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Record No. 5089

In the Supreme Court of Appeals of Virginia at Richmond

THOMAS PARKER

v.

CHARLES H. LEAVITT, CITY SERGEANT, ETC.

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5089

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 8th day of October, 1959.

THOMAS PARKER, Plaintiff in Error,

against

CHARLES H. LEAVITT, CITY SERGEANT, ETC., Defendant in Error.

From the Court of Law and Chancery of the City of Norfolk

Upon the petition of Thomas Parker a writ of error and *supersedeas* is awarded him to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 23rd day of April, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Charles H. Leavitt, City Sergeant of the City of Norfolk, administrator of the Estate of Willie Davis, deceased, was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said Court of Law and Chancery in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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MOTION FOR JUDGMENT.

To: Charles H. Leavitt, City Sergeant of the City of Norfolk, Administrator of the estate of Willie Davis, deceased.

TAKE NOTICE, that the undersigned hereby moves the Court of Law and Chancery, of the City of Norfolk, Virginia, at the Courthouse thereof, for a judgment and award against the estate of Willie Davis, deceased, in the sum of SIXTY THOUSAND DOLLARS ($60,000.00), plus interest and costs incident to this proceeding, for this, to-wit:

1.

That the said Willie Davis, who resided at 906 Louisa Street, Norfolk, Virginia, expired on the 30th day of October, 1957, in the City of Norfolk, Virginia.

2.

That on proper motion and in accordance with statute, Charles H. Leavitt, City Sergeant of the City of Norfolk, Virginia, has been appointed Administrator of the estate of Willie Davis for the purposes of this suit.

3.

That on or about the 13th day of October, 1957,
page 2 } at approximately 2:00 P. M., the plaintiff, Thomas Parker, was a passenger in a vehicle operated and controlled by the said Willie Davis, over and along Route 650 (Old Ocean Park Road), Princess Anne County, Virginia.

4.

That notwithstanding the high duty of care owed by the said Willie Davis to the plaintiff, the said Willie Davis then and there at such date, time and place aforesaid, drove his vehicle on said highway in a grossly negligent and reckless manner, and in willful and wanton disregard for the safety of the plaintiff, and by reason of the said gross negli-

gence and of the said wanton and willful disregard of the safety of the plaintiff, the said Willie Davis did cause his vehicle to leave the highway and strike a tree, and the force of said crash was so great, said plaintiff was seriously and permanently injured.

5.

That the said injuries sustained by the plaintiff were through no negligence, fault or failure of his own.

6.

That these injuries to the plaintiff and the shock resulting from the accident, have caused and are continuing to cause, and will cause in the future to the plaintiff great pain and suffering, both mental and physical, and that said injuries have required the plaintiff to be cared for in a hospital and to expend large sums of money for doctors, nurses, medicine, medical appliances and treatment, and said injuries are continuing to cause and will in the future cause the plaintiff to expend large sums of money to effect a cure. Some of said injuries will have a permanent effect on plaintiff's health and have caused him to be sick, sore, lame, disabled, disfigured and maimed for a long time, and probably for the rest of his life he will continue to be maimed and disfigured and will suffer great physical pain and mental anguish. Plaintiff has been caused to lose a great deal of time from his occupation and from engaging in any productive occupation, and has suffered and will continue to suffer a great loss of wages from diminution of his earning capacity by reason of the injuries aforesaid; and said injuries will continue to permanently disable him from all other activities normally associated with his person and station in life.

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7.

That as a direct and proximate result of the grossly negligent and reckless manner in which the said Willie Davis was operating his vehicle, the plaintiff was permanently and seriously injured as more particularly stated above.

WHEREFORE, the plaintiff moves the Court for a judgment and award against the estate of Willie Davis, deceased,

in the sum of SIXTY THOUSAND DOLLARS ($60,000.00) with interest and costs aforesaid.

THOMAS PARKER
By CALVIN W. BREIT
Of Counsel.

Filed in the Clerk's Office the 15th day of January, 1959.

Teste:

W. L. PRIEUR, JR., Clerk
H. E. AMBLER, D. C.

* * * * *

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* * * * *

ANSWER AND GROUNDS OF DEFENSE OF DEFENDANT.

Defendant, Charles H. Leavitt, City Sergeant of the City of Norfolk, Administrator of the estate of Willie Davis, deceased, as and for his answer and grounds of defense, answers and says:

1. That he neither admits nor denies the allegations contained in Section 1 of the Motion for Judgment and calls for strict proof thereof.
2. That he neither admits nor denies the allegations contained in Section 2 of said Motion and calls for strict proof thereof.
3. That he denies the allegations contained in Section 3 of said Motion.
4. That he denies the allegations contained in Section 4 of said Motion.
5. That he denies the allegations contained in Section 5 of said Motion.
6. That he denies the allegations contained in Section 6 of said Motion.
7. That he denies the allegations contained in Section 7 of said Motion.
8. That he denies that any act of commission, omission, recklessness, carelessness, negligence or failure to perform any duty of any kind on his part resulted in any injury, loss or damage to said plaintiff as alleged in said Motion or otherwise.

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9. That plaintiff was guilty of contributory negligence.
10. That plaintiff assumed the risk.
11. That he denies that he is indebted to the plaintiff for any sum whatsoever and denies that plaintiff sustained injury and damage as alleged in said Motion.
12. That he denies each and every allegation in said Motion not herein denied or answered.
13. That he further says that he intends to rely on any and all defenses which may arise from the trial of the case.
14. That he reserves the right to amend, alter, change or add to this pleading.

CHARLES H. LEAVITT, CITY SERGEANT OF THE CITY OF NORFOLK, ADMINISTRATOR OF THE ESTATE OF WILLIE DAVIS, DECEASED.
By WILLIAM L. SHAPERO
Of Counsel.

Filed 1-27-59.

H. L. STOVALL, D. C.

* * * * *

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* * * * *

BILL OF PARTICULARS.

NOW COMES the Plaintiff and files a Bill of Particulars in the above captioned matter, setting forth the following:

1. Plaintiff was treated by the following doctors:

Dr. Joseph T. McFadden
405 Wainwright Building
Norfolk, Virginia

Dr. John S. Thiemeyer
Wainwright Building
Norfolk, Virginia

Dr. Ali Maksad
c/o DePaul Hospital
Norfolk, Virginia

Dr. Clayton W. Eley
300 Wainwright Building
Norfolk, Virginia

Attached herewith are copies of medical reports in possession of plaintiff's counsel.

2. The following is a list of the known medical, hospital and doctors expenses as of the date of filing of this Bill of Particulars:

DePaul Hospital	$1,122.50	
Dr. Clayton W. Eley	20.00	
Dr. John S. Thiemeyer	350.00	
Dr. Joseph T. McFadden	250.00	
Norfolk General Hospital	13.50	(X-rays)
Norfolk Orthopedic Appliance Company	10.00	(Myo Collar)

page 10 } 3. Plaintiff has been caused to lose a great deal of time from work, thereby causing a great pecuniary loss to the plaintiff. Plaintiff was caused to be absent from his normal course of employment from the 13th day of October, 1957 until the 28th day of February, 1958, and thereby lost approximately One Thousand One Hundred Forty Dollars ($1,140.00) on the basis of Sixty Dollars ($60.00) weekly pay; and thereafter from the 28th day of February, 1958 until approximately the 1st day of November, 1958 plaintiff's employer voluntarily paid to the plaintiff Sixty Dollars ($60.00) a week, although said plaintiff was unable to fully perform his usual duties as a result of this accident.

4. Plaintiff alleges that the deceased defendant was guilty of gross negligence in that said defendant operated a motor vehicle in which the plaintiff was a passenger at a reckless and grossly excessive speed in willful disregard for the safety of the plaintiff, and that said defendant was recklessly inattentive to the safety of his passenger, the plaintiff, and that said defendant recklessly drove his vehicle without any control, thereby proximately causing the injuries sustained by the plaintiff.

THOMAS PARKER,
By ROBERT S. COHEN
Of Counsel.

Filed 4-20-59.

H. L. STOVALL, D. C.

* * * * *

page 16 } INSTRUCTION D-1.

The Court instructs the jury that in order for the plaintiff to prevail, the evidence must show more than that the injuries complained of may have resulted from one of two causes, for one of which Davis is responsible and for the other of which he is not.

And if after hearing all the evidence you are uncertain whether Davis was guilty of gross negligence which was the proximate cause of the injury to plaintiff or whether the accident occurred by reason of another cause and it appears equally as probable that either of the above was the proximate cause of the injury to plaintiff, you must find a verdict for the defendant.

Granted 4/23/59.

W. A. PAGE, Judge.

page 17 } INSTRUCTION D-2.

The Court instructs the jury that you cannot infer gross negligence on the part of the defendant from the mere happening of the accident. The presumption is that the defendant was free from gross negligence unless and until the contrary is proven by the preponderance of the evidence.

The burden is upon the plaintiff to prove by the preponderance of the evidence that the defendant was guilty of gross negligence and that such gross negligence was the proximate cause of the accident.

If after hearing all the evidence you are uncertain whether defendant was guilty of such gross negligence and it appears equally as probable that he was not as that he was, your verdict should be in behalf of the defendant.

Granted 4/23/59.

W. A. PAGE, Judge.

page 18 } INSTRUCTION D-3.

