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Records Nos. 5265, 5266, 5267

In the
Supreme Court of Appeals of Virginia
at Richmond

CURTIS O. SIMMONS
v.
JOHN B. ADAMS, AN INFANT, ETC.

CURTIS O. SIMMONS
v.
CRESCENCE K. ADAMS

CURTIS O. SIMMONS
v.
MORTON ADAMS

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. 5265

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 22nd day of November, 1960.

CURTIS O. SIMMONS, Plaintiff in Error,

against

JOHN B. ADAMS, AN INFANT, ETC., Defendant in Error.

From the Circuit Court of the City of Roanoke

Upon the petition of Curtis O. Simmons a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Roanoke on the 20th day of May, 1960, in a certain motion for judgment then therein depending wherein John B. Adams, an infant, etc., was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of 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, no additional bond is required.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5266

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 22nd day of November, 1960.

CURTIS O. SIMMONS, Plaintiff in Error,

against

CRESCENCE K. ADAMS, Defendant in Error.

From the Circuit Court of the City of Roanoke

Upon the petition of Curtis O. Simmons a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Roanoke on the 20th day of May, 1960, in a certain motion for judgment then therein depending wherein Crescence K. Adams was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of twenty-five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5267

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 22nd day of November, 1960.

CURTIS O. SIMMONS, Plaintiff in Error,

against

MORTON ADAMS, Defendant in Error.

From the Circuit Court of the City of Roanoke

Upon the petition of Curtis O. Simmons a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Roanoke on the 20th day of May, 1960, in a certain motion for judgment then therein depending wherein Morton Adams was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of 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, no additional bond is required.

RECORD NO. 5265

CURTIS O. SIMMONS
v.
JOHN B. ADAMS, AN INFANT, ETC.

RECORD

Filed in the Clerk's Office the 11th day of February, 1960.

Teste:

W. H. CARR, Clerk
LENA TESTERMAN, D. C.

MOTION FOR JUDGMENT.
Action No. 613.

(1) That on, to-wit, January 5, 1959, at, to-wit, 9:30 o'clock A. M., and in the daytime thereof, and at all times herein mentioned, John B. Adams, an infant, of the age of, to-wit, 16 years, who sues by his father and next friend, Morton Adams, the plaintiff, was sitting in the rear seat of a 1957 Oldsmobile sedan motor vehicle, which was stopped on the west side of Williamson Road, a highway in the City of Roanoke, Virginia, headed south, in a line of traffic;

(2) That at the same time and place and under the circumstances aforesaid, Curtis O. Simmons, the defendant, was operating a 1947 Chevrolet pickup truck motor vehicle along Williamson Road in a southerly direction, when he negligently drove the 1947 Chevrolet pickup truck motor vehicle into the rear of the motor vehicle in which the plaintiff was seated and waiting in a line of traffic, thereby propelling the motor vehicle in which the plaintiff was seated into and against the motor vehicle which was stopped just ahead of plaintiff's motor vehicle;

(3) That at the same time and place and under the circumstances aforesaid, the defendant negligently failed to keep a reasonable and proper lookout; he negligently failed to operate the aforesaid motor vehicle in a careful and prudent manner so as to keep the same under proper control; he

negligently failed to operate the aforesaid motor
page 2 } vehicle at a reasonable and proper rate of speed
under the circumstances then and there existing; he negligently operated the aforesaid motor vehicle at an unlawful rate of speed in the business district where the collision occurred; he negligently failed to operate the aforesaid motor vehicle at such a speed and in such a manner so as to keep it under reasonable and proper control so as to be able to stop the same or turn aside to avoid striking the vehicle which was stopped in a line of traffic; and he negligently operated his truck motor vehicle with defective brakes;

(4) That by reason of the negligent acts of the defendant, Curtis O. Simmons, in the respect aforesaid, and each of them severally, and as a proximate result thereof, the plaintiff, John B. Adams, was thrown forward with great force, causing his head to whip backward and forward, thereby producing a whiplash injury to his cervical spine; all of his cervical vertebrae were damaged; the soft tissue, muscles, tendons and nerves were wrenched, twisted, sprained, shocked, disordered, torn and otherwise injured; an arthritic condition was caused to develop; the nerves which serve his shoulders, arms, back and legs have been injured and damaged, he has been caused to suffer headaches, numbness and the loss of ability to orient his position and to maintain his balance; he has been caused to suffer severe physical pain and mental anguish; his physical, nervous and skeletal systems were severely shocked, injured and disordered and have ever since remained and will likely and probably permanently so continue;

(5) That for proper medical treatment of his injuries, the plaintiff, John B. Adams, received x-rays; purchased medicines; incurred expenses for hospitals, doctors and nurses, all in the amount of, to-wit, $250.00; and in all probability, he will incur expenses for doctors and physiotherapy in the future in the sum of, to-wit, $350.00; and in all probability, he will be disabled permanently and his earning capacity reduced to his damage of, to-wit, $7,500.00; and he has suffered injuries and pain of mind and body to his damage of, to-wit, $6,900.00;

page 3 } WHEREFORE, the plaintiff, John B. Adams, an
infant who sues by his father and next friend, Morton Adams, moves the Court for judgment against the defendant in the sum of $15,000.00.

Dated at Lynchburg, Virginia, this the 10th day of February, 1960.

WM. ROSENBERGER, JR.
Attorney for Plaintiff
407 First Colony Life Bldg.,
Lynchburg, Va.

* * * * *

page 4 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the City of Roanoke.

Law No. 613.

John B. Adams, et al.

v.

Curtis O. Simmons, R. F. D. 1 Hollins, Virginia.

Returns shall be made hereon, showing service of Notice issued February 11, 1960, with copy of Motion for Judgement filed February 11, 1960, attached:

Executed on the ..... day of ....., in the County of Roanoke, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to ..... in person.

.....
Sheriff of Roanoke County,
Virginia
By ....., Deputy Sheriff.

Not finding Curtis O. Simmons at his usual place of abode, Rt. 1, Hollins, the above mentioned papers, attached to each other, were executed on the 18 day of Feb., 1960, in the County of Roanoke, Virginia, by delivering a true copy of same to Phyllis Simmons, his wife, whom I found at the usual place of abode, a member of his family above the age of

sixteen years, and by giving information of its purport to her.

H. W. CLARK
Sheriff, County of Roanoke, Va.
By D. E. .....

Returned and filed the 23rd day of February, 1960.

W. H. CARR, Clerk
By LENA TESTERMAN,
Deputy Clerk.

page 5 }

* * * * *

NOTICE OF MOTION FOR JUDGMENT.

To: #613

CURTIS O. SIMMONS
R. F. D. 1
Hollins, Virginia

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 11th day of February, 1960.

W. H. CARR, Clerk
By LENA TESTERMAN,
Deputy Clerk.

Wm. Rosenberger, Jr., p. q.
407 First Colony Life Bldg.
Lynchburg, Virginia.

page 6 }

* * * * *

GROUNDS OF DEFENSE.

For his grounds of defense the defendant, Curtis O. Simmons, comes and states:

(1) He did not violate any duty which he owed to the plaintiff.

(2) He was not guilty of any negligence which proximately contributed to the plaintiff's alleged injury.

(3) The defendant states that at the time in question he was operating his car in a proper and lawful manner when he had a sudden mechanical failure of his brakes which could not have previously been ascertained and which was not due to any negligence on the part of the defendant which sudden mechanical brake failure caused his automobile to strike the rear of the vehicle in which the plaintiff was riding.

(4) This defendant denies that plaintiff was injured as alleged. On the contrary he calls for strict proof of each and every item of damage.

(5) All allegations of the motion for judgment not admitted herein are expressly denied.

CURTIS O. SIMMONS
By Counsel.

WOODS, ROGERS, MUSE & WALKER
301-319 Boxley Building
Roanoke, Virginia

Attorneys for Defendant.

Received and filed Feb. 26, 1960.

LENA TESTERMAN, Deputy Clerk.

* * * * *

page 59 } OATH OF COURT REPORTER
(Required by Rule 1:10)

Virginia:

In the Circuit Court of the City of Roanoke, Virginia.

John B. Adams, an infant who sues by his father and next friend, Morton Adams,

v.

Curtis O. Simmons.

CASE NO. 613.

I, John H. Spangler, a Court Reporter, do solemnly swear that I will take down and transcribe the proceedings faithfully and accurately in the above styled case, to the best of my ability, and be subject to the control and discipline of the Court. So help me God.

JOHN H. SPANGLER.

Subscribed and sworn to before me this 20th day of May, 1960.

W. R. CARTER, JR.,
Deputy Clerk.

page 67 } We, the Jury, find for the Plaintiff, John B. Adams, an infant, who sues by his Father and next friend, Morton Adams, against the Defendant, Curtis O. Simmons, and fix his damages in the amount of $5,000.00.

ELGIN E. ALTIZER, Foreman.

page 60 }

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page 69 }

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ORDER.

THIS DAY came the defendant, Curtis O. Simmons, by counsel, and indicated to the Court his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the action of the court herein, and upon motion of the defendant for the suspension of the execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the

defendant's petition for writ of error, or, if a writ of error be granted by the Supreme Court of Appeals of Virginia, until an opinion is rendered by that court, it is hereby ADJUDGED and ORDERED that, if defendant duly files his petition for writ of error in accordance with the Rules of the Supreme Court of Appeals of Virginia within four months from the date judgment was entered, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon said petition; and, if a writ of error be granted in this case, it is ADJUDGED and ORDERED that execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia. The suspending of this judgment is conditional upon the defendant, or some person or persons in his behalf, entering into bond, with surety before the Clerk of this Court within fifteen (15) days from this date in the amount of $7,000.00 conditioned according to law.

Enter this 9 day of June, 1960.

F. L. HOBACK, Judge.

* * * * *

page 70 } $7,000.00

Know all Men by These Presents, That we, William B. Poff for and on behalf of Curtis O. Simmons and Fidelity and Deposit Company of Maryland are held and firmly bound unto the COMMONWEALTH OF VIRGINIA, in the just and full sum of seven thousand DOLLARS; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. And, as to this bond, we hereby severally waive our Homestead Exemption and any claim, right, or privilege to discharge any liability arising thereunder, or by virtue of said office or trust for which said bond is given with coupons detached from bonds of this State. Sealed with our seals, and dated this 15th day of June, in the year one thousand, nine hundred and sixty.

The Condition of the above Obligation is such, That, whereas, the above bound Curtis O. Simmons has been granted suspension of execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for writ of error, or, if a writ of error be granted by the Supreme Court of Appeals of Vir-

ginia, until an opinion is rendered by that court upon executing or causing to be executed a suspending and *supersedeas* bond by order entered on June 9, 1960 in the case of John B. Adams, an infant who sues by his father and next friend, Morton Adams *v.* Curtis O. Simmons by the Circuit Court of the City of Roanoke, Virginia.

Now, if the said Curtis O. Simmons shall well and truly pay all such damages that may accrue to any person by reason of said suspension and if a *supersedeas* be awarded, to perform and satisfy the judgment in case the said judgment be affirmed or the appeal, writ of error or *supersedeas* be dismissed and to pay all damages, costs and fees which may be awarded against or incurred by the appellant in the appellate Court and all actual damages incurred in consequence of the *supersedeas* then the above obligation is to be void, else to remain in full force and virtue.

WILLIAM B. POFF (Seal)
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
(Seal)
By HAROLD N. HOBACK (Seal)
Attorney-in Fact.

In the Circuit Court for the City of Roanoke, on the 15th day of June, 1960; the foregoing bond being signed, sealed and acknowledged by William B. Poff for and on behalf of Curtis O. Simmons together with his security, to-wit:

Fidelity and Deposit Company of Maryland by Harold N. Hoback, Attorney-in-fact, who made oath to their sufficiency, the obligors therein, was ordered to be recorded.

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page 71 }

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RECORD NO. 5266

CURTIS O. SIMMONS
v.
CRESCENCE K. ADAMS

RECORD

Filed in the Clerk's Office the 11th day of February, 1960.

Teste:

W. H. CARR, Clerk
LENA TESTERMAN, D. C.

MOTION FOR JUDGMENT
Action No. 614.

(1) That on, to-wit, January 5, 1959, at, to-wit, 9:30 o'clock A. M., and in the daytime thereof, and at all times herein mentioned, Crescence K. Adams, the plaintiff, was sitting in the right front seat of a 1957 Oldsmobile sedan motor vehicle, which was stopped on the west side of Williamson Road, a highway in the City of Roanoke, Virginia, headed south, in a line of traffic;

(2) That at the same time and place and under the circumstances aforesaid, Curtis O. Simmons, the defendant, was operating a 1947 Chevrolet pickup truck motor vehicle along Williamson Road in a southerly direction, when he negligently drove the 1947 Chevrolet pickup truck motor vehicle into the rear of the motor vehicle in which the plaintiff was seated and waiting in a line of traffic, thereby propelling the motor vehicle in which the plaintiff was seated into and against the motor vehicle which was stopped just ahead of plaintiff's motor vehicle;

(3) That at the same time and place and under the circumstances aforesaid, the defendant negligently failed to keep a reasonable and proper lookout; he negligently failed to operate the aforesaid motor vehicle in a careful and prudent manner so as to keep the same under proper control; he negligently failed to operate the aforesaid motor vehicle at

a reasonable and proper rate of speed under the circumstances then and there existing; he negligently operated the aforesaid motor vehicle at an unlawful rate of speed
page 2 } in the business district where the collision occurred; he negligently failed to operate the aforesaid motor vehicle at such a speed and in such a manner so as to keep it under reasonable and proper control so as to be able to stop the same or turn aside to avoid striking the vehicle which was stopped in a line of traffic; and he negligently operated his truck motor vehicle with defective brakes;

(4) That by reason of the negligent acts of the defendant, Curtis O. Simmons, in the respects aforesaid, and each of them severally, and as a proximate result thereof, the plaintiff, Crescence K. Adams, was thrown forward with great force, causing her head to whip backward and forward, thereby producing a whiplash injury to her cervical spine; all of her cervical vertebrae were damaged; the soft tissue, muscles, tendons and nerves were wrenched, twisted, sprained, shocked, disordered, torn and otherwise injured; an arthritic condition was caused to develop, or a previously existing dormant arthritic condition was caused to flare up or to be activated; the nerves which serve her shoulders, arms, back and legs have been injured and damaged, she has been caused to suffer headaches, numbness and the loss of ability to orient her position and to maintain her balance; she has been caused to suffer severe physical pain and mental anguish, her physical, nervous and skeletal systems were severely shocked, injured and disordered and have ever since remained and will likly and probably permanently so continue;

(5) That for proper medical treatment of her injuries, the plaintiff, Crescence K. Adams, received x-rays; purchased medicines; incurred expenses for hospitals, doctors and nurses, all in the amount of, to-wit, $425.00; and in all probability, she will incur expenses for doctors and physiotherapy in the future in the sum of, to-wit, $500.00; and in all probability, she will be disabled permanently and her earning capacity reduced to her damage of, to-wit, $6,250.00; and she has suffered injuries and pain of mind and body to her damage of, to-wit, $7,825.00;

WHEREFORE, the plaintiff, Crescence K.
page 3 } Adams, moves the Court for judgment against the defendant in the sum of $15,000.00.

Dated at Lynchburg, Virginia, this the 10th day of February, 1960.

WM. ROSENBERGER, JR.
Attorney for Plaintiff
407 First Colony Life Bldg.
Lynchburg, Va.

* * * * *

page 4 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the City of Roanoke Law No. 614.

Crescence K. Adams,

v.

Curtis O. Simmons, R. F. D. 1, Hollins, Virginia.

Returns shall be made hereon, showing service of Notice issued February 11, 1960, with copy of Motion for Judgement filed February 11, 1960, attached:

Executed on the ..... day of ....., in the County of Roanoke, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to..... in person.

.....
Sheriff of Roanoke County,
Virginia
By ....., Deputy Sheriff.

Not finding Curtis O. Simmons at his usual place of abode, Rt. 1 Hollins, the above mentioned papers attached to each other, were executed on the 18 day of Feb., 1960, in the County of Roanoke, Virginia, by delivering a true copy of same to Phyllis Simmons his wife, whom I found at the usual place of abode, a member of his family above the age of sixteen years, and by giving information of its purport to her.

