corporation as the agent, servant and employee of the corporation and was then and there acting within the scope of his employment.

G.

L. J.

Given Sept. 11, 1958.

page 17 } INSTRUCTION NO. D.

The Court instructs the jury that you must consider this case solely on the evidence submitted to you and on the law as laid down in the instructions of the Court, and you must not base your verdict on surmise conjecture or sympathy.

G.

L. J.

Given Sept. 11, 1958.

page 18 }

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INSTRUCTION NO. 1.

The Court instructs the jury that if you believe from a preponderance of the evidence that the automobile in which plaintiff was a passenger was stopped for a stop light headed westwardly on Williamsburg Road and while so stopped, the automobile, owned by the defendant corporation; driven by its agent, servant or employee defendant Morris on the business of and within the scope of his employment by the defendant Corporation, negligently ran into and collided with the rear of the car in which plaintiff was riding causing her injuries, and if you further believe from the evidence that such negligence was a proximate cause, a concurring cause or an efficiently contributing cause to such injuries to the plaintiff, then you must find your verdict for the plaintiff against both defendants.

G.

L. J.

Given Sept. 11, 1958.

page 19 } INSTRUCTION NO. 3.

The Court instructs the jury that at the time of the injury to the plaintiff in this case the law provided that the duties of the operator of a motor vehicle such as in this case, on the highways of the State of Virginia, were as follows:

1. To exercise ordinary care to operate the car with proper care and caution;
2. To exercise ordinary care to keep a reasonable lookout;
3. To exercise ordinary care to keep the car under reasonable control;
4. To exercise ordinary care to run said car at a reasonable rate of speed under the traffic and conditions then existing;

And these duties are continuing duties and not necessarily dischargeable at any particular moment of time.

The Court further instructs the jury that if they believe from the evidence in this case that the operator of said car failed in his duty in any one or more of the foregoing particulars, then he was negligent: and if the jury should so believe that he was negligent and that such negligence was the proximate cause or an efficiently contributing cause or concurred in

causing the collision and injury to the plaintiff, then your verdict must be for the plaintiff.

G.

L. J.

Given Sept. 11, 1958.

page 20 } INSTRUCTION NO. 4.

The Court instructs the jury that on the evidence in this case you must bring in a verdict for the plaintiff against the defendant Henry S. Morris.

G.

L. J.

Given Sept. 11, 1958.

page 21 } INSTRUCTION NO. 5.

The Court instructs the jury that if you believe from the evidence in this case that Henry S. Morris at the time of the collision in this case was an agent, servant or employee, acting within the scope of his employment on the business of Burford Buick Corporation, and that the collision was proximately caused by, concurred in or efficiently contributed to by negligence on the part of Henry S. Morris, your verdict must be also against Burford Buick Corporation.

G.

L. J.

Given Sept. 11, 1958.

page 22 } INSTRUCTION NO. 6.

The Court instructs the jury that if from the evidence and other instructions in this case the jury believe the plaintiff is entitled to recover from the defendant, then in assessing the verdict to which the jury may believe she is entitled to recover they should do so with reference to the following:

1. Any mental and physical pain and suffering endured

by the plaintiff or which she may in the future endure as a result of her injuries;

2. The nature, character, and extent of injuries whether temporary or permanent as disclosed by the evidence in this case;

3. Any disability suffered by the plaintiff as a result of her injuries;

4. Any expense suffered by the plaintiff as a result of having endeavored to be cured of her injuries; or which she may incur in the future;

And the jury should assess such sum as will fairly and fully compensate the plaintiff, but in no event to exceed the sum claimed in the Motion for Judgment.'

G.

L. J.

Given Sept. 11, 1958.

page 23 } INSTRUCTION NO. B.

The Court instructs the jury that the fact that the plaintiff was injured creates no presumption that the defendant was negligent and the fact that she was injured does not entitle the plaintiff to a verdict. The defendant was not an insurer of the plaintiff's safety while she was riding in the automobile operated by her son, Payne H. Turner, and in order for the plaintiff to recover, she must establish by the preponderance of the evidence that she was injured as a result of the negligence of the defendant, Morris.

Refused.

L. J.

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page 27 }

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In the Circuit Court of the County of Henrico September 11, 1958.

This day came the plaintiff in person and by counsel and came also Burford Buick Corporation by its officer and its

attorney, Henry S. Morris the other defendant was called but came not.

The defendants filed their Grounds of Defense and issue is joined.

Whereupon came a jury, to-wit: Harry A. Harper, John D. Shaw, George H. Wilkerson, Jesse T. Pennell, Boyd F. Shrader, Linwood E. Barker and James H. Bickerstaff, Jr., who were sworn the truth to speak upon the issues joined and a true verdict give according to the evidence and the jurors aforesaid having heard the evidence and arguments of counsel and having received the instructions of the court retired to their room to consider their verdict and after sometime returned into court with the following verdict, to-wit: "We the jury on the issues joined find for the plaintiff against Henry S. Morris and Burford Buick Corporation and assess her damages at $5,000.00 (Signed) James H. Bickerstaff, Jr., Foreman.

Counsel for the defendants moved the court to set aside the verdict of the jury as being contrary to the law and the evidence and misdirections to the jury and errors
page 28 } committed during the trial of the case and that the verdict is excessive as to the injuries testified to and order a new trial or diminish the amount of the damages which motion is continued for argument.

A Copy—Teste:

Seal HELEN D. CLEVENGER, Clerk.
By MARGARET B. BAKER
Deputy Clerk.

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page 29 }

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Received and filed in office Dec. 3, 1958.

Teste:

HELEN D. CLEVENGER, Clerk.

MOTIONS TO SET ASIDE VERDICT.

1. The defendant, Henry S. Morris, moves the court to set aside the verdict of the jury against him and to grant him a new trial on the following grounds:

(a) There was evidence, introduced by the plaintiff, tending to establish that the collision was not caused by negligence on his part but, on the contrary, by the unexpected failure of his brakes, which this defendant had a right to have the jury consider.

(b) The court should not have given plaintiff's instruction No. 4 and should not have refused defendant's instruction No. B, for the reasons set forth in 1 (a) above.

(c) The court should have granted the defendant a new trial when the plaintiff testified that an agent of the defendant discussed with her on three occasions the settlement of her claim, thereby indicating to the jury an admission of liability by the defendants.

2. The defendant, Burford Buick Corporation, moves the court to set aside the verdict of the jury against it and to enter final judgment in its favor or in the alternative, to grant it a new trial, on the following grounds respectively:

(a) To enter final judgment:

page 30 } (1) Because there is no evidence properly admissible before the jury to establish the relation of master and servant between the defendant and Henry S. Morris, at the time of the collision, there having been no independent evidence establishing such agency that would render admissible the declarations of Henry S. Morris or those of C. S. Edwards, admitted in evidence.

(2) The authority of the alleged agent, C. S. Edwards, to bind this defendant by declarations that the relation of master and servant existed between Henry S. Morris and this dedefendant at the time of the collision was not established by competent evidence.

(3) Declarations of an agent are not admissible to establish the agency and the declarations of one agent are inadmissible to establish the agency of another.

(b) To grant a new trial:

(1) Because of the erroneous admission of evidence concerning settlement indicating to the jury an admission of liability by this defendant.

(2) Because this defendant, irrespective of the issue of agency, was entitled to have the jury pass on the negligence of the alleged agent, Morris, whose freedom from negligence there was evidence tending to prove.

(3) The court should not have given plaintiff's instruction

No. 4 and should have given defendant's instruction No. B, for the reasons set forth in 1 (b) (2) above.

AUBREY R. BOWLES, JR.
J. CALVITT CLARKE, JR.

AUBREY R. BOWLES, III
901 Mutual Building
Richmond 19, Virginia
Counsel.

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page 32 }

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Received Jan. 8, 1959.

This was an action brought by the plaintiff against the two defendants for damages sustained by her in an automobile collision.

Briefly stated the facts are as follows.

Mrs. Turner was sitting on the front seat of a car owned and operated, at the time of the accident, by her son, Payne Turner. Another son, Thomas Turner, was sitting on the back seat.

Payne Turner testified that he stopped at a red signal light on Route 60 at Lewis Road. There were two cars ahead of him, also stopped. As the light changed he had just finished putting his car in gear, but had not started forward, when a car hit him from the rear. The gentleman in the car that hit him got out and asked if anyone got hurt. He said his brakes failed; that he was a salesman for Burford Buick Corporation, of Hampton, Virginia.

Mrs. Turner, the plaintiff, sustained injuries as a result of the impact.

The car that hit the Turner car was owned by Burford Buick Corporation, of Hampton, Virginia, and had dealers tags on it. It was operated by Henry S. Morris, a salesman for the Corporation.

William B. Hubbard, of the Henrico County Police, investigated the accident. He stated that there were faint skid marks approximately 24 feet on the Morris car prior to the impact, and the Turner car was moved forward 2 or 3 feet by the impact. He further stated that Morris said he did not see the car stopped ahead of him until he was right up

on it and at that time he applied his brakes in an attempt to stop, but he did hit the rear bumper of the Turner car. When he asked Morris why he was in Richmond when he
page 33 } was a dealer from the Norfolk-Newport News area, he replied that he was on business for the company, and they knew he had the automobile in Richmond.

Thomas Turner, the other party in the Turner car testified about the impact and that Morris said his brakes failed; that he was a salesman for Burford Buick Corporation.

The plaintiff testified as to the impact and the injuries sustained by her. She was asked by her counsel, "Following this injury, did someone representing the defendant corporation contact you in connection with this case?" To which question she replied, "Yes, he did, a Mr. Edwards; that he came to see her three times and discussed settlement."

Mr. Thomas A. Williams, of counsel for the plaintiff, retired from the case because he was to be called as a witness. He testified that while acting as attorney for Mrs. Turner, he had negotiations with C. S. Edwards, representative of the defendant; that he later called Mr. Edwards over the phone to inquire whether or not he should make Burford Buick Corporation a party defendant in the suit, and was told by Mr. Edwards that there was no question about Morris being on business for the Corporation.

Henry S. Morris did not appear to defend his interest in the case. Neither did Mr. Edwards appear as a witness.

The declarations Morris made at the time of the collision relative to being on business for the Corporation were admitted in evidence by the Court over the objections of counsel for the defendants. Likewise, the testimony of Mrs. Turner and Mr. Williams relative to statements made by Mr. Edwards in an attempt to establish the relationship of master and servant at the time of the collision were admitted in evidence over the objections of counsel for the defendants.

Counsel for the defendants moved for a mistrial based upon the testimony of Mrs. Turner when she stated that Mr. Edwards had discussed settlement with her three times. The Court overruled the motion and exceptions were taken.

The jury, after being instructed, brought in a verdict for the plaintiff against both defendants in the sum of $5,000.

Counsel for the defendants moved to set aside the verdict on several grounds. For the present purpose the
page 34 } Court deems it necessary to consider only two of the reasons assigned.

1. To set aside the verdict against Morris and grant him a new trial.

(a) The Court erred in giving instruction No. 4 offered by the plaintiff.

(b) The Court erred in refusing instruction No. B. offered by the defendants.

2. To set aside the verdict against Burford Buick Corporation and enter final judgment in its favor.

(a) The Court erred in admitting evidence of third parties as to declarations made by Morris and Edwards for the purpose of establishing the relationship of master and servant between Morris and the Corporation at the time of the collision.

Counsel for the plaintiff objected and excepted to all of the instructions given at the request of the defendants.

Counsel for the defendants objected and excepted to instruction No. 4 given at the request of the plaintiff; also to the refusal of the Court to give instruction B. offered by the defendants.

As pointed out above, it is necessary only to consider two of the exceptions taken by the defendants.

1. Did the Court err in giving instruction No. 4 and refusing to give instruction No. B.?

2. Did the Court err in permitting in evidence the declarations of Morris and Edwards for the purpose of establishing the existence of the relationship of master and servant at the time of the collision?

Instruction No. 4 reads as follows: "The Court instructs the jury that on the evidence in this case you must bring in a verdict for the plaintiff against the defendant, Henry S. Morris."

The evidence in the case to establish the negligence of Morris is based upon the statements he made right after the collision. He said his attention was distracted and when he looked back in the road, he was very close on the car. He applied his brakes and attempted to stop, but he did hit the rear bumper of the Turner car. He also stated that page 35 } his brakes failed. Then there is the testimony of Officer Hubbard as to skid marks and that the Turner car was moved forward 2 or 3 feet as a result of the impact. These declarations of Morris were properly admitted in evidence and tend to prove that he was negligent. However, the defendants had the right under the circum-

stances of this case to have this issue passed on by the jury. The Court erred in giving instruction No. 4.

Section 8-218 of the Virginia Code 1950 as amended prohibits a Court from directing a verdict in any case, unless a motion to strike the evidence of the plaintiff or the defendant is granted. The Court could not have stricken the evidence in this case on motion of either party.

Instruction B., refused by the Court, reads as follows: "The Court instructs the jury that the fact that the plaintiff was injured creates no presumption that the defendant was negligent, and the fact that she was injured does not entitle the plaintiff to a verdict. The defendant was not an insurer of the plaintiff's safety while she was riding in the automobile operated by her son, Payne H. Turner, and in order for the plaintiff to recover she must establish by the preponderance of the evidence that she was injured as a result of the negligence of the defendant, Morris."

In giving instruction 4 and refusing to give instruction B., the Court took away from the defendants the right to have the jury pass upon the primary issue in this case. In this the Court erred.

2. Granting that Morris was guilty of negligence that was the proximate cause of the injuries sustained by Mrs. Turner, the Burford Buick Corporation could not be held liable unless the plaintiff establishes the existence of the relationship of master and servant between Morris and the Corporation at the time of the collision.

The only evidence offered by the plaintiff in an effort to prove the existence of the relationship of agency at the time of the collision was the declarations of Morris to the two Turner boys and Officer Hubbard; also, the declarations made by Edwards, the adjuster, to Mrs. Turner and Mr. Williams. And, it was admitted that Burford Buick Corporation, of Hampton, owned the car driven by Morris and that he was a salesman for the Corporation. The de-
page 36 } fendant corporation denied under oath that the car was being operated at the time of the collision by any of its agents or servants within the scope of his employment. Therefore, the plaintiff had the burden of proving such agency. Neither Morris nor Edwards was present to testify as to the alleged agency.

It is settled law in this state that declarations of an agent that he was an agent at the time of the happening is not admissible in evidence for the purpose of proving agency, unless there are other facts presented to establish such relationship. The fact that Morris was driving the Corpora-

tion's car and was their salesman does not establish agency at the time of the collision.

