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Record No. 5181

In the Supreme Court of Appeals of Virginia at Richmond

EDWARD W. RUSHTON, JR.

v.

JAMES C. MOUNTCASTLE

FROM THE CIRCUIT COURT OF THE CITY OF ROANOKE

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. 5181

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 20th day of April, 1960.

EDWARD W. RUSHTON, JR., Plaintiff in Error,

against

JAMES C. MOUNTCASTLE, Defendant in Error.

From the Circuit Court of the City of Roanoke

Upon the petition of Edward W. Rushton, Jr., a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Roanoke on the 29th day of December, 1959, in a certain motion for judgment then therein depending wherein J. C. Mountcastle was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of twenty-seven thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, an additional bond in the penalty of three thousand dollars is required, with condition as the law directs.

RECORD

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* * * * *

At a Circuit Court for the City of Roanoke, in the State of Virginia, at the Courthouse thereof, on the 29th day of December, 1959.

This day again came the parties by their attorneys, and the Court having maturely considered the motion of the defendant to set aside the verdict of the jury rendered in this case on the 22nd day of December, 1959, overrules said motion.

It is therefore considered by the Court that the plaintiff, J. C. Mountcastle, do have and recover of the defendant, Edward W. Rushton, Jr., the sum of $25,000.00 with interest thereon from the 22nd day of December, 1959 until paid and all of his costs in this behalf expended.

Thereupon the defendant, by counsel, excepted to the action of the Court in overruling his motion to set aside the verdict of the jury and pronouncing judgment against him, and signifying his intention to apply to the Supreme Court of Appeals of the State of Virginia for a writ of error and *supersedeas* from the judgment of this Court, execution on the above judgment is suspended for a period of sixty (60) days from this date to enable the defendant to prepare and file his bills of exceptions, upon executing or causing to be executed a suspending and *supersedeas* bond in the penalty of $27,000.00 with corporate surety, approved by the Clerk of this Court within ten days from this date.

* * * * *

page 18 } INSTRUCTION NO. 1.

The Court instructs the Jury that under the law of Virginia every driver who intends to turn, or partly turn, from a direct line of travel, shall first see such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal of his intention to make such turn, plainly visible to the driver of such other vehicle, of his intention to make such movement; the Court, therefore, tells you that if you believe from a preponderance of the evidence that the Defendant Rushton

turned without warning from a direct line of traffic, and without first undertaking to ascertain that such movement could be made in safety, and failed to give such required signal of his intention to make such movement, and that the Plaintiff Mountcastle was at the time in the process of lawfully passing the line of traffic in which the Defendant was driving, and that as a direct, sole, and proximate result thereof, the Plaintiff, without fault on his part, was injured, then the Court tells you that if you do so believe you should find your verdict for the Plaintiff and assess his damages in accordance with the other instructions of the Court.

Given.

F. L. H.

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page 29 }

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OFFICER R. S. CASSELL,

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

DIRECT EXAMINATION.

By Mr. Young:

Q. Mr. Cassell, will you tell the Court what you know about this accident?

A. Mr. Moore and myself answered a call to Wakefield Road and Brandon Road on Sunday night, the 6th of April.

By the Court: (Interposing)

Q. Just for the record, Mr. Cassell, state your name and what your occupation is.

A. R. S. Cassell, motorcycle officer for the City of Roanoke, Traffic Department.

On our arrival there we found that Mr. Mountcastle had struck the back end of Mr. Rushton's car. Mr. Rushton was going east on Brandon. He had attempted to go around Mr. Rushton's car, and struck the back point of the car here (Indicating on pad of paper) which on the '56 DoSoto is an awfully sharp pointed thing there—which I think done most

of his damage on the back fender. It attempted
page 30 } to go between the curb and Mr. Rushton's car—
which he had nine feet, we measured from the car over to the curb. We found 30 foot of skid marks before he got to the car, and the skid marks is 12 feet from the curb, which puts him on his side of the street. And back from the car is 160 feet from Wakefield back.

By Mr. Young: (Continuing direct)

Q. Explain what you mean.

A. To the curb—this curve, where he came into the curve. At the time we couldn't get any speed—how fast Mr. Mountcastle was going—because he was in pretty bad shape time we got there. And of course this case is nearly two years old, and you can't always remember everything, from having so many other accidents to check. But I do know this: You would want to know about the weight of the motorcycle.

Q. Mr. Cassell, do you actually know where the Rushton car came to rest?

A. Well, he was just about right in here (Indicating on pad) figuring to make his turn—stopped right there.

Q. When you got there where was the Rushton car?

A. The Rushton car pulled down here. (Indicating on pad)

Q. It had been moved?

A. Yes, sir; had been pulled down there.

Q. Was it moved before you got there?
page 31 } A. I think it was moved.
Q. In other words, when you saw it, it was where?

A. Been moved down beside the curb here (Indicating on pad)

Q. Now, what was the condition of the road, as far as—

A. It was dry.

Q. Now, I hand you some photographs here. (Presenting to witness)

The Court: What time was it?

Q. 7:00 o'clock in the evening?

A. Yes, sir.

Q. Well, do you know whether there are any white lines?

A. (Indicating on photo) Double line here.

Q. Those lines there at the time?

A. He was on his side of those lines—Mr. Rushton was.

Officer R. S. Cassell.

Q. Now, let's go into your qualifications on motorcycles. Would you tell the Court and jury how long you have been riding?

A. For the City ever since 1938.

Q. You know what type of motorcycle he has?

A. Indian Chief.

Q. You know the approximate weight of it?

A. Well, I wouldn't know that—be lighter than page 32 } our police machines.

Q. How much are your police machines?

A. Around 1300 pounds.

Q. Approximately how much—

Mr. Hunter: We object to any testimony along that line, unless it's the same type of motorcycle—unless he's acquainted with this particular type. We do not want to get into speculation as to what the weight of one motorcycle is, and the distance—

The Court: You'll have to confine it to the machine involved in this accident.