H. W. CLARK
Sheriff, County of Roanoke, Va.
By D. E. ....., Deputy Sheriff.

Returned and filed the 23rd day of February, 1960.

W. H. CARR
By LENA TESTERMAN,
Deputy Clerk.

page 5 }

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NOTICE OF MOTION FOR JUDGMENT.

To: #614

Curtis O. Simmons
R. F. D. 1
Hollins, Virginia.

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 11th day of February, 1960.

W. H. CARR, Clerk
By LENA TESTERMAN,
Deputy Clerk.

Wm. Rosenberger, Jr., p. q.
407 First Colony Life Bldg.
Lynchburg, Virginia.
(Office Address)

page 6 }

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GROUNDS OF DEFENSE.

For his grounds of defense the defendant, Curtis O. Simmons, comes and states:

(1) He did not violate any duty which he owed to the plaintiff.

(2) He was not guilty of any negligence which proximately contributed to the plaintiff's alleged injury.

(3) The defendant states that at the time in question he was operating his car in a proper and lawful manner when he had a sudden mechanical failure of his brakes which could not have previously been ascertained and which was not due to any negligence on the part of the defendant, which sudden mechanical brake failure caused his automobile to strike the rear of the vehicle in which the plaintiff was riding.

(4) This defendant denies that plaintiff was injured as alleged. On the contrary he calls for strict proof of each and every item of damage.

(5) All allegations of the motion for judgment not admitted herein are expressly denied.

CURTIS O. SIMMONS
By Counsel.

WOODS, ROGERS, MUSE & WALKER
301-319 Boxley Building
Roanoke, Virginia

Attorneys for Defendant.

Received and filed Feb. 26, 1960.

LENA TESTERMAN, Deputy Clerk.

* * * * *

page 8 } OATH OF COURT REPORTER.
(Required by Rule 1:10)

Virginia:

In the Circuit Court of the City of Roanoke, Virginia.

Crescence K. Adams,

v.

Curtis O. Simmons.

CASE NO. 614.

I, John H. Spangler, a Court Reporter, do solemnly swear that I will take down and transcribe the proceedings faithfully and accurately in the above styled case, to the best of my ability, and be subject to the control and discipline of the Court. So help me God.

JOHN H. SPANGLER.

Subscribed and sworn to before me this 20th day of May, 1960.

W. R. CARTER, JR., Deputy Clerk.

page 9 }

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page 10 } We, the Jury, find for the Plaintiff, Crescence K. Adams, against the Defendant, Curtis O. Simmons, and fix her damages in the amount of $1,600.00.

ELGIN E. ALTIZER, Foreman.

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page 13 }

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ORDER.

THIS DAY came the defendant, Curtis O. Simmons, by counsel, and indicated to the Court his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the action of the court herein, and upon motion of the defendant for the suspension of the execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for writ of error, or, if a writ of error be granted by the Supreme Court of Appeals of Virginia, until an opinion is rendered by that court, it is hereby ADJUDGED and ORDERED that, if defendant duly files his petition for writ

of error in accordance with the Rules of the Supreme Court of Appeals of Virginia within four months from the date judgment was entered, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon said petition; and, if a writ of error be granted in this case, it is ADJUDGED and ORDERED that execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia. The suspending of this judgment is conditional upon the defendant, or some person or persons in his behalf, entering into bond, with surety before the Clerk of this Court within fifteen (15) days from this date in the amount of $2,500.00 conditioned according to law.

Enter this 9th day of June, 1960.

F. L. HOBACK, Judge.

* * * * *

page 14 } $2,500.00.

Know all Men by These Presents, That we, William B. Poff for and on behalf of Curtis O. Simmons and Fidelity and Deposit Company of Maryland are held and firmly bound unto the COMMONWEALTH OF VIRGINIA, in the just and full sum of two thousand five hundred DOLLARS; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. And, as to this bond, we hereby severally waive our Homestead Exemption and any claim, right, or privilege to discharge any liability arising thereunder, or by virtue of said office or trust for which said bond is given with coupons detached from bonds of this State. Sealed with our seals, and dated this 15th day of June, in the year one thousand, nine hundred and sixty.

The Condition of the above Obligation is such, That, whereas, the above bound Curtis O. Simmons has been granted suspension of execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for writ of error, or, if a writ of error be granted by the Supreme Court of Appeals of Virginia, until an opinion is rendered by that Court upon executing or causing to be executed a suspending and *supersedeas* bond by order entered on June 9, 1960, in the case of

Crescence K. Adams *v.* Curtis O. Simmons by the Circuit Court of the City of Roanoke, Virginia.

Now, if the said Curtis O. Simmons shall well and truly pay all such damages that may accrue to any person by reason of said suspension and if a *supersedeas* be awarded, to perform and satisfy the judgment in case the said judgment be affirmed, or the appeal, writ of error or *supersedeas* be dismissed and to pay all damages, costs and fees which may be awarded against or incurred by the appellant in the appellate court and all actual damages incurred in consequence of the *supersedeas,* then the above obligation is to be void, else to remain in full force and virtue.

WILLIAM B. POFF (Seal)
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
(Seal)
By HAROLD N. HOBACK (Seal)
Attorney-in-Fact.

In the Circuit Court for the City of Roanoke, on the 15th day of June, 1960; the foregoing bond being signed, sealed and acknowledged by William B. Poff for and on behalf of Curtis O. Simmons together with his security, to-wit: Fidelity and Deposit Company of Maryland by Harold N. Hoback, Attorney-in-Fact, who made oath to their sufficiency, the obligors therein, was ordered to be recorded.

* * * * *

RECORD NO. 5267

CURTIS O. SIMMONS
v.
MORTON ADAMS

RECORD

Filed in the Clerk's Office the 11th day of February, 1960.

Teste:

W. H. CARR, Clerk
LENA TESTERMAN, D. C.

MOTION FOR JUDGMENT.
Action No. 615.

(1) That on, to-wit, January 5, 1959, at, to-wit, 9:30 o'clock A. M., and in the daytime thereof, and at all times herein mentioned, Morton Adams, the plaintiff, was sitting in the driver's seat of a 1957 Oldsmobile sedan motor vehicle which was stopped on the west side of Williamson Road, a highway in the City of Roanoke, Virginia, headed south, in a line of traffic;

(2) That at the same time and place and under the circumstances aforesaid, Curtis O. Simmons, the defendant, was operating a 1947 Chevrolet truck motor vehicle along Williamson Road in a southerly direction, when he negligently drove the 1947 Chevrolet truck motor vehicle into the rear of the motor vehicle in which the plaintiff was seated and waiting in the line of traffic, thereby propelling the plaintiff's motor vehicle forward into the motor vehicle in front of him;

(3) That at the same time and place and under the circumstances aforesaid, the defendant negligently failed to keep a reasonable and proper lookout; he negligently failed to operate the aforesaid motor vehicle in a careful and prudent manner so as to keep the same under proper control; he negligently failed to operate the aforesaid motor vehicle at a reasonable and proper rate of speed under the circumstances then and there existing; he negligently operated the aforesaid motor vhicle at an unlawful rate of speed in the business

district where the collision occurred; he negligently
page 2 } failed to operate the aforesaid motor vehicle at such
a speed and in such a manner so as to keep it under reasonable and proper control so as to be able to stop the same or turn aside to avoid striking the vehicle which was stopped in a line of traffic; and he negligently operated the 1947 Chevrolet truck motor vehicle with defective brakes;

(4) That by reason of the negligent acts of the defendant, Curtis O. Simmons, in the respects aforesaid, and each of them severally, and as a proximate result thereof, the plaintiff was thrown with great violence against the interior of the motor vehicle occupied by him, which caused him to sustain a whiplash injury to the cervical spine; he received contusions, blows, bruises and sprains and his body was wrenched, twisted, sprained and torn; his physical and nervous system was shocked, injured and disordered and has ever since remained and will likely and probably permanently so continue;

(5) That for proper medical treatment of his aforesaid injuries, which were proximately caused by the negligence of the defendant, in the respects aforesaid, and each of them severally, the plaintiff has engaged the services of physicians and purchased medicines; it is necessary that he wear a cast on his neck; his ability to work has been impaired and in all probability will be permanently impaired and he has suffered injuries and pain of mind and body.

(6) That by reason of the negligent acts of the defendant, Curtis O. Simmons, in the respects aforesaid and each of them severally, and as a proximate result thereof, the 1957 Oldsmobile sedan motor vehicle of the plaintiff was damaged in the body, frame, fenders and doors to his damage of, to-wit, $1,700.00; he incurred expenses for automobile rental and transportation in the sum of, to-wit, $250.00;

WHEREFORE, the plaintiff moves the Court for judgment against the defendant in the sum of $15,000.00.

page 3 } Dated at Lynchburg, Virginia, this the 10th day of February, 1960.

WM. ROSENBERGER, JR.
Attorney for the Plaintiff
407 Krise Building,
Lynchburg, Virginia.

* * * * *

page 4 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the City of Roanoke Law No. 615.

Morton Adams,

v.

Curtis O. Simmons, Route 1, Hollins, Virginia.

Returns shall be made hereon, showing service of Notice issued February 11, 1960, with copy of Motion for Judgement ..... filed February 11, 1960, attached:

Executed on the ..... day of ....., in the County of Roanoke, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to ..... in person.

.....
Sheriff of Roanoke County,
Virginia
By ....., Deputy Sheriff.

Not finding Curtis O. Simmons at his usual place of abode, Rt. 1, Hollins, the above mentioned papers attached to each other, were executed on the 18th day of Feb., 1960, in the County of Roanoke, Virginia, by delivering a true copy of same to Phyllis Simmons his wife, whom I found at the usual place of abode, a member of his family above the age of sixteen years, and by giving information of its purport to her.

H. W. CLARK
Sheriff, County of Roanoke, Va.
By D. E. ....., Deputy Sheriff.

Returned and filed the 23rd day of February, 1960.

W. H. CARR, Clerk
By LENA TESTERMAN,
Deputy Clerk.

page 5 }

* * * * *

NOTICE OF MOTION FOR JUDGMENT.

To: #615

Curtis O. Simmons
Route 1,
Hollins, Virginia.

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 11th day of February, 1960.

W. H. CARR, Clerk
By LENA TESTERMAN,
Deputy Clerk.

Wm. Rosenberger, Jr., p. q.
407 Krise Building
Lynchburg, Virginia.
(Office Address)

page 6 }

* * * * *

GROUNDS OF DEFENSE.

For his grounds of defense the defendant, Curtis O. Simmons, comes and states:

(1) He did not violate any duty which he owed to the plaintiff.

(2) He was not guilty of any negligence which proximately contributed to the plaintiff's alleged injury.

(3) The defendant states that at the time in question he was operating his car in a lawful and proper manner when he had a sudden mechanical failure of his brakes, which could not have previously been ascertained and which was not due to any negligence on the part of the defendant, which sudden mechanical brake failure caused his automobile to strike the rear of the plaintiff's vehicle.

(4) This defendant denies that the plaintiff was injured as alleged. On the contrary he calls for strict proof of each and every item of damage.

(5) All allegations of the motion for judgment not admitted herein are expressly denied.

CURTIS O. SIMMONS
By Counsel.

WOODS, ROGERS, MUSE & WALKER
301-319 Boxley Building
Roanoke, Virginia

Attorneys for Defendant.

Received and filed Feb. 26, 1960.

LENA TESTERMAN, Deputy Clerk.

* * * * *

page 8 } OATH OF COURT REPORTER
(Required by Rule 1:10)

Virginia:

In the Circuit Court of the City of Roanoke, Virginia.

Morton Adams,

v.

Curtis O. Simmons.

CASE NO. 615.

I, John H. Spangler, a Court Reporter, do solemnly swear that I will take down and transcribe the proceedings faithfully and accurately in the above styled case, to the best of my ability, and be subject to the control and discipline of the Court. So help me God.

JOHN H. SPANGLER.

Subscribed and sworn to before me this 20th day of May, 1960.

W. R. CARTER, JR., Deputy Clerk.

page 9 }

* * * * *

page 10 } We, the Jury, find for the Plaintiff, Morton Adams, against the Defendant, Curtis O. Simmons, and fix his damages in the amount of $5,000.00.

ELGIN E. ALTIZER, Foreman.

* * * * *

page 13 }

* * * * *

ORDER.

THIS DAY came the defendant, Curtis O. Simmons, by counsel, and indicated to the Court his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the action of the Court herein, and upon motion of the defendant for the suspension of the execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for writ of error, or, if a writ of error be granted by the Supreme Court of Appeals of Virginia, until an opinion is rendered by that court, it is hereby ADJUDGED and ORDERED that, if defendant duly files his petition for writ of error in accordance with the Rules of the Supreme Court of Appeals of Virginia within four months from the date judgment was entered, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon said petition; and, if a writ of error be granted in this case, it is ADJUDGED and ORDERED that execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia. The suspending of this judgment is conditional upon the defendant, or some person or persons in his behalf, entering into bond, with surety before the Clerk of this Court within fifteen (15) days from this date in the amount of $7,000.00 conditioned according to law.

Enter this 9th day of June, 1960.

F. L. HOBACK, Judge.

* * * * *

page 14 } $7,000.00.

Know all Men by These Presents, That we, William B. Poff for and on behalf of Curtis O. Simmons and Fidelity and Deposit Company of Maryland are held and firmly bound unto the COMMONWEALTH OF VIRGINIA, in the just and full sum of seven thousand DOLLARS; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. And, as to this bond, we hereby severally waive our Homestead Exemption and any claim, right, or privilege to discharge any liability arising thereunder, or by virtue of said office or trust for which said bond is given with coupons detached from bonds of this State. Sealed with our seals, and dated this 15th day of June, in the year one thousand, nine hundred and sixty.

The Condition of the above Obligation is such, That, whereas, the above bound Curtis O. Simmons has been granted suspension of execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for writ of error, or, if a writ of error be granted by the Supreme Court of Appeals of Virginia, until an opinion is rendered by that Court upon executing or causing to be executed a suspending and *supersedeas* bond by order entered on June 9, 1960, in the case of Morton Adams *v.* Curtis O. Simmons by the Circuit Court of the City of Roanoke, Virginia.

Now, if the said Curtis O. Simmons shall well and truly pay all such damages that may accrue to any person by reason of said suspension and if a *supersedeas* be awarded, to perform and satisfy the judgment in case the said judgment be affirmed, or the appeal, writ of error or *supersedeas* be dismissed and to pay all damages, costs and fees which may be awarded against or incurred by the appellant in the appellate Court and all actual damages incurred in consequence of the *supersedeas* then the above obligation is to be void, else to remain in full force and virtue.

WILLIAM B. POFF (Seal)
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
(Seal)
By HAROLD N. HOBACK (Seal)
Attorney-in-Fact.

In the Circuit Court for the City of Roanoke, on the 15th day of June, 1960; the foregoing bond being signed, sealed and acknowledged by William B. Poff for and on behalf of Curtis O. Simmons together with his security, to-wit: The Fidelity and Deposit Company of Maryland, by Harold N. Hoback, Attorney-in-Fact, who made oath to their sufficiency, the obligors therein, was ordered to be recorded.

* * * * *

RECORDS NOS. 5265, 5266, 5267

ORDER.

This day came the parties, John B. Adams, an infant, who sues by his father and next friend, Morton Adams, and Crescence R. Adams and Morton Adams, the parties Plaintiff in the three actions pending in this Court against Curtis O. Simmons; and by consent of all parties by Counsel, it is ORDERED that the three actions be consolidated and tried together, and the questions of liability and damages submitted to the same Jury.

Enter May 20, 1960.

F. L. HOBACK, Judge.

* * * * *

page 61 } INSTRUCTION NO. 1.

The Court instructs the Jury that the Defendant, Curtis O. Simmons, was guilty of negligence as a matter of law which proximately caused the accident in question, and that the Plaintiffs, John B. Adams, an infant, who sues by his father and next friend, Morton Adams, and Crescence K. Adams, and Morton Adams, were free from negligence as a matter of law, and, therefore, as a matter of law, are entitled to recover from the Defendent.

Given.