The Court instructs the jury that it is your duty to try this case without being influenced by sympathy nor the mere fact that the plaintiff was injured and has suffered and you

are under the solemn obligation of an oath to decide according to the law and facts.

Granted 4/24/59.

W. A. PAGE, Judge.

page 19 } INSTRUCTION D-4.

By the terms gross negligence, it is meant that degree of negligence which shows the utter disregard of prudence amounting to complete neglect of the safety of another.

Unless you believe from the evidence that the defendant was guilty of gross negligence as defined herein or was guilty of wilfully and wantonly disregarding the person of the plaintiff, then your verdict must be in behalf of the defendant.

Granted 4/23/59.

W. A. PAGE, Judge.

page 20 } INSTRUCTION D-5.

The Court instructs the jury that if you believe from the evidence that plaintiff permitted Davis to drive plaintiff's automobile while Davis was in such an intoxicated condition as to render him a dangerous driver and became a passenger or continued to be a passenger in the automobile after plaintiff knew or by the use of ordinary care should have known of such condition, plaintiff assumed the risk and was guilty of contributory negligence and if you believe such intoxicated condition on the part of Davis was the proximate cause of the injury to plaintiff, you must find a verdict for the defendant.

Granted 4/23/59.

W. A. PAGE, Judge.

page 21 } INSTRUCTION D-6.

The Court instructs the jury that even if you believe from the evidence that deceased Davis lost control of the automo-

bile and thereby caused the accident, this does not, in itself, prove gross negligence on the part of Davis.

Granted 4/23/59.

W. A. PAGE, Judge.

page 22 } INSTRUCTION P-5.

The Court instructs the jury that if you believe from a preponderance of the evidence in this case that the deceased, Willie Davis, was guilty of any negligence which was the sole proximate cause of the accident and the resulting injuries to the plaintiff, Thomas Parker, then you should find for the plaintiff.

Refused 4/23/59.

W. A. PAGE, Judge.

page 23 } INSTRUCTION P-6.

The Court instructs the jury that the deceased, Willie Davis, was guilty of negligence as a matter of law, and if you believe from the preponderance of the evidence in this case that such negligence was the sole proximate cause of the accident and the resulting injuries to the plaintiff, Thomas Parker, then you should find for the plaintiff.

Refused 4/23/59.

W. A. PAGE, Judge.

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In the Court of Law and Chancery of the City of Norfolk, on the 22nd day of April, 1959.

* * * * *

ORDER.

This day came the parties, in person and by counsel, and thereupon came a jury, to-wit, James E. Gregory, Mrs.

Herman Ruetschi, Mrs. Irma Aycock, William H. Moody, Mrs. M. A. Martinette, Earl T. Pollard and Ernest F. Stallings, who, upon being duly sworn the truth to speak upon the issue joined and having heard the evidence of the plaintiff, at 5:00 P. M., were adjourned until tomorrow at 10:00 A. M.

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In the Court of Law and Chancery of the City of Norfolk, on the 23rd day of April, 1959.

* * * * *

This day came again the parties, in person and by counsel, and thereupon pursuant to adjournment came again the jury, to-wit, James E. Gregory, Mrs. Herman Ruetschi, Mrs. Irma Aycock, William H. Moody, Mrs. M. A. Martinette, Earl T. Pollard and Ernest F. Stallings, who, now having heard all of the plaintiff's evidence, the defendant, by counsel moved the Court to strike the evidence of the plaintiff, which motion after having been fully heard and maturely considered by the Court, is overruled. To which action of the Court, defendant, by counsel duly excepts.

Now, the jury having heard all of the evidence and argument of counsel returned a verdict in the following words, "We the jury find for the defendant." Thereupon the Court polled the jury as to their verdict to which poll each of the said jurors replied that the verdict herein recorded was his or her verdict, thereupon the plaintiff, by counsel, moved the Court to set aside the verdict of the jury upon the grounds that the said verdict is contrary to the law and the evidence, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, plaintiff, by counsel duly excepts.

Whereupon it is considered by the Court that the plaintiff take nothing for his false clamor and that the said
page 28 } defendant go hence without day and recover of the said plaintiff his costs about his defense herein expended.

To all of which the plaintiff, by counsel, duly excepts.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: The Honorable Judge of the aforesaid Court:

Thomas Parker, by his counsel, hereby gives notice of his appeal from a judgment entered in the above styled case on the 20th day of April, 1959, and assigns the following errors.

ASSIGNMENTS OF ERROR.

1. The Court erred in refusing to grant Instruction No. P-5 and P-6, as offered by the plaintiff.
2. The Court erred in granting Instructions No. D-1, D-2, D-3, D-4, D-5 and D-6, as offered by the defendant.
3. The Court erred in overruling plaintiff's motion to set aside the verdict of the jury as being contrary to the law and evidence of the case and to grant a new trial

THOMAS PARKER
By ROBERT S. COHEN
Of Counsel.

Filed 6-15-59.

H. L. STOVALL, D. C.

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page 7 } THOMAS L. PARKER,

Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Breit:

Q. Please state your full name and address.

A My name is Thomas L. Parker and I live at 311 Henry Street, South Norfolk.

Q. Speak up louder, please. How old are you?

A. Fifty years old.

Q. When will you be fifty-one?

Thomas L. Parker.

A. February 16th.
Q. Next year?
A. Yes, sir.
Q. How long have you resided at this address, Thomas?
A. About twelve years.
Q. How long have you lived in and around the City of Norfolk?
A. Around forty-eight years.
Q. Are you married?
A. Yes.
Q. Do you have a family?
A. Yes.
Q. Do they live with you?
A. No, sir. They live in New York.
Q. Where are you now employed?
A. Edward Legum Furniture Company.
page 8 } Q. On October 13, 1957, on the day of this accident, where were you then employed?
A. Edward Legum Furniture Company.
Q. The same company you now work for?
A. Yes, sir.
Q. How long were you employed by them prior to the accident?
A. I have been employed by the company around thirty years. I was with the father.
Q. You worked for the father?
A. Yes, sir; between twenty-eight and thirty years.
Q. What was the nature of the work you were doing for this company before the accident?
A. Driver. Delivering any kind of furniture.
Q. Your employer is in the furniture business?
A. That's right.
Q. When you delivered the furniture, before the accident, who delivered the furniture?
A. It isn't but two of us on the truck so it takes two to carry it.
Q. Were you driving any of the vehicles before the accident?
A. Yes. I drove the truck all the time.
Q. And then you and the other man would lift the furniture into the house of whoever bought it?
A. That's right.
Q. On the day of the accident, what day of the week was that?

Thomas L. Parker.

A. On a Sunday.

page 9 } Q. Were you working that day or were you off that day?

A. I was off.

Q. The car in which you and Willie Davis were riding was owned by you, I believe?

A. Yes, sir.

Mr. William Shapero: I will object at this time to leading because we are getting into the facst of what happened from here on.

The Court: Make your objections as the questions are asked.

Mr. William Shapero: That was a leading question then.

Mr. Breit: Do you want me to withdraw the question?

Mr. William Shapero: No.

Mr. Breit:

Q. Who owned the car you were driving?

A. I did.

Q. You were the owner of that car?

A. Yes.

Q. Tell the Court how Willie Davis came to be driving the car on the day of the accident.

A Well, on the job, I got hurt. I dropped a box on my groin and I was hurt and Dr. Glasser told me—

Q. Don't tell us what the doctor told you.

A. He wouldn't permit me to drive or to do much walking, so Willie, this boy, well, I knew his family pretty well and he said his aunt was bad off sick. She had a heart attack. He asked me would I carry him down to his boss's to get money to put her in the hospital.

page 10 } Q. Who was it that had the heart attack?

A. Willie's aunt.

Q. How old was Wille, do you know?

A. I guess Willie was around about thirty-years old.

Q. A young man?

A. Yes, sir.

Q. What happened then?

A. I told him I couldn't carry him down there because the doctor wouldn't permit me to drive. He went away. I told him to get somebody else if he could. He went away and stayed about a half-hour or something like that and come back. When he come back, he told me he couldn't find nobody to carry him.

Thomas L. Parker.

He said, "Probably one day you might have to have somebody to help you and if I could, I would do it."

I said, "I can't drive. How will I get you down there?" He said, "I can drive the car." I know he used to drive for Growers' Exchange.

Q. Did you know that when you let him drive the car?

A. Yes.

Q. Had you ever ridden with him before in a car?

A. No. Anyway, he left. I permitted him to drive if I went with him. I wouldn't permit him to have the car by himself. Leroy Williams asked if he could go with us. I said, "All right, if he wants to."

Q. Is Leroy Williams in the court room today?

A. Yes, he's here.

Q. Where did you sit in the car?

A. In the front beside Willie Davis.

page 11 } Q. Where did Leroy Williams sit?

A. He got in the back.

Q. Where were you when you first left in the car?

A. 1000 Halifax Street.

Q. Where is Halifax Street?

A. Berkley.

Q. Where did the accident happen?

A. The accident happened on Ocean Park Road just beyond Robbins Corner.

Q. Do you know how far that is from Halifax Street in Berkley?

A. Approximately around fifteen or sixteen miles or more.

Q. Did Willie Davis drive the entire way?

A. Yes, sir.

Q. Describe how he was driving?

A. Well, he was driving as fine as anybody I have seen drive until he got down there on that curved back road. That road has a round back to it.

