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Record No. 5275

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Richmond, Va.

In the Supreme Court of Appeals of Virginia at Richmond

MARY LOUISE ADAMS

v.

CHARLES HARRISON ALLEN

FROM THE CIRCUIT COURT OF NOTTOWAY COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 5275

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 29th day of November, 1960.

MARY LOUISE ADAMS, Plaintiff in error,

against

CHARLES HARRISON ALLEN, Defendant in error.

From the Circuit Court of Nottoway County.

Upon the petition of Mary Louise Adams a writ of error is awarded her to a judgment rendered by the Circuit Court of Nottoway County on the 9th day of September, 1960, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Charles Harrison Allen and another were defendants; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 12 } INSTRUCTION NO. 5.

The Court instructs the Jury that if you believe Mrs. Adams found herself in a place of danger, through no fault of her own, requiring her to act without time to consider the best means of avoiding the danger, she is not negligent in failing to adopt the best means, and is not required to exercise the same degree of care as one having ample opportunity for full exercise of her judgment. She is not guilty of negligence if she makes such choice as a person of ordinary prudence placed in such a position might make, even though she did not make the wisest choice.

J. G. J.

* * * * *

page 20 } INSTRUCTION C.

The Court instructs the jury that at the time and place of the accident Mrs. Adams was required to exercise reasonable care to observe the following:

(1) To keep a proper lookout;
(2) To keep her vehicle under reasonable control;
(3) To apply her brakes when necessary in order to avoid a collision;

And you are told that these are continuing duties and not particularly dischargeable at any time or place.

And if you believe from the evidence that Mrs. Adams violated any one or more of these duties, then she was guilty of negligence.

J. G. J.

page 21 } INSTRUCTION D.

The Court instructs the jury that if you believe from the evidence that Mrs. Adams was in the act of passing or attempting to pass a horse and wagon vehicle on a double

solid line at the time of or just prior to the accident then she was guilty of negligence.

J. G. J.

* * * * *

page 23 } INSTRUCTION F.

The Court instructs the jury that if you believe that the accident occurred on Mr. Allen's side of the highway, then a *prima facie* case of negligence on Mrs. Adams' part has been made out against her. She is then under the necessity of an explanation of why she came upon her wrong side of the road. Not just any sort of explanation will do. It must be a reasonable explanation, one which the jury can accept, tending to show that what happened was due to some other than plaintiff's negligence.

J. G. J.

page 24 } INSTRUCTION G.

The Court instructs the jury that the statutory provision that a driver of a vehicle entering a public highway from a private road shall, immediately before entering the public highway, stop, and upon entering the highway yield the right of way to all vehicles approaching on such public highway, must be given a reasonable construction. It does not grant an exclusive privilege to drivers on the public highway regardless of their duty to obey traffic laws and to exercise reasonable care to protect the rights of others. When a driver on a private road approaches an intersection, stops, and looks in both directions for approaching traffic on the public highway, acting as a reasonably prudent person exercising reasonable care would act, he is not negligent as a matter of law if he attempts to enter the intersection under the reasonable belief that he has time and opportunity to cross safely. He is only required to yield the right of way to those lawfully approaching so near the intersection that he cannot safely enter it.

J. G. J.

* * * * *

page 26 } INSTRUCTION J.

The Court instructs the jury that in order to excuse the plaintiff Mrs. Adams for driving to the left of the center of the highway on the contention that she was confronted with a sudden emergency, they must believe from a preponderance of the evidence that such sudden emergency did, in fact, exist and that the emergency was brought about through no fault of the plaintiff Mrs. Adams, and that in driving to the left of the highway she acted as a reasonably prudent and careful person would have done under like circumstances.