F. L. H.

page 62 } INSTRUCTION NO. 2.

The Court instructs the Jury that it is their duty to determine the amount of damages to be awarded John Adams and in determining the same, they should fix the amount at such sum as to them seems a fair and just compensation for the injuries and resulting damages sustained by him as the proximate cause of the collision of the vehicles, but not to exceed the amount sued for, $15,000.00, and in arriving at the amount of damages, they may take into consideration any of the following items or elements of damage that the pre-

ponderance of the evidence may show was suffered by John Adams as the proximate result of the collision sued for:

(1) Any bodily injury, or disability, the extent and character thereof;
(2) Any physical pain, suffering and mental anguish that he has already been caused to suffer and endure or that he will likely and probably, with reasonable certainty, hereafter be caused to suffer;
(3) Any inconvenience and discomfort that he has already sustained or will likely and probably with reasonable certainty, hereafter sustain.

Given.

F. L. H.

page 63 } INSTRUCTION NO. 3.

The Court instructs the jury that it is their duty to determine the amount of damages to be awarded Morton Adams and in determining the same, they should fix the amount at such sum as to them seems a fair and just compensation for the injuries and resulting damages sustained by him as the proximate cause of the collision of the vehicles, but not to exceed the amount sued for, to-wit, $15,000.00, and in arriving at the amount of damages, they may take into consideration any of the following items or elements of damage that the preponderance of the evidence may show was suffered by Morton Adams as the proximate result of the collision sued for:

(1) Any bodily injury, or disability, the extent and character thereof;
(2) Any physical pain, suffering and mental anguish that he has already been caused to suffer and endure or that he will likely and probably, with reasonable certainty, hereafter be caused to suffer;
(3) Any expense incurred in a proper effort to be cured of his injuries, or to alleviate the effects thereof, and incurred as a proximate cause of the collision.
(4) Any inconvenience and discomfort that he has already sustained; and,

(5) The loss of value sustained as a result of the damage to the motor vehicle of Morton Adams.

Given.

F. L. H.

page 64 } INSTRUCTION NO. 4.

The Court instructs the jury that it is their duty to determine the amount of damages to be awarded Crescence K. Adams, and in determining the same, they should fix the amount at such sum as to them seems a fair and just compensation for the injuries and resulting damages sustained by her as the proximate cause of the collision of the vehicles, but not to exceed the amount sued for $15,000.00, and in arriving at the amount of damages, they may take into consideration any of the following items or elements of damage that the preponderance of the evidence may show was suffered by Crescence K. Adams as the proximate result of the collision sued for:

(1) Any bodily injury, or disability, the extent and character thereof;
(2) Any physical pain, suffering and mental anguish that she has already been caused to suffer and endure or that she will likely and probably, with reasonable certainty, hereafter be caused to suffer;
(3) Any inconvenience and discomfort that she has already sustained.

Given.

F. L. H.

page 65 } INSTRUCTION NO. 5.

The Court instructs the jury that damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is on the plaintiffs to prove by a preponderance of the evidence each item and element of damage claimed, and unless such item or element thus claimed is proven by a preponderance of the evidence, the plaintiffs cannot recover therefor.

And if you are uncertain as to whether any particular element of damage claimed was caused by the collision, or if it appears just as probable that any injury or element of

damage complained of resulted from a cause other than the collision as that it did, then the plaintiffs cannot recover therefor.

Given.

F. L. H.

page 66 } INSTRUCTION NO. 6.

The Court instructs the jury that the law recognizes that accidents may occur without negligence on the part of any party involved, and the persons may receive some injuries as a result thereof. Such accidents are known as unavoidable accidents.

Therefore the Court instructs you that if you believe from the evidence in this case that the plaintiff received some injury as a result of an unavoidable accident, that is, without negligence on the part of the defendant, then your verdict must be in favor of the defendant, Simmons.

Refused and exceptions.

F. L. H.

* * * * *

page 68 }

* * * * *

At a Circuit Court for the City of Roanoke, in the State of Virginia, at the Courthouse thereof, on the 20th day of May, 1960.

This day came the parties by their attorneys, and both sides announced ready for trial upon the pleadings heretofore filed, in which the plaintiffs joined.

Thereupon came a jury of thirteen (13) persons and the plaintiffs and defendant having each struck three of said jurors, the remaining seven (7) to-wit: Rodger L. Amole, Henry C. Manns, Andrew W. Tunnell, Jessie W. Swiney, Mrs. Lois S. Zook, Edward K. Jordan and Elgin E. Altizer were sworn to well and truly try the issue joined and having heard the evidence, received the instructions of the Court

and heard the argument of counsel retired to consider their verdicts and after some time returned the following verdicts, viz:

"We, the Jury, find for the Plaintiff, Crescence K. Adams, against the Defendant, Curtis O. Simmons, and fix her damages in the amount of $1,600.00.

ELGIN E. ALTIZER, Foreman."

"We, the Jury, find for the Plaintiff, Morton Adams, against the Defendant, Curtis O. Simmons, and fix his damages in the amount of $5,000.00.

ELGIN E. ALTIZER, Foreman."

"We, the Jury, find for the Plaintiff, John B. Adams, an infant, who sues by his Father and next friend, Morton Adams, against the Defendant, Curtis O. Simmons, and fix his damages in the amount of $5,000.00.

ELGIN E. ALTIZER, Foreman."

and the jury were discharged.

Thereupon the defendant, by counsel, moved the Court to set aside the verdicts of the jury on the grounds that the same were contrary to the law and the evidence and because of misdirection of the Court to the jury, which motion the Court overruled and the defendant, by counsel, excepted.

It is therefore considered by the Court that the plaintiff, Crescence K. Adams, do have and recover of the defendant, Curtis O. Simmons, the sum of $1,600.00 with interest thereon from the 20th day of May, 1960, until paid and all of her costs in this behalf expended.

It is therefore considered that the plaintiff, Morton Adams, to have and recover of the defendant, Curtis O. Simmons, the sum of $5,000.00 with interest thereon from the 20th day of May, 1960, until paid and all of his costs in this behalf expended.

It is therefore considered by the Court that the plaintiff, John B. Adams, an infant, who sues by his Father and next friend, Morton Adams, do have and recover of the defendant, Curtis O. Simmons, the sum of $5,000.00 with interest thereon from the 20th day of May, 1960 until paid and all of his costs in this behalf expended.

* * * * *

Received and filed July 8, 1960.

NANCY JONES, Deputy Clerk.

NOTICE OF TENDERING TRANSCRIPT.

To: Mr. William Rosenberger, Jr. Mr. Marshall E. Livingston, 407 First Colony Life Building, Lynchburg, Virginia.

You are hereby notified that on Friday, the 15th day of July, 1960, at 10:00 o'clock A. M., or as soon thereafter as he may be heard, the undersigned will present to the Honorable F. L. Hoback, Judge of the Circuit Court for the City of Roanoke, Virginia, a transcript of the evidence in these cases, pursuant to Rule 5:1, §3(f) of the Rules of Court, and re-
page 72 } quest that the same be certified as a true copy thereof and made part of the record for the purpose of an application for Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia from a judgment entered in these cases on the 20th day of May, 1960.

Respectfully,

CURTIS O. SIMMONS
By WILLIAM B. POFF
Of Counsel.

* * * * *

page 73 }

* * * * *

Received and filed July 8, 1960.

NANCY JONES, Deputy Clerk.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To: Mr. W. H. Carr, Clerk of the Circuit Court for the City of Roanoke, Virginia, and to Counsel of record for the plaintiff.

YOU ARE HEREBY NOTIFIED that the defendant, Curtis O. Simmons, does hereby file with the Clerk of the

Circuit Court for the City of Roanoke, Virginia, this his notice of appeal and assignment of error from the joint final order of the said Circuit Court for the City of Roanoke, Virginia, entered in the three above-styled causes on the 20th day of May, 1960.

The defendant assigns as error the following:

page 74 } (1) The action of the trial court in giving Instruction No. 1 which struck the defendant's evidence and submitted the case to the jury only on the question of damages.

(2) The action of the trial court in refusing to instruct the jury, or permit the jury to pass upon, the defendant's defense of unavoidable accident.

(3) The action of the trial court in giving Instructions No. 2, 3 and 4, which instructed and informed the jury of the amounts sued for by the plaintiffs, although there was no evidence in the case to support such figures.

(4) The action of the trial court in instructing the jury that they could return a verdict for the full amount sued for in each of these three cases although the plaintiffs' motions for judgment expressly enumerated the amount claimed for each alleged injury or item of damage and although there was no evidence introduced by the plaintiffs on many of the alleged injuries and items of damage to support a verdict.

(5) The action of the trial court in refusing to set aside the verdicts of the jury for Morton Adams and Crescence K. Adams on the grounds that such verdicts were excessive and contrary to the law and the evidence.

Respectfully,

CURTIS O. SIMMONS
By WILLIAM B. POFF
Of Counsel.

* * * * *

Officer J. D. Smith.

TRANSCRIPT OF TESTIMONY

RECORDS NOS. 5265, 5266, 5267

* * * * *

page 74-A }

* * * * *

The above-styled cause was tried before the Hon. F. L. Hoback, Judge of the Circuit Court for the City of Roanoke, Va., on the 20th day of May, 1960.

Appearances: Mr. William Rosenberger, Jr., Mr. Marshall E. Livingston, of counsel for plaintiffs.
Mr. John H. Thornton, Jr., Mr. William B. Poff, of counsel for defendant.

* * * * *

page 76 } (The Court prefaced its *voir dire* with the following information to the jury:)

The Court: By agreement of counsel, these three cases are being consolidated, and tried together.

page 77 } (A jury was empaneled and duly sworn).

(Opening statements were made to the jury by—Mr. Rosenberger for the plaintiffs, Mr. Thornton for the defendant).

OFFICER J. D. SMITH,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EAMINATION.

By Mr. Rosenberger:
Q. State your full name.
A. Jack Dempsey Smith.
Q. How long have you been in the Traffic Department of the City of Roanoke?
A. I have been with the Traffic Department three years.

Officer J. D. Smith.

Q. Did you have an occasion to investigate a collision on Williamson Road on January 5, 1959?

A. Yes, sir; I did.

Q. Will you tell us what you found when you got there—where it was located?

A. We found the accident to be located in front of #2223 Williamson Road. We received a call at approximately 9:35 A. M. On our arrival we found that two automobiles and a pickup truck were involved in an accident.

Q. Will you describe the first one, in sequence, page 78 } going on back and starting with the Pontiac?

A. We found a '58 Pontiac, which was driven by Mr. Alls, and he had been traveling south on Williamson Road, and was attempting to make a left turn. He had been struck in the rear of his vehicle, and we estimated damage of approximately $500. We found a second car involved, a 1957 Oldsmobile, which was driven by Mr. Adams, and was following in the lane of traffic behind the first car—Mr. Alls. His damage was to the front and rear; we estimated it to be approximately $800. The third vehicle we found to be a '47 Chevrolet pickup truck, driven by Mr. Simmons, who had collided with the Oldsmobile, which in turn had—the Oldsmobile struck the Pontiac. On our arrival, the ambulance—

Q. How much damage to the Chevrolet pickup?

A. Approximately $500.

Q. All right, sir.

A. On our arrival the ambulance was there. We assisted in putting Mrs. Adams and John M. Adams in the ambulance, which in turn was taken to the Lewis-Gale Hospital. After the preliminary investigation at the scene, of course we went to the hospital.

Q. Did you notice anything wrong with John Adams by looking at him?

A. I was with Mr. Adams quite some time. In what regard?

Q. The young man—did you see anything wrong with him?

A. Yes, sir. In the opening statement he was talking about the fact he was to one side—I noticed that. And page 79 } I was the Officer that asked him if he had an infirmity. He was standing there at the time, saying he had this injury to his neck, and his knees hurt—is the reason I went to the hospital.

Q. Now, did you make any investigation at the scene to determine whether or not any vehicle made a skid mark on the street?

A. Yes, sir.

Officer J. D. Smith.

Q. What did you find there?

A. Approximately 30 feet of skid marks, before the impact, behind the 1957 Chevrolet.

Q. That 1957 Chevrolet truck was operated by who?

A. C. O. Simmons.

Q. (Indicating) That's the gentleman sitting over there?

A. Yes, sir.

Q. Now, Mr. Smith, did you get in the Chevrolet truck of Mr. Simmons to try the brakes?

A. I don't recall whether I got in, or just stood on the ground and put my foot on the brake pedal. The pedal went all the way to the floor, which indicated a defective brake.

Q. Did you try pumping the brake pedal?

A. I don't recall whether I pumped the brake pedal to get it to stand up, or put my foot on the brake pedal and it went down—it was either one of the two. It was defective brakes on the vehicle.

Q. Did Mr. Alls tell you how long he had been standing there before he was struck?

page 80 } A. I don't recall.

Q. Did Mr. Adams, who was driving the other automobile, tell you?

A. I don't recall that, either.

Q. Thank you.

CROSS EXAMINATION.

By Mr. Thornton:

Q. Jack, I never knew your name was Jack Dempsey, until right now. The brakes—you do have a recollection that this car didn't have any brake on it?

A. That's right.

Q. It didn't have any pedal when you put you foot on it?

A. I don't know what caused the pedal not to be there—it went to the floor.

Q. Certainly, after the accident, there wasn't any pedal on it?

A. That's correct.

Q. You don't know of your own knowledge why that reason existed, do you?

A. No, sir.

Q. You don't know of your own knowledge whether, when he was coming down that street, the brakes were all right, and they suddenly went out, do you?

Officer J. D. Smith.

A. No, sir.

Q. Now, did you go to the hospital with all three page 81 } of these people?

A. Yes, sir. I went after the preliminary investigation at the scene. Of course, Mrs. Adams and the boy were already at the hospital.

Q. Was Mr. Adams at the scene?

A. Yes, sir.

Q. When you got there, and when you went to the hospital with them?

A. Mr. Adams stayed with us until we completed that part of it, and then he went to the hospital with us.

Q. You know of your own knowledge who treated them, or what the medical diagnosis was on them?

A. No, sir.

Q. And you say this is about all you know about it? Do you know when they left town, or anything like that?

A. He was in court that afternoon, and that was the last I seen of him.

Q. That's the last time you had seen them until today?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Smith, you know whether those brakes were damaged in the collision by the force of the blow, or not?

A. No, sir.

Q. That's all.

page 82 } By the Court:

Q. Did this truck have an emergency brake on it?

A. That model is equipped with one, your Honor. I do not recall checking it to see if it was in working condition, or not.

RE-CROSS EXAMINATION.

By Mr. Thornton:

Q. Officer, you talked about the damage to the pickup truck, and you said you had down there $500. Did you follow that up—I mean, Mr. Simmons frankly tells me that he fixed the truck up for about $95. I wondered what you based that estimate on.

A. That was an open estimate of what I seen.

Q. What you saw?

A. I didn't take into consideration it was a '47 model vehicle, which was at that time 13 years old.

Q. And that was just something you wrote down there at the scene? You didn't talk to the garage people, or anything like that?

A. No, sir—the same with the other two vehicles.

The witness stands aside.

OFFICER R. T. PADGETT,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Mr. R. T. Padgett, and you are a member of the Roanoke Police Department?

page 83 } A. Yes, sir.

Q. You were there with Mr. Smith?

A. Yes, sir; I was.

Q. Who took the lead in the investigation?

A. Officer Smith did most of the investigating.

Q. Do you know anything more about this accident then what he's already related?

A. No, sir.

Mr. Rosenberger: You may examine.

Mr. Thornton: Stand aside.

The witness stands aside.

MR. WALTER L. ALLS,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Alls, please state your full name.

A. Walter Lindberg Alls.

Q. Will you tell us what occurred on January 5, 1959, when you were driving your car—what kind of car, and in what direction?

Walter L. Alls.

A. I was driving south on Williamson Road from Gordon Foods—which is approximately two or three blocks away to the north,—going to Smith's Restaurant.

Q. You were driving south to go to Smith Restaurant, and were driving on Williamson Road?

page 84 } A. Yeah.