Q. You mean it is humped in the middle?

A. Yes, so when he got down there, after he passed the church, after he passed Robbins Corner, (You turn by the church to the right) he got in there, I would say about one hundred feet from that church and his wheel started swaying like that. (Witness makes motion with his hands.) I looked at him and said, "What is the matter with you, boy?".

He latched his hand tighter to the wheel. Looked like he was losing control and he leaned over a little bit and

page 12 } started to going fast. I said, "Man, cut down on the gas. You're going too fast. Get up off the gas."

Thomas L. Parker.

I said, "You will never gain control going like that." He beared down and went fast; so he went on the right side of the road first and cut across a little mall there. I thought that would choke him down. He went on across the field and hit some little small trees about the size of your head and the car just mashed the small trees to the ground and kept going. He didn't cut down on the speed a bit.

There was one large tree in that area and he hit it and that smashed everything all to pieces.

Q. Prior to the time that he actually left the hard surface of the road into the field, do you know what the speed of the vehicle was?

A. I don't know, but he was going every bit of sixty or sixty-five miles an hour.

Q. How long have you been driving a car?

A. I drove a truck for twenty-two years. I have been driving for Edward Legum for seven.

Q. Before he made the turn by the church, what was his rate of speed?

A. He was going around forty, probably fifty when he turned in by the church.

Q. When you say he leaned forward and grabbed the wheel, did his eyes close, do you know?

A. I couldn't see his eyes.

Q. Did he appear to have had any kind of an attack so that he was not handling the car when you looked at it?

page 13 } A. He didn't seem like that to me because he was driving so nice all the way down there before this happened.

Q. At the time he started speedling up?

A. He ain't done nothing; no more than grab the wheel tighter. The reason I thought he was trying to grab that tighter was to gain the control back. That's all I could see.

Q. Did he slump over in the seat at all?

A. No When he went to grab the wheel, he pulled his back back from the seat.

Q. He pulled his back back from the seat?

A. Yes.

Q. He did not fall over the wheel?

A. No, he didn't fall over the wheel.

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

Mr. Breit:

Q. What, if any, kind of control did you have over the

operating mechanism of the automobile through this trip?

A. During the time of the accident?

Q. Before the accident.

A. I didn't have nothing to do with it because he was driving and I knew he was driving all right so I didn't have nothing to do with it.

Q. Do you know how many days he lived after the accident?

A. I am not sure but I think it was around about sixteen days after the accident.

Q. Sixteen days after the accident?

page 14 } A. Yes. He was admitted to Norfolk General. That's where he died.

Q. Thomas, after the accident, where were you taken?

A. To DePaul Hospital.

Q. Were you able to move about?

A. No, sir.

Q. How were you taken from the scene of the accident?

A. On stretchers.

Q. What, if anything, happened to you when the car hit the tree? Do you recall?

A. Well, I recall when it first hit it but four or five minutes after that, I was just numb; just blacked out.

Q. When do you recall anything else after that?

A. When they brought me out of the hospital.

Q. When were you admitted to the hospital for actual treatment?

A. I mean right after the accident.

Q. On the night of the accident you didn't stay at the hospital?

A. No. They released me.

Q. How much later were you admitted, do you know?

A. Around eleven days.

Q. During that eleven days, what symptoms, if any, did you have of injury?

A. I had to stay in bed for those eleven days. I wasn't a fit man. After I went back home I had to lay down all the time. Couldn't even sit up to eat.

Q. Did you have pain throughout your body?

page 15 } A. Yes; all through the neck and shoulder.

Q. Anywhere else?

A. My leg.

Q. What happened to your leg?

A. I don't know but from that whack in the tree something underneath the dashboard got that leg.

Q. Describe what injury you had to it.

Thomas L. Parker.

A. I didn't know, well, I don't know what kind of injury. It just went through the leg. He gave me treatments at the hospital for it.

Q. What kind of injury did you have to it? What part of your leg was hurt?

A. Right in the midsection; right in the front there, in the shin.

Q. Were there any visible marks on your shin?

A. Yes, sir. The marks are there yet. They treated them at the hospital. I had to go back there for treatment.

Q. What exactly did they do for your shin at the hospital?

A. I don't know. They put something on there, It hurt some kind of bad.

Q. How long did it hurt?

A. Well, it hurt me after I come back home. I stayed home eleven days. It hurt me all that time. I had to get another doctor to come there and examine me because they had released me. I didn't know what was the trouble after they released me and said I was all right.

Q. They released you in the emergency room at the hospital?

A. Yes. They carried me through x-ray, too.

page 16 } Q. When did you go back to the hospital?

A. I went back to the hospital the 28th of October.

Q. Dr. Thiemeyer and Dr. McFadden treated you, is that right?

A. That's right.

Q. Describe what you had to do in the hospital after you were readmitted?

A. What he had to do?

Q. What did they do to your body?

A. They carried me upstairs there and put me on some stretchers and pulled my neck back in place and put those tongs in my head. Then they brought me back down and put me in the bed and I think I stayed in the bed about six weeks with those tongs.

Q. Were you able to get out of bed in those six weeks?

A. No, sir; couldn't get up.

Q. Were you able to move about in the bed?

A. Nothing but turn over from my back to the side.

Q. Did you need help to do that amount of moving?

A. When I first went there, yes.

Q. After that six weeks with the tongs, then what did they do to you?

Thomas L. Parker.

A. I had an operation then.

Q. After the operation, then what?

A. I was in bad shape. I couldn't move then, I would say, for about four or five weeks.

Q. Were you still in the hospital?

page 17 } A. Yes, I was still in it.

Q. When did they remove the tongs, do you know?

A. The tongs stayed on me about six or seven weeks.

Q. Then what did they do?

A. They operated on me before they took the tongs off of me.

Q. After they took the tongs off of you and after they operated, did they give you any other kind of paraphanelia to wear?

A. They gave me that plaster cast.

Q. Describe the cast as best you can.

A. It was just a straight jacket. It went over my head, face, eyes, and everything and then they took a saw and cut the eyes and cut the ears out and cut a place out for the mouth.

Q. How far down did it go on you?

A. Down to my hips.

Q. How long did you have to wear that cast?

A. Six months.

Q. During that six months did you remove it at all?

A. No, sir; couldn't move it.

Q. What effect, if any, did this cast have on your ability to sleep?

A. It was a bad way to sleep. Part of the time I didn't do no sleeping.

Q. What effect did the use of the tongs have on your ability to sleep in the hospital?

A. I couldn't sleep with them on. I would catch little cat naps; something like that. Only time I could sleep

page 18 } was when I asked for a hypodermic. After a hypodermic, I slept for four hours.

Q. How often did you get a hypodermic?

A. They wouldn't give it to you but every eight hours.

Q. How many did you have?

A. I don't know. I had many a one because every time I would be hurting and couldn't sleep, I would call the nurse to give me one.

Q. Describe whatever kind of pain you were feeling while you were in the hospital.

A. Well, I had pain from every angle it looked like to me

because I was operated on in two places. I felt like a man who had had ice picks throwed at him and throwed down a swamp somewhere. I was operated on my hip and operated back there. I felt like a man who had been killed and throwed in the swamps. I had a numb feeling. I was hurting.

Q. Do you now the date your cast was removed from your body?

A. No, sir, I can't remember exactly the date because I stayed home approximately a month before I was back to work. When I went back to work, I didn't do nothing but write and walk.

Q. Did you go back to work with the cast?

A. Yes, sir.

Q. Your boss put you back to work?

A. Yes.

Q. Did you do the same work when you got back that you were doing before?

A. No. I didn't do nothing but write and walk.

page 19 } Q. How long have you been doing that type of work as distinguished from the work you were doing before this accident?

A. What type? Regular working, you mean? I just done that until I got some of my strength back so I could work. I couldn't bend down with that cast on. I couldn't bend down and pick up nothing with the cast on.

Q. After the cast was removed from your body, what kind of work did you do?

A. Well, I done sweeping and mopping up the office and carrying out waste baskets; small stuff. I would pick up and carry things around like that.

Q. When did you go back to doing the type of work you were doing before the accident?

A. I never went back.

Q. Do you drive the vehicles for Legum?

A. None but the station wagon. I can't drive the truck. You have to look back.

Q. How about the furniture? Can you lift that?

A. Nothing heavy; just small stuff.

Q. What, if any, pain do you experience now? Describe what symptoms you have from injury.

A. When I pick up anything, any weight, fifty, sixty, seventy pounds it pulls this shoulder here. It pulls it and I can feel it in between these two shoulder bones.

Q. Before the accident, how much could you pick up without feeling pain?

Thomas L. Parker.

A. Before the accident, I could pick up a hide-
page 20 } away bed and that weighs about as much as a piano and there ain't but two of us on the truck and two of us have to carry it and go up to the fourth floor.

Q. What was your pay at the Edward Legum Furniture Store at the time of the accident?

A. $60.00 a week.

Q. How long were you without any pay from your employer?

A. From the 13th of October until about the last of February.

Q. Last of February?

A. Yes.

Q. After you went back to work and had this different type of work, did your boss pay you your salary or not?

A. Yes, They put me back on regular salary.

Q. He put you back on regular salary?

A. Yes, sir.

Q. After you took the cast off, were you required to wear any other kind of apparatus? If so, describe it.

A. Yes, sir. I wore a collar.

Q. What kind of collar was it?

A. It was a plastic collar with rubber collar; I mean with a rubber rim at the top.

Q. How long did you wear the collar?

A. Around four months.

Q. Who prescribed the collar?

A. This man on Colley Avenue. What is his name? Price?

Q. No. That's where you bought it. Who told you to wear the collar?

page 21 } A. The hospital advised me to wear it. Dr. Thiemeyer.