Q. Have you driven more than one type of motorcycle?

A. Yes, sir.

Q. You have driven many types?

A. Indians, and everything.

Q. So you have driven the same type he had?

A. We had an Indian; it was a four-cylinder Indian. Whether it was an awful heavy machine—I believe it was a heavier machine.

Q. What I want to ask you about it this—the braking action of motorcycles in general, as compared to the braking action of automobiles—and would like for you to explain to the Court and jury what is the difference, if any, between the reaction of a motorcycle to the application of page 33 } brakes, as compared with an automobile.

Mr. Hunter: I object, your Honor. There's no question about the braking of an automobile in this case; and there's no comparison to be made between motorcycles and automobiles.

The Court: You will have to confine it to braking action of a motorcycle.

Q. Will you go ahead and tell us about the braking action of a motorcycle?

Officer R. S. Cassell.

A. If you put your handbrake on the same time you put your footbrake on, you'll stop quicker. If you put your brake on your back wheel a little bit sooner than you do your front wheel,*your* liable to skid. But the brake marks I found, they were straight on Mr. Mountcastle's motorcycle. You can't stop a motorcycle as quick as you can a car, counting the weight.

Q. Will a motorcycle skid and produce—could it produce 30 feet of skid marks if it's going at a speed of less than 25 miles an hour?

A. I don't think so—unless he only uses his back brake.

Q. If he only uses his back brake, he could do it?

A. Yes, sir. Of course, he could have a lighter machine.

page 34 } Q. What is the effect of a light machine on the application of the brakes and the skid marks—does that produce more skid marks?

A. Yes, sir.

Q. It does produce more?

A. Yes, sir.

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CROSS EXAMINATION.

By Mr. Hunter:

Q. Mr. Cassell, I believe you stated that you measured the distance from the scene of the accident back to the curve?

A. Yes, sir.

Q. And what was it?

A. 160 feet—that you could see around the curve.

Q. Now, I believe you stated you were experienced in the operation of motorcycles; and this particular type of motorcycle left skid marks of 30 feet, which would indicate a speed of what?

A. Well, now, he could make 30 feet of skid marks; he couldn't make it at 15, I don't believe; he would make it at 25 or 30 if he was on a heavy machine—depends on the weight of the man and the motorcycle.

Q. That would be the stopping distance?

Officer R. S. Cassell.

Q. That motorcycle didn't stop before it struck
page 38 } the car, did it?
A. No, sir.
Q. The car aided in stopping it?

Mr. Young: I object to whether it struck it and stopped.
The Court: You put him on as an expert witness. Overrule the objection.
Mr. Young: The point I make, Judge—this witness was not there at the scene. He couldn't know.
The Court: He couldn't talk about how far it skidded—except as an expert. He has a right to examine him.

Q. The skid marks, alone—or the braking of the motorcycle didn't stop it? It struck the rear of the car?
Q. Could you tell from the car and motorcycle—did you examine both?
A. Yes, sir.
Q. Was it just a tap, or was it quite a blow?
A. It was a real heavy blow.
Q. Now, I believe you said that those skid marks were straight?
A. Yes, sir.
Q. Could you tell from the skid marks, and where the accident, occurred, was there any debris or any-
page 39 } thing of that sort on the highway to show just where the collision took place?
A. (Indicating on pad) Right in here; yes, sir.
Q. Right near the corner?
A. Yes, sir.
Q. There was some debris?
A. Yes, sir.
Q. What side of the highway—or Brandon Road, was the scene of the accident, or the place of the accident?
A. That would be on the south side of Brandon.
Q. South side?
A. Yes, sir.
Q. Mr. Rushton's car—the best you could determine— it was on the south side?
A. Yes, sir.
Q. Did the debris, or other evidence there, show in what position Mr. Rushton's car, with respect to the center of the road, was?

Officer E. C. Moore.

A. No. It was over to the right side of the road.
Q. That's the side east—supposed to be going east?
A. Yes, sir.
Q. On his right-hand side?
A. Yes, sir.
Q. Was he over the center line of the highway—
page 40 } Mr. Rushton?
A. No, sir; his car never was.
Q. His car was not? Nothing to indicate he was on his left side of the highway?
A. No, sir.
Q. Of course, you don't know whether he was stopped at the time?
A. No, sir.
Q. And how far was it from the curb of Brandon Road—that's the south side of Brandon Road—to the debris in the highway?
A. I'd say about 9 foot.
Q. Nine feet?
A. Nine or ten feet.

RE-DIRECT EXAMINATION.

By Mr. Young:
Q. Do you know why Mr. Rushton's car was moved, or who moved it?
A. No, sir; I don't.

The witness stands aside.

OFFICER E. C. MOORE,
a witness of lawful age, called on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Young:
page 41 } Q. Mr. Moore, state your name and occupation.
A. E. C. Moore. I'm with the Traffic Bureau.
Q. Did you investigate the accident involving this case?
A. Yes, sir.
Q. Will you state whether or not you found any evidence of the Rushton vehicle having been moved after the accident?
A. Yes, sir; it was parked over at the curb.

Officer E. C. Moore.

Q. Moved away? Was it moved away from the scene of the impact?
A. Yes, sir.
Q. You know why it was moved?
A. No, I couldn't tell you.
Q. You know who moved it?
A. No, sir; I couldn't say.
Q. That's all.

CROSS EXAMINATION.