Q. All right, sir.

A. And I come to the front of the restaurant. They have parking spaces marked just in front of the restaurant, off the street, and I come to the intersection to go into the restaurant and had to stop for the northbound traffic—which was two lanes at that time of the day, running full; and the light was against me to turn. So I stopped with the signals, and the brake lights on. Of course, because it's downgrade, you would have to apply your brakes to set there. And Mr. Adams was in the center lane of the highway, following me, and he come down behind me and stopped, waiting for me to make the left turn when the traffic would allow in the other direction. So we were sitting there approximately half a minute, waiting for the traffic to clear—and I wasn't looking back; I noticed him through my rear mirror—they had come in behind me and stopped; I noticed him, but I didn't realize anything else till I was hit, and I didn't know at the time what happened until I got out of the car then. I never heard anything, or saw anything, until I was hit from the rear.

Q. How far did it knock your car?

A. Approximately a car-length.

Q. In feet, about 18 feet?

A. I would say from 15 to 18.

Q. 15 to 18 feet? And you were driving a 19—

A. —58 Pontiac.

page 85 } Q. Well, will you tell us what damage was done to your car?

A. As far as I recall, it was—You mean financially?

Q. I want to know the parts, first.

A. The rear bumper and the frame—from the main frame back to the bumper; in other words, there was a frame that runs back—an extended frame, in other words, to the bumper; and the bottom of the back fenders.

Q. And how much in money?

A. As well as I recall, $196.

Q. $196. Did you test the brakes on this truck of Mr. Simmons?

A. I don't recall whether I tested them, or checked them, or whether it was the Officer that checked them. But I saw

the brake, and the brake was on the floor of the truck—or there was no brake; in other words, the pedal was up, and when you pushed the pedal, there was no brake; in other words, it traveled the full distance. And as you pumped the pedal, you got brake; in other words, it had pedal.

Q. In other words, after the pedal was pumped, then you had brake?

A. Yes, brake.

Q. Did you talk to Mr. Simmons about it?

A. Yes.

Q. What did he say?

A. He said that he had—I asked him what
page 86 } happened, and he said that his brakes failed.

Q. Did he say when he had had them fixed?

A. As far as I *reall,* he had them worked on the day before.

Q. Did he tell you he fixed them, or who fixed them?

A. He didn't say. He said he fixed them—whether he meant he took it to a garage, or fixed them hisself, I couldn't say.

Q. What did he tell you he had fixed on them?

A. A master cylinder.

Q. A master cylinder put on the brakes?

A. Yeah.

Q. Now, where do you work?

A. Associated Transport.

Q. What do you do for them?

A. Truck driver.

Q. How long have you driven trucks?

A. 14 years, going on to 15.

Q. Now, do you operate trucks and automobiles with hydraulic braking systems?

A. Automobiles only.

Q. Are you required, with automobile brakes, to have a hydraulic system?

A. I have—

Mr. Thornton: If your Honor please, in anticipating Mr. Rosenberger, what's the purpose of this line of
page 87 } questioning?

Mr. Rosenberger: I am going to ask him what was wrong with the brakes.

Mr. Thornton: Ask him if he examined this system.

Mr. Rosenberger: He saw it examined.

Walter L. Alls.

Mr. Thornton: Somebody saw him put his foot on the pedal. I have no objection if the gentleman is qualified as an expert.

Q. For Mr. Thornton's benefit, did you test, or see these brakes tested at the scene?
A. I saw them tested, or tested them myself.
Q. You're not sure whether you actually pumped it, or somebody else?
A. That's right.
Q. When the first examination was made, the brakes went to the floor?
A. Yes.
Q. And after it was pumped, then it had brake pedal?
A. Yes, sir.
Q. You saw that right at the scene?
A. (Witness does not respond).
Q. Based on your experience with hydraulic brakes, and your repairing of brakes of that type, what would cause a brake pedal to operate like that?

Mr. Thornton: I object.
The Court: You can question him about his
page 88 } ability to testify, or examine him on his qualifications as an expert.
Mr. Thornton: If your Honor please, my objection is that I didn't understand that this man did any more than see that it had no brake pedal. It seems to me he couldn't testify about them.
The Court: That's your opinion. You can ask him after he testifies. I don't know whether he could, or not.

Q. Based on what you saw, and your experience with this type of brake, what caused the brake at one time to go to the floor, and then when you pump it, to have brake pedal?
A. I never found any hydraulic brake that would do that, unless it had air in the lines.
Q. Air in the lines?
A. Yes, sir.
Q. Now, if the line was broken, and you pumped it, what would happen to the brake?
A. You'd pump the fluid out, and you wouldn't have any brake whatsoever.
Q. Now, when that hydraulic brake line is broken, then what runs out on the street?

A. Your fluid.

Q. Had you seen the fluid run out on the street under this truck?

A. No, sir; I don't recollect seeing it.

page 89 } Q. If the fluid—

A. Now, let me make another statement there.

Q. Yes.

A. Because, as well as I remember, there was water, and so on, from the radiator.

Q. Yeah?

A. Whether it was fluid mixed with it, I don't know.

Q. Now, if you had the fluid running out of the truck, could you, by pumping it with the line broken and the fluid running out, get any brake pedal?

A. I don't think so; no, sir.

Q. Now then, did you understand Mr. Simmons to say, I take it, that he fixed—put the brake cylinder on?

A. He could have said, "I had them fixed"—which is the expression I used myself—or that he could have went to the garage and had it done; or he could have done it hisself, I don't know which.

Q. What I want to know—from what he said, what impression did you get from him?

Mr. Thornton: That's the first time I heard about the impression. I object to it.

The Court: No, sir; he can't testify about his impression.

Q. What did he actually say?

A. As well as I recollect—of course, it was some

page 90 } time past; and he said, "I put a master cylinder on the truck yesterday."

Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Thornton:

Q. Mr. Alls, so the jury won't be confused, you have further stated that it was your impression that he could have meant he had it done by someone other than himself?

A. Right.

Q. You used that expression yourself?

Walter L. Alls.

A. I did.

Q. This much is certain: You went around, and either you tested that brake, or somebody else did, after the collision, and there wasn't any brake there?

A. Right.

Q. You're not in a position, I assume, to tell us whether that situation occurred suddenly and without warning, or whether those brakes had been bad earlier that morning; you wouldn't know that, would you?

A. There is no way of telling.

Q. No way of telling? You say that in your professional opinion—what I mean, in your experience—your're experienced—that you will get a situation where you hit your brakes and don't have any pedal sometimes when there's air—

A. —in the line.

Q. Air in the line?

page 91 } A. Now that was a hydraulic brake. But air is different.

Q. The air brakes on your big trucks?

A. Yes.

Q. With a hydraulic brake—Do you mean this, Mr. Alls: That air gets in your car hydraulic brake line, and you could drive down the street and you'll have brakes at the corner, and at the next corner you won't have any?

A. Possibly.

Q. That can happen?

A. That's possible.

Q. And that seemed to you one explanation, anyhow, of this situation?

A. It could be.

Q. Did you see Mr. Simmons' vehicle before it collided with Mr. Adams'—

A. No, sir.

Q. —car?

A. I did not.

Q. When you got out you asked him—which is only natural —what happened, and he said, "I didn't have any brake"?

A. Right.

Q. Thank you, sir.

By the Court:

Q. Did you check the emergency brake, Mr. Alls, or see it

checked?

page 92 } A. I did not.

Q. Do you have any explanation of why there would be 30 feet of skid marks, if there were no brakes?

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. This truck has an emergency brake on it, doesn't it?

A. It's equipped with one.

The witness stands aside.

JOHN B. ADAMS,

a Minor, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Your name is John B. Adams?

A. Yes, sir.

Q. And when this collision occurred you were how old?

A. 16 years old.

Q. 16 years old? That was when the collision happened last January a year ago?

A. That's right.

Q. And where do you live, John?

A. Sodas, New York.

Q. And what grade are you in?

A. This year I'm a Senior.

page 93 } Q. In high school?

A. That's right.

Q. And now, on this day you were riding down on Williamson Road south with your parents, what seat were you riding in?

A. I was in the back seat.

Q. On what side of the automobile?

A. Left-hand side of the automobile.

Q. Behind your father?

John B. Adams.

A. That's right.

Q. And now, tell me what happened when your automobile was struck.

A. As well as I can remember, I was thrown to the floor, and I was in the back seat, and the front seat fell over on top of me.

Q. Was your automobile moving, or had it come to a stop?

A. It had stopped.

Q. How long had it been stopped before you were hit?

A. About a minute.

Q. You think it was stopped about a minute?

A. Yes, sir.

Q. Now, when you were thrown to the floor, what seat came over on top of you?

A. The front seat. The front seat broke off and came back on top of me.

page 94 } Q. Now, did you have anything in the back seat with you that might be thrown around, or forward, in there?

A. Yes. We had a portable television set.

Q. You know where this went?

A. It flew into the front seat and hit my father, and fell back to the back seat again.

Q. Now, how did you feel after that collision; did you have any spots that hurt?

A. My neck was sort, like somebody had a clamp on it; and my knees were sore, as if they had been hit with some hard object.

Q. And how did you get out of the automobile?

A. Through one of the doors.

Q. Did you get out alone, or were you assisted?

A. I was assisted out.

Q. Who assisted you?

A. I don't remember.

Q. Then how did you go to the hospital?

A. In the ambulance on one of the cots they have in the ambulance.

Q. You were on a cot?

A. Yes, sir.

Q. And what hospital did you go to?

A. Lewis—I don't remember the exact name of it.

Q. How did you feel the next day?

A. My neck got worse, and it swelled up and was quite sore;

John B. Adams.

and my knees were both sore, making it hard to
page 95 } walk.

Q. Did you go home, or stay here in the hotel?
A. I stayed in the hotel.
Q. Your family were with you?
A. Yes, sir; that's right.
Q. Do you remember how many days you stayed here?
A. Two or three days.
Q. And then where did you go?
A. I continued on to Florida.
Q. Now, how long did you stay down in Florida?
A. About three days.
Q. And did you stay the full time you were supposed to stay there?
A. No, we didn't.
Q. What did you have to do?
A. I had to fly home.
Q. What did you do that for?
A. School was starting; and also, I had to fly home, rather than come by car, because of my bad neck, and the other conditions that I had.
Q. Now, were you able to go to school then on the school bus, as you had done before?
A. No. I had to be taken by my mother, or father, whichever happened to be going that way.
Q. Up until that time, what kind of job did you have?

A. I worked my 4-H project, which was raising
page 96 } sheep, and in particular—

Q. You say you worked on your project? How many sheep did you have?
A. At this time about 50. And then later in the year they have lambs, which made it come to about 100 sheep all told.
Q. What I'm talking about is the number of sheep you were minding in January, 1959?
A. January, about 50 yews.
Q. 50 yews?
A. Um-hum.
Q. And were you in that business—or just explain to us what you were doing.
A. In this, I owned the sheep myself, and it was my 4-H project. And I would care for them both mornings and nights, feeding them grain and water and hay.

John B. Adams.

Q. How did you get water to the sheep?
A. Carried it by pails.
Q. And how many pails did you usually carry?
A. Carried one in each hand.
Q. After this collision, were you able to do that work?
A. No, I wasn't.
Q. Why?
A. It would pull on my shoulder muscles and neck muscles and make them awfully sore, and hurt.
Q. Who was hired to take care of that?
page 97 } A. A neighbor boy, Dean Davidson.
Q. How long did he do that work for you people?
A. Up until the last part of June.
Q. From January till June?
A. That's right.
Q. Now, how long had you been engaged in having this—owning and minding this flock of sheep?
A. Oh, I'd had sheep ever since I'd been ten years old, or eleven years old.
Q. Had you been minding that many?
A. No. The most I ever had was—
Q. Who was taking care of the main flock until you took over?
A. First, my older brother had the flock, and then when he went away to school, my father bought the flock from him, and then in turn I bought some more yews and gradually built my flock up, and bought the remainder of the flock from my father. During the years, two or three of us had had a share in the flock.
Q. And in January, 1959, who was the owner of the flock?
A. I was full owner.
Q. Now, when you were doing that, that would put you in about the third year high school?
A. That's right—I was a Junior.
Q. Now, when you rode the school bus to school, how long did it take you to get to school?
page 98 } A. About half an hour.
Q. How long to come back?
A. An equal amount of time—half an hour.
Q. How was it you didn't continue to ride the school bus?
A. The doctor said it added half an hour each way; and the rough ride to school would have made my condition worse.

John B. Adams.

Q. Did you do as well in your studies?
A. No, I didn't.
Q. You did not?
A. No.
Q. Now then, what is the trouble with your knees?
A. My knees, in climbing the stairs, they'll get sore and stiff, you know—sort of couldn't bend them; and they'd leave me in quite a bit of pain. And my neck would be in the same condition, also.
Q. Now, from January to June, 1959, were you able to take part in all of the rough-and-tumble exercises, and all the games, as you had done before?
A. No. I was excused from gym for the remainder of the year for that.
Q. Because of "that"?
A. My neck and knees, yes.
Q. Now, what is the condition in your neck and knees now?
A. It hasn't gotten much better from what it was at that time. My neck still aches and pains as it did after
page 99 } the accident—and the same way with my knees.
Q. Now, are you taking care of your sheep as you had done before?
A. Now I am, yes.
Q. And you're not hiring the Davidson boy?
A. No.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Thornton:
Q. You're going to finish high school this year, John?
A. That's right.
Q. You hope to?
A. I hope to, yes.
Q. Do you play any sports?
A. Yes, I do.
Q. What do you play?
A. Last fall I played soccer; and in the wintertime I was on the bowling team.
Q. Soccer and bowling?
A. Yes.

John B. Adams.

Q. Were you on the young varsity soccer team last year?
A. That's right.
Q. We don't have that sport down here. That's sort of like football, except you kick the ball, and there's a lot of running and so forth?
page 100 } A. That's right.
Q. Did you make your letter?
A. That's right.
Q. This last year?
A. Um-hum.
Q. Now, the boy that kept the sheep from January until June, what did your father—or whoever it was in the family that paid—what was he paid for doing it?
A. He had an hourly wage.
Q. Did you handle that, or did your father?
A. My father handled it.
Q. And you weren't billed about any of these expenses, or anything, I assume—
A. No.
Q. —in connection with your medical treatment? Now, I understand that your neck was sore, and your knees were sore, and you went over to a hospital here in Roanoke?
A. That's right.
Q. Whose name you don't remember at the present time?
A. Um-hum.
Q. Did they put you to bed over there?
A. No, they didn't.
Q. And you went on down to Florida with your family?
A. That's right.
Q. Was that a vacation?
page 101 } A. That's right.
Q. And how long did you stay—how long did *you* family stay in Florida that winter?
A. For three days.
Q. Now, you all live on a farm, I take it?
A. That's right.
Q. And does your father operate the farm, or does he have another job?
A. He has another job.
Q. He's connected with the cannery, isn't he?—
A. That's right.
Q. —is what I understand. When you went to Florida, did you see any doctor in Florida?
A. No, I didn't.
Q. You didn't see a doctor in Florida? When you went

back to New York, who was the first doctor you saw when you got back home?

A. Our family doctor.

Q. What's his name?

A. Dr. Hobbie.

Q. Dr. Hobbie?

A. That's right.

Q. And what did he do to you?

A. I don't recall.

Q. How many times did you see him?

A. I don't remember.

page 102 } Q. You don't recall? Then you went, I think, three times to a "Dr. Howe" in Rochester?

A. That's right.

Q. Isn't that correct?

A. Um-hum.

Q. Did you see any other doctors?

A. Yes, I did.

Q. Who were they?

A. I only remember the names of the others. I don't remember his name.

Q. Was he in Rochester?

A. Yes, he was.

Q. You saw one other doctor, and you don't remember the name? Are you planning to go to college next year?

A. Not next year.

Q. When you finish this year?

A. (Witness does not respond).

Q. You were able to participate last year in soccer and bowling?

A. That's right.

Q. That's all.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. John, were you able to continue in the marching platoon at your school?

page 103 } A. We have a gym demonstration, in which I was in the marching platoon, and during this time when I was marching—of course, it's high-stepping, as you know—and my knee would give me trouble, because I wouldn't be able to bring it up as high and bend it, and it was

quite painful.