Q. Do you know what you paid for that collar?

A. I don't know. Mr. Legum got them to bring it up there. I settled with him about the collar.

Q. After the cast was removed from your body, describe what, if anything, you felt in the way of pain or different from what you had been before the accident?

A. I felt my neck was weak for one thing because that cast held it up straight and after they pulled the cast off, it had to do for itself. That felt weak. Right now it's going to bother my shoulder back there, you see?

Q. Describe what you have at this time in the way of feeling about your injury.

Thomas L. Parker.

A. Well, at times it hurts right between the two shoulders and I guess it is weak in the neck, too at times; right now.

Q. Do you have any other pain anywhere in your body?

A. No; just these two shoulders and the neck.

Q. Before you got into the automobile or while you were riding with the driver, what, if any knowledge did you have concerning any alcoholic beverages that the driver may have used?

A. None at all because I ain't seen nobody drinking nothing or I ain't smelt nothing in there.

Q. Answer Mr. Shapero.

page 22 } CROSS EXAMINATION.

By Mr. Maurice Shapero:

Q. Tom, I understand you to say that Willie Davis had driven approximately sixteen miles?

A. Yes, sir. That is what I estimated it.

Q. Before the accident?

A. Yes, sir.

Q. And I understand you to say that the driving was perfectly all right?

A. Certainly was.

Q. When you turned into, well, I will call it the Bayville Road, you know where it is?

A. You mean Ocean Park Road? Yes, sir.

Q. Ocean Park Road. Willie was going about forty miles an hour when you first got in the road, isn't that right?

A. I estimate that.

Q. You know me, don't you, Tom?

A. Yes, sir.

Q. You have talked to me, haven't you?

A. Yes, sir.

Q. The first thing that you noticed irregular was that the car seemed to zigzag a little, isn't that correct?

A. That's right.

Q. You then turned and looked at Willie?

A. Yes.

page 23 } Q. And at that time when you looked at Willie, Willie had his hand on the steering wheel with his head bent over the steering wheel, isn't that correct?

A. No. He didn't do that until I scolded him about losing control. That is when he tightened up on the wheel and leaned over.

Q. Tom, think about that a little bit. I will ask you again.

Thomas L. Parker.

When you looked at him after the car was zigzagging and before then there had been no zigzag at all, but then the car started to zigzag?

A. That's right.

Q. And you turned to look at Willie who was sitting on your left and he had his hand on the steering wheel?

A. Yes, sir; sitting straight up and his hand was on the steering wheel.

Q. And his head bent over the steering wheel?

A. No, he didn't do that until I scolded at him about going so fast and losing control.

Q. Did Willie answer you when you said something?

A. Not a word.

Q. Did he utter a sound?

A. Not nothing.

Q. Isn't the next thing and only thing Willie said after you looked at him, after you said something about control, you looked at him and his hand on the steering wheel, did you say he was sitting straight up or down?

A. Sitting straight up when the car started zigzagging. Sitting straight as I am not. When I felt the zigzagging, I said, "Willie, what is the matter with you? Can't you get the car back in the road straight no more?" I said, "What the devil's the matter with you?" He leaned over and grabbed the steering wheel tighter.

page 24

Q. He never answered you at all?

A. He never answered me at all.

Q. And the next word he uttered and the only word was after the car ran off the road some four hundred feet down into the tree head on and Willie was thrown in your lap?

A. Yes.

Q. And Willie said, "I am dead now."?

A. That's what he said.

Q. And that's all he ever did say?

A. That's all I remember him saying when they carried us to the hospital.

Q. And again, up until that point before he started zigzagging and you looked at him, he had been driving perfectly all right?

A. All right.

Q. And the police department called the ambulance, did it not, to take you and Leroy Williams, who by the way, was your brother-in-law?

A. Yes.

Q. He married your sister, Bessie, right?

Thomas L. Parker.

A. Yes.

Q. And the ambulance took you and Leroy Williams and Willie Davis, the three of you, to DePaul Hospital, isn't that correct?

A. That is correct. Ocean Park Ambulance.

page 25 } Q. Then they released Leroy Williams from the hospital?

A. They released us all.

Q. Now, pay attention to this. When were you and Willie Davis taken down and put in jail; in the Princess Anne County jail?

A. All three of us were together. They put Leroy out on the road side.

Q. They didn't put Leroy in jail?

A. No.

Q. But they did put you and Willie Davis in jail?

A. Sure did.

Q. How much had you had to drink?

A. Nothing.

Q. Nothing whatever?

A. No, sir.

Q. Do you know how much Willie Davis drank?

A. He didn't drink nothing as I know of.

Q. You were sitting right next to Willie?

A. Right beside him.

Q. Tom, how long have you been knowing Willie?

A. About fifteen or twenty years.

Q. You said Willie was thirty years old. You mean forty?

A. I said I guessed he was around thirty.

Q. You have been knowing him how long?

A. About twenty years. I knew him when his mother died.

Q. Was Willie ten years old?

page 26 } A. I don't know, but I do remember that Willie was just a small boy.

Q. Tom, Willie and you went around together before his death, didn't you?

A. No, sir. I didn't go around with Willie. Willie wasn't my age, but we—

Q. Didn't you—

Mr. Breit: Your Honor, I submit that counsel should let the witness finish his answer.

Mr. Shapero:

Q. Have you completed your answer?

Officer Clark Whitehurst.

A. You asked me how long I had been knowing him.
Q. And your answer was?
A. Around twenty years.
Q. I will ask you again wasn't Willie Davis about forty years old?
A. I don't know. I estimated he was about thirty. I don't know that for sure.
Q. Tom, how old a man is Leroy Williams?
A. He is about fifty-three years old; older than I am. He is somewhere around that age.

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RE-DIRECT EXAMINATION.

By Mr. Breit:
Q. Did Willie Davis at any time from the time you first noticed him driving this car until the time he died ever state anything to you concerning any seizure or heart attack?
A. No, sir. I asked his aunt, all of them, if he had been in the service and they said—

Mr. Maurice Shapero: Object.
The Court: The first part of his answer was responsive. The latter part was not. The jury is instructed to disregard it.

(Recessed for lunch—1:00-2:30 P.M.)

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OFFICER CLARK WHITEHURST,
a witness called in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Cohen:
Q. Please state your name.
A. Clark Whitehurst.

Officer Clark Whitehurst.

Q. Where are you employed?
A. Princess Anne Police.
Q. How long have you been employed?
A. Approximately four years; going on four years, sir.
Q. Did you *investiage* an accident that occurred on the 13th day of October 1957 on Route 650 in Princess Anne County?
A. Yes, sir.
Q. Did you or did you not make any arrests as a result of this investigation?
A. Yes, sir.
page 30 } Q. Whom did you arrest?
A. I arrested the driver of the car, Willie Davis, and Thomas Lee Parker.
Q. You say that the driver of the car was Willie Davis?
A. Yes, sir.
Q. Why did you arrest both of these men?
A. The investigation determined who was the driver of the car at that time. I arrested Davis. He admitted driving the car but we weren't sure so I arrested Parker, too, and he put up a cash bond.
Q. In other words, you didn't know who was driving the car?
A. No, sir. I didn't see the accident.
Q. At the time; and you arrested both men?
A. Yes, sir.
Q. When you got to the scene, will you describe what you found as to the physical evidence, please?
A. Mostly what I could find for reckless driving was the skid—

Mr. William Shapero: Just what he found.
The Court: Just state, sir, what the physical facts were when you observed.

Mr. Cohen:
Q. Did you observe any tire marks?
A. Yes, sir.
Q. Tell the Court and Jury what you observed.

The Court: Confine your testimony just to the physical facts.

A. Yes, sir. The car swerved off the right of the
page 31 } road. I had a tape measure and measured it off;
490 feet on the right hand side of the road from

the direction he was traveling in, which after he came back onto the road was 144 feet, into an oak tree.

Q. Where did you find the vehicle that it was later established that Willie Davis was driving?

A. Head on, wrapped around an oak tree.

Q. What was the condition of this vehicle?

A. Practically totally demolished.

Q. Did you consider it a total wreck?

A. Yes, sir.

Q. How far was this from the left side of the road, approximately?

A. Approximately fifteen to twenty feet.

Q. Fifteen to twenty feet?

A. Yes, sir. I don't know exactly but it was between fifteen and twenty feet.

Q. When you came upon the scene, in what position did you find the Plaintiff, Thomas Parker? Where was he at that time?

A. Sir, at that time the Ocean Park Ambulance had volunteered to take them away. I was on the scene. They had already left. Parker and Davis had already gone from the scene of the accident.

Q. They were not there?

A. That's right.

Q. From your own personal knowledge, do you know how they were removed from the scene of the accident?

A. They were removed by ambulance, by stretcher.

Q. Where was the first time you saw Willie
page 32 } Davis, the driver of the automobile?

A. On the stretcher at DePaul Hospital.

Q. Did you have occasion to talk to him concerning this accident in making your report?

A. Yes, sir, I was talking to him.

Q. Did he or not admit he was driving the automobile?

A. He admitted driving the car, yes, sir.

Q. Did he mention to you anything concerning a sudden seizure or heart attack at that time?

Mr. William Shapero: Object, Your Honor.