Fisher v. *White,* 94 Va. 236, 26 S. E. 573; *Hoge* v. *Turner,* 96 Va. 624, 32 S. E. 291; *Moore* v. *Aetna Casualty & Surety Co.,* 155 Va. 556, 570, 155 S. E. 707.

In the absence of other evidence on the question of agency, the Court erred in permitting testimony of the third parties as to the declarations made by Morris and Edwards for the purpose of establishing agency.

The Court does not deem it necessary to consider the other exceptions taken by counsel for the defendants for the reasons herein stated.

Therefore, the Court sustains the motions made by counsel on behalf of the defendants.

The verdict against Henry S. Morris will be set aside and a new trial awarded him.

The verdict against Burford Buick Corporation will be set aside and final judgment will be entered in its favor.

This opinion is to be filed in the papers in this suit and made a part of the record in this case.

Jan. 7, 1959.

LEWIS JONES, Judge Designate.

page 37 }

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ORDER ON MOTIONS TO SET ASIDE VERDICT.

This day came the parties, the plaintiff and the defendants, by counsel, and, the written motions to set aside the verdict heretofore filed herein and restating the oral motions heretofore made herein being fully heard by the Court; and it appearing to the Court for reasons set forth in writing and hereby made a part of the record in this action that said motions should be granted, that the verdict against both defendants should be set aside, that a new trial should be awarded the defendant, Henry S. Morris, and that final judgment should be entered for the defendant, Burford Buick Corporation, notwithstanding the evidence;

THEREFORE, it is considered by the Court and is ADJUDGED and ORDERED that the verdict of the jury heretofore rendered in this action on September 11, 1958, and recorded at page 47 of Common Law Book No. 39 in the

Clerk's office of this Court be, and the same hereby is, set aside, that a new trial is awarded to the defendant, Henry S. Morris, and that the plaintiff take nothing by her motion for judgment against the defendant, Burford Buick page 38 } Corporation, and that said defendant, Burford Buick Corporation, go hence without day and recover of the plaintiff its costs by it in this behalf expended; to all of which action of the court, the plaintiff, by counsel, objected and excepted.

• • • • •

We ask for this:

AUBREY R. BOWLES, JR.
J. CALVITT CLARKE, JR.
AUBREY R. BOWLES, III
901 Mutual Building
Richmond 19, Virginia
Counsel for the Defendants.

Seen:

GORDON P. WILLIAMS
1016 Mutual Building
Richmond 19, Virginia
Counsel for Plaintiff.

Enter 1/10/59.

LEWIS JONES, Judge Designate.

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Received and filed in office Jan. 21, 1959.

Teste:

HELEN D. CLEVENGER, Clerk.

MOTION TO SET ASIDE JUDGMENT.

1. The plaintiff, Virginia Hening Turner, moves the Court to set aside its judgment granting a new trial to defendant Morris, reinstate the verdict of the jury and enter final judg-

ment in favor of the plaintiff as to defendant Morris on the following grounds:

(a) That there was no evidence offered by the defendants in denial of plaintiff's evidence as to the negligence of the driver Morris and the evidence as to brake failure was insufficient to make a jury question, hence, there was no evidence offered by defendant to submit to the jury and Section 8-218 of the Virginia Code as amended was not applicable.

(b) There was no error in the granting of instructions.

2. The plaintiff, Virginia Hening Turner, moves the Court to set aside its judgment in favor of Burford Buick Corporation, reinstate the verdict of the jury and enter final judgment thereon or in the alternative, grant plaintiff a new trial as to Burford Buick Corporation as well as defendant Morris on the following grounds respectively:

page 40 } (a) To enter final judgment for plaintiff:

(1) There was evidence of ownership by the Corporation of the vehicle involved as well as the employment of Morris as a salesman which, under the authority of *Sydnor and Hundley* v. *Bonifant,* 158 Va. 703 (for convenience of the Court, a quotation is set out in the attached appendix), made a *prima facie* case, thus giving rise to the proper reception of additional circumstantial evidence as maintained by plaintiff in her brief previously filed herein.

(2) That the evidence of brake failure was insufficient to submit to the jury and, hence, the Court did not err in submitting that evidence to the jury.

(3) There was no error in the granting of instructions.

(b) To grant a new trial for plaintiff:

(1) For the reasons set forth in paragraph 2. (a) (1) above.

GORDON P. WILLIAMS
1019 Mutual Building
Richmond, Virginia
Of Counsel.

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Januaery 28th 1959.

Mr. Gordon P. Williams
Attorney at Law
Mutual Building
Richmond, Va.

Dear Mr. Williams:

Re: Turner v. Burford Buick Corp. *rt* al. Henrico Ct. Court.

I have carefully considered your motion to set aside the judgment heretofore entered in this case. I have also read the cases cited by you, as well as those cited by Mr. Bowles.

I am of the opinion that I was fully justified in entering the judgment for the reasons set out in the opinion of January 7th 1959.

Therefore, the motion to set aside the judgment is denied.

I see no reason for entering any further order, as the judgment becomes final 21 days from the date of entry.

Yours truly,

LEWIS JONES, Judge Designate.

cc: Mr. A. R. Bowles
Miss Helen Clevenger, Clerk.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: Helen D. Clevenger, Clerk, Circuit Court of the County of Henrico.

The plaintiff, Virginia Hening Turner, by her attorney, hereby gives notice of her appeal from that certain Final Order entered in the above styled case on January 10, 1959 in which judgment was rendered in favor of Burford Buick Corporation and the motion for a new trial was granted Henry S. Morris.

The following are the assignments of Error:

1. The Court erred in allowing defendants to file answers after the time for filing had expired.

2. The Court erred in receiving evidence introduced by the Burford Buick Corporation.

3. The Court erred in setting aside the verdict of the jury and granting final judgment in favor of Burford Buick Corporation.

4. The Court erred in setting aside the verdict of the jury and granting a new trial in favor of Henry S. Morris.

5. The Court erred in denying plaintiff's motion to set aside the judgment of January 10, 1959.

6. Errors apparent upon the face of the record.

GORDON P. WILLIAMS
Of Counsel.

Received and filed in office February 9, 1959.

Teste:

MARGARET B. BAKER, Dep. Clerk.

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page 3 } Note: Before the jury was impaneled, the following occurred in Chambers.

The Court: I came by here Monday and looked over these papers and saw that the Grounds of Defense had not been filed and no Order had been submitted to me, and I notice on this Order granting leave to file them that they were objected to by the Plaintiff.

Mr. Thomas A. Williams: They later filed an affidavit denying that the agent, the operator of the car, was their agent; they put that one in subsequently, but the question of his agency shows at the time of the happening because the driver told the Officer that he was here delivering a car on business.

Mr. Clarke: Just a moment. If you are testifying, I want you sworn before you testify. I understood that right now we are talking about the Grounds of Defense. Are we going to talk about the plea or the Grounds of Defense?

Mr. Thomas A. Williams: The Grounds of Defense, with the affidavit attached.

The Court: The Grounds of Defense are not page 4 } sworn to.

Mr. Clarke: No, sir.

Mr. Thomas A. Williams: That's right.

The Court: Now what objection do you have to the Grounds of Defense?

Mr. Thomas A. Williams: Because, if Your Honor please, included in the Grounds of Defense is their joint filing of a plea denying the agency of ownership and control of the car, and the filing of the one would be allowing the other, and there is a change of situation here with regard to the plaintiff in this matter. To allow the filing of the Grounds of Defense and the Plea of Non Ownership would put the plaintiff in the position of having to prove that. We have evidence that will connect Henry S. Morris to the Burford Buick Corporation, but at the same time it is a different burden than if they were not allowed to file their plea that he is not their agent, and it is a change of situation and we would object to it.

The Court: It appears here from the record that the plea, the affidavit and so forth denying agency was filed December 26, 1957. That has already been filed.

Mr. Thomas A. Williams: It has been accepted

page 5 } by the Clerk.

The Court: Yes, it was received here that day.

Mr. Thomas A. Williams: We were sent a copy of that but there was no Order filing it. I don't think it can be filed except by Order of the Court. The 21 days having been up and there is no Order entered filing that, then I do not believe it is proper for the defendant to attempt to file it at this time.

Mr. Clarke: Does Your Honor wish to hear from me?

The Court: No. Just a moment. Had the 21 days expired when this plea was tendered?

Mr. Thomas A. Williams: Yes, sir.

The Court: If so, of course, it would be in order for the Court to deny the filing of it.

Mr. Clarke: It is my understanding that the Court in its discretion can allow time to file Grounds of Defense. It is my understanding that a plea denying operation and control can be filed any time up to the time you get to the trial on the merits. It is a special statutory plea and there is no statement in the statute it has to be filed within 21 days.

Note: The question was argued by counsel.

page 6 } The Court: I am going to allow the filing of the Grounds of Defense, gentlemen. Those things happen and I don't see that you would be prejudiced because he would have filed the same thing had he gotten the information on time.

Mr. Gordon P. Williams: We will note our exception, for the reason stated.

The Court: I will enter this Order as of today. What happened, according to Miss Clevenger, this was presented to Judge Hening and he did not think it proper for him to enter it as long as he had disqualified himself. I was designated back in January, I think. Miss Clevenger was blaming herself for not having sent this order to me and I told her if she had sent it to me I would not have entered it until I had a conference with you gentlemen because you had objected to it, so I am going to enter it as of today.

Mr. Clarke: I would like to take this matter up with the Court. Mr. Morris, who is the defendant in this case and who was driving the vehicle owned by Burford Buick Corporation at the time of the accident, was at that time a salesman for the company. We take the position, and I think
page 7 } properly so, he was not acting as a salesman at the time, but he was merely using the car. Sometime after the accident he left Hampton and the Newport News area and went out West, to Arizona, and for quite some time I was unable to find out where he was. Finally I did find out where he was and wrote him several letters, by registered mail, return receipt requested, and advised him of the trial date and that he should get in touch with me and that he had to be here, and when I received no reply from him I put him on notice in various letters we considered that a breach of the policy.

I have also submitted to him a non-waiver agreement which he could have signed, under which we would have proceeded to defend him even if he did not show up.

I feel in view of the fact I filed Grounds of Defense I still must proceed to do what I can for him, but when the Court convenes and before the Jury has been selected, I will ask the Court to have the Sheriff call for Mr. Henry S. Morris and if he is not here, I think it is my duty to ask for a continuance, but in all candor I must say to the Court
page 8 } I don't know whether I have any better chance of getting him here the next time. I feel I have to do what I can, but I can't tell the Court he is any more likely to be here later than now.

The Court: I am not going to continue it.

Mr. Clarke: If Your Honor will ask the Sheriff to call him, then it will be considered I made the motion and it is overruled?

The Court: Yes. That's all right.

Note: The following occurred in open Court.

In open court.

Mr. Clarke: I will have Mr. Morris called now.

Note: The Sheriff called Henry S. Morris in the Courtroom and in the corridor, and reported that he did not answer.

Whereupon, the jury was duly impaneled, the witnesses were sworn and excluded, and the reporter was sworn.

Mr. Thomas A. Wliliams: Would Your Honor allow counsel to go with you to Chambers for one moment, please?

page 9 } Note: The following occurred in Chambers.

In Chambers.

Mr. Thomas A. Williams: If Your Honor please, he has asked for the separation of the witnesses. On the question of agency, I may be a witness myself. I talked with their representative in handling this matter and I wanted to know whether I would have to retire from the case. My testimony goes only to this: That Mr. Edwards was the representative of the Royal Indemnity people that handled the case and two days before I filed suit, I wanted to make certain whether I would have to have Burford Buick Corporation in the suit and I called him up and I said, "I want to know from you, Mr. Edwards, whether or not Mr. Morris was on business for the company at the time."

Mr. Clarke: Wait a second. Whether counsel is testifying before the jury or the Court, it is improper for him to testify one way or the other if he is going to try this case, so I object to it. I also object to it on the ground that what he is trying to do is quote another witness, which is
page 10 } hearsay and therefore inadmissible. So I object to what he is saying to the Court in the form of testimony right now, either before the Court or before the jury.

The Court: He would have to tell me, so I could rule on it. Let him finish.

Mr. Thomas A. Williams: Mr. Edwards, their representative, I am prepared to prove he is their negotiator—he handled all the negotiations. I have a ticker-tape of his conversation with Mrs. Turner before I ever got in the case. He handled the negotiations with me and with her up to the point the case went to Mr. Clarke's hands. He is their representative.

The Court: He represents Burford Buick Corporation?

Mr. Gordon P. Williams: He represents the insurance company which covered Burford.

The Court: Can you properly testify about something an adjuster for an insurance company told you?

Mr. Thomas A. Williams: A representative of the defendant made the statement in the course of his business to me, to wit,—and I have it written down on the file. I page 11 } have it verbatim. "There is no doubt in the world he was on the business of Burford at the time."

Mr. Gordon P. Williams: We wanted to determine in advance whether the Court will allow that evidence, and, if so, Mr. Williams will have to be excluded on the Order of the Court. If not, we will have to note an exception and he will stay in the Courtroom.

Mr. Clarke: I have very grave objection to his testifying. If he claims Mr. Edwards made some statement which is favorable to his side, it is up to him to get Mr. Edwards here.

The Court: Mr. Edwards is not available?

Mr. Thomas A. Williams: I imagine he could be here. He is their representative. I have my statement of what he says, and I think it would be admissible for me to testify to that in Court, and I have a decision of the Supreme Court to prove it.

The Court: The question is whether or not Mr. Williams should be allowed to stay in Court. Now something else may develop in the evidence before we get to the point when he would have to testify, if I allow it. Don't you page 12 } think I would be in a better position to determine that at that time than I would be right now?

Mr. Thomas A. Williams: The only thing is I have to stay in the Courtroom, and then they will say, "Mr. Williams, we asked that the witnesses be excluded." I don't want to take them by surprise.

The Court: If Mr. Clarke objects to your staying, we will have to exclude you.

Note: The question was argued by counsel.

Mr. Clarke: I think the record should be clear that Mr. Williams has made no effort to get Mr. Edwards here. Mr. Williams is relying on Mr. Edwards' testimony or his knowledge of the facts with which Mr. Williams wishes to prove a point. It is axiomatic if you are relying on the knowledge of a witness about some transaction, you are supposed to have the witness there, and the hearsay evidence rule is a clear bar

to Mr. Williams' testifying about what somebody else told him. I don't care who the man works for, he is just as subject to the processes of this Court if he is in the jurisdiction.

If he is outside the jurisdiction of the Court, he
page 13 } then is subject to the taking of deposition, and
the fact Mr. Williams has not wanted to do so is something else. If Mr. Williams had placed Mr. Edwards testimony on the stand and claimed he was surprised by a change of testimony, then maybe he could be put on to contradict his own witness on the basis of surprise, but he certainly can't put on this testimony of what another person has told him.