Q. Now, this other doctor you saw in Rochester—he was not your doctor?

A. No, he wasn't.

Q. You don't remember his name?

A. It began with an "M," or something; I can't remember.

The witness stands aside.

MRS. CRESCENCE K. ADAMS,

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

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Mrs. Morton Adams, and your name is Crescence K. Adams?

A. That's right.

Q. And you're the mother of John, and the wife of Morton?

A. Right.

Q. Now, on this day you people were driving—had been driving from Sodas, New York, and you were on the way to Florida—

A. Yes.

Q. Will you talk a little louder—I can't hear
page 104 } you.

A. Yes.

Q. How long had you planned to be there?

A. The length of time that we were to stay in Florida was indefinite.

Q. It was an indefinite time?

A. I was taking with me a transcript from his school, and wanted to put John in school down there.

Q. As you were driving down Williamson Road—First, where had you spent the night?

A. I can't remember.

Q. As you were driving down the road, tell us what happened before the collision occurred.

A. Well, it was a pleasant morning trip, and I was enjoying watching the mountains—that was all—that was the impression I am left with.

Q. Now, did your husband have an occasion to stop?

A. Yes, he did—in the line of traffic.

Crescence K. Adams.

Q. And was he stopped behind this fellow who just testified here this morning?

A. Yes.

Q. While you were stopped there, what happened?

A. Well, we were hit in the rear of the car.

Q. And what happened to you?

A. Well, I was hit on the back of the head, and in some way—and while I was conscious after that—the
page 105 } main impression I have is not only of the pain, but that I had a peculiar feeling of weakness, as if I had no control over myself. And I had no vision out of the car itself—I never saw the car back of us, or any of the traffic, or anything around me.

Q. Do you know whether you were conscious, or unconscious, when whatever hit you, hit you?

A. I would say that I was conscious, because if I was spoken to, I could answer. And when John spoke, and we knew he was alive, I realized that.

Q. Now, when the seat went back, what happened to you?

A. Well, I laid back across the seat when we came to again.

Q. You remember how you got out of the automobile?

A. I was helped by someone; whether it was by the ambulance driver, or the police, I don't know. I do remember they said to me, "I don't believe you should walk." But I did walk, with their assistance.

Q. And how did you go to the hospital?

A. I went to the hospital with John. And I can remember putting my hands on him, because he was having chills.

Q. Now, what did you observe about him?

A. Well, he was in pain, but he was still John.

Q. I see. Now, did you notice any difference in the way he held his shoulders, or head, or neck?

A. I couldn't say too much about that, because they took him on the stretcher right into the emergency
page 106 } room, and they wouldn't allow him to move until the doctor had examined him. And they took him to the X-ray room before I was taken to the X-ray room.

Q. Now then, after you people left the hospital, where did you go?

A. We stayed at the Roanoke Hotel.

Q. How long did you stay there?

Crescence K. Adams.

A. I say it was three days; I'm not sure.
Q. And then you drove to Florida?
A. Right.
Q. How did John make out on that trip?
A. He laid down in the back seat, and we had hot water bottles, and the doctor had given him pain pills to take.
Q. Did you notice anything different about him the following day?
A. You mean the following day in Roanoke?
Q. Yes.
A. Of course he had to return to the hospital before we were allowed to leave the City, as far as that was concerned. And the pain then was going up into his ear, and it was very severe. At the hospital he was checked only for fractures.
Q. Was the size of his neck the same?
A. No. He couldn't fasten his collar.
Q. What was this due to?
A. The swelling.
Q. Where did the swelling extend?
page 107 } A. (Indicating left shoulder and neck) Down the left shoulder—the "cervical region," as I remember their calling it; and up into the ear—this part.
Q. Where else did he complain about?
A. He was lame and sore all over, and his knees didn't work. As I think if it, as he tells it to me, it's in the kneecap slipping over the knee—it cramps.
Q. How did he make the trip to Florida? Was he comfortable with the hot water bottles and pain pills?
A. No, he wasn't comfortable—but he didn't expect to be comfortable.
Q. How were you on the trip?
A. Weak.
Q. How did you feel?
A. Weak.
Q. Now, did you stay as long as you wanted to, or let John stay as long as he wanted to?
A. He wanted to come home.
Q. I see. And then what did you do with John?
A. We sent him home to a friend we have—we have no relatives—and this teacher in the school kept him until we got home. We started right out after he did.
Q. And now then, how did you get home?
A. We drove home.

Crescence K. Adams.

Q. And sent him home by plane?

page 108 } A. Yes.

Q. Now, Mrs. Adams, after he got home, was he able to continue on and do his chores and the work he was supposed to have done?

A. No, he did not.

Q. What did you do about his school?

A. We helped him all we could, and it was very difficult for him to stand the long hours of study; and it was especially at night that he was uncomfortable, after he'd been in a reading and writing position.

Q. Now then, when you got back, did he start right back to school, or did he miss any time?

A. He went along to school. We live in a small community, and he knows everybody, and everybody knows him, and they were all considerate of him.

Q. Was he able to stay the full day at school?

A. Unless he was unusually uncomfortable, he did.

Q. What is the size of Sodas?

A. Sodas Village is about 1000 people, but our Sodas Township is about 4000, and we have a central school. I think John's class will have about 50 students in it.

Q. Now then, how far are you from Rochester?

A. Our home is probably 35 miles from Rochester. It would taken an hour and 15 minutes to an hour and a half to get down into the City.

Q. Who is your family doctor?

page 109 } A. Dr. Thomas Hobbie.

Q. Did you consult with him about—

A. Yes.

Q. —John?

A. Many times in the office, and many times by phone. And he said, "This is something that will bother John for a long time—just like a sprained ankle." And he said, "Give aspirin, and use the hot water bottle." And he would use analgesic balm and Bengay when his neck knotted up on him. And Absorbine, Jr., was a regular system.

Q. What do you mean, his neck would "knot up on him"?

A. At night there would be the tightening of the muscles in the back of his neck, which would make it very difficult for him to relax and rest at night. Night after night he didn't feel

Crescence K. Adams.

like doing his homework, because he was uncomfortable from the neck.

Q. How well did he do in school that spring?

A. Up until the time of the accident he had an average of 85, and after that it fell at the end of the year to about 75 to 78.

Q. Now then, had your boys always had these sheep, and attended to the sheep John spoke of?

A. Yes, we have.

Q. Now, was he able to do his chores from January until June?

A. No, he wasn't.

Q. All right.

page 110 } Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Thornton:

Q. Mrs. Adams, did your husband handle the financial transactions?

A. That's right.

Q. You didn't pay the bills, and weren't billed by anybody?

A. That's right.

Q. And as I understand, John is going to graduate—he's going through school this year, and expects to graduate?

A. If he passes the state examinations in a few weeks.

Q. And he tells me he played this year on the soccer team and the bowling team?

A. John does not realize—and I hate to speak about it in front of him—he was allowed to take gym this year in school, and he wanted so badly to be like the other boys; and the coach, who has known him since he was a small child, allowed him to be on the soccer team, which carries a number—I don't know how many they carry—maybe 15 or 17 boys—and John was allowed to play only the number of minutes which would make him a member of the team—because he talked with me about it.

Q. He did play?

A. But he never played even a full quarter.

Q. Did he do the bowling he talked about?

A. Yes, but that's not at the same time; that's
page 111 } later in the year.

Q. That's a winter sport?

A. He couldn't play basketball.

Q. And as I understand from him, he couldn't take care of the sheep from January until June, but he's now doing his chores?

A. Yes. But he is now on what they call—the orthopedic doctors call "restricted activities."

Q. He's taking care of his flock of sheep we're been talking about?

A. That's right. But he's not supposed to squat down, as one would do what they call "deep-knee bending."

Q. Well, now, Dr. Howe is the doctor that's looking after him; isn't that correct?

A. Yes.

Q. I think that's all.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Mrs. Adams, did I understand you to say he couldn't play basketball, even this year?

A. No.

Q. And one other question—You're the one that goes with him to Dr. Howe—which is about 35 miles from Rochester—?

A. We had to wait a number of weeks—I would say almost four to six weeks—for an appointment with Dr. Howe, too.

Q. Now, John spoke of the fact he saw another
page 112 } doctor in Rochester. You know his name?

A. Yes, I do. Dr. Moscowicz.

Q. Now, was Dr. Moscowicz the doctor of your selection to see John?

A. No, he was not. I don't mean that I objected to that. But we had nothing to do with seeking the appointment for Dr. Moscowicz.

Q. Mr. Thornton's office, or some of his associates, arranged to have John examined by Dr. Moscowicz?

A. That's right.

Q. You don't know him?

A. No.

Q. All right.

The witness stands aside.

MR. MORTON ADAMS,

a witness of lawful age, called in his own behalf, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Mr. Morton Adams?

A. Yes, sir.

Q. And you are the father and husband?

A. I am.

Q. Now, your home—your farm is in Sodas, New York? And what is your business?

page 113 } A. Well, I live on the farm, own the farm, and see that it's operated, and I work for a canning company, and we can vegetables and fruits—beets and apples and cherries.

Q. I see. Now, what size farm do you have there, Mr. Adams?

A. 240 acres.

Q. And these sheep—what have you had these sheep for these years?

A. It's a method of raising boys.

Q. You keep them for the boys?

A. That's right.

Q. And how long has John been managing this flock of sheep?

A. Ever since—he wasn't allowed to join the 4-H Club until he was 10 years old. The year he was to be ten, he purchased his first sheep. He pays for the sheep, and he pays for all the feed and everything, and if he makes any profit, then that's for his schooling.

Q. I see. For his college education?

A. That's right.

Q. Now, do you have any other boys that have done that?

A. Two older boys have both done the same thing. One of them had sheep, and the other had pigs.

Q. Where is the one that had the pigs?

A. Cornell, at the Agricultural College.

Q. The one that had sheep?

page 114 } A. He graduated from Cornell Agricultural College in genetics, and he got—he was interested in genetics, and the medical people at the University of Michigan like his record, and they requested him to come there to take medicine.

Q. He's in Michigan Medical School?

A. That's right.

Morton Adams.

Q. Now, you were going to Florida, and you were driving the automobile south?

A. Yes, sir.

Q. And this was on a Monday morning about 9:30?

A. Somewhere along that line; yes, sir.

Q. You were driving along Williamson Road?

A. I know it was Route #11.

Q. Route #11? And of course you don't know the stores, or the things around there?

A. No, sir.

Q. What did you do as you came along Williamson Road?

A. Well, as I recall it now, somewhere north of where the accident happened there was a stop light—we stopped there for that; I was in the left-hand lane of the two lanes that were progressing south on Route #11; and of course there were two lanes on the other side, going north. And we were in that line of traffic, and there was a line of traffic on my right, going the same direction I was. And of course traffic was going north—two lanes the other way. And we proceeded along I would guess, about 25, 27 miles an hour, and the car in front of me started to indicate that he was
page 115 } stopping—his brakes grabbed, and then the signal light came on—he was going to turn left; and so eventually he did stop, and I stopped at a reasonable distance back of him, and we sat there.

Q. How long had you been sitting there when something happened?

A. Of course, I have heard different hours—or different minutes specified here—my guess is that it would be at least a minute, maybe as much as two minutes—I wouldn't be able to tell exactly—somewhere in that vicinity. We were definitely stopped, and had been stopped for a considerable length of time.

Q. There wasn't any sudden stop on your part?

A. No, sir.

Q. Now, what happened?

A. We sat there, and we had to keep the brakes on, because it was downhill a little bit; and all of a sudden we were badly bumped in the rear. Naturally, it flashed through my mind what had happened. The next thing I remember, I looked at my wife on the right, and she was, I thought, completely unconscious—she was sprawled out, part on the floor, and part on the seat—which was broken; in other words, it's a

four-door sedan—the brace which held the back of the front seat was apparently broken because of such a shock. And I looked to see where John was, and he was under me; in other words, he was—the back seat had broken back, and he was down on the floor, between the back of the seat and the floor—if I make myself clear. I spoke to my

page 116 } wife and she gave me some type of an answer, though not very coherent. I asked John if he was all right, and he said Yes. He said something about "How bad are you hurt?" And I told him to please stay where he was, because it looked as if he was right bad hurt. And I got out of the car—and the man in front of us had already got out of his car—and by the time I got organized, he was back by the side of my car to find out what the trouble was, and how bad the injuries were.

Q. Did you examine your car?

A. Yes, I did.

Q. How was it damaged?

A. As you looked as it from the rear, all of the rear bumpers were badly bent in. And what I want to call a "hood"—

Q. The lid of the trunk?

A. The lid of the trunk was badly crumpled—sprung up; but yet you couldn't raise it up; in other words, it was—the way it had been hit, the frame had been so badly damaged, it squeezed it out. The rear fender was all crumpled up; the rear doors were jammed together and sprung out. You could get into the right-hand door of the rear by forcing it open. The left-hand door, as I recall it, you could not open. The front of the car was, I would say, "stove in"—that isn't exactly the right word; but it looked as if the grill and radiator, and all that, had been shoved back into the engine. And of course the fenders were crumpled; the lights were broken out, and the bumpers were split and damaged.

Q. Now, then, after the ambulance got there,

page 117 } and John and Mrs. Adams got away, did you realize how you felt?

A. Yes, sir. The Officers were continually asking me, because apparently I was talking rather fast and a little excited, because they finally took me over to the restaurant and bought me some coffee—and tried to help me in that way. About that time I knew that I was hurt in my stomach, and in my legs and knees. My pants were torn in one leg, and one leg was skinned.

Q. Now, what hit your stomach?

A. I could only assume the steering wheel did, because the

steering wheel was bent down—and that's where I was—I *assumed* that's what happened.

Q. Now, then, after you had gotten to the hospital, and gotten your family, and got in the hotel, what did you do with your automobile? How much mileage did you have on it?

A. It was a 1957 Oldsmobile, T 7-98—I'm sorry. It was a gray four-door, being purchased—I should probably say in excellent shape. It had been used as a family car, and was well painted and polished, and was a good car of that type.

Q. How much mileage did you have on it?

A. About 40,000, as I recall.

Q. What did you do with it?

A. With the kindness of the policemen, we finally were able to get a truck to come and tow it to the Oldsmobile garage. And the policemen took me down there, and I made arrangements to have the baggage and stuff protected page 118 } until I could get back to pick the stuff up. And then they took me to the hospital where I was X-rayed and so on.

Q. Now then, did you make any disposition of the automobile?

A. Not that particular morning. But I did the next day.

Q. The next day?

A. Um- hum.

Q. How many people did you have checking it, to make bids on it?

A. I had three dealers check it. As far as that goes, I had no regular dealers—as far as new-car dealers—junk dealers and new-car dealers bid on it as to what they would pay for it.

Q. And what did you sell it for?

A. I sold it to the highest bidder of the three, for $890.

Q. You remember any of the other bids?

A. Beg pardon?

Q. You remember any of the other bids?

A. I had one for eight hundred, and one for seven eighty, as I recall it.

Q. And you took the highest—eight ninety?

A. Yes; right.

Q. What did you do about an automobile?

A. Then I went to several dealers and tried to negotiate the

Morton Adams.

purchase of a new car, and finally purchased one from Valley Cadillac-Oldsmobile Co.

Q. What kind of car did you buy?

page 119 } A. I bought the same type, same model as I had before—a four-door Oldsmobile 98.

Q. Do you have a list of various items of expense? First, if you'll start off with what expenses you had at the Lewis-Gale Hospital.

A. I had an expense for Mrs. Adams for $33; for John Adams for $28; and for myself, $18.

Q. Now, was there any charge for the ambulance?

A. Yes; $5 for the ambulance.

Q. And then was there any other charge there at the Lewis-Gale?

A. Not at the Lewis-Gale. I of course bought medicines and things of that sort—I didn't keep track of them—I guess five of seven dollars, or something like that.

Q. Now then, what was your hotel bill at the Hotel Roanoke?

A. $52 for the three of us.

Q. Did you have any telephone expense?

A. Yes. Naturally I had to try to arrange for all the business details that go with accidents of that type. I had a bill of $54.75.

Q. Were they long distance calls?

A. Long distance calls.

Q. Now then, did you have any towing bill?

A. Yes, I had Cole Garage haul my car for $6.

page 120 } Q. Then what about your automobile—did you rent?