• • • • •

page 37 } August 3, 1960

MR. GEORGE S. CUMMINS, JR.
MR. W. M. GRAVATT, JR.
Blackstone, Virginia

MR. ERNEST G. GARRETT, JR.
MR. J. CALVITT CLARKE, JR.
Mutual Building
Richmond, Virginia

Re: *Adams* v. *Allen* (Nottoway)

Gentlemen:

I have now gone over the papers in this action and am of the opinion that the evidence presents a question for the jury. The jury has decided this question adversely to Mrs. Adams.

There were other objections made by Mrs. Adams during the course of the trial to the instructions and to other matters. She has not abandoned these objections but they were not argued orally nor have they been argued and briefs filed in this case. I am of the opinion that none of these objections constitute such error as would require the setting aside of the jury's verdict in this case.

I am therefore of the opinion that the motion for a new trial should be denied and that judgment be entered on the verdict of the jury. Mr. Garrett may prepare an order

carrying out the above expressed view and submit same to other counsel.

Yours very truly,
J. G. JEFFERSON, JR., Judge

J. G. J., Jr.: 1b

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* * * * *

The Court having heard the argument of counsel, having read the memoranda of law and facts submitted by counsel and having read the transcript of the testimony is of the opinion that the motion to set aside the verdict of the jury, to enter judgment in favor of the plaintiff and to impanel a new jury for the fixing of damages and the alternative motion to award a new trial should be and the same hereby are overruled, and it is ORDERED that the plaintiff take nothing of the defendants and that the defendants recover from the plaintiff their costs, to which action of the Court the plaintiff objected and excepted.

Enter this Order:

J. G. JEFFERSON, JR. Judge

September 9, 1960.

We ask for this:

ERNEST G. GARRATT JR. pd.
W. M. GRAVATT, JR., pd.

Seen and objected to:

GEORGE S. CUMMINS, pq.
J. CALVITT CLARKE, JR., pq.

* * * * *

page 39 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

TO: Hodges S. Boswell, Clerk of the Court aforesaid, and Ernest G. Garrett, Jr. and William M. Gravatt, Jr., Counsel for the defendant, Charles Harrison Allen:

Take notice that the plaintiff in the above styled case does hereby note an appeal from a final order of judgment rendered in this case on September 9, 1960, and does hereby signify the plaintiff's intention of filing, within the time prescribed by the Rules, a petition for an appeal with the Clerk of the Supreme Court of Appeals of Virginia, or with one of the justices of the said Court.

The plaintiff makes the following assignments of error:

I. The Court erred in permitting counsel for the defendant to continually cross-examine the witness Foster as to an extra judicial statement allegedly made by the witness, after the witness denied that the alleged extra judicial statement had been so made by him, the result of which improper cross-examination was to permit the counsel for the defendant to in effect be testifying, with resultant confusion and misleading implication being placed before the jury, and which confusion and misleading implications were unwarranted by the evidence as a whole and were by design intended to confuse the facts of the accident.

II. The Court erred in not granting the plaintiff a mistrial and in failing to instruct the jury in each instance that they should disregard the remarks of counsel for defendant, and in permitting counsel for the defendant to state to the jury, as a fact, that the jury did not properly and completely view the scene of the accident and to state further, as a fact, that part of the grass shoulder along the road side shown in one of the exhibits had been destroyed by battery acid from the plaintiff's car, on the ground that the statement of defendant's counsel were designed to and did confuse and mislead the jury and placed before the jury matters of surmise and speculation on the part of defendant's
page 40 } counsel as being established fact, the Court further being in error in failing to instruct defendant's counsel fully against commenting on matters that were beyond the record and outside the evidence.

III. The Court erred in failing to sustain the plaintiff's motion to strike the defendant's evidence at the conclusion of all the evidence and enter summary judgment for the plaintiff and instruct the jury solely on the matter of dam-

ages, on the ground that there was no evidence of negligence on the part of the plaintiff and ample evidence from all of the witnesses, including the defendant himself, that the defendant was guilty of negligence amounting to the sole proximate cause of the accident.