By Mr. Hunter:
Q. There's nothing unusual about moving a vehicle that's in the center of a traveled highway, before the police officers get there, is it?
A. No, sir.
Q. It would impede traffic, would it not?
A. They're not supposed to move it, but most
page 42 } of them do.
Q. Do you have any estimate of time, as to how long it was before you got to the accident after it happened?
A. No, sir.
Q. You don't have any record as to when the call came in?
A. We received the call at 7:07—that's all I know.
Q. 7:07?
A. Yes, sir.
Q. And you don't know how long it was between the time the accident happened and the call was made?
A. No, sir.
Q. And how long it would take you to get out there?
A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Young:
Q. You said they are not supposed to be moved. You know why they are not supposed to be moved, sir?
A. Well, usually if they sitting there in the street, you know where they were when the accident happened.
Q. That's all.

The witness stands aside.

MR. JAMES C. MOUNTCASTLE,
a witness of lawful age, called in his own behalf, being duly sworn, testified as follows:

page 43 } DIRECT EXAMINATION.

By Mr. Young:

Q. *Mt.* Mountcastle, will you state your name and age, please, sir?

A. James C. Mountcastle, age 34.

Q. Are you the party who's involved in this accident?

A. Yes, sir.

Q. Will you tell us what direction you were driving on that day of the accident?

A. I was traveling east on Brandon Road.

Q. And where had you gotten into Brandon Road?

A. I had turned off Grandin Road to Brandon Road.

Q. Would you go ahead and tell the Court and jury how the accident happened.

A. I was traveling east on Brandon, approaching Wakefield. I was riding next to the center white line, with the line of traffic on my right—extreme right. Just as I approached Wakefield, this car, without any signal or anything, pulled right over in front of me; and I applied my brakes—I pulled my motorcycle to the right and slammed on my brakes and tried to avoid the collision. And that's where I hit the right rear of his car.

Q. How far away would you say this car was that pulled over in front of you suddenly, as you say?

A. Approximately 30 or 40 feet.

Q. Now, later did you find out whose car it was?

page 44 } A. Yes, sir.

Q. Whose car was it?

A. Edwin W. Rushton.

Q. Who was operating it?

A. He was, sir. (Indicates defendant)

Q. Is he the party you saw?

A. Yes, sir.

Q. Now, you know what happened to you after that?

A. Well, when I came to myself a nurse was assisting me —or she said she was a nurse—trying to get someone to call the ambulance for me; and I was taken to the hospital.

Q. Did you do everything you could to avoid the accident?

A. I did.

Q. Now, do you know what brakes went on on your motorcycle?

A. I used—I only had time for my back wheel brake.

James C. Mountcastle.

Q. Do you have a front brake on your car?
A. Yes, sir; I do—it's worked by hand—it's a handbrake.
Q. Which is the easiest and quickest to get to?
A. The foot brake.
Q. Which did you put on?
A. The foot brake.
Q. What wheel does the foot brake operate?
page 45 } A. The rear wheel.
Q. Well, do you remember what happened to you next?
A. Yes. I was rushed to the hospital, and there they put pins through my legs, and put me in a cast.
Q. How long was that cast?
A. From my toes up to my chest (Indicates chest).
Q. All the way around your body?
A. Yes.
Q. How long were you in that cast?
A. I was in that cast three months—about three months.
Q. Then what happened to you?
A. Well, they took the cast off; and I was still bedfast for another month, and then they let me up gradually where I could roll myself around in a chair.
Q. How long were you pulling yourself around in a chair?
A. Of course, that was approximately three months—somewhere long there—before I could get on crutches.
Q. How long were you on crutches?
A. I was on crutches until September of this year.
Q. And until September when—this year?
A. '59.
Q. Have you been working any since the acci-
page 46 } dent?
A. No.
Q. Are you able to work?
A. Very light work.
Q. Are you able to do any lifting?
A. No lifting.
Q. Have you tried to get work?
A. I have tried different unemployment offices.
Q. Have you been to the Hire-the-Handicapped place?
A. I have been to the Vocational Center, and they tried to find me a job, and didn't have anything.
Q. Is your wife working?
A. Yes.
Q. What's her job?
A. Nurses' Aide at the Jefferson Hospital.

James C. Mountcastle.

Q. How fast were you going at the time?
A. 25.
Q. Now, how much money were you making prior to this accident?
A. I was making $40 a week—that was on the job I was working at the time; I was furloughed from it. And I was making approximately three seventeen a month on the railroad—I was furloughed. And I was working for Williams Window Co. in Salem at $40 a week.
Q. When were you furloughed?
page 47 } A. January, I believe it was—'58.
Q. What type of work were you doing for the railroad?
A. Helper, Car Repair.
Q. Describe some of the duties in that job.
A. Bucking rivets, feeding fires; and I was working on a crane feeding chains.
Q. Did you have to do lifting?
A. Yes.
Q. You have to lift heavy objects, or light objects?
A. Heavy.
Q. Are you able to do that work?
A. No.
Q. Well, how many times were you in the hospital?
A. I have been in five—four times.

* * * * *

page 50 } CROSS EXAMINATION.

By Mr. Fox, III:
Q. Mr. Mountcastle, to go over your testimony, you stated you were proceeding down Brandon Ave.; is that correct?
A. That's right.
Q. You were on the right-hand side of the white line?
A. Correct.
Q. How close were you to it?
A. Approximately 3 feet.
Q. Three feet from it? Go ahead and describe this accident from that point.
A. As I approached Wakefield this car on my right suddenly whipped over from the right-hand lane of traffic, in front of me, and applied his brakes.
Q. He applied his brakes?
A. That's right.

James C. Mountcastle.