A. I rented a rental car here to get around to make the necessary calls, and taking the people—my family back to the hospital, and things of that sort. I paid $30 for a Hertz You-Drive-It car.

Q. Now then, what was that thing—the portable TV—any damage to that?

A. Yes. It didn't belong to us. That and the clock radio, we were taking with us in the car, belonged to my boss. And he had offered us the use of his home in Florida for a week or two, and we were taking these down for him.

Q. What was the cost?

A. When I got to Florida, the repair for the two of them was $8.50.

Q. Now then, about the medical expense in New York after you got back up there, how much was Dr. Howe's bill?

Morton Adams.

A. Of course I don't have all of Dr. Howe's bills yet. My notes here indicate that I have so far paid him $69. I asked how much more I probably would owe him at the end of the month—he bills on a monthly basis—and apparently it's going to run, to date, about $150.

Q. The total amount?

A. A total amount of about $150 to Dr. Howe.

Q. To this time?

A. Yes.

page 121 } Q. Now then, John spoke of the fact that he had to have somebody to take care of this herd of sheep?

A. Um-hum.

Q. Can you tell us about that—how much it cost, and how he paid it?

A. As I said, I have to be at work, and so I can't do a lot of these chores. And so I have to hire someone when the boys are not able to do it. We have that neighbor boy who is willing to do it for pay. We pay him a dollar an hour. He does whatever is necessary to do each day, and that's why from week to week it's varied as to how much he charged, by how many hours he worked.

Q. How much did you pay him from January to June?

A. From January to June, if I have gotten the thing right, about $468.01.

Q. $468.01?

A. Um-hum.

Q. Do you have a tally of those items?

A. Yes.

Q. I didn't ask you about this question of glasses. Whose glasses?

A. Mine.

Q. Did you have to buy glasses?

A. They were broken. I had them in my pocket. I was carrying them, and when I went into the steering wheel, they broke.

page 122 } Q. Of all those items you have referred to, not including the automobile, what do they total?

Mr. Thornton: Mr. Rosenberger, are we going to have some other bills?

Mr. Rosenberger: He has a lot of them here.

Morton Adams.

A. They are all here. If I haven't made any mistake, it's $2,500 I say, without the car loss. I figure $933.37, without the additional bill from Dr. Howe, which I don't have.

Q. Now then, what is your figure for the car loss?

A. I figured it at $1,610.

Q. And those two figures total how much?

A. Twenty-five forty-three thirty-seven, without Dr. Howe's additional bill.

Q. How long did you have this soreness that you spoke of in the stomach and in the knees?

A. As far as the stomach soreness was concerned, three to four weeks, and it gradually dissipated. The knees' soreness went in maybe three weeks. But it was followed by another difficulty which I have only recently had, and have not had any more trouble with, and that is, somebody discovered that I couldn't ride in a car more than an hour, or hour and a quarter, without having a severe pain in my left hip. I'd have to get out and walk, or lie down on the back seat, or rest in some way. When I got home, I thought maybe it was the new car that was doing that, so I had the new car seat raised and blocked up, but I didn't help. Gradually that has become dissipated. That's gone on for

page 123 } maybe a year, or year and two months—that's as far as the hip goes.

Q. The right or left hip?

A. The left hip.

Q. What happened to your left knee?

A. It gradually got so it was—they gave me first aid, and I had a skin fracture—not fracture—the skin damage eventually healed; and then the knee soreness, within two or three or four weeks, went away, and I haven't had any more trouble on that since.

Q. Now, Mr. Adams, when did you first notice the difficulty with your hip?

A. About the second day—the third day after the accident, after we were started again for Florida. We only drove an hour or so before we stopped the first day. The next day I began to notice the difficulty because I couldn't continue to drive like I had before. So it was the third day or so after the accident.

Q. Did you experience the same difficulties as you drove home?

A. Even more on the way home. We were trying to get home to John, and we were driving longer distances than

we normally drive, and naturally that was aggravating the hip, apparently.

Q. This total of bills that I asked you about—Did I ask you about the airplane ticket for John from Florida?

A. $92.15.

Q. Did you include that in the total?

A. I did.

page 124 } Q. That's included?

A. Um-hum.

Q. So the total of the nine thirty-three thirty-seven, plus sixteen ten—the total of the car—is twenty-five forty-three thirty-seven?

A. Um-hum.

Q. Now, who helped get John back and forth to school?

A. The majority of the time Mrs. Adams did. If she was sick—because I normally go to work before it's time for him to go to school—if she was sick or indisposed some way, I did, or we had someone else—neighbor, or somebody, to do it for us. Generally speaking, she did.

Q. What was her condition following that? Was she the same, or did you see any difference in her?

A. Quite a lot of difference, first on the way down, and on the way back. Every time we stopped for a stop sign, or a light, she involuntarily would stiffen out and look back to see if she was going to get hit. It wasn't a conscious effort. She got progressively worse, as far as her nervous condition was concerned—being upset by any little thing—normally, she didn't get upset about anything. The last year or so it's been very noticeable that she is very easily upset by troubles or by decisions, or by anything of that type. And when the children are sick, or when they aren't doing well in school, or things of that sort, it shows up more than it used to.

page 125 } Q. Does she seem any different to you today—I mean, nervous, or normal?

A. She's more nervous than she was three years ago, or two years ago, yes.

Q. How has John done in school following this, as compared to the way he did before?

A. Considerably less well, to the point that he's agreed that he'll go another year in school—even though he's been admitted for next year to college—in an effort to try to get

his marks up to the point where he'll be able to carry on a college career more easily, I hope. But we probably made a mistake, because he so badly wanted to keep up with his class. We made every effort we could, following the accident, to get him in school and get passing grades. He's kept up with his class, but he surely hasn't kept up with his class average.

Q. For that reason he's going to repeat this year?

A. Yes, sir.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Thornton:

Q. What is the name of your company?

A. Alting (?) Can Co.

Q. You're Vice-President of it?

A. That's right.

Q. How many people does it employ?

page 126 } A. It employes 30 during the—counting the year round. And we have as high as—during the season of July to November, when we have to run two shifts—we have as high as a hundred total.

Q. And that is your—you're not a farmer by profession, so to speak?

A. If you mean I get most of my livelihood from the farm, that's correct. My profession originally was a farmer, yes.

Q. Your main—what we think your main occupation now is, the canning business, is what it is?

A. That's right.

Q. You were on your way to Florida for vacation, were you, when the accident happened?

A. Yes, sir.

Q. Did you see Mr. Simmons' car prior to the impact?

A. Not prior to the impact.

Q. Did you test the brakes on the car?

A. I did not.

Q. You don't know anything about the brakes?

A. Only what's been told to me.

Q. This question of the brakes—you don't know anything about it directly?

A. No, sir.

Q. Now, you, and your wife and boy were taken over here to Lewis-Gale Hospital, and had some medical treatment on the day of the accident. They did not hospitalize you, as

I understand it?

page 127 } A. You mean—

Q. You weren't kept overnight?

A. We were told to come back the next morning.

Q. Did they discharge you the next morning; that is, you and your wife?

A. They took more X-rays the next morning, particularly of my leg. And then they said we could go on, and report to our doctors when we returned.

Q. And you went to Florida?

A. Yes.

Q. And did you see any—You and your wife, what was the next doctor you and your wife consulted?

A. None.

Q. In other words, the only medical treatment you and your wife had for the accident was in the Lewis-Gale?

A. Yes, sir.

Q. A $33 and $28 bill ?

A. That's right.

Q. I wanted to be certain about that. This crick in your hip that you referred to—you didn't consult any physician for that?

A. No, sir.

Q. Nor, I would gather, did you do what we sometimes refer to as "lose time from work" because of it?

A. No.

page 128 } Q. Now, with regard to these bills, sir. Mr. Rosenberger handed me this envelope—it contains some matters that I don't think I have a right to look at.

By Mr. Rosenberger: (Interposing)

Q. I thought you had all the bills in that?

Mr. Thornton: I didn't do any more than glance at it.

A. (Indicating paper) Here's the total.

(After a short recess, the proceedings continue).

By Mr. Thornton: (Continuing)

Q. Mr. Adams, I think we have checked these various bills. We have got $18 for glasses; and Mrs. Adams has $33 worth of medical for her Lewis-Gale visit; and the son had $28 at

the Lewis-Gale, and he had—we can't quite agree—somewhere between $120 and $150 in New York. You had $5 ambulance charge; you thought you spent about $7 for drugs; and you had a hotel bill of $52. How many days was that, you recall?

A. I believe it was three days, two days.

Q. You had a $54 telephone bill, $6 toll charge; you had a $30 automobile rental—was that for use in the City?

A. In the City here, yes.

Q. You stayed at Hotel Roanoke?

A. Yes.

Q. Now on the automobile, you testified that you felt—

Mr. Rosenberger: Did you get the airplane ticket there?

I think they had that. You didn't go over that.

page 129 } It was $92.51.

Q. Your boy said, in addition to the question of the condition of his neck, he was due back at school. Had he planned to go on back—I mean, assuming there hadn't been an accident? The thing wasn't quite clear in my mind.

A. It wasn't clear in my mind either. The original plan had been that if things worked out well in Florida, Mrs. Adams and John would stay there—and she had his transcript to enter school there. When this happened, we changed our plans and had to go back to Sodas to school.

Q. If he had driven back with you all, he wouldn't have made it?

A. He wouldn't have made it. And he also wasn't in any shape to spend that many hours in the car.

Q. Now, on the automobile you got, I have got a couple of questions. You testified that you felt your loss on your automobile was $1,610?

A. Yes.

Q. And there is a repair estimate here from the Valley Cadillac to repair the car for $1,032.01. No question about that, is it?

A. I don't know about the Valley Cadillac business.

Q. That was what you just had in your file to me.

A. That is not Valley Cadillac. It's an ap-

page 130 } praisal of stock.

Q. And it says—firm name—a man named Clifford Topton—"Receipt of authorization for parts for the undersigned. Will complete and guarantee the above repairs for $1,032.01."

Morton Adams.

A. Right.

Q. I take it you traded the car in because you felt you didn't wait it repaired? You didn't want a repaired vehicle?

A. I felt that when you put repairs of that magnitude on a car, it depreciated its value, because it's been in such a serious wreck, and it would not make it worth while to repair it and then trade it.

Q. Have you gotten any automobile appraisal as to the worth of that automobile prior to the wreck?

A. I have some notes here.

Q. I don't mean your own. I mean, do you have any from an automobile firm—somebody in the trade?

A. No, sir.

Q. Now, you paid this boy $468.01 on the sheep—taking care of the sheep. Just as a matter of curiosity, who was taking care of the sheep when you were off to Florida? Was that boy?

A. This boy. I didn't figure that in. I started here this January 24th for the boy.

Q. As to what you paid him?

A. Yes.

Q. The week ending January 24th? How do you work the sheep? We don't raise them down here. You
page 131 } keep books on them? Do you sell that flock, and figure up whether you made any money on it—

A. Yes, sir.

Q. —or don't make any money on it?

A. Yes, sir. You keep the mother sheep—the yews—and breed them to a ram—and in the fall. And then you take care of them during the wintertime, and when the spring comes they have lambs.

Q. Do you know, for instance, on this particular flock, that boy that took care of them for six months—how did that come out?

A. I don't have the figures.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You told us that the damage on your automobile was $1,610. How did you arrive at that figure?

A. Well, of course in my business I trade quite a few cars and trucks, and I also have some idea of what the evaluation

of a $4,500 car is, a year and a half old, or so. And on that basis, I was convinced that $2,500 was a fair figure for the value of the car at that particular time. I sold the junk for $890, and that left me, to my way of thinking, $1,610 loss.

Q. That's all those items of $2,543.37?

A. Yes, sir—with the open end on the doctor.

Mr. Thornton: And also figuring the $1,600 page 132 } loss on the car?

Mr. Rosenberger: Yes, sir.

Q. Do you have the checks for those payments to the young man?

A. (Apparently indicating Mr. Thornton) He has those.

Mr. Rosenberger: You have checked those?

Mr. Thornton: Yes, sir.

The witness stands aside.

Mr. Thornton: (Indicating transcript) There is one question in there that I think ought to be omitted—page 18, and 19.

(Court and counsel convene in chambers).

Mr. Thornton: There is an objection to page 18. The question runs all of page 19, and goes to page 20. The objection was that the hypothetical question, I take it, was put on facts which were not sustained.

The Court: What do you propose do—have me rule on the objection, or do you want to read it to the jury?

Mr. Rosenberger: What is the objection?

Mr. Thornton: On the grounds there's no swelling in the neck area. The mother testified there was.

The Court: There is evidence now.

Mr. Rosenberger: Any evidence of the swelling of the knee? I'll put her back on.

Mr. Thornton: If their evidence is sufficient to page 133 } make that—all right.

The Court: The boy said he couldn't button his collar. Leave out pages 20 and 21.

(Court and counsel return to the courtroom).

MR. ARTHUR W. FLESHMAN, JR.,
a witness of lawful age, called in behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. State your full name.

A. Arthur W. Fleshman, Jr.

Q. What is your business, Mr. Fleshman?

A. I am Vice-President and Sales Manager of Valley Cadillac-Oldsmobile.

Q. Did you see the automobile of Mr. Morton Adams after it was wrecked in January of '59?

A. I did, sir.

Q. It's in evidence it's a 1957 Oldsmobile 98.

A. Four-door sedan.

Q. Could you give us your opinion of the fair market value of that automobile before it was damaged by the collision?

A. I would consider the automobile was the average '57 Olds—the eight, four-door sedan. Apparently it page 134 } was, I think, in pretty good shape. We use a guide, which is known as a "National Automobile Dealers Association Official Guide Book" that, I think, at that time valued the automobile at roughly $2,200. I would say it was worth $2,200 prior to the accident.

Q. So the $2,200 figure you put on it was in that ADA book?

A. Yes, sir.

Q. Mr. Adams testified he sold the salvage for $890. You don't know?

A. We made a bid on the automobile.

Q. How much?

A. $800.

Q. $800?

A. Yes, sir.

Q. And then you subsequently sold him a new one?

A. Yes, sir.

Mr. Rosenberger: You may examine.

Arthur W. Fleshman, Jr.

CROSS EXAMINATION.

By Mr. Thornton:

Q. Mr. Fleshman, did you check one of the Red, White, or Blue Books on that for the '57?

A. I have one of them in my pocket.

Q. Does it say the average value in that book?

A. Retail value $2,200.

Q. Let's flip to the page here, a minute.

A. (Witness opens book) It's classified this
page 135 } way, Mr. Thornton—Wholesale Value. If you were buying, you would try to buy for resale at $1,795 retail.

Q. If Valley Cadillac was buying it from you, you'd offer me $1,700 for it?

A. That's right, sir, to resell retail, which is $2,200. If I gave you seventeen ninety-five, I price it at $2,200.

Q. It seems to me, if I am a guy out here trying to establish the value—I am not a dealer—trying to establish the value of my car, it probably ought to fall somewhere between seventeen and twenty-two?

A. I don't think so.

Q. You gave me—

A. I was only asked.

Q. You wouldn't give me $2,200 for it, would you?

A. I am buying to resell the car on the open market. If you had an automobile worth, say, $1,800, and you're on the open market, and somebody offered you fifteen for it, you wouldn't take it.

Q. Well, the point I'm trying to make—if the book—if it's retail $2,200—and that's what you all have to do, in buying them—you have got to make something on them. I'm a man out here with the car, trying to dispose of it; I'm not going to get quite the $2,200 for it, am 1? How am I going to get $2,200, if I have to go to a dealer to sell it?

A. No, sir—you mean on the basis of an indivi-
page 136 } dual? You can sell better than we can sell.

RE-DIRECT EXAMINATION.

Mr. Rosenberger:

Q. That NADA retail at $2,200 is the average retail?

A. That's the average. It doesn't take into consideration anything over and above the standard of a well-equipped automobile.

Q. You like to buy them all on NADA, and sell them all on NADA?

A. We surely would.

RE-CROSS EXAMINATION.