IV. The Court erred in granting any instructions for the defendant on the ground that there was no show of any primary negligence on the part of the plaintiff by any evidence of a probative nature and on which reasonable men might differ, and on the further ground that the defendant established his own negligence as a matter of law by his failure to maintain a proper lookout and to see that which should have been obvious to him; and on the further ground that the defendant did not keep his vehicle under proper control and failed to yield to the plaintiff the right of way to which the plaintiff was entitled.

V. The Court erred in granting over the objection and exception of the plaintiff, the following instructions for the defendant:

(1) Instruction No. C.

* * * * *

(2) Instruction No. D.

* * * * *

(3) Instruction No. F.

* * * * *

(4) Instruction No. G.

* * * * *

(5) Instruction No. J.

* * * * *

VI. The Court erred in overruling the plaintiff's motion to set aside the jury verdict as being contrary to the law and the evidence and enter final judgment for the plaintiff, empaneling a new jury for the purpose of fixing page 42 } the *the* plaintiff's damages, on the ground that the verdict of the jury was contrary to the evidence,

against the great weight of the evidence and absolutely without evidence to support it.

Respectfully,

MARY LOUISE ADAMS
By Counsel

GEORGE S. CUMMINS
The Marshall Building
Blackstone, Virginia
Counsel for Mary Louise Adams

* * * * *

Filed Sept. 9, 1960.

J. G. JEFFERSON JR., Judge

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page 4 }

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EVIDENCE ADDUCED
IN BEHALF OF THE PLAINTIFF.

Mr. Cummins: Trooper Darnell.

CHARLES T. DARNELL
was sworn in behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Cummins:

Q. You are Mr. Charles T. Darnell, a Virginia State Police Officer from Nootoway County?

A. Yes, sir.

Q. In your capacity as a State Police Officer, Mr. Darnell, did you, on May 6, 1959, about 5:30 p. m., investigate an automobile accident at or about Cherry Tree Crossing in Nottoway County on Route 460?

A. Yes, sir.

Q. If you would, please, sir, tell us from the beginning

of your alert, or whatever you might call it, what you did and what you determined?

A. I was notified of this accident at 6:00 p. m. by radio and I arrived at the scene ten minutes later, which was

page 5 } 6:10, and the time of this accident I established was 5:50 p. m.

On my arrival at the scene, I found a '51 Hudson sedan which had been headed east and a '50 Pontiac sedan, which apparently had been headed west, had collided.

My investigation further revealed that Mary Louise Adams was the operator of the Hudson sedan and that Charles Harrison Allen was the operator of the Pontiac, which was a '50 model.

The injured, which was Mr. Allen and Mrs. Adams, had been removed at the time. A deputy sheriff by the name of Frank Shepherd was at the scene and he was attempting to direct traffic. Some wreckers had arrived at the scene.

Q. At the time, Mr. Darnell, what was the condition of the weather?

A. The condition of the weather at that time, it was clear. I might add further that the surface was black top at that point; the traffic lanes are marked; it was open country; it was daylight.

Q. How many lanes of traffic are there, sir?

A. There is two lanes of traffic.

Q. One east and one west?

A. Yes. I might add further that the point of impact in this accident occurred—

Mr. Garrett: Just a minute.

page 6 } A. (Continuing)) What I am going to establish, sir, is the distance from a STOP sign at the intersection.

Mr. Garrett: Your Honor, I think that Trooper Darnell should confine himself to what he found when he got there and any conclusion as to what happened where would be improper.

The Court: That is right.

Mr. Cummins: That is what I was asking him.

By Mr. Cummins:

Q. Continuing now, Mr. Darnell, you may tell us—I imagine

for the record you might tell us what the approximate width of that road is, the lanes?

A. The width of the highway at that point is approximately 20 feet, the surface. At that time, I made some pictures with a camera belonging to another subject. These pictures—the negatives were not developed by me or the pictures were not printed by me. I have these pictures here.