Mr. Thomas A. Williams: What he wants me to do is the thing I don't want to do for this reason: He wants me to put Mr. Edwards on and he will say he didn't make the statement and that would make it a question of veracity. My testimony is of probative value and Mr. Edwards' testimony would negative that. He isn't going to admit it. I have it written on my file where he gave it to me on the phone.

Mr. Clarke: I can only recall my statement to the Court that there has been no evidence of any effort whatsoever to secure the deposition of Mr. Edwards, if he is out of the jurisdiction, or to have him here.

The Court: Gentlemen, if they establish the fact
page 14 } to the satisfaction of the Court that Mr. Edwards
was the representative of this Buick Corporation, then I am going to permit him to testify, Mr. Clarke, but I am going to wait until later on. That is my ruling at this time. Should he not establish to my satisfaction he is their representative, then I am not going to allow him to testify.

Mr. Clarke: We respectfully except to the Court's ruling, and I also wish to note my exception to the Court's overruling of my motion for a continuance.

Without waiving that exception to the Court's ruling, and in the expectation that Your Honor might allow Mr. Williams to testify, I take the position he should be excluded.

The Court: Yes, sir, the Court will have to do that.

Mr. Thomas A. Williams: I would like to do this before I go. My client, Mrs. Turner, knows Mr. Edwards because he was there and he talked with her. Now I want to have an opportunity of cautioning her not to say he was an insurance representative, just a representative of the defendant. I want
to caution her about that.

page 15 } The Court: You might do that.

Mr. Clarke: One other thing. I am moving the Court, or will move the Court at the appropriate time, for a continuance or stay in the case if he is allowed to testify

about this alleged conversation with Mr. Edwards in order to give me time to get Mr. Edwards here, and also, Your Honor please, if we are going to allow testimony of this type, move the Court to allow me to introduce signed statement of the former sales manager, who is now dead, which he gave to another person representing Burford, that there was no agency, and I also want to get Mr. Edwards here to deny the testimony of Mr. Williams.

The Court: Where does he live?

Mr. Clarke: I understand he has been transferred to Chicago.

The Court: Both of you knew about Mr. Edwards, didn't you?

Mr. Clarke: Yes, sir, I knew about it.

Mr. Thomas A. Williams: I don't want him.

The Court: It seems to me you could have had him here, either one of you.

page 16 } Mr. Thomas A. Williams: I am not going to summons Mr. Edwards because I don't want him to negate my testimony.

Mr. Clarke: I make that very point. He is just as available to the other side as he is to me.

The Court: All right, gentlemen, Mr. Williams will retire from the case.

Note: From this point on in this transcript, the attorney for the plaintiff in the case will be referred to as "Mr. Williams," which will designate Mr. Gordon P. Williams, as Mr. Thomas A. Williams was excluded from the Courtroom and took no further part in the case.

The following occurred in open Court in the presence of the jury:

The Court heard opening statements of Mr. Williams, followed by the opening statement of Mr. Clarke. During the course of Mr. Clarke's opening statement, the following occurred:

In open court.

page 17 } Mr. Clarke: * * * On behalf of both Mr. Morris and Burford Buick Corporation. Since this suit has been instituted, Mr. Morris has moved and gone to Arizona. Pursuant to my duty to him as his lawyer, I wrote him more than one letter, by registered mail, return receipt requested, and I am confident he received notice of the

fact that the case is set for trial today and he should be here. You noted undoubtedly that when the Court opened, the Judge had the Sheriff call out for Henry S. Morris. I am unable to explain to you gentlemen why he is not here, but I can only tell you he has not put in an appearance. If he shows up during the trial of this case and is here to testify, he will tell you—

Mr. Williams: May I be permitted to cross examine Mr. Clarke on this testimony he is giving the jury?

The Court: No, sir. I tell the jury the statements the attorneys make are not evidence, are not to be considered as evidence at all.

Mr. Williams: I note an objection to counsel's statements as to what he has done, if the Court please, and except to it.

The Court: I think he was telling why Mr. Morris wasn't here, why he couldn't reach him.

Mr. Clarke: I said if he arrives and does ap-
page 18 } pear in the case, this is what he will tell you, and as the Court has told you this is not evidence and you cannot consider it as such, unless Mr. Morris does show up and testifies to what I am telling you.

If he showed up, Mr. Morris would testify * * *.

WILLIAM B. HUBBARD,

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

DIRECT EXAMINATION.

By Mr. Williams:

Q. You are Officer William B. Hubbard?

A. Yes, sir.

Q. Of the Henrico County Police?

A. Yes.

Q. What are your duties as a County Police Officer?

A. Well, it is strictly criminal law enforcement, anything that comes along.

Q. In the course of that, did you investigate this automobile accident?

page 19 } A. Yes, sir.

Q. How long have you been employed in that capacity, Mr. Hubbard?

A. About eight years.

Q. Did you, on September 14, 1956, have occasion to in-

William B. Hubbard.

vestigate an accident at the intersection of Lewis Road and Williamsburg Road?

A. Yes, sir, I did.

Q. What time was that?

A. The call was received at headquarters at 8:33 p. m., and I arrived at 8:40 p. m., on a Friday evening.

Q. What did you find when you arrived there, sir?

A. There were two cars in the westbound traffic lane, one car operated by Payne Hening Turner. He was the owner of the vehicle. The second vehicle was a 1956 Buick operated by Henry Sanford Morris, and the car was owned by Burford Buick Company, of King and Lincoln Streets, Hampton, Virginia.

Q. Describe that intersection, the streets.

A. Williamsburg Road runs east and west; Lewis Road dead ends at Williamsburg Road on the south side, traveling north and south. There are two traffic lanes there and on the north side there is the entrance to what is now the Airport Drive-In Theater, at that time the Richmond Drive-in Theater. There is a restaurant on the northeast corner and a field on the southwest and southeast corner, open country.

Q. Is that intersection now the same as it was then, approximately?

A. Yes, sir, other than one or two buildings have been built a short distance east of the intersection and the drive-in theater has changed names.

Q. Are the mechanical signals, traffic control regulations, the same now as they were then out there?

A. Yes, sir.

Q. I hand you a picture, and I will ask if you can identify this photograph?

A. Yes, sir, this is looking west on Williamsburg Road.

Note: The photograph referred to was filed in evidence and marked Plaintiff Exhibit No. 1.

A. (Continuing) This one is looking northeast.

Note: The photograph referred to was filed in evidence and marked Plaintiff Exhibit No. 2.

A. (Continuing) This one is looking east.

William B. Hubbard.

Note: The photograph referred to was filed in evidence and marked Plaintiff Exhibit No. 3.

Q. I hand you a small photograph. The photographer failed to develop an enlargement of that.
page 21 } A. This one is looking west.

Note: The photograph referred to was filed in evidence and marked Plaintiff Exhibit No. 4.

Q. Now, Officer Hubbard, looking at photograph No. 1, do you see a sign there?
A. Yes.
Q. Tell us what that sign says?
A. It is a standard highway, state highway sign denoting a warning of traffic signals ahead,.
Q. Looking at these other photographs or from your own knowledge, can you tell me how far that sign is from the intersection?
A. Those signs are usually put at a standard distance of approximately 300 yards, varying 50 yards one way or the other, depending on road conditions.

Mr. Clarke: The question was whether he knew where the sign was.
The Court: I wish you gentlemen would talk a little louder.

A. It is approximately 300 yards from the traffic signal.

By Mr. Williams:
Q. Would you show this to the jury?
A. (The witness does so).
Q. Now looking at photographs Nos. 2 and 3, are
page 22 } these photographs looking generally toward or away from Richmond?
A. That is correct.
Q. Looking which way?
A. Looking east, away from Richmond.
Q. And No. 1 and No. 4 would be looking toward Richmond, is that correct?
A. Yes, sir.
Q. And the sign here (indicating on photograph), is that the entrance to the Airport Drive-in?

William B. Hubbard.

A. That is the center of an island, a big wide driveway approximately 60 feet in width with this in the center for cars to go around to enter and exit.

Q. I see. Point out on Exhibit 2 approximately where these vehicles were located?

A. The Turner vehicle was stopped approximately at the end of these double white lines, just about where the car in the picture is sitting at this time, and the vehicle operated by Mr. Morris was directly behind that vehicle, hitting the back bumper of the Turner vehicle.

Q. Were there any brake marks?

A. Faint skid marks approximately 24 feet on the Morris vehicle prior to the impact.

Q. Was the Turner vehicle moved by the force of
page 23 } the impact?

A. A short distance forward.

Q. Can you state approximately what that distance was?

A. I would say two or three feet, something like that.

Q. All right. Now did you question Mr. Morris there at the scene?

A. Yes, sir, I did.

Q. Did he give you any explanation for the cause of this collision?

A. He stated at the time that he didn't see the car stopped ahead of him until he was right up on it and at that time he applied his brakes. The only other statement I have from him were statements about the dealer tags being on the vehicle.

Q. What did he say about that?

A. I asked him if the company knew he was out of the City where he worked this distance with the automobile, which in cases where dealer tags are used it is a routine check, and he said that he was there on company business.

Mr. Clarke: If Your Honor please, this is not a part of the statement about how the accident happened, going to the question of negligence or liability. Perhaps the statement would be admissible on the ground it was a state-
page 24 } ment against interest or a part of the *res gestae,* but what the officer is testifying about now is a matter that is not part of the *res gestae* or a statement against interest, so far as how the accident happened. Therefore, the statement made by the officer is pure hearsay, not in contradiction of anything previously said, and therefore in-

admissible. I ask that the Court strike that evidence and direct the jury to disregard it.

The Court: I can't hear everything that is said. I understood Mr. Williams to ask him about the dealers tags.

Mr. Clarke: Mr. Williams asked him what statements he made.

The Court: He asked him first about the dealers tags, didn't he?

Mr. Williams: I asked him what statements were made and he answered about the dealers tags.

The Court: What did he say about that?

The Witness: It is routine for us to check all cars bearing dealers tags and I asked him at that time whether he would tell me why he was in Richmond when he was a dealer from the Norfolk-Newport News Area, and he told me at that time

page 25 } he was there on company business; that they knew he had the automobile coming to Richmond with him.

The Court: That is not part of the question at all, I mean, the reasons for his action. I understood Mr. Williams to ask him if he could give any explanation as to how the accident occurred.

Mr. Williams: That's right.

The Court: What answer did he give about his reasons for the accident happening?

Mr. Clarke: He said he didn't see the car until it was too late.

The Witness: At the time he stated his attention was distracted and when he looked back into the road he was very close on the automobile and he applied his brakes and attempted to stop but he did hit the rear bumper of the Turner vehicle.

Mr. Williams: The next question was did he make any other statements, and he voluntarily went on. I questioned him about the dealer's tags and I asked him to go ahead with that. I believe that is *res gestae.* I don't have the citation at hand but it has been allowed in a case involving a truck.

page 26 } Mr. Clarke: If we are going to have a detailed argument, we ought to go in Chambers.

The Court: We are not going to have any detailed arguments. Any statements he made at the scene of the accident soon after the accident occurred as to how the accident happened are certainly admissible, but statements he made that do not give explanation as to the accident, that

is, as to his employment, and so forth, are not admissible and the Court will tell the jury to disregard what Mr. Morris told him about who he was employed by.

Mr. Clarke: And the purpose for which he was coming to Richmond.

The Court: The whole thing is excluded.

Mr. Williams: Exception.

The Court: Go ahead.

By Mr. Williams:

Q. What was the speed limit there?

A. It is a posted 45-mile-an-hour speed zone.

CROSS EXAMINATION.

By Mr. Clarke:

Q. Did I understand you to say, Mr. Hubbard, that when you arrived there you found that the Turner car was right there at the break in the white lines?

page 27 } A. It was just a little past where the double white lines end, just about at the place where you turn off to go into the second turn at the drive-in movie. The island in the center separates them and it is a wide place to make the turn.

Q. Did you find out the Turner car was the head car in the line when it was stopped for the light?

A. No, sir, there was another vehicle in front of the Turner vehicle.

Q. And I believe you said there was a light skid mark for 20 feet?

A. Approximately 24 feet. I stepped them off by paces.

Q. And the Turner car had been moved two or three feet?

A. Approximately three feet east at the point of impact.

Q. Were you told by the Turners they were about to start up or were starting up when the accident happened?

A. I don't recall. I don't have it in my notes here at all.

Q. You are testifying from your notes, are you not?

A. Yes, sir.

Q. May I see them a moment?

page 28 } A. Yes, sir. It is a standard field book.

Q. Is this all?

A. That's it.

Q. Was it dark at the time?

William B. Hubbard.

A. Yes, sir, no street lights other than the Neon lights from the sign at the Airport Drive-in.

Q. This accident happened on September 14, 1956, did it not?

A. Yes, sir.

Q. Where in your notes did you make notes about what the parties told you?

A. I have a fairly good memory.

Q. Mr. Hubbard, how many accidents do you investigate in a year's time, do you suppose?

A. One hundred or 120—something like that.

Q. And this accident happened two years ago, just about two to the day, so you have investigated two hundred or two hundred and fifty accidents since that time, have you not?

A. Yes, sir.

Q. And you have no place in your notes here about what the parties stated to you at the scene of the accident?

A. I remember—

Q. Just answer the question.

page 29 } A. I remember the case because I helped Mr. Morris get back to his home town by cashing a personal check for him, because he didn't have any money in his pocket, and I talked to him quite some time while waiting for the wrecker to pick up the automobile.

Q. My question was whether or not the notes you made at the time of the accident have any reference in there to any statements made by the parties at the scene of the accident, and I submit you can say yes or no.

A. Not altogether, no, sir.

Q. Do you have that in there anywhere?

A. No.

Q. Then your answer is not "not altogether"—it is "no"; isn't that right?

A. (The witness does not answer).

Q. Was Mrs. Turner there when you got there?

A. Yes, sir, she was.

Q. She was at the scene?

A. Yes.

Q. Where was she when you got there? Do you recall where she was?

A. No, sir.

Q. Did you talk to her?

A. I don't recall whether I did or not.

Dr. Ernest B. Carpenter.

Q. But you are conscious of the fact she was
page 30 } there and moving around?
A. Yes, she was at the scene.
Q. She wasn't unconscious, was she?
A. No, sir.
Q. You didn't call the ambulance, did you?
A. No.
Q. Did you make any notation in your report that anybody was injured?
A. No, sir.
Q. Nobody claimed at the scene of the accident they were injured?
A. No, sir.