Q. Did he skid?
A. I don't know.
Q. Then what did you do?
A. I immediately slapped on my brakes and threw my motorcycle to the right to try to avoid the collision.
Q. You hit him on the right-hand side of his car; is that correct?
A. That is correct.
page 51 } Q. How did that happen?
A. When I laid my motor over to the right to try to miss him, that's when—
Q. You had been passing cars, I believe you said?
A. I was on the left-hand of the line of traffic.
Q. Did you pass some cars?
A. That's right.
Q. You passed some cars?
A. That's correct.
Q. You skidded 30 feet, and still hit this car with enough force to do you damage and the car damage?
A. It doesn't take much on a motorcycle.
Q. You remember testifying in a previous matter concerning this same accident?
A. Yes; in Traffic Court.
Q. You remember what you said there, sir?
A. I don't know. What did you want? What's your question? I'll answer it.
Q. In Traffic Court did you not say that you suddenly saw a red light in front of you, and that's all you saw?
A. When he applied his brakes, the brake lights came on in my face.
Q. And now you say you saw Mr. Rushton's car cut in, out from the right-hand lane?
page 52 } A. I said he whipped over in front of me, and the brake lights come on in my face.
Q. You say you said that in Traffic Court?
A. If I didn't, I sure meant to.
Q. That's when you saw the car then?
A. I saw the line of cars on my right.
Q. But you saw his car? You say it whipped over in front of you?
A. That's right.
Q. Where was his car at the time you hit it?
A. On the extreme right of Brandon Road.
Q. His car was on the extreme right of Brandon Road?
A. When he was in the line of traffic.

James C. Mountcastle.

Q. When you hit him?
A. When he whipped out of the line of traffic over next to the white line.
Q. When you hit him, where was he?
A. He was over next to the white line.
Q. Next to the white line?
A. That's correct.
Q. Approximately 9 feet out from the curb, then?
A. Somewhere along there, I suppose.
Q. Plenty of room for you to get between the curb and the car then?
page 53 } A. It would have been if it hadn't been so sudden.
Q. Did you see the red lights?
A. I saw the taillights.
Q. You were following so close you couldn't stop when you saw his signal?
A. No, sir—about 30 to 40 feet.
Q. But you were following so close you couldn't stop, and you hit him?
A. It wasn't too close, no.
Q. You didn't stop, did you, sir?
A. It wasn't too close in that traffic.
Q. Is your motorcycle equipped with a speedometer?
A. Yes, sir.
Q. When did you last check it?
A. I had it checked. I hadn't checked it when we was on the road, or anything, with cars.
Q. When did you look at it coming down Brandon Road?
A. I had noticed it in the curve at Mount Vernon.
Q. And had you been passing cars coming down that stretch?
A. I was coming next to the white line, going straight through. The cars were on my right, and I was riding close to the white line attempting to go straight down Brandon, straight through. These cars were on my right. No one was racing, so I wasn't trying to pass them. I was—
page 54 } Q. But you did pass them?
A. I was passing some, yes.
Q. Now, these cars that you passed, did they hit Mr. Rushton's car?
A. No.
Q. Where did they go?
A. I suppose they stopped, or when I was thrown off they would have run over me.

James C. Mountcastle.

Q. They were able to stop, weren't they?
A. Sure.
Q. They were going about the same speed you were?
A. None stopped suddenly in front of me.
Q. Didn't Mr. Rushton stop suddenly in front of them, as he did in front of you?
A. He pulled out from in front of them over to the white line.
Q. Approximately what point did Mr. Rushton pull out to the white line? At approximately what point did he pull out?
A. It was just in the—almost into the intersection, before turning into Wakefield.
Q. How did he pull out? Did he make a gradual turn?
A. He came out in front of me at once.
Q. Now, you're familiar with cars, aren't you, page 55 } sir?
A. Yes, sir.
Q. It takes some distance to do that, doesn't it, sir?
A. It takes some distance; still, you can come out fast and make a turn.
Q. Now, you hit him on the right side?
A. That is correct.
Q. You state you were going 25 miles an hour. How can you say that so positively, sir?
A. Because it was a 25-mile zone there at the time.
Q. Now, let me ask you one more question. You say you were about 3 feet from the left line—3 feet from the center line?
A. Yes.
Q. Wouldn't it have been easier for you to go around to the left of Mr. Rushton's car than to have executed a turn to the right?
A. I would go across the white line into the oncoming traffic.
Q. Gone into oncoming traffic?
A. There had been—
Q. Did you see any oncoming traffic?
A. I saw some cars down there.
Q. Any at the time? Here you are right out here at the center line—why was it you didn't go around to the left side—the closest side?
page 56 } A. I couldn't cross a double white line into oncoming traffic.

Q. That's all.

The witness stands aside.

* * * * *

page 68 }

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OFFICER R. S. CASSELL,
having been previously sworn in this case, is recalled to the witness stand.

RE-DIRECT EXAMINATION.

By Mr. Young:
Q. Mr. Cassell, where this accident happened, will you please tell what type of general district it was?
A. Residential district. It's a park on one side of the street, and homes on the other.
Q. Do you know what the speed limit was?
A. 25 then. It's 35 now.
Q. That's all.

RE-CROSS EXAMINATION.

By Mr. Fox, III:
Q. Mr. Cassell, were there any marks behind the Rushton car—any skid marks?
A. No, sir.
Q. That's all.

The witness stands aside.

Mr. Young: The plaintiff rests.

page 69 } (Court and counsel met in chambers, and the following took place:)

Mr. Fox, III: We'd like to move at this time to strike the plaintiff's evidence on the following grounds: One, the plaintiff admitted on cross examination he was following too closely, thus being in violation of both statutory and other duties to stay a safe distance beyond the Rushton car.

Robert K. Walsh.

The Court: I didn't hear him say that. You tried to get him to say that. That was your contention.

Mr. Fox, III: I'll take it back, sir. I thought I heard him.

The physical facts show a large amount of skid marks behind the plaintiff's motorcycle, and none behind the Rushton car. The car was hit on the right-hand side—if, as was claimed, the Rushton car cut suddenly out, it would seem like the left-hand side of the car was the proper place. And further, the motorcyclist admitted he was passing cars on the outside. The highway is marked with two lanes—it's not a four-lane highway coming down that way on the outside of the cars—at the time just prior to the time this accident happened. He further admitted seeing the Rushton
page 70 } red light—his speed should have been such, under the law, that he could have stopped upon seeing that red light. As a matter of fact, he slid at least 30 feet, plus hitting the Rushton car with a great impact. That's it.