By Mr. Thornton:

Q. That other figure was seventeen ninety-five?

A. Yes.

Q. Stokley Roberts, independent appraiser, apparently made an appraisal. You have seen these appraisals made before?

A. Frequently.

Q. You made an appraisal on this car?

A. I don't know whether you call it an appraisal, or not. There is Mr. Adams' copy of it (Indicating) for $1,032.01, with the firm name Valley Cadillac.

Q. Apparently, if he had wanted that car repaired, you all would have repaired it for $1,032.01?

A. That is the Service Manager's signature.

Q. Mr. Clifton is your Service Manager?

A. Yes.

page 137 } Q. If he said that you all—

A. We would have repaired it for that.

RE-REDIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Would the repair value put the automobile back in the same condition—market value—as it was before the collision?

A. It's a real good question. Generally speaking, if the car is hit on the front end, it's much easier to repair than a car hit on the rear end. The rear-end damage entails damage to the body proper—there's no portion of the body that can be replaced. And generally speaking, it has to be straightened and refinished, and there's always indications that the car has been damaged, or wrecked. That will devalue the car as much as $100.

Q. If you have an automobile that's been damaged to show it hit from the rear—hitting the rear so hard the back doors buckled out, you think a buyer would pay the same amount for that automobile as one that hadn't been wrecked?

A. No, sir.

Q. You think a buyer would be satisfied to buy it, deducting just a hundred dollars depreciation for the accident?
A. If he didn't know any better, maybe yes.
Q. You wouldn't, would you?
A. No, sir.

The witness stands aside.

page 138 } (At this point in the proceedings, counsel prepared to read the deposition of Dr. William W. Howe to the jury.)

Mr. Livingston: I would like to state "In the City of Roanoke."
The Court: Read it as if it were in the City of Roanoke—and the original will be changed. The original will be marked "By agreement of counsel," bottom of page 20, to the top of page 21.

(Counsel complete the reading of the deposition).

Mr. Rosenberger: That completes the deposition—and plaintiff rests.

MR. CURTIS O. SIMMONS,
a witness of lawful age, called in his own behalf, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Thornton:
Q. Your name is Curtis Simmons?
A. Yes, sir.
Q. What do you do, Mr. Simmons?
A. I own a hardware store on Williamson Road.
Q. That's a hardware store adjoining the Mick-Or-Mack, isn't it?
A. Right.
Q. On Williamson Road?
A. Right.
page 139 } Q. Were you driving a '47 pickup, or some kind of a truck, back in January when it collided with the rear of Mr. Adams' car over here?
A. Yes, I was.
Q. What kind of a truck was it?

Curtis O. Simmons.

A. A '47 three-quarter ton pickup.
Q. '57, or '47?
A. '47.
Q. Was that the truck used in your store?
A. Yes, sir.
Q. Where were you going?
A. I was going downtown on an errand.
Q. For your business?
A. Well, it was a personal matter.
Q. What time of day was that?
A. About 9:00 o'clock.
Q. In the morning?
A. Yes, sir.
Q. Now, with respect to your truck—getting down to the important part of this case—with respect to your truck, when you left your place of business, what condition were the brakes in?
A. They were good.
Q. Did you have any occasion, from the point of your place of business, to the place of this accident, to put the brakes on?

page 140 } A. Well, I went through approximately, I say—there's five stop lights between the distance between my store and where the accident occurred, and I must have stopped at one of them.

Q. Any trouble stopping your truck?
A. None at all.
Q. As you came down—just tell the Court and jury—you came down to where these cars were stopped, or stopping—tell what you can remember happened.
A. I first approached Mr. Adams' car from the rear, and of course I seen that he was stopped, or was stopping, and of course I naturally slowed down just a little. I applied my brakes, and they held good. And as I went just a little further down—say probably a hundred, or a hundred and fifty foot, I planned to stop, and I put on my brakes, and it went all the way down to the floor —I didn't have any. And then, of course, I made an effort to get the emergency brake on—I don't know whether I got it on, or not.
Q. You saw the car?
A. I saw the car.
Q. Were you speeding—going fast?
A. Well, it's a 25-mile-an-hour limit—most everybody was

probably going about the same—and I limited my speed to about 25 miles an hour.

Q. If your brakes had worked, would you have had any trouble stopping?

A. Not at all.

Q. Now, the policeman testified that when he got
page 141 } there he found 30 feet of skid marks behind your truck. Have you got any explanation for that?

A. No, sir. As I remember, when I stepped on the brakes there wasn't any at all. Of course the first time I applied the brakes was just a little gradual stop that shouldn't have made a mark. I did make a grab for the emergency brake—I don't know whether it did any good, or not—I did grab for it. It could have been the marks. The foot pedal didn't hold at all.

Q. All right. You answer Mr. Rosenberger's question.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. You put your brakes on 150 feet away, and they held?

A. Yes, sir.

Q. So Mr. Simmons was stopped when you were 150 feet away?

A. Mr. Adams?

Q. Mr. Adams; yes, sir.

A. Yes, sir.

Q. So you had plenty of notice he was stopped in the street, and you had stopped back up at that traffic light at Liberty Road, hadn't you?

A. Yes, sir.

Q. Your brakes stopped all right up there?

A. That's right.

Q. When did you fix your brakes?

A. Well, I had a new master cylinder put on it,
page 142 } I think, maybe January 2nd.

Q. Didn't you tell Mr. Walter Alls here you put a master cylinder on it the day before?

A. No, sir.

Q. Did you put it on there?

A. No, sir.

Q. And that was done on January when?

A. Second.

Q. And this happened on January 5th?

Curtis O. Simmons.

A. Yes.

Q. And your brakes had been holding all right up till this time?

A. That's right.

Q. And you put your brakes on 150 feet away, and they held?

A. That's right.

Q. So the foot brake didn't make a mark 150 feet away? The officer said the mark led up to the back of your truck—a 30-foot skid mark. You know whether put your emergency brake on or not, don't you?

A. Well, I applied the foot brake, and of course it didn't hold. And of course my next reaction would be to go to the emergency brake, and I did pull it. Whether it helped me to stop or not—

Q. You sure you pulled the emergency brake?

A. I made a grab for it. I don't know whether I pulled it or not.

page 143 } Q. Now, are you telling us what you know, or think might have happened, or are you reasoning back on what happened?

A. I don't remember clearly.

Q. You don't remember anything about the emergency brake, really, do you?

A. I know I made a grab for it.

Q. If you made a grab for it, that was the most important thing at the time. You knew whether you got it, don't you?

A. If I was going to hit that car, if I didn't—

Q. You didn't get it, because you hit the car?

A. I didn't say that.

Q. That was the conclusion—you knew you were going to hit the car if you didn't get the emergency brake? You still hit the car. You must not have gotten the emergency brake?

A. I put my hand on the emergency brake, and I was coming back on it—whether I pulled it back and held it and made those marks, I don't remember.

Q. You were coming back with it when you actually hit him? Is that a fair statement—that you were coming back with the emergency brake when you actually hit Mr. Adams?

A. When I hit Mr. Adams my hand was on the brake.

Q. How far you had gotten it back, or had gotten it back at all, you don't know?

A. No, I don't.

Curtis O. Simmons.

page 144 } Q. Well then, if you hadn't gotten on your emergency brake, you couldn't have made that skid mark?—it must have been the foot brake?

A. (Witness does not respond).

Q. You hit this thing hard enough to damage your foot brake, didn't you?

A. Not necessarily.

Q. All right. After you got out—Mr. Alls has come here and said he saw those brakes pumped, and after they were pumped they held. That's so, isn't it?

A. No, sir.

Q. Didn't they hold after you pumped them?

A. That wasn't the way it was.

Q. I'm not asking you—Did you see the test made of your brakes?

A. Yes, sir.

Q. And who fixed them afterwards?

A. Fixed them after what?

Q. After the collision.

A. I just parked the truck—and of course I sold it right there—I mean, I pulled it back to where that car was, and I disposed of it then.

Q. Who examined your brakes afterwards to find out—you say your brakes failed you—who examined them to find out why the brakes failed?

A. Officer Smith.

page 145 } Q. Officer Smith, the man who testified here today?

A. Right.

Q. Any mechanic examine those brakes, so you knew there was something wrong with them after this collision occurred?

A. No, sir.

Q. Well now, for you to sell it—you weren't going to sell it to a man when you knew that it had broken brakes on there, without him knowing the brakes were defective?

A. I didn't sell it to him there; in other words, he come back by and he said he wanted the truck, and I sold it to him exactly with what was wrong with it, and of course he bought it as was.

Q. How was it damaged?

A. Well, of course the front bumper was knocked off, the two fenders bent in a little bit—and I replaced those.

Q. You fixed the fenders?

A. Yes, sir.

Q. How about the radiator?

A. Well, the radiator was bent in, too.
Q. That was leaking water?
A. Yes, sir.
Q. And you replaced the radiator?
A. Yes, sir.
Q. You did that, too, before you sold it?
A. Yes, sir.
page 146 } Q. And what else did you fix on it before you sold it?
A. That was about all.
Q. And here was a truck that you had a wreck with, because the brakes were defective, and you didn't fix the brakes?
A. (The witness does not respond).
Q. You didn't have the brakes repaired?
A. No.
Q. The line wasn't then broken, was it?
A. No, sir.
Q. That's all.

The witness stands aside.

MR. ORVILLE A. JOYCE,
a witness of lawful age, called in behalf of the defendant, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Poff:
Q. State your full name for the court reporter.
A. Orville Austin Joyce.
Q. Where do you work?
A. I work at the Esso, as an attendant, on Williamson Road.
Q. How long have you worked out there?
A. Well, been out there since January 1st. We was over across the street at Texaco first.
Q. And what kind of work do you do there?
A. Service station attendant.
page 147 } Q. Do you do work on automobile brakes?
A. No, not there—not that station.
Q. Have you prior to this?
A. Yes.
Q. Were you doing work on brakes in January of 1959?

Orville A. Joyce.

A. We did brake work, yes.

Q. Are you acquainted with Mr. Simmons, the defendant in this case?

A. Yes, sir.

Q. Have you ever done any work on a vehicle owned by Mr. Simmons?

A. On his brakes, and pulled the master cylinder on it.

Q. When did you put the master cylinder on it?

A. To the best of my recollection, around about January 2nd—along the first of January.

Q. And is it correct to say he came to your place of business and employed you to put the cylinder on?

A. He dealt with us, and we took care of his car.

Q. And the time of this replacing of the master cylinder you say was when?

A. The second, I believe it was—as close as I can figure it.

Q. Mr. Joyce, based on your experience as a mechanic who has done work on automobile brakes, if the brakes of Mr. Simmons had been damaged in this accident that

page 148 } has been testified to in this case, would the brakes have reacted and built up the way Officer Smith testified?

A. I don't think so—I don't hardly believe it would.

Q. How would they be likely to react?

A. Most of the time it's brakes that are damaged, or something like that, in a case of that kind—they still remain sometimes. A cylinder jams by a jar—it might close the brakes—the jar of the accident—very seldom it happens that way.

Q. If the brakes are damaged in such a way, the brakes will go all the way to the floorboard? Will they, as a result of the damage occurring in the accident, build back up?

A. Not much, I'd say.

Q. That's all. And Mr. Rosenberger will want to ask you some questions.

CROSS EXAMINATION.

Mr. Rosenberger:

Q. Did you put the master cylinder on January 2nd?

A. Yes, sir; I did.

Q. And at that time where were you working?

A. Summerdean Esso, #7307 Williamson Road.

Q. And you say you had not only put the master cylinder on, but you bled the line?

Orville A. Joyce.

A. We had bled them after we did it.

Q. What you mean to say is that you bled the line to get the air out of the line?

A. Yes, sir.

page 149 } Q. Where did you get the master cylinder?

A. He had his own—he brought it to us.

Q. Was that a regular, standard Chevrolet master cylinder?

A. It's a—I don't know where he got it; it's a master cylinder for that type of car, anyway.

Q. Now, did he come back to you and say it wasn't put on right?

A. No, sir.

Q. Did he come back to you after the collision and tell you that the brakes failed?

A. He did that; yes, sir.

Q. When?

A. Right after the wreck. He said—I asked him where his truck was, and he said he had a wreck with it.

Q. Did you examine them?

A. No, sir; I never saw the truck after that.

Q. You're the man that put them on two or three days before? You didn't look at them, and he didn't ask you to examine them?

A. No, sir; I never saw the truck after the wreck.

Q. Did he pay you for doing it?

A. Yes, sir.

Q. You heard him testify that the brake line didn't break? So he still had the fluid in the system, didn't he?

A. That's right.

page 150 } Q. When you have got your fluid in the brake line, and at times it doesn't catch, and again you pump them up—that's a sign you've just got air in there, and you pump it?

A. It's possible.

Q. It's possible, isn't it?

A. Well, yes, I'd say so.

Q. Thank you.—And you don't just get air overnight? It's something that's been in there two or three days?

A. No, sir; the air can get—if you have a bad line, or something like that, the next thing you know—you can get air any time.

Q. Is it likely for the air to get in there between the traffic light—a block and a half—and this accident?

H. G. Cole.

A. Well, you never know when it's going to happen. It might have been building all along, and just got to a state where it failed.

Q. The best time for it to get in there was when you put the master cylinder on, and didn't get the air out, and he had to pump it up and down to get the brakes?

A. Naturally you're going to have some air in there when you put a new master cylinder on—and that's what we bled them for.

Q. A lot of times you bleed them, and you don't get it all out?

A. That's probably the reason.

Q. If that was the situation, and you put it on page 151 } on January 2nd, he had to pump those brakes before that thing happened, didn't he,—if you had left air in there?

A. If we had left air in there? I don't know for sure now.

Q. Thank you, sir.

The witness stands aside.

MR. H. G. COLE,

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

DIRECT EXAMINATION.

By Mr. Poff:

Q. State your full name.

A. H. G. Cole.

Q. What do you do?

A. I run a garage on Williamson Road.

Q. And how long have you been running a garage?

A. About 42 years.

Q. You do all types of mechanical work at the garage?

A. Yes, sir.

Q. Including brake work?

A. Yes, sir.

Q. Are you acquainted with the defendant, Mr. Simmons, in this case?

A. I have been knowing him a good while.

Q. Did you have occasion in January of 1959 to inspect a 1957 three-quarter ton truck owned by Mr. Simmons? page 152 }

A. I did.

H. G. Cole.

Q. Do you know what time in January?

A. No, I couldn't say; I don't know. I think it was around the third or fourth, somewhere along there—I couldn't tell you.

Q. At the time you inspected—

A. He brought it down there, and he said he just put a master cylinder on it, and his brakes was tight on it, and it was tight when they put it on. They left the adjustment on the master cylinder that held the brakes on all the time. So I went ahead and adjusted the linkage on the master cylinder, and checked it all over.

Q. So is it correct to say that at the time you inspected this vehicle, it had recently had a master cylinder put on it?

A. It had a new master cylinder on it.

Q. Now, Mr. Joyce, I believe he testified that he put a new master cylinder on this vehicle on January 2nd; so your inspection of this vehicle must have been then—was it not?—between January 2nd and the date of this accident—January 5th—?

A. Yes, sir.

Q. Now, Mr. Cole, based upon your experience as a mechanic, if a vehicle is damaged or—excuse me—if the brakes of the vehicle are damaged as a result of an accident, in your opinion would they build back up again after that?

A. No, sir.

Q. That's all, Mr. Cole.

page 153 } CROSS EXAMINATION.

By Mr. Rosenberger:

Q. If they will build back up after an accident, is it likely there was anything wrong with them before?

A. If which?

Q. If they build back up after the accident so he's got pedal, it would indicate nothing was wrong with it before?

A. If they build back up after the accident, what he can have, you see—

Q. If they build back up after the accident, that indicates nothing was wrong with it before, doesn't it?

A. If it builds back?

Q. Yes.

A. It could have been something wrong with it.

Q. What could have been wrong with it?

H. G. Cole.

A. Here's the way—otherwise, someone got the hydraulic —got the air brakes—

Q. We're not talking about air brakes—hydraulic brakes.

A. I got hydraulic, and I got power brakes run with the master cylinder.

Q. You know this didn't have power brakes.

A. The same thing—power brakes run by brake fluid—the same thing. You can take a master cylinder—a wheel off, and put—rehone them out, and put a new cylinder kit in the wheels—and you might catch some air in the line.

page 154 } Why, you might bleed them, and there will be an air pocket—it may be six or seven or ten days —a little air pocket will catch in between the fluid and the brake back in there. I have lined several brakes, and maybe they'll run for a week, and the man will come back and say, "I stepped on my brakes, and the brakes went to the floor-board. And the next time I stepped on them they built right back up." There's air will catch in the line, and maybe stay there for six, or seven or ten days, before you get all the air out.