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page 31 }

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DR. ERNEST B. CARPENTER,
a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

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page 32 }

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Q. Coming to the case here before us, did you have occasion to examine or have as a patient Mrs. Virginia Hening Turner?
A. Yes, sir.
page 33 } Q. When did she come under your care?
A. I first saw her on September 19, 1956. She stated she had been involved in an automobile accident the preceding Friday, September 14th. I questioned her regarding the injury, how she was hurt. She stated she was riding in the right front seat of a car and this car was hit from the rear and that she was thrown forward and then backwards and struck her head against the back of the front seat. She

stated she was not unconscious but dazed for several minutes and had pain in her head and back of her neck shortly after the accident. I saw her five days after that, on September 19th.

Q. What was the injury she suffered, Dr. Carpenter?

A. I felt she had suffered what is called, for lack of a better word, a whiplash injury, a whiplash injury of the cervical spine. I think a better term is acute sprain and injury to the muscles and ligament of the cervical spine or neck.

Q. Now what would you diagnose her dazed condition to have been?

A. I estimate she had suffered—and she told me she struck the back of her head on the seat—she probably had a mild concussion that caused the dazed feeling, although she said she was not unconscious.

page 34 } Q. Now, Doctor, what treatment did you prescribe?

A. The first time I saw her I recommended the use of hot packs to her neck and gave her medication to relax the muscle spasm which was present, and recommended she use the hot packs three times daily. I also gave her medication to take four times a day, and also medicine to relieve nervous tension. She felt quite apprehensive about her injury.

On subsequent dates I continued the same treatment, except on November 19, 1956, I started her using traction which is a mechanical device to apply traction to the head and neck which she could use at home, and she used that two or three times daily and continued the use of the hot packs. I varied her medication from time to time depending on the symptoms, and she continued to use heat and traction until I last saw her on March 28, 1957, and she stated at that time she was feeling much better although she did have occasional soreness in the back of her neck, particularly toward the end of the day or when she was tired, but that the headaches had improved.

Q. Before going into that, before completing the course of the treatment, I would like to have you describe to the Court and jury the anatomy of the cervical spine, the portion you say was injured in this case.

page 35 } A. The cervical spine, as we call it, consists of the first seven vertebrae of the spine from the base of the skull to the top of the shoulders. The vertebra are made up of a roughly spherical-shaped body and in back of that is a canal through which the spinal cord passes,

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and between each vertebra there is a small pad or cartilage which acts as a shock-absorber for movements of the vertebrae and also permits mobility for the vertebrae of the neck, since they move more than the vertebrae in the largest part of the spine.

Attached to the sides and back and front of the vertebrae are also various muscles and ligaments which give support to the neck and also the mechanism of movement of the neck, and between each vertebrae passing off from the spinal cord there is a nerve which passes out on each side of the vertebrae, between each vertebra, and these nerves join together and are the nerves that move our arms and shoulders and hands.

Q. Dr. Carpenter, these muscles and ligaments are from the bony portion in the area. What do they attach to?

A. They attach to the outer layer or lining of the bone, which is known as the periosteum. They attach to the outer layer of the bone.

Q. How is the head fastened on to the spinal page 36 } column itself?

A. The bony support of the spinal column sits in almost like a dowel. The first cervical vertebra fits in the opening at the base of the skull, which is about the size of an egg, and fits in a dowel shaped manner overtop of this first cervical vertebra, which attaches to the remaining six cervical vertebrae in turn.

Q. How is the head attached?

A. By that attachment and plus the muscles and ligaments that extend down also in the front.

Q. Are these areas of the head you describe also served by those nerves you say are in that portion of the spine?

A. Yes, the operation of sensation of the scalp and of the skull itself comes from the nerves which pass from the cervical spine. One on each side passes to the back on the skull, known as occipital nerves.

Q. Can you describe what occurs in this area when one has a sprain?

A. We feel that in these so-called whiplash injuries that at the moment of impact, if the impact is from the rear as in this case, the head and neck are thrown forward as far as the bone and muscles and ligaments will permit, and then at the moment of impact, at the moment the impact stops then the momentum of it brings the head and neck back to either past

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page 37 } its normal position or to a normal position, and if the impact is of such intensity it can cause pulling and tearing of the muscles and ligaments where they are attached to the cervical spine.

Q. What is a sprain itself, as you have diagnosed her condition?

A. A sprain is a tearing or stretching of a muscle or ligament.

Q. Is that what she had in this case?

A. Yes, sir, I feel she did.

Q. Now can this condition be shown by x-ray?

A. Not a sprain, no, sir. We took x-rays on her, as we do on all of these cases, to be sure there is not any bone injury.

Q. Dr. Carpenter, what is subluxation?

A. Subluxation is a rather poorly used term which means a partial dislocation.

Q. Does that occur in this type of injury?

A. It could.

Q. Can it always be shown by x-ray?

A. It is possible to have a subluxation which will go back in place which will not show on the initial x-ray unless you take angle views or oblique views and there you will see the damage to the small bones on either side of the cervical vertebrae.

page 38 } Q. Can you say whether or not Mrs. Turner did or did not have a subluxation?

A. I did not feel she had clinical evidence of a subluxation. Usually with a subluxation they get various symptoms of the arms, numbness or tingling, and it may be severe in some instances. Although she had a great deal of muscle spasm at the time I examined her, I don't feel she had any bony injury.

Q. Doctor, what is a muscle spasm?

A. A muscle responds to injury by going into spasm to prevent excessive movement, because it is excessive movement that causes pain, so the muscle contracts itself and the surrounding tissues by tightening up and therefore prevent undue movement which would be painful.

Q. And that is an objective finding?

A. Yes, you can always determine muscle spasm.

Q. Now what were her complaints as to pain? Can you tell us what they were?

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A. She was complaining rather severely of pain in her neck and headaches in the back of her head. That was her chief complaint.

Q. Would headaches come from this type of injury?

A. We assume headaches in this type of injury. They can occur in the most severe way. With the muscle being in spasm, the occipital nerve as it crosses up through the vertebra can be irritated by muscle spasm. Almost all
page 39 } of these cases do have headaches at first.

Q. And would there be any damage to the nerves themselves?

A. If there is damage to this cartilage between the vertebrae, of course there could be damage to the nerves, but there again you would have manifestation of arm or shoulder pain.

Q. Do some of these nerves serve specific areas solely, such as motor and sensory functions?

A. Oh yes, and some of the nerves are mixed nerves. They stimulate a muscle to move and they also supply sensation or feeling.

Mr. Clarke: Your Honor, I don't like to interrupt this fine scientific discourse—I am interested in it—but I wonder if we could confine the testimony to the findings in this case?

The Court: I assume he is. I think he is laying the foundation.

Mr. Clarke: He says these things could happen but he finds no symptoms of them in this case.

The Court: I take it he is going to be specific.

By Mr. Williams:

page 40 } Q. The nerves in the neck that serve specific areas, are some of them motor and some sensory only, exclusively?

A. Yes, some are purely for sensation and some purely for movement of muscles.

Q. Is there one or more of those that serves the back of the head?

A. The anatomy of sensation to the skull has not been completely determined because there is such a variance in individuals. You may have one individual where the occipital nerve itself may supply all sensation to the skull and in another individual you may find branches of other nerves that may supply sensation.

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Q. Do all of these nerves that do supply sensation to the skull have their derivation from the spinal cord in the cervical area?

A. No. The branches of the tenth and eleventh vertebrae which extend from where the spine begins to taper down, we believe these carry some sensation to the skull.

Q. Could they be damaged by trauma?

A. Yes, they could be.

Q. Would they have been damaged by trauma such as in this case?

page 41 } A. It requires a very severe degree of injury to damage the brain stem of the midbrain. We usually see damage to the brain stem of the midbrain in individuals who have had a severe blow to the head and are deeply unconscious.

Q. Would you continue with the treatment you have prescribed, up to the present time?

A. As I stated, I recommended the use of hot packs to her neck, followed by linament and traction which she used at home.

Q. How long was that traction used, to your knowledge?

A. To the best of my knowledge, my notes do not say when I told her to stop the traction but I am sure she used it until I saw her February 28, 1957. Uusually on these patients as their symptoms improve I suggest they either cut down on the amount of time they use traction or decrease the number of times a day they use it.

Q. When she was first given the traction, was she to use it daily?

A. Yes. I suggest they use it as often as they can, at least an hour three times a day.

Q. And what position do they have to be in to use that device?

page 42 } A. Most of my traction sets hook up over the door-jam and they sit in a chair, it goes through a pulley and has a weight tied to a rope. You can use it in bed if you have a gadget to hook on the bed, but most of them at home use it in a sitting position.

Q. Now what is the healing process for this type of injury?

A. You mean the mechanism of the healing or the time interval?

Q. Both.

A. In any sprain or any soft tissue injury, depending on

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the severity of it, you usually have some degree of bleeding about where the sprain occurred, in any part of the body. Now that bleeding is clotted by the normal mechanisms of the body and then it is replaced by what we call fibrous or scar tissue, and then the scar tissue is replaced by normal tissue. The scar tissue acts as a strong repair at first and as time goes on then this scar tissue is less resilient and does not have the stretching ability that normal tissue has, so nature repairs that scar tissue as time goes on.

I think you can describe the repair of a sprain similar to the repair of a cut. When a cut first heals, the scar is largely reddish and then it gets purple, and after a long period of time it ultimately becomes white in color and it is beginning to be replaced by normal tissue.

page 43 } As far as the time interval goes, I think the time of repair of any sprain and particularly to the cervical spine is dependent on the severity of the initial injury. I would say the minimal time is three to six months and they can go from six to nine months, depending on the severity of the symptoms.

Q. I see. Do the symptoms continue longer than that as a usual thing?

A. It is possible. I find the great majority of patients will have reached their maximum improvement usually within six months. You do see an occasional case that will go a few months longer, but it is very unusual to see a case have symptoms longer than a year.

Q. In the building up of the scar tissue, do adhesions occur?

A. Well, adhesion is scar tissue.

Q. That is scar tissue?

A. Yes.

Q. What is the effect of adhesions? How do they dissipate themselves?

A. By the normal process of replacement with the normal muscular or ligamentous fibers or cells, if it is in an area there is going to be complete absorption of it.

Q. Have you seen Mrs. Turner recently?

page 44 } A. I saw her on May 8, 1958.

Q. What were her complaints referrable to the accident at that time?

A. She stated at that time she was usually concerned about headaches and some inability to walk a straight line when she got up from a sitting position or prone position. She stated she still had an occasional catch in her neck if she turned it

a certain way. She had not previously seen anyone regarding her head and I arranged for her to see Dr. John Meredith regarding her complaint of headaches.

Q. Did he give the same diagnosis as you had given in connection with her injuries?

Mr. Clarke: I didn't understand the question.

Mr. Williams: I asked him if Dr. Meredith gave the same diagnosis as he had given in connection with her injuries.

Mr. Clarke: I object to that. Dr. Meredith is available for testimony.

The Court: I don't think that is proper.

Mr. Clarke: I think if Dr. Carpenter relied on any advice of another doctor in prescribing, he can testify about that but he cannot testify to what any other doctor would say.

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Mr. Williams: I would like to say that while we have Dr. Meredith under summons, he will not be here because he had a prior subpoena to Spottsylvania County and since he had a prior subpoena we took the liberty of telling him to go ahead.

The Court: I don't think Dr. Carpenter can testify to what Dr. Meredith's diagnosis was.

By Mr. Williams:

Q. Did he give her any additional treatment beyond what you had given her?

Mr. Clarke: I object to that on the same grounds.

The Court: Mrs. Turner can testify to that, unless Dr. Carpenter knows of his own knowledge.

A. To my knowledge, I don't have his letter. I sent it to Mrs. Turner's—after I received it and also sent a copy to Mr. Williams, but I recall he suggested the use of two medications for her.

By Mr. Williams:

Q. Doctor, aside from the prescribed treatment which you administered and which she had taken over this period of time, is there anything else that the surgeon, whom you say was Dr. Meredith, could have done to aid or hasten her healing?

page 46

A. No, sir.

Q. Now this healing process which resulted in scar tissue in the ligamentous and muscular area, is that the same type

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of tissue that is normally in the ligamentous and muscular tissue originally, prior to the injury?

A. Not identical, no, but it is physical and as far as function is concerned, it is the same. You can tell the difference microscopically, but unless you have a very excessive amount of scar tissue in one particular area,—that large amount of scar tissue would not work the same as prior to the deposit of the scar tissue.

Q. Can that be shown by x-ray?

A. No, sir.

Q. Has she told you of any disability or have you checked to observe any limitation of use, her ability to do things?

A. The last time I saw her, on May 8th, I examined her and she has no residual muscle spasm. She does complain of what she calls a popping sensation in her neck with excessive movement of it, but you can carry her neck through a full range of motion.

Q. What about the use of her arms, and so forth?

A. Full range of motion in shoulders and elbows.

Q. Did you talk to her about lifting?

page 47 } A. She didn't mention it to me at that time.

CROSS EXAMINATION.

By Mr. Clarke:

Q. Doctor, when you x-rayed Mrs. Turner when she first came to see you on September 19th, did you find any sign of any arthritis?

A. No, sir.

Q. She had a good cervical spine from the standpoint of normal healing?

A. Yes, sir.

Q. There was no pre-existing condition to be aggravated?

A. No, sir.

Q. As I understand it, the way you have described this injury is an acute sprain?

A. Yes, sir.

Q. The reactions of the joints and ligaments and so forth in the neck would be the same as in an ankle. All this talk about adhesions, and all that, the same things happens anywhere you sprain the muscles and ligaments. Is that not true, Doctor?

A. It is the same process.

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Q. It is just about like a sprained ankle, and the healing process is the same, too?

page 48 } A. Yes. I think the healing process in the neck may be prolonged a little over what you would get in an ankle, say, for the reason you have more muscles and ligaments in the neck, but basically the healing process is the same regardless of where a sprain is.

Q. And all the testimony you have given about internal bleeding is the same thing you see in bruises and sprains of your ankle?

A. Yes, sir.

Q. So outside of the fact there are more muscles and ligaments involved in the neck and it is in a different part of the anatomy, it is basically the same sort of injury?

A. Yes, sir.

Q. And when you sprain your ankle or your neck, it is stiff and it hurts?

A. Yes, sir.

Q. And your object in strapping a sprained ankle is to immobilize it so it will not work. Is that not true, Doctor?

A. That's true.

Q. And that is the same reason for putting this chain strap under the chin, to kind of hold the neck steady so the head will not work around and irritate those sprained muscles and things?

page 49 } A. That's true.