The Court: The motion is overruled, the Court being of the opinion at the present time it is a question for the jury to determine the negligence of the defendant, if any, and any contributory negligence on the part of the plaintiff, if any; and that it is not, at this stage of the trial, a question of law, in the Court's opinion. Of course, you say I'm wrong.

Mr. Hunter: Except to the ruling of the Court on the grounds stated.

(Court and counsel return to the courtroom, and the trial continues.)

MR. ROBERT K. WALSH,

a witness of lawful age, called on behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Fox, III:

Q. State your name, please, sir.

A. Robert K. Walsh.

Q. Where do you live?

page 71 } A. I live in Roanoke County.

Q. Now, Mr. Walsh, you have been listening to the evidence here?

A. Yes, sir.

Robert K. Walsh.

Q. Now, on the night of this accident were you in the vicinity of this accident?

A. Yes, sir; I was.

Q. Go ahead and tell the jury where you were, and what you saw.

A. I was driving my car, headed west on—I believe that's Brandon Road, the road on which the accident occurred; as I was driving west, and got to a point about 150 feet to the east of where the intersecting street with the "W" on it—I don't recall the name of the street—it's—

Q. Wakefield?

A. Wakefield; thats correct—I noticed Rushton's car headed east, and I noticed Mountcastle coming on his motorcycle behind the car.

Q. Now, where was the Rushton car?

A. The Rushton car was approximately a car-length or so to the west of Wakefield intersection.

Q. Was it out in the center of the road, or where was it?

page 72 } A. I would say it was about six to eight feet to the north of the curb line in his proper eastbound lane of travel.

Q. Would that be a proper lane to make a left turn from?

A. That's correct.

Q. Now, what speed would you say the Rushton car was making?

A. When I first observed it, it was either stopped, or going very slow; I couldn't be positive.

Q. Was it making any appreciable speed?

A. No, sir; it was not going at any appreciable speed.

Q. When you first saw this situation, how far back would you estimate Mr. Mountcastle's motorcycle to be?

A. Mr. Mountcastle's motorcycle was about a car-length behind the car when I first noticed it—this Mountcastle motorcycle.

Q. What was it doing?

A. It was coming up toward the rear of the Rushton car.

Q. Now, did you see the motorcycle attempt to swerve?

A. Yes, it appeared it was trying to swerve.

Q. Now, how long had you seen the Rushton car—for what distance had you observed it?

A. Just as I said—a distance of a car-length, or so, in movement.

page 73 } Q. Had you seen the car come around this curve—we talked about—on Brandon Road?

A. No.

Robert K. Walsh.

Q. When you saw it, it was on the straight-away?
A. It was.
Q. Going slowly, or stopped?
A. Going slowly, or stopped.
Q. Did you observe whether Mr. Rushton had his turn signal on, or not?
A. I couldn't say. He might have had it on, or not; I couldn't say.
Q. Were you under any particular impression about Mr. Rushton's car?
A. There was nothing unusual about the car that attracted my attention. I just happened to see it as I was approaching.
Q. Would you have noticed the Rushton car if it had stopped suddenly?
A. I think I would.

Mr. Young: I object to that.
The Court: What he did see—not what he might have seen.

Q. Did you see the car stop suddenly?
A. No, sir.
Q. Did you observe the skid marks after the accident?
A. I did.
page 74 } Q. Would you describe those to the Court?
A. The motorcycle laid skid marks leading up to the right rear of the Rushton automobile, and they measured approximately 30 feet long.
Q. Were any skid marks behind the Rushton car?
A. No, sir; there were not any skid marks.
Q. Would you be able to estimate the speed of the motorcycle?
A. I could not estimate the speed of the motorcycle.
Q. Could you say it was fast, or slow, or indeterminate?
A. I say its impossible for me to to estimate the speed—its indeterminate as far as my own opinion is concerned.
Q. That's all.

CROSS EXAMINATION.

By Mr. Young:
Q. As I understand you, you said when you first saw the Rushton car it was already over next to the center line of Brandon?
A. That's right.

Robert K. Walsh.

Q. And you don't know how long it had been over next to the center line, do you?

A. No, sir; I don't know how long he had been there.

Q. And how close was it to the center line?

A. I would say about three to four feet.

Q. Well, I don't think there is any other—What

page 75 } time of night was this?

A. It was approximately 7:00 o'clock.

Q. This was in April?

A. I believe that's right.

Q. April? When does it get dark in April—when did it get dark on that night?

A. I don't believe I can answer that question. I'm not familiar with the timetable of darkness in the month of April.

Q. Well, you remember the condition of that night that particular time?

A. I had my parking lights on. I felt that it was a period of dusk; it was not dark.

Q. All right. That's all.

RE-DIRECT EXAMINATION.

By Mr. Fox, III:

Q. Mr. Walsh, when you first saw the Rushton car, was it parallel to this center white strip?

A. Yes, sir; it was.

Q. Did you see any swerving by the Rushton car?

A. I did not.

Q. You say there was a distance of three to four feet from the white line to the Rushton car?

A. That's my recollection.

Q. Would there have been room for a motorcycle

page 76 } to get between the car and the white line?

A. It would have been a tight squeeze for one to have gone around the Rushton car.

Q. Would it have been possible, though?

A. To pass the Rushton car?

Q. Yes.

A. I don't know. I'd say it would be possible, but it would be very close quarters.

Q. Now, one other question—When you first saw this motorcycle, was it coming in a straight line, or over to the right?

A. It was coming in a straight line to—

Q. Toward the back of the Rushton car?

Edward W. Rushton, Jr.