Mr. Maurice Shapero: Leading.

Mr. William Shapero: It is not only leading, but the main thing is that is is hearsay; whether a deceased man told this officer he had a heart attack is hearsay. It is not admission against interest. Actually, it is a self-serving declaration.

Mr. Cohen: Your Honor, my friend, Mr. Shapero, is antici-

pating the answer of this witness. He says it would be self-serving. I asked whether or not he made any statement concerning attack, heart attack seizure.

The Court: This looks a little prolonged. Suppose the jury step in the jury room.

Mr. William Shapero: We waive it. Let him answer it. We don't want to hold this up.

Mr. Cohen: May I rephrase the question?

page 33 } Q. Would you tell this Court and jury whether or not Willie Davis made any statement to you at the hospital concerning any heart attack or seizure on his part?

A. No, sir.

Q. Did he at any time state anything to you concerning a heart attack as to the cause of the accident?

Mr. Maurice Shapero: May it please the Court, I object. It is not necessary for the jury to go out. The condition of the individual of necessity would call for a medical opinion. You may have a pain in your chest right now. You can't tell us if it was your heart or not. I don't think the question is proper nor the answer he gives is pertinent.

The Court: It appears to me he hasn't answered the question that you asked. I will sustain the objection.

Mr. Cohen:

Q. What explanation, if any, did Willie Davis ever give you for the accident or his manner of driving?

A. Sir, he didn't give me any. He was in such a critical condition and everything.

Q. He was what?

A. In a state of shock and everything from the accident.

Q. Did you also have an opportunity to talk to the Plaintiff at the hospital?

A. In the hospital immediately after the accident. Is the Plaintiff Thomas Parker? Yes, sir.

page 34 } Q. Could you describe to the Court and jury whether or not he was in a state of shock at that time?

A. Sir, I asked him who was driving the car and he stated who was driving the car.

Q. Did he appear to be dazed to you at that time?

A. Yes, sir. He had had a shock when they hit that tree.

Q. Answer Mr. Shapero.

Officer Clark Whitehurst.

CROSS EXAMINATION.

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

Q. Actually, Officer Whitehurst, was the driver of the vehicle the one now deceased, in any condition to discuss the accident with you at all?

A. No, sir; not in too good condition.

Q. From your investigation of the accident, you determined that Thomas Parker, the man sitting here, had been drinking, did you not?

A. Yes, sir.

Q. How did you determine that?

A. Sir, he had an odor on his breath; not a large quantity, but he did have an odor on his breath.

Q. Of alcohol?

A. Yes, sir.

Q. And you could tell that yourself?

A. Yes, sir.

Q. And also you, from your investigation of the accident, determined that the driver of the car, Willie

page 34 } Davis, had been drinking, did you not?

A. Yes, sir.

Q. How did you determine that?

A. Also, the odor and also at the hospital, his actions.

Q. From your investigation would you say that Willie Davis was drunk?

A. Sir, I don't know for sure that he was drunk. I didn't have any blood alcohol test or anything. He had been drinking.

Q. From your observation of the way he was acting and the smell, did you not think he was obviously drunk?

A. He had been drinking. It seemed he had a stronger odor than Parker or Williams.

Q. Did you think that he had had enough to drink to affect his driving? I ask you to refer to your report.

A. (Looks at report.) That is what my opinion would be. I marked it down on my investigation that it was.

Q. That what was?

A. That it affected his driving.

Q. That his intoxication affected his driving?

A Yes, sir.

Q. You put that on your report?

A. Yes, sir.

Q. That was obvious to you, in other words?

A. Yes, sir.

Officer Clark Whitehurst.

Q. How old did your investigation determine
page 36 } Willie Davis to be?
A. His age was forty.

Q. Officer, on your report, you noted that the driver of the vehicle was very intoxicated, did you not?

A. Yes, sir. I put that on the accident form of my investigation.

Q. Obviously drunk?

A. Yes, sir.

Q. That's all we have of this witness.

RE-DIRECT EXAMINATION.

By Mr. Cohen:

Q. Was the driver, Willie Davis, examined on the 13th of October by a doctor, to your knowledge?

A. Yes, sir.

Q. Do you know whether or not he was released on the 13th of October by that doctor?

A. Yes, sir.

Q. Was he released?

A. Yes, sir.

Q. Was he then taken by you to Princess Anne County Police Station?

A. Yes, sir.

Q. At the time that he was released to you and taken down to the Princess Anne County Police Station was he in such a state of shock at that time that he could not talk to you concerning the accident?

Mr. William Shapero: Object to that, Your Honor. Now he is leading his own witness.

page 37 } Mr. Cohen: I asked whether or not he was in a state of shock.

The Court: I think it is leading. Rephrase your question.

Mr. Cohen:

Q. Officer, would you tell me whether or not Willie Davis was in a state of shock?

Mr. William Shapero: Object. He may ask what his condition was.

The Court: Ask what his condition was.

Eddie Few.

Mr. Cohen:

Q. Did his condition improve or not from the time he was in the hospital until the time you took him from the hospital to the police station?

A. The only thing he had to say on the way down to the police station was to complain of his back.

Q. That is not responsive to my question. You testified he was in a state of shock at the hospital?

Q. I ask you whether or not his condition improved or did not improve from the time you took him to the hospital from the hospital to the police station?

A. I didn't notice much difference. His condition was pretty much like it was at the hospital, I would say.

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MR. EDDIE FEW,

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

DIRECT EXAMINATION.

Examined by Mr. Breit:

Q. Will you state your full name and address.

A. Eddie Few.

Q. What is your address?

A. Business?

Q. Home.

A. 1054 Davis Street, Norfolk.

Q. Business address?

A. Pleasure House Road, Bayside.

Q. What business are you in?

A. Garage business and service station.

page 39 } Q. Did you have occasion on the night of October 13, 1957 to be called to the scene of an accident in which a vehicle driven by Willie Davis was involved?

A. Yes, sir.

Q. When you arrived, what did you see there?

A. Well, the car that they had been driving was up against the tree and the three fellows were laying out in the side of

the road, in the ditch like, sort of a drop in the side of the road.

Q. Were any of them walking about?

A. No, sir.

Q. Did you have occasion to assist any of them into the ambulance?

A. All three of them.

Q. What did you do in that regard?

A. Well, it takes approximately three or four men to pick one man up and put him on the stretcher without harming him, rolling him.

Q. Did you get close to the Plaintiff here during that operation?

A. I did.

Q. Did you get close to the driver of the car?

A. I did.

Q. Describe what, if any, odors you found on either of these men.

A. None that I know of.

Q. Did you or not smell the odor of alcohol about the person of these men?

A. I did not.

Q. Do you know whether or not there was any page 40 } alcohol found in the vehicle?

A. There was no remnants of alcohol in the automobile.

Q. Were the men, or not, in any state of shock, if you could tell?

A. They were all out more or less, semi-conscious. A couple of them were groaning and one of them was just laying there.

Q. Do you know the deceased driver of the car or this man?

A. I know this man.

Q. Did you know him prior to the accident?

A. No.

Q. Did you have any business connections with them?

A. Not prior to the wreck, no.

Q. Have you any interest in the outcome of this case?

A. None whatsoever.

Q. Have you seen me or talked to me prior to this case?

A. No, sir.

Q. You did speak to my associate once prior to this?

A. Yes, sir.

Q. Answer Mr. Shapero.

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MR. LEROY WILLIAMS,
a witness called in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Breit:
Q. State your full name, please.
A. Leroy Williams.
Q. Where do you live?
A. 1000 Halifax Street, Berkley.
Q. How long have you lived there?
A. Since 1945.
Q. How old are you?
A. Fifty-three.
Q. Are you married?
A. Yes, sir.
Q. Where are you employed?
A. Colonna Shipyards.
Q. Did you have occasion to be in the automobile with Thomas Parker on the day that it was involved
page 42 } in an accident?
A. Yes, sir.
Q. Who was driving that car?
A. Willie Davis.
Q. How long had you known Willie Davis prior to this?
A. I have known him a number of years.
Q. How long?
A. A good while.
Q. How long had you known Thomas Parker?
A. Practically all my life.
Q. You are related to Thomas Parker, are you not?
A. Yes, sir.
Q. What is your relation?
A. I married his sister.
Q. On the day in question, where were you sitting in the automobile?
A. In the back seat.
Q. Where was Thomas Parker sitting?

Leroy Williams.

A. In the front seat.

Q. Prior to this time, do you know of your own knowledge whether Thomas Parker had ever had any neck or back trouble?

A. Not as I know of.

Q. How far had the driver of the vehicle driven the car from the time you got in it until the time it actually had the accident?

A. How far he had drove it?

Q. Do you know how many miles it was?

A. I would say fifteen or eighteen miles.

page 43 } Q. From the time you first got in the car?

A. Yes, sir.

Q. When you got in the car, did you have occasion to observe Willie Davis?

A. No, sir. He looked all right.

Q. Well, did he appear to have been drinking to your knowledge?

A. No, sir.

Mr. Maurice Shapero: I object. The question is leading, but of course, my objection is ineffective now.

The Court: Sustained.