Q. Until they have an opportunity to relax and heal themselves?

A. Yes, sir.

Q. Now, Doctor, in your opinion—let me put it this way. You last saw Mrs. Turner in 1957 in March, isn't that correct?

A. March 28, 1957, yes, sir.

Q. And at that time it was your feeling she had recovered without any residual disability, as you call it?

A. Yes, sir.

Q. So she had nothing left wrong with her from the accident?

A. Yes, sir.

Q. Now these complaints she had, when she came to see you a year later in 1958, is it your opinion they are or are not connected with the accident?

A. Well, as I stated I had not seen her since March 28,

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1957, for her neck injury. I might add I had seen her on two occasions in May 1957 for an injury to her wrist which occurred otherwise and had no relationship to her neck injury.

Q. Was that a sprained wrist?

A. Yes, sir.

page 50 } Q. Did that recover in a normal manner?

A. Yes, sir, a very mild sprain.

Q. Have you ever had to testify about the wrist?

A. Yes.

Q. You did?

A. Yes.

Q. All right. Go ahead.

A. Of course, I didn't see her again until May of this year and I assumed that had she continued to have trouble with her neck she would have come back to see me. As a matter of fact, I was surprised when I saw her in May of this year, not having seen her for a year, when she stated she was still having headaches. It is most unusual to see symptoms last for that period of time.

Q. Now, Doctor, did you instruct her when you last saw her in March 1957, as doctors generally do, "If you have any more trouble, come back"?

A. Yes, sir, I always do.

Q. As a matter of fact, her husband's office is right across the street from your office, is it not?

A. Yes, sir.

Q. Do you know whether they live there or not?

A. No, they live in Hanover, I believe.

Q. I see. Now to answer my question, is it more

page 51 } probable or less probable that her complaints of May 1958 had anything to do with this accident?

A. I think it is less probable.

Q. Then it is your opinion as an orthopedic surgeon it is not likely that the trouble she complained of in May 1958 has anything to do with the accident?

A. I think it is most unusual and probably unlikely.

Q. All right, Doctor. If there was any diagnosis now of possible arthiritis, that arthritis was not existing when you took your x-rays at the time of the accident or shortly afterwards?

A. No, sir.

Q. And arthritis could not have been caused by this accident? Arthritis is something that grows on you?

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A. With the one exception of the so-called traumatic arthritis.

Q. You found no evidence of traumatic arthritis in this case, did you?

A. No, sir.

Q. So if it should be diagnosed by any doctor she now be suffering from arthritis, that would be something entirely disconnected with the accident?

A. I think there would have to be a diagnosis of the type of arthritis. If it were so-called hypertrophic arthri-
page 52 } tis, which we are all heirs to, the normal processes of ageing, I would think it would be very unlikely. If it could be shown she had traumatic arthritis, then I think that there would be a possibility of relationship, but there again traumatic arthritis only follows an injury to a specific joint surface.

Q. And you found no evidence of injury to a specific joint surface in your treatment and diagnosis of her injuries following the accident?

A. No, sir.

Q. Isn't part of the therapy or treatment of any patient to reassure them and encourage them and tell them they are getting along all right and to get their minds off it and worry about other things, generally speaking?

A. Yes, I think that is as important as the medicine, maybe even more so.

Q. There has been some testimony about brain stem damage and a lot of other things, but actually you have told the jury all there is to it,—a sprain of the neck which followed a pretty normal course of healing?

A. Yes, sir.

RE-DIRECT EXAMINATION

By Mr. Williams:

page 53 } Q. When you examined her in 1956 and she was x-rayed, was there hypertrophic arthritis present?

A. No, sir.

Q. There was none?

A. No, sir.

Q. How long does it take for traumatic arthritis to form?

A. It depends on the joint involved and the severity of the injury.

Q. The bony portion of the joint surface is covered, is it not?

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A. Covered with cartilage, yes, sir.

Q. Does trauma or injury to that area show on x-ray?

A. Oh yes, certainly, if you have a fracture extending to a joint it will show on x-ray, yes, sir.

Q. If there is injury to the surfaced portions that connect with the bone but are not the bone, does that show on x-ray?

A. No, I don't think you could.

Q. Could injury to such connective tissue cause irritation of the bony surface?

A. There is no bony surface in a joint. It is a cartilaginous surface. You get arthritis because the cartilaginous covering of the joint is interrupted and therefore it heals
page 54 } with a less smooth surface than it had before. That is traumatic arthritis. You have to have an interruption in the continuity of the cartilage by fracture or severe blow that would actually rupture the lining surface of the cartilage.

Q. Would such an interruption of the lining surface show on x-ray?

A. If you had sufficient trauma to have a rupture of the lining surface of the cartilage, I think with good x-rays I could tell it, yes.

Q. Have x-rays been made recently?

A. I haven't had any made,—not to my knowledge.

Q. I neglected to ask you your bill. Do you have your bill?

A. No, I don't.

Q. Would this be it?

A. I believe it is, including traction and all.

Note: The bill referred to was filed in evidence and marked Plaintiff Exhibit No. 5.

By Mr. Williams:

Q. What was the amount of that bill?

A. $103.00.

Q. Now, Doctor, while you were treating Mrs. Turner did someone contact you about your treatment of Mrs. Turner, representing themselves as a representative or
page 55 } agent of the Burford Buick Corporation, the defendant in this case?

A. I received a letter from Mr. C. S. Edwards asking me to send him a medical report and he had an authorization signed by Mrs. Turner and I filled out the report.

Q. Do you still have the authorization in your file?

A. I have this letter to me.

"We understand you are treating Mrs. Virginia Hening Turner for injuries received in automobile accident occurring on or about September 14, 1956.

"We are attaching medical authorization signed by Mrs. Turner and request that you complete the attached forms and return them to this office at your earliest convenience."

Q. And as a result of that you wrote to Mr. C. S. Edwards on several occasions?

A. Yes, I sent the form in and subsequently wrote him December 11, 1956, January 24, 1957 and March 29, 1957.

Witness stood aside.

page 56 } Mr. Clarke: I want the Court to understand that my objection goes to that portion of the testimony relative to the matters which we discussed in Chambers, for reasons which I can state to the Court later.

The Court: Yes, sir. I think that was competent evidence.

PAYNE HENING TURNER,

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

DIRECT EXAMINATION.

By Mr. Williams:

Q. You are Mr. Payne Turner?

A. Payne Hening Turner.

Q. You are Mrs. Turner's son?

A. Yes, sir.

Q. What is your age?

A. 25.

Q. Were you the driver of the car in 1956 when your mother was injured?

A. Yes, sir.

page 57 } Q. Whose car was it?

A. Mine.

Q. Your car? What were you doing? Where were you employed then?

A. In the Army, Uncle Sam.

Q. Who else was in the car besides you and your mother?

A. My brother Tom.

Q. Where was your mother sitting and where was your brother sitting?

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A. Mother on the right front and brother was sitting in the back.

Q. And you were driving?

A. Right.

Q. Tell just what occurred at the time of this collision. First of all, where had you been and where were you going?

A. Coming from the Rappahannock River, Urbanna, coming home and stopped for a red light on Route 60 and I was the last car, the third car.

Q. Where on Route 60.

A. Lewis Road, the road going to the Drive-in Theater.

Q. And you stopped for the red light?

A. Yes.

page 58 } Q. Were there other vehicles ahead of you?

A. They stopped, too.

Q. What occurred after you stopped?

A. I stopped for a few seconds and the light just changed and I just finished putting the car in gear and the man behind me hit me a pretty hard blow and for a minute it dazed me, and I got out of the car to look to see what the damage was and the gentleman in the car behind me got out and asked me if anybody got hurt and I told him I didn't think so.

Q. Now was anything said about the reason he ran into you or any explanation given for it?

A. We both got back in the cars and moved them and I went to call the police down at the service station half a block away.

Q. While you were there and during the course of the time you were talking with him, did he give you any explanation or reason for having run into you?

A. Said his brakes failed.

Q. Now did he say what the purpose of his trip was or who he was with?

A. He was up on business for Burford Buick Corporation, Hampton, Virginia. He was a salesman.

Q. Now did you have your car repaired?

A. I did, at DuBose Buick.

page 59 } Q. Is this the repair bill itself?

A. It is.

Q. What was the amount of these repairs?

Mr. Clarke: I think it should be explained to the jury there is no suit here for the repair of his damages and there is no financial involvement to that extent.

Mr. Williams: In my opening statement I think I made

the statement there was damage to the extent of $168.20, which shows the severity of the blow. I made no demand for that.

The Court: He can introduce it for that purpose.

Mr. Clarke: That is perfectly proper.

Note: The bill referred to was filed in evidence and marked Plaintiff Exhibit No. 6.

The Court: Of course, the jury understands this does not involve damage to his car. He is submitting it for the purpose of showing the severity of the blow.

CROSS EXAMINATION.

By Mr. Clarke:

Q. Did you get any other estimate on that car?

A. DuBose Buick did.

page 60 } Q. You asked the people who were going to repair it to get other estimates?

A. Mr. Morris told me to ask them to.

Q. You didn't get any other estimates?

A. No.

Q. I see. Your car wasn't involved with any car ahead of it, was it?

A. No, sir, it wasn't.

Q. They had gone on by the time your car was pushed forward, if it was pushed forward?

A. Yes, it was pushed forward.

Q. And I believe you said you had your car in gear to go forward?

A. Right.

Q. Had you started forward at all?

A. No, I didn't.

Q. Did you have your foot on the accelerator?

A. Yes, it was.

Q. It wasn't on the brakes?

A. No.

Q. Now what time of day was it when this accident happened?

A. It was at night but I can't tell you the time.

Q. You all had been to your daddy's summer place on the Rappahannock River?

page 61 } A. Yes, sir, we had.

Q. Was it dark?

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A. Yes, sir, it was dark.

Q. You say that you all moved your cars after the impact occurred?

A. Yes, we got out and both moved our cars.

Q. Was that before you said hello to him?

A. We both got out of the cars and asked if anybody was hurt and then we got back in the cars and moved them.

Q. And then you drove your car to the side?

A. Right, and he followed me.

Q. How far did you drive it before you could get it over to the side?

A. Not too far.

Q. Did you drive it beyond the intersection?

A. No, it was almost where you go into the drive-in theater.

Q. Did you turn right or left?

A. Right.

Q. How far do you reckon it was you moved your car, if you remember?

A. About ten feet.

Q. And how wide is the road there?

A. A three-lane highway. I don't know how page 62 } wide it is.

Q. Could you estimate it?

A. I couldn't tell you.

Q. You could not?

A. No.

Q. When he parked his car, where did he park it in relation to yours?

A. Behind me.

Q. Were you all straight with the road?

A. Off the road on the shoulder, straight in line with each other.

Q. Straight with the road?

A. Yes.

Q. So you had to pull over and straighten up?

A. Yes, sir.

Q. And he did likewise?

A. Yes, sir.

Q. How far behind you did he stop?

A. Not too far. About ten feet, I think.

Q. Then where did you go?

A. We both got back out of the car and I told him I was going to call the policeman, and so I went to the service station to call the policeman.

Q. And then you came back?

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A. Right.

page 63 } Q. How long after that was it the officer got there?

A. It wasn't long.

Q. How long?

A. Five to ten minutes, I would say.

Q. And at that time did you show him where the accident happened?

A. We just got out and started talking. I think we did.

Q. How long, altogether, were you at the scene of the accident?

A. I think we stayed there about an hour.

Q. And your mother and brother stayed there with you all that time?

A. Yes.

Q. Did they get out and walk around or were they in the car?

A. My mother was complaining she was hurting pretty bad so I went back three times and asked her did she want the ambulance.

Q. You didn't tell the officer anybody was hurt, did you?

A. I don't know whether I did or not. I told him my mother was shaken up.

Q. You are sure of that?

page 64 } A. No, I am not sure.

Q. How long was Mr. Morris around?

A. He was there until his car was taken away.

Q. Was yours taken away?

A. I drove mine.

Q. But his was taken away?

A. Yes.

Q. I see. When did you have this conversation with him?

A. After I made the phone call.

Q. You have no difficulty remembering that, do you?

A. No.

Q. You have talked to Mr. Williams about that, haven't you?

A. Yes.

Q. And he told you he was going to ask you that question.

Mr. Williams: I don't know whether it is proper for him to go into that.

The Court: I don't see the relevancy of it.

A. I think—yes, he did.

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The Court: I mean, the other questions that have preceded this, I see no relevancy in them. I see the page 65 } relevancy of this.

Mr. Clarke: If you want to instruct the jury to disregard it, then of course Your Honor may do so, but I don't think the Court's comments about the relevancy of my questions is proper. I will take that up in Chambers later.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. When this collision occurred, your car was ready to go ahead? Did it stall out or was the engine still running?

A. Cut the engine completely off.

Q. Did you observe the marks in the road?

A. Yes, I did.

Q. What were they made by?

A. From the car that hit me.

Q. Where were they and how long were they? Or could you estimate it?

A. About 20 feet.

Q. About how far was your car moved, do you know?

A. I don't know.

Q. What reason, if any, did the driver of the car give for running into you?

A. Said his brakes failed.

Q. These marks that you observed, were there page 66 } more than one or not?

A. The two front brakes are the only ones that looked like they took hold.

Q. Were they straight or not?

A. Straight.

RE-CROSS EXAMINATION.

By Mr. Clarke:

Q. You are not a mechanic, are you?

A. No.

Q. And you are confident that those marks left in the road are brake marks, from the wheels locking?

A. Sure.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. What department of the Army were you with?

A. At that time?
Q. Yes, and since then?
A. I was in the Engineers and then transferred to Transportation.

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page 67 } THOMAS A. TURNER,
a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:
Q. State your full name and age?
A. Thomas A. Turner, 23 years old.
Q. You are Mrs. Turner's son?
A. Yes, sir.
Q. Were you in the automobile at the time of the collision?
A. Yes, sir.
Q. Where were you sitting in the car?
A. On the back seat, on the driver's side.
Q. And what was your first knowledge of a collision or that a collision might occur?
A. A car crashed into us and I slid forward on the seat and caught myself.

The Court: Please speak louder.

A. (Continuing) I slid forward on the seat and caught myself on the front seat with my hands.
Q. What sort of blow was it?
A. Well, it was just a crashing sound, threw me
page 68 } forward toward the front seat.
Q. Now did you talk with the driver of the car that ran into you?
A. I don't recall. My brother did the talking.
Q. Were you present and did you hear what was said?
A. Yes, I heard some of the conversation.
Q. Do you recall what the gentleman said with regard to why he ran into you?
A. I remember him distinctly saying his brakes had failed.

Q. Did he say anything else as to who he was with or why he was there?

A. I think I heard him say he was a car salesman for Burford Buick.

Q. Did you hear him making any statement as to whether he was on business or not?

Mr. Clarke: I object to the leading question.

The Court: That is not proper. He said he was a car salesman. Let that go.