A. Toward the back of the Rushton car.

Q. Was it a sharp swerve, or—

A. Sharp swerve to the motorcycle's right, as if attempting to move around the automobile.

Q. That's all.

The witness stands aside.

MR. EDWARD W. RUSHTON, JR.,
a witness of lawful age, called in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Fox, III:

Q. State your name, please, sir.

page 77 } A. Edward W. Rushton, Jr.

Q. And where do you live, Mr. Rushton?

A. I live at #1819 Warrington Rd., Southwest.

Q. You have heard the testimony here. Will you go ahead and just describe what you remember of that night. Let me ask you this: Where had you come on Brandon Road?

A. I had turned right onto Brandon from Grandin Road, at the intersection of Brandon and Grandin. I was proceeding in an easterly direction on Brandon, and just before reaching Wakefield Road, I had gotten over to my left side of my lane, approximately three feet, four feet, from the double center line. I was preparing to make a left turn into Wakefield. I noticed a rather heavy line of traffic coming toward me in an easterly direction, which necessitated my staying in my lane until the time I could make my turn. I had made a gradual stop, from 100 to 125 feet from Wakefield Road—from the west of Wakefield Road. I was, as I say, about three or four feet to the right, in the proper line of the center lane. I was parallel to the line. I was at a complete stop, and I heard this screeching noise behind me, and got an impact to my right rear. We were knocked forward for a few feet—I don't know how many—and then I got out of the car and saw Mr. Mountcastle on the right shoulder.

Q. Now, Mr. Rushton, before you started to pull to the left-hand side, did you check behind you in the road to

page 78 } make sure that there was no oncoming traffic?

A. I looked in my rear-view mirror and saw no one.

Q. Did you give a left-hand signal?

Edward W. Rushton, Jr.

A. I gave a signal with my mechanical blinker.

Q. How long do you estimate you'd been at a complete stop before this—

A. Somewhere between five and ten seconds.

Q. Answer Mr. Young's questions.

CROSS EXAMINATION.

By Mr. Young:

Q. Mr. Rushton, were you at the scene when the police officers got there?

A. Yes, sir.

Q. What had you done in the meantime—before they got there?

A. Well, what I did—I think you have brought it out—I moved my car over to the right, and then I got out and saw Mr. Mountcastle.

Q. Can you tell us why you moved the car?

A. Well, the traffic was particularly heavy—at least coming toward me—I wanted to get it out of the way so as not to impede traffic.

Q. Had you done something else, besides moving your car?

A. Had I?

page 79 } Q. Didn't you take somebody home?

A. You mean, after moving my car, before getting out?

Q. Um-hum.

A. No, sir; I didn't until the policeman came.

Q. Didn't you go to your home, and take a passenger home?

A. After the policeman came.

Q. After the policeman came?

A. Um-hum.

Q. Were you aware of the fact, at the time you moved your car, you're not supposed to move your car after accidents?

A. No, sir; I was not at the time.

Q. Did you testify down at the hearing in the Traffic Court on April 14, 1958, that your car had been knocked a considerable distance by the motorcycle?

A. I don't think we were in Traffic Court in April, 1958.

Q. Well, do you deny you made this statement in the Traffic Court on April 14, 1958, at 2:30 P. M.?

A. Would you read the statement?

Q. The statement I'm asking you about—if you made a

statement in the Traffic Court, saying your car had been knocked so many feet, or a certain distance?

A. I think I said it had been knocked a certain
page 80 } distance. I didn't say how far—I couldn't state it right now.

Q. And you don't remember, or don't know, particularly, about that, do you, at this time? You didn't take any measurements? You don't know?

A. No, sir.

Q. Did you see Mr. Mountcastle over there on the side of the road?—I believe you said?

A. That's correct.

Q. What was he doing?

A. Upon the advice of counsel, I have been instructed not to answer the question, because it's irrelevant and immaterial.

By the Court: (Interposing) Answer the question. I'm instructing you to answer it.

Q. Would you repeat.

By Mr. Young: (Continuing cross)

Q. If you saw Mr. Mountcastle immediately after the accident, what was he doing?

A. Well, he was lying down.

Q. What was his condition?

A. Upon the advice of counsel—

Mr. Hunter: Your Honor, this has nothing to do—

Mr. Young: I'll waive it.

The Court: This might be material.

page 81 } By the Court:

Q. Was he conscious, or unconscious?

A. He was conscious.

Mr. Fox, III: I'm afraid that the witness has become confused with the interrogatories that were propounded to him.

The Court: He must have been confused. I haven't instructed him that they are irrelevant and immaterial. He's supposed to answer the questions. If you want to counsel him again, we'll stop.

Mr. Young: I don't have any more questions.

The witness stands aside.

MISS SALLY RUSHTON,

a witness of lawful age, called on behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hunter:

Q. Please state your name?

A. Sally Rushton.

Q. Where do you live?

A. #1819 Warrington Road.

Q. Please state where you were at the time of the accident, which is the subject matter of this suit.

A. I was—

page 82 } Q. Were you an occupant of either one of the vehicles?

A. Yes, sir.

Q. Which vehicle were you an occupant in?

A. The one of my brother. I was on the right side of the car, front seat.

Q. So you were riding with the defendant on Brandon Road, were you not?

A. Yes, sir.

Q. Now, just go ahead in your own words and tell what transpired, or what did you observe just prior to the collision?

A. Well, we were going down Brandon Road, headed east —we were not going fast. We come to a complete stop. We were going to make a left turn.

Q. You had come to a complete stop?

A. Yes, sir.

Q. Can you give any estimate with regard to time, as to how long the vehicle in which you were riding had stopped prior to the collision?

A. Around ten or fifteen seconds.

Q. Beg pardon?

A. Around ten to fifteen seconds.

Q. So, if I understand you correctly, the automobile in which you were riding had come to a stop?

A. Yes, sir.

page 83 } Q. Did you hear anything behind you?