Mr. Breit:

Q. Describe how he drove the car when he first got into the car.

A. He was driving like an ordinary man was driving. He was driving nice.

Q. Tell us exactly what happened from that time on.

A. He was driving along just as nice. I was sitting in the back. Mr. Parker was sitting in the front. He was driving along just as nice and all at once he started speeding up on it.

Q. Where were you at that time?

A. I was sitting in the back.

Q. Where was the car at that time?

A. You are talking about the accident? We were going out to the Shell Road. He was speeding up on the car at that time. I looked across the seat there. He was speeding so I looked across the seat and looked at the speedometer and he was going sixty-five or seventy miles an hour.

page 44 } Q. What, if anything, was said at that time?

A. What did I say? I said, "Willie, why don't you slow up on the car here." He didn't say nothing.

Dr. Charles O. Barclay.

Q. Describe the driver and what he did from the time you first noticed that he was speeding up until the actual impact with the tree.

A. When he was driving, he speeded up; that's when I noticed it.

Q. Was he doing anything abnormal in the front seat?

A. No. Doing like he always did; driving normally.

Q. Where were his hands and fingers?

A. His hands were on the steering wheel.

Q. What about his head and shoulders? In what position were they?

A. He was like an ordinary driver, driving.

Q. What, if anything, happened to the car?

A. What happened to the car?

Q. When you first noticed it started speeding up, where was the car?

A. It was on the highway but it run off the highway. I don't know which side. It run off the side and then it come back and then it went over in the weeds and then that is all I remember when it went in the weeds.

Q. Had Davis taken a drink in your presence?

A. Not as I know of. I hadn't seen him take any.

Q. Answer Mr. Shapero.

CROSS EXAMINATION.

By Mr. Maurice Shapero:

Q. Willie Davis never said a word when you
page 45 } spoke to him, did he?

A. No.

Q. That's all.

DR. CHARLES O. BARCLAY,

a witness called by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Breit:

Q. Please state your name.

A. Charles O. Barclay.

Q. Doctor Charles Barclay?

A. Yes, sir.

Q. What is your occupation, Doctor?

A. I am a physician.

Dr. Charles O. Barclay.

Q. Are you or not Chief Medical Examiner for the Commonwealth of Virginia in this area?

A. Yes, sir. I was medical examiner for the City of Norfolk up until 1958.

Q. On October 30, 1957, did you have occasion to examine for the cause of death one Willie L. Davis?

A. Yes, sir.

Mr. Maurice Shapero: What date?

A. October 30th.

Mr. Breit:

Q. How old did you find him to be?

page 46 } A. His age was stated as thirty-eight. My findings were compatible with that.

Q. What did you find out to be the date of his death?

A. October 30, 1957.

Q. What was the cause of his death?

A. Cause of death was a paralysis resulting from a subluxation of the 5th and 6th cerebral vetebrae in the neck.

Q. Was there any evidence, Doctor, in examining him, of any previous heart or epileptic or other conditions?

Mr. Maurice Shapero: I object to it, may it please the Court. He examined him as coroner and he found that which caused immediate death; as to the history some seventeen days prior to that, he couldn't tell. It is physically impossible. He saw the man after he was dead, and of course, the heart had stopped beating. It is physically and mentally impossible for the doctor to testify with any accuracy on that.

Mr. Breit: If the doctor says he can testify—

Mr. Maurice Shapero: May it please the Court, he can testify as to what condition he found would cause immediate death. Everybody knows the heart stops beating or you don't die but as to what condition existed on the day of the accident which caused Willie Davis to act in this peculiar manner, out of the ordinary manner, this doctor cannot testify. He can tell what caused immediate death as he has said, paralysis, apparently from the blow; but what preceded that caused him, as we contend, to lose

page 47 } control of his car, that is the pertinent issue and we object to him giving any evidence on the subject of that.

Dr. Charles O. Barclay.

Mr. Breit: Mr. Shapero told the jury about a seizure. I didn't tell them about it. I never heard of it until this morning. If there was a seizure, I submit a competent doctor could have told it notwithstanding the fact the man was dead. That is the purpose of making an autopsy. If the body had been riddled with cancer, it would be obvious even if he died from injury to the spine. If there was evidence on the patient indicating that these words of Mr. Shapero's of which we have had no evidence yet then this doctor ought to be permitted to testify about it if he can.

The Court: You qualified it just as Mr. Shapero objected to the extent if he so testified to it—

Mr. Breit: I first asked him if he could. If he can't, of course, the question will have no basis.

The Court: The Court will allow the question. Overrule the objection. Note your exception.

Mr. Breit: Please read the question.

The Reporter: "Was there any evidence, Doctor, in examining him, of any previous heart or epileptic or other conditions?"

Mr. Maurice Shapero: I still object.

The Court: Rephrase your question.

Mr. Breit:

Q. Doctor, what, if anything, did you find on the deceased other than this subluxation or paralysis and the fact, of course, that his heart had stopped beating?

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A. No other findings.

Q. If, in fact, this party had had a coronary infarction or a heart attack of some nature two weeks prior to the date of his death, would your examination have revealed that fact?

A. My examination at the time after his death?

Q. Yes.

A. He was not autopsied; just by looking at the body, I could not say a man had or had not had a heart attack in this case.

Q. You did not perform an autopsy?

A. No, sir. The body was not autopsied.

Q. What was the size and weight of this deceased, do you know?

A. Six feet one in height. Estimated weight was 180 lbs.

Q. Answer Mr. Shapero.

Mr. Maurice Shapero: No further questions.

MRS. HELEN TITUS,

a witness having been previously sworn, was recalled to the witness stand by Counsel for the Plaintiff; was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Breit:

Q. You are Mrs. Titus, the same lady who testified earlier today, the custodian of the records of DePaul?

A. Yes.

Q. You now have the record of October 13th of
page 49 } Thomas Parker. What, if anything, do those records reveal in reference to any alcohol or drinking on the part of Thomas Parker?

Mr. William Shapero: First, we would like to take a look at those.

The Court: All right.

Mr. William Shapero: We have no objection to this.

The Court: Please read the question back.

The Reporter: "Q. You now have the record of October 13th of Thomas Parker. What, if anything, do those records reveal in reference to any alcohol or drinking on the part of Thomas Parker?"

Mr. Maurice Shapero: Your Honor, the record itself is the best evidence and if they want to introduce that in evidence, I don't think I could successfully object to it. This lady is not a doctor. She is, at most, the keeper of the records or bookkeeper. I don't know what her designation is but I am sure she is not a doctor.

A. No.

The Court: You intend to offer it?

Mr. Breit: Yes. I wanted her to read to the jury—

Mr. Maurice Shapero: The jury can read it.

The Court: If he is to offer it in evidence, I see no objection to her stating what, if anything, appears. Then if he offers it, the jury will have the full benefit.

Mr. Maurice Shapero: It is an elaboration. This jury can take that like any other exhibit and examine it in the jury room. The best evidence is the record itself. The doctor is here to testify. Of course, that is ad-
page 50 } missible and my objection would be of no consequence so you would overrule it. As I understand

the law, the record itself is the best evidence and we have got the best evidence now. We object to her elaborating it or explaining it.

The Court: It is a simple question, it would appear to me, to be answered. The Court will allow the question on the basis that counsel intends to offer the entire record.

A. There is nothing on the record to indicate that there was any odor of alcohol or that the patient was intoxicated.

Mr. Breit:

Q. Does the record reveal that the patient was discharged that same evening?

A. Yes.

Q. All right.

Mr. Breit: Your Honor, Plaintiff would like to offer this record as "Exhibit P-5."

The Court: So marked.

Mr. Breit:

Q. How long have you been custodian of records at this hospital?

A. Fifteen years.

Q. Is it a common practice in the hospital for evidence of intoxication to be placed on the emergency room records?

Mr. Maurice Shapero: Object to it, may it please the Court.

Mr. Breit: If Your Honor please, if it is a common practice of the hospital. If it is done in the ordinary course; if it wasn't done here—

page 51 } Mr. Maurice Shapero: It is a question of what this record shows.

The Court: The Court feels the record speaks for itself. The Court sustains the objection.

Mr. Breit: Exception noted.

Mr. Maurice Shapero: We have no questions.

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Mr. Cohen: The attorney for the plaintiff objects and excepts to the Court's refusal of Instruction numbered P-5 for the reason that inasmuch as Thomas Parker, the plaintiff, was not a guest within the meaning of Section 8-646.1 of the Code of Virginia and thereby not bound by the standard of gross negligence, the instructions throughout this case, and particularly Instruction P-5, should have been with reference to any simple negligence on the part of the defendant, Willie Davis.

The plaintiff objects and excepts to the refusal by the Court of Instruction P-6 as offered, for the reasons previously stated with reference to P-5 and for the further reason that the evidence was uncontradicted that Willie Davis was guilty of negligence in the following

page 71 } respects: That he was traveling at a speed of 70 miles per hour; that he had no control whatsoever of his vehicle at such time immediately prior to the accident; that he was zigzagging along the road immediately prior to the accident; that during the time when he left the road he traveled approximately 490 feet partially off the roadway, having ample opportunity to control the vehicle and making no effort to control the vehicle, thereby causing his vehicle to go back on the highway, off the road to the left and 150 feet into a tree. It is clear that this establishes negligence as a matter of law and that the standard of simple negligence should have been applied in this case and the jury should have been instructed as indicated in P-6 as offered and which was refused.