Mr. Williams: That's all.

Mr. Clarke: No questions.

Witness stood aside.

page 69 } Mr. Williams: If Your Honor please, I believe we have sufficiently laid the foundation for this additional testimony we discussed earlier. If not, then I will put Mrs. Turner on to add to it. I am referring to Dr. Carpenter's testimony with regard to Mr. Edwards.

The Court: Yes.

Mr. Williams: If the Court considers that sufficient, I will put my father on; if not, I will put Mrs. Turner on.

The Court: I reckon you better put Mrs. Turner on.

MRS. VIRGINIA HENING TURNER,
the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. You are Mrs. Virginia Hening Turner?

A. That's right.

Q. You are the mother of these two young men that testified?

A. Yes, I am.

page 70 } Q. Would you tell what occurred to you when this collision occurred in September 1956, what your first knowledge of it was and what occurred to you and your next knowledge of events?

A. Would you like for me to tell about our trip?

Q. Tell us about where you were going?

A. We had been to our place at Locust Hall, Virginia, in Middlesex County and Payne was on a week's leave of absence

Virginia Hening Turner.

and we were coming back to town that Friday night for Tom—he is in the Virginia National Guard—to go to his Post Saturday morning, and as we approached the stop light—I understand it is Lewis Road and Williamsburg Road, but I didn't know then—the light was red and Payne had stopped and just as the light turned green, we were hit from the back this terrific blow by Mr. Morris' car.

Q. What happened to you?

A. I was thrown forward and then the momentum brought me back and I hit the back of the seat a terrific blow and I had a very violent headache after that and the boys at that time didn't pay too much attention to me because they were finding out about the car, but Payne did come back two or three times and asked me if I was hurt and should he call an ambulance, and then some girl was coming across going to the open-air theater and she saw I was hurt and page 71 } she started back to where she lives—I understand now it is the Lewis Apartments.

Mr. Clarke: I don't know whether the witness has gone beyond what she should, but I don't think she ought to testify to what another person said or did.

The Court: If this young girl helped her, she can testify to it.

A. (Continuing) I mean, I didn't know the name of the road, but I understand it is Lewis Road, and she went home and got a cold wash cloth and brought it back and applied it to my head and she stayed with me quite some time until she went on to the theater, and I asked her did she see the accident and she said no. I failed to get her name and I wish I had because she was very nice to me.

Neil, my oldest son—Payne had called him—and he said, "Are you hurt?" And I said, "I am. I have a very violent headache." He said, "I will take you by Medical College of Virginia."

The Court: Just state what was done, not what was said.

A. (Continuing) I am sorry.

Mr. Williams: You can say if he made a sug-
page 72 } gestion.

The Court: She can say what he did.

Virginia Hening Turner.

By Mr. Williams:

Q. What did he do?

A. He went back and talked with Payne and Mr. Morris and the officer, I suppose. I didn't see any of them because I was in the car, and then after it was over Neil took me home to my husband who is a doctor and he gave me a sedative and I went to bed and I suffered all night long and I couldn't get an appointment with Dr. Carpenter on Monday, when I called him. I had to wait until Wednesday to see him.

Q. And this collision occurred when?

A. Friday.

Q. Have you had headaches prior to that?

A. Never before, and I certainly have had them since and I have one right now.

Q. Now during the course of this treatment, what did you have to do to take the treatment prescribed for you?

A. Well, Dr. Carpenter prescribed the heat packs. I had to use a bath towel wrung out of hot water and put on a heating pad and I had to lie on that an hour three times a day and then after that I had to apply this linament. That was very confining. I couldn't go anywhere or do anything. Then he put me on this traction exercise and then he reduced the hot applications to twice a day, 45 page 73 } minutes each time.

Q. How long did you endure this? What was the duration of the treatment?

A. The whole time I was under his care.

Q. That was beginning in September until when?

A. Until the following March.

Q. Now did you have further trouble beyond that?

A. After that I have never been completely well of my headaches and I can't lift anything with my hands down, the pressure pulls here (indicating). When I elevate them to this distance (demonstrating) I am comfortable but when I have a strain on my hands like this (demonstrating), it pulls and hurts in here.

Q. Your husband is a regular practitioner, I believe?

A. No. He is an ear and throat specialist.

Q. Have you during the course of this time consulted him with regard to your injury and complaint?

A. Definitely, and he has been giving me things to take.

Q. I see. Following this injury, did someone, representing the defendant corporation, contact you in connection with this case?

Virginia Hening Turner.

A. Yes, he did, a Mr. Edwards.
page 74 } Q. Mr. C. S. Edwards?
A. Yes.
Q. Did he represent to you he was a representative of the defendant corporation?
A. Yes, he did.
Q. And how many times did he see you?
A. Well, to my knowledge it was three times.
Q. In those times what was discussed? Not the actual words said but the nature of the discussion?
A. The settlement.

Mr. Williams: I see.
Mr. Clarke: I want to take up a matter in Chambers in connection with that. That is completely improper and Mr. Williams knows it and I want to move for a mistrial.
Mr. Williams: I think that is quite proper to establish what we laid the foundation for in the beginning. We intended using some evidence and Your Honor said we must establish the connection between the person making the statements we will prove and the defendant corporation, and this is the whole purpose, and I see no harm or prejudice. Defendant has requested that this evidence be shown.
Mr. Clarke: It was the question and the re-
page 75 } sponse to it, and I think it should be taken up in Chambers.

Note: The following occurred in Chambers, in the absence of the jury.

In chambers.

The Court: Now, let me see, gentlemen, if I have this straight. Mrs. Turner stated that Mr. Edwards saw her about three times or more and he represented to her he was representing the motor company, the defendant, and Dr. Carpenter I believe testified that he had a request from Mr. Edwards for medical reports, as a representative of Mrs. Turner.
Mr. Williams: With an authorization from her, authorizing that they be given to him.
The Court: And you asked Mrs. Turner the question and Mr. Clarke made objection, something about what was talked about and she said, "The settlement."

Mr. Williams: That's right. I asked her not for the specific exchange but for the subject matter, the general nature of the discussion, and that would be the negotiation for settlement.

The Court: And you think that goes far enough
page 76 } to prejudice the jury to the effect there was insurance?

Mr. Clarke: As I understand the law, the law encourages parties to get together and resolve their differences and the law throws about those parties during those negotiations the cloak of it being done without prejudice, and to come up here with the statement we have Mr. Edwards trying to get her to settle is highly prejudicial to us. On the theory of his case, with which I disagree and I disagree with his theory that his father can testify, it was not necessary for such a thing to be said and it was said, in my opinion, for the sole purpose of prejudicing the jury to make them feel we have been consistently waiting on her, and while that may have been true, it is something the jury has no business knowing.

I am so very sincere in my feelings I do ask that the Court declare a mistrial. Liberty has been taken with the Rules of Evidence and with the law, and I respectfully ask the Court for a mistrial.

Mr. Williams: I think if counsel were so sincere, he might admit that Mr. Edwards is a representative of
page 77 } Burford, and I don't think there is any question in the Court's mind or in my mind, but the Court said I would have to present proof. He didn't offer to waive that proof. He insisted that the proof be made, and how else could we do it but in this way? My father said this morning he was going to do that. Of course, it would be entirely improper to prove the subject matter, but the nature of it, as a representative of the defendant, is certainly proper. I can see no prejudice whatever if the jury is instructed that this evidence is offered solely for the purpose of showing C. S. Edwards is a representative of the Burford Corporation, the defendant corporation, and statements or representations made by him would be statements of that company.

The Court: I am sure that when Mrs. Turner made that statement about settlement she did not have anything in her mind about it, prejudice or unfair advantage. I am certain of that. I have heard cases of this kind where a witness will inadvertently go on and say—he may be asked who paid the bill and he will say, "the insurance man paid it." Of course, that would be a mistrial. Frankly, whether this
page 78 } measures up to it or not, I am going to take under advisement until we come back and rule on that

question. Before we adjourn for lunch, how many more witnesses do you have?

Mr. Williams: My father and Dr. Turner. It will not take but a very short while for each of them.

Mr. Clarke: I might say this, in view of Your Honor's ruling and without prejudice to my exception to Your Honor's ruling as to whether or not Mr. Williams will testify, I have made several long distance calls to Chicago and Mr. Edwards is being flown here. It may very well be we will ask the Court's indulgence in view of the unusual nature of the matter, to give us a small extension of time until tomorrow morning to get him to testify if it is necessary.

The Court: It cannot be tomorrow morning.

Mr. Clarke: It is my understanding the earliest plane connection he could make would get him here at 5:52 this afternoon and while I hate to impose on the Court, if Your Honor does not rule a mistrial, I would ask the Court if we approach the Court at the proper time and tell the Court we feel the evidence of Mr. Edwards is material, we
page 79 } would ask the Court to let us have that opportunity to put him on. I cannot say now that Mr. Edwards' testimony will be material but it might develop to be and, again, I make that statement without prejudice.

Mr. Williams: If Your Honor please, Mr. Clarke was informed by letter from my father on July 30, 1958, acknowledging receipt of his letter where they were denying agency, denying coverage of the driver, and advising his client took the position they were no longer obligated. He says, "I do not agree with the position taken by your client and the company refusing to pay a proper amount. I talked to Mr. C. S. Edwards and he told me he didn't think there was any question about it." He can't say there was any surprise about this evidence coming in today when my father wrote him a letter and told him so.

Mr. Clarke: I have talked to Mr. Williams about this matter and the only time he suggested to me he was going to take a position contrary to what was in the several pleas was in a garnishment case after this case is over. That is the only time it has been presented to me as such.

page 80 } The Court: I don't understand why either the plaintiff or the defendant or both of you did not have Mr. Edwards here today.

Note: The following occurred in open Court in the presence of the jury.

In open court.

The Court: Gentlemen, I am now going to adjourn until two o'clock. Please do not talk to anybody about the case or let anybody discuss it with you and be back at two o'clock.

Note: At this point, the hearing was adjourned for the lunch period.

page 81 } AFTERNOON SESSION.

Richmond, Virginia
September 11, 1958.

Note: The following occurred in the absence of the jury.

Jury out.

The Court: Mr. Clarke, I am going to overrule your motion for a mistrial. I think it is a very narrow proposition, a nice proposition, but I do not believe that what Mrs. Turner said would be prejudicial. She didn't say there was any offer of settlement; she simply said in reply to Mr. Williams' question, when she was asked what the talk was about or what was discussed, she said settlement. It is a close question but I am going to overrule your motion.

Mr. Clarke: We note an exception to the ruling. If Your Honor please, I think this should be said on the record, in regard to my previous position taken about the fact that Mr. Williams should not be allowed to testify in this page 82 } case. Those things that go on between adjuster and attorneys prior to a trial or prior to the conclusion of a case, looking toward the conclusion of a case, are always matters which I think the law throws a cloak of protection around. If Your Honor is going to allow Mr. Williams to testify here about his conversations with the adjuster, with attorneys or anybody else associated with his handling of the case prior to the time it goes to trial, then there is going to be an impossible situation in regard to the relationship between parties prior to trial. I am going to have to instruct all the clients I represent they must under no circumstances have any conversation with any lawyer prior to the matter being turned over to me, and I will then have to take the position, because in many respects Mr. Edwards and I were occupying the same position, that I am precluded from having any conversation with any opposing lawyers. Everything that can be said about a case, a lawyer can get up and testify about. It is going to play havoc in attempts to negotiate cases and work out settlements and I feel sure

page 83 } that the practical results of Your Honor's allowing Mr. Williams to testify about conversations which he had with the adjuster, investigator or lawyers leading up to the trial of the case or the bringing of the suit, is going to be terrible.

The Court: I see your point and I think you are right, but I am not going that far. His testimony is going to be limited to one particular point and that is his effort to establish agency; that is, that this man said he represented the motor company. He will not go any further than that.

Mr. Clarke: Oh, yes, he is.

The Court: I am not going to allow him.

Mr. Clarke: His purpose in testifying is to state that he said he represented the motor company and that the driver was on the business of the corporation.

The Court: I will hold him down to that statement.

Mr. Williams: He stated he called Mr. Edwards, the representative of the company, for the specific purpose of asking about agency, and that is where allowing their answer is prejudicial because prior to the filing of suit we

page 84 } could go through additional investigation for determination for ourselves, because my father called the representative of the company and relied on what he said and filed suit. He asked him was Morris on business for the company and Edwards' answer was, "I don't think there is any question about it."

The Court: That is as far as I am going to let him go. That may be going too far.

Mr. Clarke: I respectfully submit it is and note an exception. I think it ought to be clear to the Court and I want the record to show, every time one of these witnesses starts talking about the relationship of Edwards to the Company, the relationship of Morris to Burford Buick, my objection, though unstated at the time, is there and my exception to the Court's ruling.

The Court: I understand.

Mr. Williams: I would ask the Court to allow me to note this. The Court having overruled our motion to exclude the answers filed, we do take exception to that and make the same objection and exception he has noted as to the cross examination of witnesses throughout the course of the trial by the defendant.

page 85 } Now, if Your Honor please, you will recall the officer made the statement concerning Morris' remarks at the scene he was on business of the company, and he said in the presence of these boys he was on business of the

company. I should like to be heard on that point, if Your Honor please.

Note: The question was argued by counsel.

The Court: I am going to allow the evidence, let the witness testify to the statements Morris made at the scene of the accident. I instructed the jury to disregard it, and I will now tell them they may consider it.

Mr. Clarke: It seems to me, if Your Honor is going to say anything it would be preferable to say, "Gentlemen, earlier in the trial I instructed you to disregard the statement of the officer. I am now telling you I made an error."

The Court: There was evidence in the case, the statement of the officer as to what Morris said to him and also one of those boys.

Mr. Clarke: You didn't tell them to disregard the statement of the boys.

The Court: I certainly did not because you didn't object. I think that will correct it.

page 86 } Note: The following occurred in open Court, in the presence of the jury.

Jury in.

The Court: Gentlemen of the jury, you recall this morning that Officer Hubbard testified as to certain statements that Mr. Morris made at the scene of the accident in which he was questioning Morris about the dealer tags and Morris made the statement to the officer as to his employment with the plaintiff, Burford Motor Company, and that he was on business for them. The Court told you this morning not to consider that evidence. I tell you now that you may consider that evidence of the testimony of the officer. Do you understand, gentlemen?

* * * * *

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THOMAS A. WILLIAMS,

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

Thomas A. Williams.

DIRECT EXAMINATION.

By Mr. Williams:

Q. You are Mr. Thomas A. Williams?

A. Senior, yes, sir.

Q. And your profession is attorney and you are representing Mrs. Turner?

A. Lawyer for 46 years.

Q. Were you representing Mrs. Turner?

page 90 } A. On November 18th I was interested in getting ready to file a suit for her. I represented her. I had had negotiations with Mr. C. S. Edwards, representative of the defendants.