A. No, sir.

Q. Were you conscious of any blow when the car struck you?

A. Yes, sir.

Q. Will you describe the blow?

Sally Rushton.

A. The only thing I know was that something hit us from behind, and it knocked the car forward.
Q. The car in which you were riding?
A. Yes, sir.
Q. Did you get out of the car after the accident?
A. No, sir.
Q. That's all.

CROSS EXAMINATION.

By Mr. Young:
Q. You said the only thing you know, you were conscious of a blow—something hitting the car?
A. Yes, sir.
Q. And then you stayed in the car?
A. Yes, sir.
Q. And I believe you were taken home from the scene?
A. Yes, sir.
Q. By your brother?
A. That's right.
page 84 } Q. Right after the accident?
A. (Witness nods head).
Q. Did he drive you home in the car that was in the collision?
A. Yes, sir.
Q. Were you there when the police got there?
A. Yes, sir.
Q. You testified that your brother's car was stopped ten or fifteen seconds before it was hit by the motorcycle, and he testified it was five to eight seconds. Can you tell us why there is this difference? Can you explain that?
A. That's just my estimation.
Q. Your estimation is just a guess on your part?
A. Yes, sir.
Q. You didn't time it?
A. No, sir.
Q. As a matter of fact, you were going very slowly before you came to a stop, weren't you?
A. Yes, sir.
Q. You know exactly at what time, or place, you actually came to a complete stop?
A. No, sir; I don't.
Q. That's all.

The witness stands aside.

page 85 } Mr. Fox, III: Your Honor, we rest.

(The jury are sent to the jury room, after being admonished by the Court not to discuss the case among themselves).

(Court and counsel retire to chambers to consider Instructions.)

Mr. Hunter: We renew our motion that the evidence of the plaintiff be stricken, the plaintiff having failed to prove his case. There is no evidence of negligence on the part of the defendant. All the facts and circumstances show that this plaintiff was following too closely. And even though the plaintiff may have been guilty of some negligence—the defendant may have been guilty of some negligence, the plaintiff was certainly guilty of contributory negligence in following so closely prior to this accident.

The Court: I don't know what you mean by "following." The plaintiff says he was out in a passing lane when the defendant suddenly pulled out in front of him.

Mr. Fox, III: The facts show there is no passing lane on this street—that came out in the evidence.

The Court: It shows there's a double solid line in the particular street, and that—

Mr. Fox, III: The street is 36 feet wide.

page 86 } The Court: The plaintiff says he was going along, passing a line of cars—whether he could pass it, or not, nobody's introduced one way or the other.

Mr. Hunter: Under the statute, your Honor, there is quite a burden on a party following another automobile; he mustn't follow so closely he can't stop under reasonable circumstances.

The Court: He said he was out in a passing lane when the defendant pulled out in front of him. He wasn't following the defendant. Where is your evidence he was following the defendant?

Mr. Hunter: If he were passing, he'd be passing on his right, which he shouldn't have been doing.

The Court: He said he was out in the passing lane when the defendant pulled out in front of him, and he had to cut right to try to miss him.

Mr. Fox, III: I submit the street is 36 feet wide, which leaves 18 feet to a side.

The Court: There was a solid line in the middle of the street?

Mr. Hunter: The officers stated it was—there was a solid line in the middle of the street.

The Court: He may have been negligent in undertaking to pass anybody at that point.

page 87 } Mr. Hunter: Undoubtedly. That's the evidence of the two officers—that this solid line was in the middle of the street.

The Court: Well, I'll have to overrule the motion, being of the opinion still that it's a jury question as to whether the plaintiff was contributorily negligent or not.

Mr. Hunter: Except to your Honor's ruling on the grounds stated.

The Court: Ed, the only thing your man can possibly tie to is the fact that the defendant suddenly pulled out of a line of travel without giving a proper signal, and stopped, and that he was unable, in the exercise of reasonable care, to avoid hitting him—that's the whole case, if you've got any.

Mr. Young: (Indicating citation) This case says it was "suddenly"—that was the evidence.

The Court: That was the reversal of it.

Mr. Young: It was reversed on other grounds.

The Court: You read it. I think the instruction is all right.

Now, this business of the motorcycle passing—they are certainly entitled to an instruction on that, as to

page 88 } whether he was guilty of negligence in passing—and I'll admit he was almost guilty, as a matter of law, of passing at a point where he was going around a line of traffic.

Mr. Hunter: His testimony isn't that he was passing the motorcycle. He said he passed a number of other cars, and he had gotten around it.

Mr. Young: This car came out of the line of traffic from his right—that's what he said, Mr. Hunter.

The Court: I didn't understand him to say he had been following the Rushton car. He said he had already passed some cars, and was not following the Rushton car.

Mr. Hunter: No cars were between him and the Rushton car.

Mr. Young: When he pulled out.

The Court: I missed this evidence. He said he was passing, and he was in the left of this line of cars when the Rushton car suddenly whipped out in front of him. You all haven't shown that it was not proper to pass at this particular place. It may be the line was in the middle of the road, but somebody should have introduced evidence—if this is a fact—you're not supposed to pass any cars at that

page 89 } point. Apparently the defendant thought it was proper, because if he had a right to pull over to the

double white line and stop to make a turn, so the cars could go around to his right, then apparently the plaintiff would have a right to pass him before he pulled out; in other words, there'd be room for it.

Mr. Fox, III: He didn't say he went over for that reason. Of course the law requires you to go to the extreme left to make a turn.

The Court: If there was room for him to go to the extreme left, or the right.

Mr. Fox, III: I don't think there was any traffic—the motorcyclist testified there was none.

The Court: He said there was a line of cars to his right.