The plaintiff objects and excepts to the Instruction D-1 as granted by the Court for the reason, first, that the standard of care in this case should have been simple negligence, and for the further reason that there was no evidence whatsoever in this case of any cause of the accident other than the negligent driving of Willie Davis, and any reference in the instruction to "whether the accident occurred by reason of another cause" is not applicable to this case and should not have been included in Instruction D-1.

The plaintiff objects and excepts to Instruction

page 72 } D-2 as granted by the Court for the reason that this requires plaintiff to prove gross negligence in this case and the standard of care should be ordinary negligence, as previously indicated. We say that Parker should not be considered as a "guest" in his own vehicle, based on the facts and circumstances in evidence.

The plaintiff objects and excepts to Instruction D-3 as granted by the Court for the reason that the following words, "You are under the solemn obligation of an oath

to decide according to the law and the facts" should have been incorporated in all of the instructions or should have been indicated in a separate instruction so as not to confuse the jury as to their obligation under oath and emphasize upon the minds of the jury their obligation under the oath only with particular reference to Instruction D-3 as granted.

The plaintiff objects and excepts to Instruction D-4 as granted by the Court for the reason, first, that it defines gross negligence when the standard of care in this case should have been ordinary negligence as previously indicated; and for the further reason that a definition of gross negligence in this instruction was combined with a last paragraph to indicate a finding instruction and such "finding instruction" does not contain all the necessary page 73 } elements to be a proper and legal finding instruction.

The plaintiff objects and excepts to Instruction D-5 as granted by the Court, for the reason that the reference to Willie Davis in such an intoxicated condition as to render him a dangerous driver is most misleading. The plaintiff contends that the question of whether or not Willie Davis was in an intoxicated condition was a question for the jury to decide and this instruction as granted presupposes that Willie Davis was in an intoxicated condition, taking the question away from the jury and thereby misleading the jury. This same objection holds true for the reference to whether plaintiff knew of such intoxicated condition.

The plaintiff objects and excepts to Instruction D-6 as granted by the Court, for the reason that it places too much emphasis on the cause of accident as having been "lost control of the automobile" and does not in any manner convey to the jury the legal elements of gross negligence.

* * * * *

Mr. M. B. Shapero: If it please the Court and you ladies and gentlemen of the jury: This case has dragged page 74 } on and you have been very patient. I don't reckon you have much choice; you were here, you just had to be patient. But I am not going to take up too much of your time. However, there are certain aspects of this case which I believe you should give some thought to in determining.

Firstly, ladies and gentlemen, I want to say one or two words about your own duty. To become a juror under our system of government—and I say under our system of law if you want to call it that—is more or less of a privilege.

You probably don't think so because you would much prefer being at home attending to your affairs. I am sure you feel that way. However, it is a privilege. And every privilege that you have of that kind also carries obligations. You have an obligation to exercise that privilege in a manner that is fair under the circumstances. And when I say "fair" I mean according to the law. And the law is what these instructions say to you. I shall read one or two of these to you.

The Court has told you ladies and gentlemen that you shall not be swayed by sympathy or bias; and that has a great deal of significance because as normal human beings such as you are, I hope that I am, you are sympathetic with anybody that has been hurt or sick. Why
page 75 } shouldn't you be? You would be quite unnatural if you weren't. But we cannot try these cases on sympathy, of course,—the jury, a lawyer, anybody. A person has gotten hurt; it is a question of who is at fault.

Now, you heard a lot about negligence, which is legal language, so to speak. But I am going to try to discuss this with you as laymen such as I would do if I were talking to my sister or brother, who are not lawyers. And that brings us down to this point. Let's see what happened so that you may determine who was at fault and whether this dead man, who is the defendant, whether you should bring in a verdict against him. Unfortunately for us, he has passed on to the Great Beyond and I have never had an opportunity to talk with him—which is, of course, a handicap in handling any case when you cannot talk to your client. But that is one of the things we must accept.

Speaking of you: you are not back there at random; you have been pretty carefully selected. I knew who was on this jury. I got the list and I know a little bit about each of you, the background. We had an opportunity, each of the lawyers, to strike off; I did strike off three. I didn't strike off you seven. It is part of our job to see whom we are going to try a case with and what the background is and
page 76 } whether they are fair people, fair-minded or, are they given to bias or prejudice or want to "soak" everybody. We analyze you, not personally but I know who each of you is and you have been selected and with care or you wouldn't be there.

Now, let's get down and see just what transpired that day. On Sunday, October 13, 1957, Willie Davis, who apparently was a friend of Tom Parker, came over and wanted Tom Parker to take Willie Davis down to Princess Anne so he could get some money for his boss because Willie Davis's

aunt was sick and he wanted to take her to the hospital. I have been over all this before, this phase of it, and I don't think I have varied one bit from what I told you we would be able to prove. I also told you we were going to prove it by this very man we are suing. As I said, the testimony that we would ordinarily have from the defendant, why, he is in the ground; I couldn't talk to him. So to get back on that subject, Tom Parker let Willie Davis drive his automobile. Leroy Williams, who married Tom Parker's sister Bessie—and they all eat at the table together, all three of them—he stated he wanted to go along.

page 77 } When my friend says that Leroy Williams has no interest in the case, I would think I would have right much interest in my brother-in-law if he was trying to collect some money. I believe I would if he married my sister; but maybe they are a little different from anybody else in the world. I think he has got right much interest, so what he says is of no consequence.

Now, they proceed—give me that list, the resume (indicating). Willie Davis is behind the wheel, my client; and he goes for 16 miles down to Princess Anne. He goes from Halifax Street, the Campostella Road through Norfolk by Brambleton Avenue, turned into Park Avenue, turned into Princess Anne Road towards Virginia Beach, down Princess Anne Road, through Lansdale Circle, through Diamond Springs to Robbins Corner, turned toward the Shore Drive until he got to the church. And then he turned on the Bayville Road, which is the one right in front of Bayville Farms Dairy, which I am sure you are all are familiar with.

Until that time, according to Parker, he had driven all right. And then, out of a clear sky—mind you, there is no intimation that they had any fuss or any argument, or anything of that kind. Out of a clear sky the car starts to zigzag, picks up speed. Tom Parker looks over to—he was sitting next to Willie and says "Get control of the car, boy."

page 78 } or something of that kind; I have forgotten the exact language but it isn't material. He tells you—if I am wrong, you can disregard what I am saying but I will not be so stupid as to tell you something wrong, when you heard it—he said that Willie clenched the steering wheel, held his head rigid, right straight, looking ahead of him, did not answer, did not turn to say a word, went off the side of the road, through the woods and into a tree and killed himself. Well now, what do we have at that phase of it? The Court tells you this:

"The Court instructs the jury that in order for the plain-

tiff to prevail, the evidence must show more than that the injuries complained of may have resulted from one of two causes."

Now, this is very important, ladies and gentlemen. I hope you will listen to me carefully because it is your duty to do just what I am asking you to do. This is the Court's instruction, under which, in one event, Davis is responsible and in the other event, he is not.

"And if, after hearing all of the evidence, you are uncertain whether Davis was guilty of gross negligence which was the proximate cause of the injury to the plaintiff or whether the accident occurred by reason of another
page 79 } cause and it appears equally as probable that either of the above was the proximate cause of the injury, you must find a verdict for the defendant"—meaning a verdict for Willie Davis's estate.

Certainly, a man who has driven 16 miles through the City of Norfolk, as I have told you, and all of a sudden goes berserk—something happened. This man, who is sitting next to his friend, driving the automobile, driving his friend's automobile, who doesn't turn around and answer him, doesn't do anything but drive straight through the wood into a tree and kills himself, something is bound to have happened. There was no recklessness beforehand, not anybody having to say to Willie Davis "Slow down. Don't go so fast. Take it easy." No. Out of a clear sky things exploded. There can't be but one conclusion, as I see, that you could come to. Something happened to Willie Davis over which Willie had no control. All right. That is one cause. If you believe that, under the law he cannot recover. You may go home this afternoon and you have some form of accident, I don't know what it is. I may disagree with you but I have got to show something that you did wrong. And that over which God has control, and you don't, certainly cannot be attributed to you as having done wrong.

Let's see the other phase of it. And I believe,
page 80 } ladies and gentlemen, I can show you under this evidence that you can't bring in a verdict against the defendant, under this evidence and the law as I am going to read it to you. When I say "can't," I am not so stupid as not to know that you—you can, yes. You can disregard this thing and you can do what you feel like doing and I can't stop you. But I mean if you are going to do what I believe that you will do; that is, do your duty and try this case according

to the law and the evidence, I don't believe that you can bring in a verdict against the defendant.

Now, what does the police officer tell you? I didn't put him on. The plaintiff put him on, Officer Clark Whitehurst; I believe it is the Princess Anne County police officer. The plaintiff put the police officer on as part of his case and he tells you that Willie Davis was drunk. And Tom Parker says he didn't drink anything while he was with him, so he had that whiskey in him all along.

And the Court tells you that if you believe that he was intoxicated and this accident resulted from his intoxication—that is, Willie Davis—and Tom Parker knew it or should have known it—and you can't sit up next to a man that is "high," so to speak, without knowing it; you are bound page 81 } to know it—the Court tells you that if you believe that—and you have got to believe it because the police officer says so; they put him on, I didn't; you cannot believe otherwise.