Q. Is that the defendant Burford Buick Corporation?

A. Burford Buick Corporation.

Q. Now did you talk with him on November 18th?

A. Yes, I called Mr. Edwards up to see whether or not I should include Burford Buick Corporation in the suit and I asked him whether or not Henry S. Morris was on the business of the company at the time. His answer to me was there was no question about him being on the business of the company.

Mr. Williams: That's all.

Mr. Clarke: No questions.

Witness stood aside.

Mr. Thomas A. Williams: Your Honor, may I stay in the Courtroom?

Mr. Clarke: I object to his staying in here.

page 91 } Mr. Thomas A. Williams: I am not going to testify any more. I think I have the privilege.

The Court: I think if you will sit in the back, it will be all right.

Mr. Clarke: If Your Honor please, if the plane gets here in time there is going to be someone to disclaim what he says.

The Court: He will not hear any more about that by staying in here.

Mr. Clarke: No, sir, but I want him to know if I can get Mr. Edwards here in time his testimony will be denied.

Mr. Thomas A. Williams: If Your Honor please, I would like to add to my testimony this one thought.

Mr. Clarke: I object to his further testimony.

Dr. Neilson H. Turner.

Mr. Thomas A. Williams: At the time I talked to Mr. Edwards, I recorded his conversation right here on the top of my papers, and put it right down there, right there (indicating on file).

page 92 } DR. NEILSON H. TURNER,
a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:
Q. You are Dr. Neilson H. Turner?
A. That's right.
Q. And you are the husband of Mrs. Turner, the plaintiff in this case?
A. That's right.
Q. Doctor, what is your occupation?
A. I am a physician.
Q. And what is your training, Doctor?
A. I am a graduate of the Medical College of Virginia.
Q. Please speak loud enough for the Judge to hear you.
A. Graduate of the Medical College of Virginia in 1919, and I specialize in eye, ear, nose and throat.
Q. Are you a graduate from the Medical College in Medicine?
A. In medicine, that's right.
Q. Now, Doctor, you were not present at the time
page 93 } of this collision in which your wife was injured, were you?
A. No.
Q. Did you examine her following the collision?
A. Yes. She came home, and of course she was complaining and I—

Mr. Clarke: Please speak loud enough so we all can hear you.

A. (Continuing) She was complaining and of course I did examine her.
Q. What was your finding?
A. Tenderness in the back of the neck at the site of the injury and it was painful.
Q. Did you prescribe for her?
A. I had to. I had to prescribe a hypnotic to relieve her.

Dr. Neilson H. Turner.

Q. Now subsequent to that she was attended by someone else?

A. That is correct.

Q. Since the happening of this occurrence, have you observed her and can you relate what her complaints have been since then?

A. Well, naturally I have observed her because I have been right in the house with her and she continued to have pain and tenderness in the neck and of course from time to time I have to order sedatives and hypnotics to relieve her.

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Q. Now over what period of time, how long has she had these pains and complaints?

A. Of course, they are still continuing but they are not as often as they used to be or quite as severe. I guess roughly, I would say about 18 months or close to that, or maybe a little longer.

Q. Have you observed any difference in her activities since as compared with her activities prior, that you can relate?

A. Prior to the injury, you mean?

Q. Yes, sir.

A. Of course, she had none of these symptoms prior to the injury.

Q. What difference, if any, have you observed in her activities since the collision as compared to her activities prior?

A. Well, she cannot indulge in a good many of her activities as she did before. For instance, to use her arms or anything, she is troubled with pain in the back of her neck, and that limits her in the use of her arms.

Q. In what use would that be?

A. Anything that requires the use of the arms for any length of time, such as lifting.

Q. Anatomically, what is involved in that lifting that could be related to the neck?

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A. Well, it would be the trapezius muscles there. That would be the basis.

Q. Did you say trapezius muscles?

A. They pull the head backwards.

Q. Where are they on the body?

A. From the up-circle of the occipital bone to the scapula and clavicle below.

Q. In lay language, what parts of the body do you find the scapula and clavicle?

A. The occipital bone is the bone in the back of the skull. It is right back here (indicating). The scapula is the shoulder

Dr. Neilson H. Turner.

blade, whereas the clavicle is your collar bone which extends across.

CROSS EXAMINATION.

By Mr. Clarke:

Q. You have known Dr. Ernest Carpenter for a long time?

A. For some time.

Q. And you refer your family to him when orthopedic problems arise?

A. That is correct.

Q. And an injury to the cervical region of the spine is certainly in the field of orthopedic practice, is it
page 96 } not?

A. Yes.

Q. And it is not in the realm of the ear, nose and throat practice?

A. No, not as a rule.

Q. Is your answer no?

A. No.

Q. So this thing of which your wife complained is peculiarly within the province of Dr. Carpenter's practice, is it not?

A. He was her physician.

Q. And he would be better able to testify about things in connection with her injury and medical facts than you?

A. Of course. That is his special line of work.

Witness stood aside.

Mr. Williams: That is the plaintiff's case. The plaintiff rests.

Mr. Clarke: I would like to address the Court
page 97 } in Chambers.

Note: The following occurred in Chambers, outside the presence of the jury.

In chambers.

Mr. Clarke: Your Honor please, the defendant Burford Buick Corporation, respectfully moves the Court to strike the evidence against Burford Buick Corporation and to render up judgment in favor of that defendant, or in the alternative moves the Court for summary judgment, pursuant to Rules of Court, both motions being made on the ground that there has

been no competent evidence of agency between Burford Buick Corporation and the defendant, Henry S. Morris, at the time of this accident.

Note: The motion was argued by counsel.

Mr. Clarke: Your Honor, we are not denying he was a salesman, but whether or not he was on business for the company is a legal conclusion. I renew my motion that all the evidence about that proposition be excluded as being hearsay and contrary to the Rules of Evidence and immaterial to the issues and, therefore, any evidence you have is
page 98 } improper evidence; for the further reason there is no proof of agency between Burford Buick Corporation and Henry S. Morris at the time of the occurrence, and I renew my motion that there be granted summary judgment at this time or at least the Court should strike the evidence as to Burford Buick Corporation.

The Court: I think, Mr. Clarke, there is sufficient evidence there to go to the jury. I think it should be a jury question. I understand very thoroughly what you say and it is a mighty close point. There are some mighty close points that I have ruled on, but I am going to overrule your motion because I think there is sufficient evidence to go to the jury on the question of agency.

Mr. Clarke: If Your Honor please, I told Your Honor earlier when we were discussing this matter of the filing of the Grounds of Defense and the Special Plea that I had been delayed in doing that by virtue of having to request information through the people who were handling this matter in the Newport News Area concerning the question of agency. Pursuant to my instructions, Mr. W. G. Beaver, who is connected with Crawford and Company there, in-
page 99 } vestigators, secured a signed statement from Mr. Henry S. Morris. This statement was relayed on to me by Mr. W. G. Beaver.

I ask the Court to allow me to introduce this statement in evidence in view of the fact Your Honor has allowed hearsay evidence concerning the alleged statements of Edwards and of Mr. Morris. I feel it is competent to put in evidence his signed statement.

The Court: Any objection to that?

Mr. Williams: Absolutely. I think it would be self-serving and hearsay.

The Court: You all should have had these people here.

Mr. Clarke: As I told you, Mr. Williams told me he was going to testify in the suit on the policy. He did not tell me

he was going to testify today. My position is this, Your Honor, that without waiving my objection I submit there is no difference between admitting a signed statement than there is in admitting what someone else said.

The Court: What does the signed statement show?

page 100 } Mr. Clarke: It tells how the accident happened and it does relate that something was wrong with his brakes.

Mr. Williams: That is negligence of the company right there.

Mr. Clarke: He states at the time of the accident he was not on any business for Burford Buick, that he was here to visit personal friends.

The Court: Whose statement is this?

Mr. Clarke: Mr. Morris', the driver of the car.

The Court: He is a party-defendant. He should have been here.

Mr. Clarke: I am putting it in in relation to Burford Buick, not to absolve him.

The Court: I cannot admit that, Mr. Clarke.

Mr. Clarke: If Your Honor please, I note an exception on the grounds stated, that the request for admission of this is on the same principle of law as the request for admission of the testimony offered by plaintiff on the same question.

We have been advised Mr. Beaver is on a plane and he will arrive at Byrd Airport at 4:19 p. m. He is the man that took

page 101 } this statement from Mr. Morris and will be able to testify Mr. Morris told him he was not on any business for the corporation. You have allowed testimony Mr. Morris said he was on business.

The Court: We will get to that.

Mr. Clarke: What I am asking Your Honor is, it is quarter to three now. I have one witness and I don't want to play fast and loose with the Court and drag this witness out.

The Court: Let's go ahead. We can consider the instructions after your testimony.

Mr. Williams: I would like to point out one thing. There is no question in my mind but what that statement is inadmissible, self-serving declaration of a party to the suit, and to bring in someone representing the defendant to say the same thing for him is not going to be any more proper than putting the statement in. Mr. Beaver's testimony is not going to be proper testimony.

The Court: I will pass on that when the time comes. I tell you frankly, Mr. Clarke, I want to give you every opportunity but I don't think I am under any legal obligation to wait for that man, if it comes to that. So that the ends of

page 102 } Justice will be met, I don't want to do anything that might be questionable along that line. And I may have to continue it until some other time. I cannot be here tomorrow.

Mr. Clarke: We would ask that we be allowed to put it on.

The Court: You gentlemen should have had that witness here.

Mr. Clarke: I agree that the plaintiff should have.

Mr. Williams: We asked you more than a month ago and you told us you didn't know where he was.

Note: The following occurred in open Court in the presence of the jury.

In open court.

JAMES PENN REVIS,

a witness called by and on behalf of the defendants, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Clarke:

page 103 } Q. Please state your full name.
A. James Penn Revis.
Q. And what is your address, Mr. Revis?

A. 1539 Slater Avenue, Hampton, Virginia.

Q. Your age?

A. 41.

Q. Who do you work for?

A. Burford Buick Corporation.

Q. What is your position with that company?

A. Secretary and treasurer and general sales manager.

Q. At the time of this accident we have been discussing today, September 14, 1956, what was your position then?

A. I was assistant sales manager.

Q. And do you know the defendant in this case, Mr. Henry Morris?

A. Yes, sir.

Q. Did he work under you?

A. Yes, sir.

Q. Did he take his instructions from you?

A. The sales manager and myself, yes, sir.

James Penn Revis.

Q. Now, Mr. Revis, did your company have then and does it have now a policy concerning the use—

Mr. Williams: Object. I don't see where the company's policy is going to be evidence in this case.

page 104 } The Court: Let him finish his question.

By Mr. Clarke:

Q. Does your company have any policy about the furnishing of cars to salesmen?

A. It does, sir.

The Court: I think that's all right, furnishing cars to salesmen.

By Mr. Clarke:

Q. And Mr. Morris was at that time a salesman?

A. Yes, sir.

Q. Did your company furnish him with an automobile?

A. Yes, sir, he was assigned an automobile.

Q. That was the car involved in this accident?

A. Yes, sir.

Q. Now did your company have any instructions to Mr. Morris and your other salesmen about what range of distance they could use these cars in without getting special permission from the officers of the company to go further?

Mr. Williams: I have to object to that. I think this line of testimony is entirely self-serving and is not proper evidence, as to whether or not this particular salesman was on their business at the time or not. It is two different

page 105 } things, what their policy had been or what their instructions are.

The Court: I think it would be proper for him to ask the witness if he knows what territory Mr. Morris had the right to sell automobiles in, rather than the policy.

Mr. Clarke: There are two aspects to this thing, the first is whether he was selling and the other is whether he had permission to take that car that far from his home base.

The Court: Does this witness know that?

Mr. Clarke: Yes, sir. I am asking him whether this particular salesman and whether their salesmen in general were under instructions not to drive their cars out of the Peninsula Area.

James Penn Revis.

The Court: Ask him about this particular one, Mr. Clarke, because some of them may have had certain rights others did not have.

By Mr. Clarke:
Q. Was Mr. Morris under any instructions from your company that he should not drive this car—

Mr. Williams: I object to the leading question.
The Court: Ask him what Mr. Morris did and then you can follow it up.

page 106 } By Mr. Clarke:
Q. May I ask this question: What territory was he allowed to operate the car in?
A. There is no certain territory that you cannot go to sell cars. However, you should have permission or will have permission from Mr. Gates, who was the sales manager at the time, or from me, as assistant sales manager, or from Mr. Burford, the owner of the place, if you go off the Peninsula anywhere other than Ft. Eustis. You will not go across the James River Bridge and not go across the ferry into Norfolk without permission. Any salesman is instructed to come to one of the three of us.

Mr. Williams: Object.

By Mr. Clarke:
Q. Was this salesman specifically instructed to come to one of the three of you?
A. Yes, sir, he was.

By the Court:
Q. Who gave these instructions to the salesmen?
A. I have given the instructions myself. I have also heard Mr. Gates give the instructions.

Mr. Williams: I object. He is not talking about the particular man, this Morris.

By Mr. Clarke:
Q. Did you personally give instructions to Mr. Morris that he was not to take the car across the James River Bridge or

further than Ft. Eustis?

page 107 } A. I did.

Q. Were those instructions in effect on the day of this accident?

A. Yes, they were.

Q. Did Mr. Morris have permission to take the car to Richmond or this vicinity at the time of the accident?

Mr. Williams: I object to that, as to whether he consulted him it would be all right, but whether he had permission from the other officers that could grant the permission, that is another thing.

Mr. Clarke: He is assistant sales manager, or rather he was at the time of the accident, and it was in the province of his duties to know these things. I would be glad to ask him what he knew.

The Court: If he knew of his own knowledge, he is competent to testify, but there were other parties, the manager and owner, who could give that permission.

A. Either one of the three could give that permission.

Mr. Williams: But he might not have been present when the others gave permission.

Mr. Clarke: That's exactly right.

page 108 } By Mr. Clarke:

Q. Did you make an investigation of this matter following the accident as to whether or not he had permission to use this car as far away from Norfolk as the accident occurred?

A. I did.

Mr. Williams: I object. I don't think what he obtained by investigation would be relevant.

The Court: If he knows from his own knowledge.

Mr. Williams: He knows from investigation, but that will be hearsay from other people, and those people should be brought here so we can cross examine them.

The Court: Not necessarily. I take it this officer should know what is going on. Go ahead, Mr. Clarke.

By Mr. Clarke:

Q. Did Mr. Morris state to you whether or not he knew he had driven further than he was supposed to at the time?

James Penn Revis.