Mr. Fox, III: I think there's an interesting point. If there'd been a line of cars that failed to stop, or the Rushton car had gone around to his right—if this car suddenly came out, and if there was a long line of cars, either they would have hit the Rushton car right behind him—or the motorcyclist—and he was thrown in front of him—I think that's the circumstances there..

page 90 } The Court: That might be. But, as I said, the theory of the plaintiff's case is that he was on the left, passing a line of cars.

Mr. Hunter: Had passed.

The Court: Passing them. And when he was 30 or 40 feet away from the Rushton car, the Rushton car suddenly pulled out in front of him.

Mr. Fox, III: I submit that's not the facts as he puts them there.

The Court: What you submit? That's what the evidence is—I didn't testify to it—and that's what I'm going to submit the case on. That's what the evidence is. I didn't hear anything about any gap you say he said about it. You can ask the reporter to look again.

(At the request of Mr. Fox, the reporter read the direct examination of Mr. Mountcastle.)

Mr. Fox, III: I was mistaken about it.

The Court: I think you are.

Instruction #1 for the plaintiff.

#1—given.

Mr. Hunter: Defendant objects to the granting of In-

struction #1 on the following grounds: (1) The
page 91 } testimony does not bear out any intention on the
part of the plaintiff to pass defendant's car immediately prior to the accident. The evidence, taken as a whole of the plaintiff, shows that he was merely following the defendant's car, and had prior thereto passed other traffic on Brandon Road; (2) the Instruction, being a finding instruction, emphasizes unduly the plaintiff's case, and ignores setting forth the theory of the defendant's case.

Mr. Young: The Supreme Court, in *Cook* v. *Griggs,* said the plaintiff is entitled to an instruction on his theory, and the defendant is entitled to an instruction on his theory; and that the burden is not on the plaintiff to prove an absence of contributory negligence—that's what the defendant is claiming; the burden is on him to advance that as a theory and prove it, if he can. I submit the Instruction is proper.

Instruction "A" for the defendant.

Mr. Young: I object to it on the grounds that under *Cook* v. *Griggs* the plaintiff doesn't have to prove absence of contributory negligence, or sole proximate cause—the word "sole" being improper. Instruction "A" given.

Instruction "B" for the defendant.

page 92 } The Court: At this time, I don't know of any
evidence that he was following.

Mr. Hunter: If your Honor please, he was obliged to have been following him—he was behind him on the highway.

Mr. Fox, III: At the time this thing happened, Walsh states he sees them 18 to 20 feet apart, the motorcycle directly behind the car, and the car stopped.

Mr. Young: It was one car-length.

Mr. Hunter: He was following him.

Mr. Young: But I asked him, "Do you know when this man pulled out in front of the motorcycle?" I asked him, "Do you know how long he had been—the motorcycle—had been behind him?" He said, "No, I don't know. When I looked at it, it was one car."

The Court: Why don't you do this—there is a conflict in the evidence—say, "The Court instructs the jury if you believe from the evidence that the plaintiff was following the automobile driven by the defendant—"

Mr. Fox, III: Your Honor, there is one problem there—

two problems, really. The rest of that Instruction
page 93 } would apply, whether he was following, or whether
he was passing.

The Court: All I can say is that the plaintiff said he wasn't following at the time of the accident; your man said he was.

Mr. Fox, III: Whether the rest of the Instruction would apply, whether he was following or passing—I don't want to limit it.

Mr. Young: You have to prove it by the preponderance of the evidence.

The Court: If they believe Walsh, and that he was following him, this would be applicable. If they don't believe him—that's the jury point. But you have got to leave that question up to them as to whether he was or was not following. I think we can fix it—"The Court instructs the jury if you believe from the evidence the plaintiff was following the car of the defendant prior to the accident, that then it was the duty of the plaintiff while following," and so on. And the rest of it is all right.

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The Court: I couldn't figure, frankly, why someone didn't ask the officers if it was lawful to pass at that point.

Mr. Hunter: You wouldn't ask a question that way—that would be expressing an opinion of law. The point I'm making is this: No one has ever made it clear that man was attempting to pass anybody.

Mr. Young: He said he was passing a line of traffic.

Mr. Hunter: And he said he had passed the car behind.

The Court: I just never heard it before at all. That was the impression I had—he was running down the left of this line of cars when the car pulled out in front of him. You all can argue the case. If you want an instruction on passing at that point—

Mr. Fox, III: Here's one thing I think is important—Rushton was asked about the fact whether he heard anything
behind before the screeching of the wheels. Of
page 95 } course there is a duty, upon an overtaking motor-
cycle to sound a warning.

Mr. Young: But not in the residential district.

Mr. Fox, III: Business or residential district.

The Court: You put on there that it was a residential district.

The Court: Although you have rested, if either side wants to put one of the officers back on the stand and ask him if that's a point where you can pass, it's all right with me.

Mr. Hunter: Aren't you asking the police officer what the law is?

The Court: I'm going to ask him if, at that particular point where the accident occurred, passing is permissible.

Mr. Hunter: The law states what a double white line is.

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Mr. Hunter: Your Honor, we move that the verdict be set aside as contrary to the law and evidence, and especially on the grounds that the jury was misdirected—the page 97 } grounds having been stated when objections to the Instructions were made.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of the City of Roanoke, Virginia:

Counsel for Edward W. Rushton, Jr., the defendant in the above styled case in the Circuit Court of the City of Roanoke, Virginia, hereby gives notice of appeal from the order entered in this case on the 29th day of December, 1959, and sets forth the following assignments of error:

1. The Court erred in denying defendant's two motions to strike plaintiff's evidence.

2. The Court erred in granting plaintiff's instruction No. 1 over defendant's objections thereto.

3. The Court erred in denying defendant's motion to set aside the verdict of the jury.

HUNTER, FOX AND FOX
By C. E. HUNTER
Counsel for Defendant.

Received and filed Feb. 1, 1960.

LENA TESTERMAN, Deputy Clerk.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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