Q. It may be some time before you get all the air out? As soon as the air in in there, and you operate it, you know you got air in the line—the brakes don't always operate right?

A. No, no. You might have a pocket caught in between the line—and you have perfect brakes. As soon as it works to the wheel, where you bleed them, it will go all the way down.

Q. You examined these brakes after Mr. Joyce put the master cylinder in?

A. I said the linkage on the master cylinder.

Q. At the time the brakes were so tight he couldn't get them to act right?

A. The reason of that, when he put the master cylinder on, he set that linkage tight—you have play in there—and he had it tightened up.

Q. And when you examined this, you found the brakes were all right before you let it go?

A. Yes, sir.

page 155 } Q. And you were satisfied the brakes were all right on the third or four of January?

A. When I inspected the brakes, they were in A-1 shape.

Q. Were those brakes good enough to make a 30-foot skid mark?

A. Oh, yes. Then they could make—I mean, could have made a skid mark. Most of the time, where you find a long

skid mark will be there, if your foot brakes happen to give, then you have to catch hold of the emergency brake—you'll be running, say, at 15 miles an hour, and your brakes—with two wheels locking, you leave a skid mark clean up to where your foot brakes work.

Q. You think foot brakes make slide marks?

A. Emergency brakes make three times as much.

Q. You have tried that?

A. Yes, sir—because you only got two wheels pulling by your emergency brake. And then you put on the foot brakes and you got all four wheels.

The witness stands aside.

(Court and counsel convene in chambers to consider instructions).

Mr. Thornton: Before you get down to the damage instruction, what's going to be the Court's view on whether we go to the jury on unavoidable accident?

Mr. Rosenberger: The first thing, the plaintiff moves the Court to strike the evidence on the ground that page 156 } the evidence shows that the defendant's guilty of negligence as a matter of law, and that none of the plaintiffs were guilty of any negligence which was the proximate cause of the accident; and for that reason the plaintiffs are entitled to a verdict as a matter of law.

The Court: You've got too many things going on at the same time. I want to see the position of counsel for the plaintiffs.

Mr. Thornton: I'm trying to get it started.

The Court: What evidence do you have to base an instruction of unavoidable accident on?

Mr. Thornton: The man's brakes—and I've had this in numerous cases. Frankly, I don't know if you have ever had it up this far. The man must have been guilty of some negligence. There apparently isn't any question of lookout—the guy said he saw the car, and he intended to stop. And he said he had brakes before, and he put his foot on the brakes, and he didn't have any. Now, if he was at all familiar with the doctrine of—if he had reason to know he had bad brakes, or something like that, then it is negligence. But taking the proposition—if you have got a sudden—which I expect it is—

refined sudden unexplained brake failure, to which the driver didn't contribute—I guess that's about as close
page 157 } as you can get to it. What's his negligence, in other words?

Mr. Rosenberger: His negligence here—he had a filling station man put on a brake cylinder that he knew that that thing looked bad, and then he took it then to another man to get it adjusted, and that other man says it was perfectly fine. And then we got a skid mark here in the road right up behind him, which must have come from his foot brakes, because he put that—he says he doesn't know whether he put that on.

Mr. Thornton: I don't think that follows as a matter of law. And the brakes—

Mr. Rosenberger: And his brakes weren't good enough to stop it at the speed he was going. He said he had brakes 150 feet away, and within 50 feet away he had to stop. In that 150 feet he didn't stop with his foot brake—and he didn't stop with his emergency brake. And a man forewarned of that—he never put his hand on his emergency brake—he knows he reached for it.

Mr. Thornton: Wasn't forewarned at 150 feet? His brakes worked at a hundred and fifty feet.

Mr. Rosenberger: He was forewarned to stop at 150 feet. He wasn't drunk—he was driving with his eyes shut. He was going too fast.

The Court: That's the thing you don't have—is the speed.

page 158 } Mr. Rosenberger: He said he was going at 25 miles an hour. We can look at the garage, and see. The thing that bothers me about the unavoidable accident is the following: There is no technical evidence of any character or kind from anyone who examined the brakes after the accident, to state that they were in fact defective. The police officer stated, while the pedal would go to the floor, by pumping you did have brakes. That's the evidence of the plaintiffs. The defendant himself stated he had brakes 150 feet away. He has never yet stated at what point, or distance from the plaintiff's car the brakes failed, or that he had no opportunity to dodge the car, turn away from it, or in any way do anything to avoid the collision. He has simply said his brakes failed. And then he did not have the brakes examined after the accident—he stated that on his examination. He said he did replace the radiator and other parts of the car, but sold it without ever having the brakes examined, repaired, or anything done in connection with it. His evidence, to be frank about it, is so incorrect, I don't see how

the Court could possibly grant an instruction based on unavoidable accident. And the Court should sustain the motion of the plaintiff, that the plaintiffs were free from negligence, and are entitled to summary judgment.

page 159 } (Motion of plaintiffs' sustained—and summary judgment awarded).

Mr. Thornton: We'll note an exception, and for the reason we think it's a jury question.

The Court: The Court would like to add, further, there is no evidence on which the jury could base a finding, one way or the other, that the brakes were or were not defective. There is no evidence that after the accident the brakes were even defective at that point. Now, that brings us back to the question of verdicts. But I don't think you can have one verdict. I'm willing to cooperate with you, but I'm not willing to keep the jury here too late tonight.

Mr. Thornton: When we get down here to the question of the amount sued for in the infant's case, I don't know how—this is the first time it has come up for me—I don't know how to handle it. But I suppose the easiest way would be to make a motion that the amount sued for in John D. Adams' case be reduced to $7,500. Paragraph 5 of John D. Adams' case claims $250 physiotherapy; doctors in the future, $350—you haven't got any evidence of that. Then you have got permanent disability and earning ability. Permanent disability, $7,500; pain and suffering, sixty-nine hundred. Now, I think I am entitled under the evidence, as it now stands, to ask that No. 8 be reduced, in the John Adams case, to—by $750, which would make it—

page 160 } Mr. Rosenberger: Over here (Indicating) we say the sum of $4,000—over here is what he's talking about, Judge. We're alleging that he received medical treatment, X-rays, purchased medicine, incurred expenses of the hospital, all in the amount of, to-wit, $250—and in all probability incurred expenses for doctors and physiotherapy of the sum of $350. He says he has to go back to see Dr. Howe, because he has to have another examination and another treatment. He still has trouble. And in all probability, he'll be disabled permanently, and his earning capacity reduced—the damage, to-wit, $7,500. And he has suffered injuries and pain of mind and body—it is damage, to-wit, $6,500. We asked for damage for $7,500 in paragraph 5—they are all under "*Videlicet.*" But in any event, they are

not set down as any definite amount. And we asked judgment in the sum of $15,000. No bill of particulars asked, and none furnished.

Mr. Thornton: I didn't have to furnish any. You have claimed $7,500, according to this, for permanent disability—you haven't got any permanent disability.

Mr. Rosenberger: I asked for $15,000.

Mr. Thornton: Composed of the following items.

The Court: You may be entitled to an instruction. I don't recall the evidence exactly, now, that there is
page 161 } no permanent disability—or that would be left out of any instruction to the jury. But I don't see how the Court could delete the amount sued for, by deducting any one item.

Mr. Thornton: It's unusual. I have never had it come up.

Mr. Rosenberger: They might think there are other items. It's not absolutely that amount.

The Court: Certainly no plaintiff could recover more than $15,000, and that's the amount sued for.

Mr. Thornton: And we take the position that the John Adams case would have to limited to $7,500 at the most. And the same thing is done—in reading these things over the other night—Mrs. Adams, the same arrangement comes up—I was talking permanent disability, sixty-two fifty, to her. And—I mean, there's something that isn't right about that. I mean, they can base the claim on permanency worth so much, and there isn't any evidence of it. And I don't think the jury is entitled to consider that. I want to save the point.

The Court: You save the point, and I'll overrule it right now—and handle it on what the jury may consider.

Mr. Rosenberger: What I want to get—you know more about writing these verdicts. Right at the end
page 162 } of this instruction, can't you write, "You're directed that you shall return three verdicts."

The Court: You can't direct them on anything.

#2 is the damage instruction. You may have to separate the ones for each particular plaintiff.

Mr. Livington: May I suggest, in that respect, that in Mr. Adams case, "for the damages suffered by him, to-wit, all expenses, medical and otherwise, which he was put to as a result of the accident, including property damage, medical loss"—whatever expenses have been put in here. He's responsible, as the husband, for his wife and his son.

Mr. Rosenberger: We've got that all in the evidence, and it's shown it was paid by him—and they'll have to return it to him. I don't think the Judge, under our law, can tell

them what items of damage they shall return for plaintiffs. You see what I mean?

The Court: I think we can in the form of the instruction—what they can consider. Let's try it, and see where we get to. There was no objection to it in the previous case. I'll go up in the ranks with a record to inform the jury what's being sued for—they are being informed on everything else.

Mr. Thornton: At this point, I want to be certain the records shows that our objection to the first in-
page 163 } struction is on the grounds—it's our position that it's a jury question on the issue of negligence.

The Court: Not on negligence, but on the issue of unavoidable accident?

Mr. Thornton: Yes. And the position that our client was not guilty of negligence; that he was confronted with a sudden mechanical failure, without fault on his part—that's what it is. We save the point on the $15,000. We object to #6 refused, and except.

The Court: They amended the rule. You know, we have a peculiar system in Virginia—you're not supposed to comment on the evidence in the State court; and you can't direct a verdict; and yet you can set the verdict aside, if it isn't in accordance with the law. And accordingly, we sometimes have a problem. Are you familiar with this recent amendment, effective February 1st, that says you can enter up judgment for either party? They didn't tell you how to do it. That's a recent amendment to take care of a situation of this kind. But it does not say how you're to proceed. This is my practice—I don't know whether it's right—I have given instructions on it. In effect it is charging the jury, because you're using the jury to liquidate damages.

Instruction #1, given. (Excepted to by Mr.
page 164 } Thornton as to the amount sued for.)

Instruction #2, given.

Instruction #3, given.

Instruction #4, given.

Instruction #5, given.

Instruction #6, refused. (And exceptions taken)

Mr. Poff: Defendant by counsel has objected to the giving of Instruction #1, which holds that as a matter of law the plaintiffs are entitled to recover—and I believe the record shows we have stated our objections.

The Court: Instructions #2, #3 and #4 given for the plaintiffs. All excepted to by the defendant, in that counsel

opposed the Court putting in $15,000 as the amount sued for. No other exceptions?

Mr. Poff: No other exceptions. I wanted to be sure it reflects our exceptions to the Court's ruling not to reduce the amount sued for.

The Court: You put it in. Let the record show that the defendant moved the Court to reduce in the case of each one of the plaintiffs, in the case of John B. Adams, an infant, and in the case of Crescence K. Adams. The defendant moves the Court to strike from the complaint

page 165 } that portion of paragraph 5 which relates to permanent disability; and the defendant moves the Court to reduce the amount sued for to the extent that each of these complaints claims damages for permanent disability for which there is no evidence in this case upon which to base such a recovery. The Court would like to point out, however, that in each of the Instructions given the jury, as to matters they may consider, these elements referred to by counsel for the defendant have been omitted; in other words, the element of permanent injury has been left out, and similar items.

Mr. Poff: I take it, your Honor, the Court would consider it a fair subject for closing argument to mention the fact that the plaintiff has only sued for so much as pain and suffering—and that's all the evidence there is to support.

The Court: I think you could comment that there has been no evidence of permanent injury.

Mr. Poff: And he claims so much for it?

The Court: The Court wouldn't take objection to it. I don't know whether they'll object to it, or not. They could reply that they sued for $15,000—for whatever it's worth.

(Court and counsel return to the courtroom).

(The Court instructs the jury).

page 166 } (Summations were made to the jury by—Mr. Rosenberger for the plaintiffs; Mr. Thornton for the defendant; Mr. Rosenberger for the plaintiffs.)

(The jury retired to consider their verdict, and later returned the following awards:)

"We, the jury, find for the plaintiff John B. Adams, who sued by his father, against the defendant, Curtis O. Simmons, and fix the damages in the amount of $5,000;

"We, the jury, find for the plaintiff, Morton Adams, against the defendant, Curtis O. Simmons, and fix the damages in the amount of $5,000;

"We, the jury, find for the plaintiff Crescence K. Adams, against the defendant, Curtis O. Simmons, and fix her damages in the amount of $1,600."

Mr. Thornton: We want to make the usual motion to set the verdict aside on the grounds of excessiveness, misdirection of the jury, and being contrary to the law and the evidence—and in each case.

The Court: In each case, which motion the Court overrules.

page 167 } CLERK'S CERTIFICATE.

I, W. H. Carr, Clerk of the Circuit Court for the City of Roanoke, State of Virginia, do hereby certify that the foregoing stenographic copy or report of testimony and other incidents in the trial of the case of John B. Adams, et al., *v.* Curtis O. Simmons, was filed with me as Clerk of said Court on the 20 day of July, 1960.

W. H. CARR, Clerk.

page 168 } JUDGE'S CERTIFICATE.

I, F. L. Hoback, Judge of the Circuit Court for the City of Roanoke, State of Virginia, do hereby certify that the foregoing is a true and correct stenographic copy or report of all the testimony that was introduced, and other incidents of the trial therein, all questions raised and all rulings thereon, and the exception noted, in the case of John B. Adams, et al. *v.* Curtis O. Simmons, tried in the Circuit Court for the City of Roanoke, State of Virginia, on the 20th day of May, 1960, with the exception that the transcript does not contain the deposition of Dr. William W. Howe, which is referred to on p. 61 of the transcript, which was read to the jury, and which, by agreement of counsel, has previously been formally filed and made part of the record in this case. It appears in writing that the plaintiffs' attorneys have had reasonable notice of the time and place when this report of the testimony and other incidents of trial would be tendered and presented to the undersigned for certification, which was presented to me

on July 15, 1960 within sixty days after final judgment, and signed by me within seventy days.

I also certify that the court reporter reporting said case was sworn to take down and transcribe the proceedings faithfully and accurately, to the best of his ability.

Given under my hand this the 19th day of July, 1960.

F. L. HOBACK, Judge.

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

Page

Writ of Error and *Supersedeas* Awarded—#5265 1
Writ of Error and *Supersedeas* Awarded—#5266 2
Writ of Error and *Supersedeas* Awarded—#5267 3
Record No. 5265 4
Motion for Judgment 4
Proof of Service 6
Notice of Motion for Judgment 7
Grounds of Defense 8
Oath of Court Reporter 8
Jury Verdict 9
Order—June 9, 1960 9
Bond 10
Record No. 5266 12
Motion for Judgment 12
Proof of Service 14
Notice of Motion for Judgment 15
Grounds of Defense 15
Oath of Court Reporter 16
Jury Verdict 17
Order—June 9, 1960 17
Bond 18
Record No. 5267 20
Motion for Judgment 20
Proof of Service 22
Notice of Motion for Judgment 23
Grounds of Defense 23
Oath of Court Reporter 24
Jury Verdict 25
Order—June 9, 1960 25
Bond 26
Records Nos. 5265, 5266 and 5267 28
Order—May 20, 1960 28
Instructions 28, 88
Judgment—May 20, 1960 31
Notice of Tendering Transcript 33
Notice of Appeal and Assignments of Error 33
Proceedings 35, 70, 85, 90
Witnesses:
Officer J. D. Smith 35
Officer R. T. Padgett 39
Walter L. Alls 39
John B. Adams 45
Mrs. Crescence K. Adams 52
Morton Adams 58

Page

Arthur W. Fleshman, Jr. 71
Curtis O. Simmons 74
Orville A. Joyce 79
H. G. Cole 82
Certificates 91