Mr. Williams: I object to that. It is improper.

Mr. Clarke: The plaintiff has been putting in all sorts of evidence.

The Court: The statements of Mr. Morris were part of the *res gestae.*

page 109 } By Mr. Clarke:

Q. Immediately after this accident, the first time you saw Mr. Morris after the accident, did you converse with him about whether or not he had permission to come up here?

A. I did. Mr. Morris drove in in a different car from his demonstrator—

Mr. Williams: If he is going to say anything Mr. Morris said, I feel I must object.

The Court: He can state what he did. That is what he is saying.

A. (Continuing) Mr. Morris drove in in an automobile other than his demonstrator the next morning and I went out on the lot and asked him what he was doing driving this car and he said he had an accident with his car and I said, "Where?" And he said, "Up around Richmond." I asked him what happened and he told me he ran into the back of a car.

Mr. Williams: I think we are going to get into something improper. I object to it.

The Court: I don't think any statements Mr. Morris made are admissible. He is a defendant in the suit and he is not here.

Mr. Clarke: Certain things are being laid to Burford Buick and statements he has made have been re-
page 110 } lated by other parties.

The Court: Not except as part of the *res gestae.*

Mr. Clarke: There was a statement by Dr. Carpenter about certain things in connection with Mr. Edwards and there was no *res gestae* there.

The Court: I admitted that on another theory.

Mr. Clarke: I believe it has been testified and Your Honor has said it was admissible that he made an investigation and found he did not have permission.

Mr. Williams: I object to that.

James Penn Revis.

The Court: I thought he said he made an investigation.

Mr. Williams: And that's all. He didn't say what he found, because I objected. He can state what he did and what factually he learned, without hearsay.

The Court: Gentlemen, the testimony of this witness, for what value it may have, is up to the jury. He has testified he was in a position to know, he was an officer of the company, and Mr. Morris did not have any permission to drive on that day. Isn't that what you stated?

The Witness: That's right.

page 111 } The Court: Leave it at that.

Mr. Williams: Note an exception to the Court's ruling.

Mr. Clarke: Now that is as to his permission to have the car, but there are two questions. One is permission and the other is business, and I am trying to find out now whether he was on business for the company and I want to ask that question. I don't mean to be beating a dead dog, but I want to clear it up.

The Court: I will allow that, gentlemen. This witness has testified as to his duties with the corporation and the Court thinks he was in authority. I will not let him go into detail, but he may answer the question yes or no.

Mr. Williams: Note an exception.

By Mr. Clarke:

Q. In respect to your official duties, did you make inquiry as to whether or not he was on any business for the company?

A. I did.

The Court: Not inquiry—ask him did he know.

A. (Continuing) I know he was not and he said he was not.

Mr. Williams: I object and except to that and

page 112 } ask that it be stricken.

By the Court:

Q. Do you know he was not on business of the company?

A. I know he was not on business of the company, yes, sir.

Mr. Williams: We object and except and ask that it be stricken, and except to the Court's ruling.

James Penn Revis.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Revis, it is customary for a sales employee to sell automobiles, is it not?

A. That is correct.

Q. And quite often occasions will arise where prospective sales occur and a salesman would naturally respond to those occasions, would he not?

A. Repeat that.

Q. The salesman would respond to an occasion where he might have an opportunity to sell?

A. That's true.

Q. This collision occurred on late Friday evening. Now occasions could arise that would require a man to leave pretty quick, couldn't they?

A. Not that far away, no. If they did, we could
page 113 } always be contacted.

Q. This car was actually taken into DuBose Buick locally?

A. So far as I know.

Q. It was?

A. Yes, sir.

Q. And it had a dealer's license on it, did it not?

A. Yes, sir.

Q. And isn't there a legal restriction to that, to your knowledge as a salesman, restricting the use of those dealer's tags other than for the business of demonstrating and showing automobiles?

Mr. Clarke: I don't think it is up to a lay witness to answer questions about legal requirements. That is a matter of law to be presented to the jury by the Court.

The Court: That's true.

Mr. Williams: In this instance, he was an officer of the corporation, specifically in that field and designated to instruct his men and said that he did instruct them.

The Court: I will let you ask it.

Mr. Clarke: Exception.

By Mr. Williams:

Q. Do you know there is a legal restriction to
page 114 } the use of dealer's licenses?

A. Yes, sir.

Q. And what is that, to your knowledge?

James Penn Revis.

A. Well, I know—I couldn't lend you one of my dealer's tags, to put on your car.

Q. As a matter of fact, these licenses are for the purpose of demonstrating automobiles and not for any other purpose. Isn't that right?

A. Yes.

Q. And you instruct your men accordingly?

A. However, if I want to take my demonstrator and take a trip in it, and get permission from my superior, I can do so legally.

Q. Although the trip has no relationship to your selling?

A. That is correct.

Q. You can legally use that automobile?

A. As far as I know. Christmas, for instance, my wife's father had a heart attack and I had to leave the next morning, and I got permission and took my company car and went to Galax, Virginia. I certainly couldn't drive the car without tags. It is not a titled automobile, and there would be no way I could drive the automobile if I didn't.

Q. You don't have a private automobile?

page 115 } A. I have a private automobile, yes, sir.

Q. Did Mr. Morris have a private automobile, to your knowledge?

A. He did, but at that particular time I don't recall whether he had sold his car or whether he still had it.

Witness stood aside.

Mr. Clarke: Your Honor, subject to the other testimony which we said we would put on and about which I told Your Honor, that is all we have right now. As I told Your Honor, Mr. Beaver will arrive on the 4:19 plane. There are matters coming up we did not expect and he was not in town and we asked that the Court take up other matters in the interim, such as Instructions, and I don't believe it will take up any time in the long run.

The Court: All right. I will grant that privilege, but I don't know whether I am under a legal obligation to do it, but I am going to do it.

page 116 } Mr. Williams: Note an exception.

The Court: Gentlemen of the jury, you may go in the jury room or walk around in front. Don't talk to anybody about the case.

Note: The Court heard argument of counsel on Instruc-

tions, outside the presence of the jury, which argument is not included in this record, and thereafter the following occurred in open Court in the presence of the jury.

Mr. Clarke: Your Honor, we rest. That is the defendant's case.

The Court: Gentlemen, I now will instruct you, give you the law that governs you in deciding this case.

Note: The Court read the Instructions to the jury, following which the jury heard arguments of counsel. During the course of Mr. Williams' opening argument, the following occurred:

Mr. Clarke: Your Honor, I object to Mr. Williams, Sr., sitting there and counseling and coaching his boy.

Mr. Williams: He reminded me of the time.

Mr. Thomas A. Williams: I said, "The damage instruction."

Mr. Clarke: You are telling him what to argue.

page 117 } Mr. Thomas A. Williams: I didn't say anything about arguing. I said, "The damage instruction."

Note: During the course of Mr. Clarke's argument, the following occurred:

Mr. Clarke: * * * registered letters, return receipt requested, in which I not only advised him of the trial date but advised him of the possibility of what would happen to him if he did not appear and cooperate with me.

Mr. Williams: I object to that. I objected in my opening statement to his making those remarks. There is no proof of it.

The Court: The jury understands he did everything he could to get the man here, and he is not here.

Mr. Clarke: That's exactly right, and I am sorry he was not here to tell you how this accident happened * * *.

Note: During the course of Mr. Williams closing argument, the following occurred:

Mr. Williams: * * * she had to go through these infirmities, the extent of which is not known. The only way to know is to cut in there and who is going to do that for a

page 118 } sprain? But there was bleeding and tearing of that muscular and ligamentous tissue which Dr.

Carpenter said was acute. What is more acute than a broken neck.

Mr. Clarke: There is no evidence of any broken neck or any evidence of any necessity to cut into that area, and I object to this.

The Court: The jury heard the evidence. Of course, there is no evidence of that.

Note: Following closing argument, the following occurred:

The Court: Gentlemen, you will retire and consider your verdict and write your verdict on a yellow sheet of paper. The Court tells you you are bound to find a verdict against Morris, and the Court tells you you may find a verdict against Morris alone, you may find a verdict against Morris and the corporation combined, or you may find a verdict for the defendants and not allow anything, so that is what your verdict can be.

Mr. Thomas A. Williams: Did Your Honor say they are bound to return a verdict against Morris?

The Court: Yes, and they may return a verdict against the two defendants jointly or may return a verdict in favor of both defendants.

page 119 } Mr. Thomas A. Williams: But they are bound to find against Morris.

A Juror: May I ask a question?

The Court: Yes, sir.

A Juror: What is this amount we are supposed to set?

The Court: You can set any amount you want not exceeding $25,000.00, based upon the instructions of the Court.

Note: The jury retired at 4:45 p. m., and the following occurred in the absence of the jury.

Jury out.

Mr. Clarke: Your Honor please, the defendant respectfully moves the Court to discharge the jury and declare a mistrial on the ground that the Court undertook to instruct the jury on only one aspect of the case on two occasions. The Court instructed the jury by reading the charge prior to argument and then after argument reiterated the instructions which were finding instructions for the plaintiff, without giving some instructions requested by defendants, that is, having to do with the burden of proof and proving of dam-

page 120 } ages, and it is the position of the defendant that it was prejudicial to the defendant to have the

jurors told on two occasions they had to find a verdict for the plaintiff, and yet did not tell them on the second occasion the restrictions on that order of the Court.

The Court: I told the jury they could find in favor of the Burford Buick Company but they had to find a verdict against Morris, but they could find in favor of the other defendant.

Mr. Clarke: Yes, sir, but you didn't tell them there were restrictions on what verdict they could render, as to the burden of proof. I note an exception.

The Court: All right. The jury was properly instructed and what the Court told them before they went out was done for the purpose of trying to help them in telling them what the various verdicts could be, and I don't think I was partial in any way. I certainly told them what three verdicts they could bring in and I don't think I emphasized any one of them. I will overrule your motion.

Mr. Clarke: Note an exception.

page 121 } Note: Following a brief recess, objections and exceptions were noted in the record, in the absence of the jury, as follows:

Mr. Clarke: The defendants object and except to the Court's giving any Instructions on the grounds stated in the motion to strike made at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence.

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page 122 }

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Mr. Clarke: Defendants object and except to the giving of Instruction 3 in the following particulars.

There is no evidence of excessive speed in relation to Item 4.

* * * * *

page 124 }

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Mr. Clarke: Defendants object and except to the giving of Instruction No. 4 on the ground that the plaintiff has by her own evidence indicated that Henry S. Morris may not have been guilty of negligence. She presented evidence to the

Court which would indicate that the cause of this accident was defective brakes and there was no evidence that Henry S. Morris was aware of the defective brakes or that he, with the exercise of reasonable care, should have been aware of such brakes. The burden of proof is on the plaintiff throughout the case and it was possible for her to make inquiry
page 125 } into the question of brakes, and her failure to do so should not be held against the defendants.

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Mr. Clarke: Defendants object and except to the giving of Instruction No. 5 on the ground that there was no evidence, properly admitted, of probative value, which would indicate or would make out a jury question of agency between Burford Buick Corporation and Henry S. Morris, so as to impute the negligence, if any, of Morris to Burford Buick Corporation.

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page 126 }

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Mr. Clarke: Defendants object and except to the Court giving Instruction No. 6 on the ground that in Paragraph 4 there is no evidence that she will endure future suffering or pain. As to Paragraph No. 2, there is no evidence of any permanency of injury. As to Paragraph No. 4, there is no evidence that she will incur any expense in the future.

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page 127 }

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Mr. Clarke: Defendants object and except to the Court's refusal to give Instruction No. B because it denies the right of the jury to find that the defendants were not guilty of any negligence.

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page 130 }

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Mr. Williams: Plaintiff objects and excepts
page 131 } to the Court's granting of any instruction for the defendants for the reasons that the defendants, both of them, were in default, having failed to file an Answer with the Court prior to the day of trial, and not within the 21 days as required by the Rules.

Note: Following a brief recess, the jury returned at 5:50 p. m., with the following verdict:

"We, the jury, on the issue joined find for the plaintiff against Henry S. Morris and Burford Buick Corporation, a corporation, and assess her damages at Five Thousand Dollars ($5,000.00).

"Signed James M. Bickerstaff, Jr., Foreman."

Whereupon the jury was discharged.

Mr. Clarke: If Your Honor please, the defendants both respectfully move the Court to set aside the verdict of the jury and enter up judgment for the defendants on the grounds that the verdict is contrary to the law and the evidence, for misdirection of the jury, and for error committed during the trial for which exceptions were taken.

The defendants further and in the alternative respectfully move the Court to set aside the verdict on the ground that the verdict was excessive for the injuries testified
page 132 } to, so far as any competent evidence concerning injuries was concerned, and to order up a new trial or to diminish the amount of the damages allowed, after deliberation by the Court.

Defendant Burford Buick Corporation further and by itself moves the Court to set aside the verdict and enter up judgment for that defendant on the grounds as stated in the joint motions expressed previously and on the further ground there is no competent or properly admissible evidence which would tend to show or could show any agency between Burford Buick Corporation and the defendant Morris, and that such a verdict against that defendant was brought about entirely contrary to the law and the evidence and is without evidence to support it; and further that the Court erred in admitting any evidence that would tend to show any agency between them, of the nature which was admitted.

Your Honor has stated on more than one occasion during our argument that there were several right close points in this case and it would seem to me that Your Honor should take

this matter under advisement until such time as
page 133 } we can get the record written up and can properly
present written and oral argument to the Court,
with the record before the Court. This is an important case and I am sure you were shocked and I know I was shocked at the amount of the decision, and I think it is clear it is high.

I certainly feel that the points of law involved in this case justify a close study by the Court under the proper circumstances.

Mr. Williams: We wish to oppose the continuance on the motion and think the Court is amply able to pass upon it at this time and we now ask the Court to enter judgment.

The Court: I have always, gentlemen, given an opportunity to counsel to argue a motion to set the verdict aside. At present, as I feel in this case at this time, I would overrule the motion, but if Mr. Clark seriously wants—I don't mean you were not serious about it—but if you do want the opportunity to argue the matter before me, I would certainly continue it
for that purpose. If you do not, I am ready to
page 134 } render my decision.

Mr. Clarke: I am serious in my motion.

The Court: I know you are serious, Mr. Clarke. I don't mean to infer that you were not. I don't think there is anything in the world as to your motion as to excessive damages. As to the other matters, as I am presently advised I would overrule the motion, but I am going to give you an opportunity to be heard.

Mr. Clarke: Thank you, Your Honor. I want my motion to show the exceptions taken, not only during the trial but in chambers and after the instructions to the jury and at the conclusion of the argument.

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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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