Let's see what the Court says to you about that. And I believe, ladies and gentlemen, under this evidence you look at it both ways. You can't bring in a verdict against the defendant, and let's see what the Court says about the very phase I am talking to you about. This was what Judge Page had to say about it. "The Court instructs the jury that if you believe from the evidence that plaintiff"—Tom Parker here—"permitted Davis to drive plaintiff's automobile while Davis was in such an intoxicated condition as to render him a dangerous driver"—and he was plenty dangerous because he ran and hit that tree and killed himself; you can't get more dangerous than that; you can't kill him twice. Now—"was in such intoxicated condition as to render him a dangerous driver and became"—meaning Parker—"a passenger or continued to be a passenger in the automobile after plaintiff knew or by the use of ordinary care"—and if you are sitting up next to a man that is high and the man is smelling of whiskey, if you are normally intelligent you know what the score is—"knew or by the use of ordinary care should have known of such condition, plaintiff"—Tom Parker page 82 } —"assumed the risk."

That means when you get in an automobile with a man that is intoxicated, you take that chance yourself. If you ride with me when I am drunk and you know it or my conduct is such that you should know it, if you get hurt you cannot make me pay you because you have no business getting in. And, after all, ladies and gentlemen, Davis was driving Parker's car. He didn't have to let him do it. ". . . plaintiff assumed the risk and was guilty of contributory

negligence and if you believe such intoxicated condition on the part of Davis was the proximate cause of the injury, you must find a verdict for the defendant.'' That is Davis's statement. So I say to you, ladies and gentlemen—and I don't think that I am imposing on you to ask you this; I don't think I am trying to ask you to strain your imagination. If something happened to the man—and it is apparent it did—out of a clear sky darts off the road, after Parker had said ''What you doing, boy?'' or something; ''Get control''; here is a man holds his head just like this (indicating). Let's assume he didn't droop it. I thought he did. Let's say he didn't. I am not talking, am not going to talk to you about anything this evidence didn't show. Parker said he was like this, clenched the wheel; said he didn't turn and never uttered a sound, never answered a word, went right
page 83 } off, down the field and into a tree, killed himself.

If that is the case, we get back to what the Court told you to start with, the accident occurred by reason of another cause—that is what the Court is talking about—you can't bring any verdict or shouldn't do it.

And on the other side of the ledger, if you believe he was drunk; that is, he was intoxicated to such extent that it affected his driving and that was the proximate cause of the injury, they can't recover.

Therefore, ladies and gentlemen, as I see the evidence—and I have tried quite a few of these, am somewhat experienced in this—I don't believe there is any theory that you could employ and conscientiously bring in a verdict under this evidence.

And the Court tells you this—you are going to take these instructions back with you when you go into the jury room and I hope you will read them—the Court says this: ''The Court instructs the jury that it is your duty to try this case without being influenced by sympathy.'' You may feel sorry for this man. I am not adverse to him. I am performing a duty; and you have got a duty to perform. The Court instructs the jury that it is your duty to try this case without being influenced by sympathy or the mere fact
page 84 } that the plaintiff was injured and has suffered.

You are under the solemn obligation of an oath to decide according to the law and the facts. This law that I have read you here is what the law of this case is. And I say, ladies and gentlemen, there just isn't a case here of gross negligence. Oh, it is true, he ran off the road. But up until that time he was driving all right. So if he—something happened to him physically; there can't be any doubt in my mind that it did, and I don't believe there is in yours. They can't

collect, or shouldn't. And if he was drunk, they can't collect. On what theory can they collect in this case unless a verdict is simply brought in arbitrarily, which I don't believe you will do. If I thought you had that kind of mind I surely would miss my guess in selecting you or trying to select you. I had three people to strike off and I did and you weren't one of the three, any one of them.

Now, let me talk to you just about a minute or so. What kind of time?

Mr. W .L. Shapero: Plenty of time.

Mr. M. B. Shapero: Talk to you a little about this blackboard. That is what is known as window dressing. I trust you will not be taken in by that blackboard. I can sit up here and work up a bent toenail into $150,000 with a blackboard.

page 85 } I say to you, gentlemen, you ladies and gentlemen, that is hocus-pocus. To date I have never used one. I have been practicing 36 years. Because I expect juries to be intelligent, to have the same kind of mind I hope I have. I think a blackboard of that kind, frankly—with that conglomeration of figures on there, this kind of injury—is an insinuation on people's intelligence to come and ask you to listen to such tommyrot. And I say that seriously. I am satisfied you feel the same way. A dollar for pain and two dollars for this and so and so, and a conglomeration of figures there.

Now, I am not going to say anymore about that because I am satisfied you are not going to be taken in by that. I just have that confidence in you that you won't.

And the Court tells you further—and this is what Judge Page has to say about this case further: "The Court instructs the jury that even though you believe from the evidence that the deceased Davis lost control of the automobile and thereby caused the accident, this does not in itself prove gross negligence on the part of Davis." They have got to show you somthing else. And they haven't shown you something else because they couldn't. I knew what was in this case. As I

page 86 } said, I certainly did not get this out of thin air. I got it from one person. I told you "He is going to say so and so," and he did. I knew the facts in this case before we tried it, and I don't think it has varied one bit from what I have told you.

Now, ladies and gentlemen, I could go on and talk to you more about this case but I am going to read you a couple of instructions and then I am going to quit because I believe you are just as capable of passing on this case now as you will after I talk you to death, and so I am going to stop there.

"The Court instructs the jury that you cannot infer gross negligence"—you just can't assume that it is that—"on the part of the defendant from the mere happening of an accident. The presumption is that the defendant was free from gross negligence unless and until the contrary is proven by a preponderance of the evidence. The burden is upon the plaintiff"—Thomas Parker—"to prove by a preponderance of the evidence that the defendant was guilty of gross negligence and that such gross negligence was a proximate cause of the accident."

Now, this is the man that drove for 16 miles perfectly, and here is the part that I think, ladies and gentlemen, we can't get over—I say "over," to the extent of bringing
page 87 } in a verdict. "If after hearing all the evidence you are uncertain whether defendant was guilty of such gross negligence and it appears as probable that he was not as that he was, your verdict should be in behalf of the defendant."

I don't believe, ladies and gentlemen, from this evidence you could possibly go back to the jury room and come to a conclusion that this is the way it happened, there is no doubt about it, there is no uncertainty, no "probability"—with the plaintiff's officer saying he was drunk. And Tom Parker says it. He drove perfectly proper, used the word "proper," until he gets out on this road and out of a clear sky starts to zigzag and holds himself rigid and straight and doesn't speak to a soul and within three seconds after that he is dead, so to speak, up against a post. He never spoke to anybody after that. You couldn't possibly say with any degree of certainty that there was gross negligence there; and those are all the facts you have got in this case.

Now I am going to leave you because I believe that I have covered the essential points and if I keep on it will be nothing but a reiteration. And if I were sitting in that box, it would bore me to no end to have a lawyer keep on saying the same thing over and over. Well, I am not going to do it.
page 88 } I say, ladies and gentlemen you have a duty to perform. You are not to be swayed by sympathy. You are to follow the law as set out in these instructions. You know just as well what that situation was out there as I do. You know just as well what those people were when they got in that automobile. You know just exactly who they are and there is no use talking a lot of foolishness about who they are not. And if he did drink whiskey on the way out there, Lord knows if he did Tom shouldn't collect a penny, and if he was still drunk 16 miles from there, drunk, he had a powerful load when he left Halifax Avenue.

Ladies and gentlemen, it is for you to pass on this case. We have tried to present it fairly. I hope we have. I believe we have. I don't believe that they have made out a case. I don't believe that you will bring in a verdict, conscientiously bring in a verdict under the circumstances. Thank you.

(After closing argument by counsel, the jury retired to consider their verdict.)

JUDGE'S CERTIFICATE.

I, Walter A. Page, Acting Judge of the Court of Law and Chancery of the City of Norfolk, Virginia, who presided over the foregoing trial in the case of Thomas Parker v. Charles H. Leavitt, City Sergeant of the City of Norfolk, Administrator of the estate of Willie E. Davis, deceased, tried in said court in Norfolk, Virginia, on the 22nd day of April 1959, do certify that the foregoing is a true and correct report of the evidence, with the exception of the testimony of Dr. McFadden and Dr. Thiemeyer, together with all motions, objections, and exceptions on the part of the respective parties, the action of the Court, all exhibits, and all other proceedings of said trial.

I do further certify that the exhibits offered in evidence, as described by the foregoing record and designated as Plaintiff's Exhibit 1-5 are all the exhibits offered upon said trial and the originals thereof have been initialed by me for the purpose of identification.

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

Given under my hand this 15th day of June, 1959.

W. A. PAGE, Judge.

A Copy—Teste:

W. A. PAGE, Judge.

CLERK'S CERTIFICATE.

I, W. L. Prieur, Clerk of the Court of Law and Chancery of the City of Norfolk, Virginia, do hereby certify that the foregoing transcript of the testimony and other proceedings of the trial of the case of Thomas Parker v. Charles B.

Leavitt, City Sergeant of the City of Norfolk, Administrator of the estate of Willie E. Davis, deceased, duly certified by the Judge of the said court, was filed in my office on the 15 day of June, 1959.

W. L. PRIEUR, JR., Clerk.
By L. M. CALVERT, D. C.

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.

CLERK
SUPREME COURT OF APPEALS
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