Mr. Clarke: May we see them a minute?
The Witness: Yes, you may.
Mr. Garrett: Just a minute. Let us see the pictures.

page 7 } By Mr. Cummins:

Q. Don't tell us anything, Mr. Darnell, except what the several lawyers might ask you.

A. Yes, sir.

The Court: Let me mark them the first thing you do.
Mr. Cummins: They haven't been introduced yet.
The Court: Are you going to introduce them?
Mr. Cummins: Mr. Darnell was gratuitously telling us that he had taken some pictures. I have no desire to introduce them at this time.
The Court: All right. If you do not want to introduce them I won't mark them.

By Mr. Cummins:

Q. Mr. Darnell, I hand you—

The Court: Are you going to introduce those?
Mr. Cummins: Yes, sir.
The Court: Let me mark them so there won't be any confusion.

(The three photographs were received in evidence as Plaintiff's Exhibits 1, 2, and 3, respectively.)

page 8 } By Mr. Cummins:

Q. Mr. Darnell, I see that you have been reading from your accident report book, you have been refreshing your recollection from that; may I see it?

A. Yes, sir.

Q. This is your accident report book, Mr. Darnell?

A. Yes, sir.

Q. Stays in your possession?

Charles T. Darnell.

A. With the exception of the present time, and whether at the time that this accident report was made, it is a practice now that when we investigate an accident we make the notes and sometimes we draw the diagram, sometimes we don't, and they are left in the office, a secretary types the report, and draws the diagram part of the time, and mails it to the Division.

Q. May I ask you this. Did you make a diagram in your field notebook regarding this accident?

A. I did, yes, sir.

Mr. Garrett: May I see that, Mr. Cummins, before you question the trooper further?

Your Honor, we feel that the trooper can make a diagram of what he found when he got to the scene of the accident. I believe that would be—

page 9 } Mr. Cummins: That is what that is.

Mr. Garrett: That would be entirely proper. Any of this sort of stuff I believe would be improper.

The Court: All right, sir. Go ahead.

Mr. Clarke: Do I understand you are objecting to the trooper's showing the diagram he made at the scene of the accident to the jury in his testimony?

Mr. Garrett: Mr. Clarke, you don't even have to ask me that question.

Mr. Cummins: I do, because I want to know what you are objecting to. Do you mind the jury seeing this diagram?

Mr. Gravatt: Your Honor, the trooper can tell what he found when he got to the scene. It is for the jury to determine what happened there. Whether it's for me or against me, I don't think it's proper to put it in there—and certainly some of it is for me.

The Court: You can draw what you found there and use your—

By Mr. Cummins:

Q. Mr. Darnell, here is a blank pad of paper. Do you have a pencil?

page 10 } A. Yes, sir.

Q. If you would take that blank pad of paper and now draw on it what you found, just whatever you need to use from your own knowledge, and draw what you found.

The Witness: May I stand up, Judge?

Charles T. Darnell.

The Court: Yes, sir. Just put the position of the cars when you got there.

A. All right, sir. (Drawing)

The Court: Also put on there "Crewe" and "Blackstone" so that we will know which way it looks.
The Witness: All right, sir.

A. (Continuing) I am not a very good artist. I don't know whether this represents what you want.

By Mr. Cummins:
Q. That is all right. You are not being graded on artistry. you are being graded on your accuracy.

Mr. Garrett: May I see that?

By Mr. Cummins:
Q. If you will, sir, will you, as best you can, just sketch in the driveway. You might make reference to any mailbox or Coca-Cola sign with reference to these pictures, Exhibit No. 1 and Exhibit No. 3, which have been introduced in evidence. We just want every kind of thing, like the apron as the driveway spreads out, Mr. Darnell.
page 11 } A. All right. (Drawing) May I ask you, do you want the Coca-Cola sign in there?
Q. You may make an X where that is, or a little sign, you do not have to be so precise. I just want the jury fully oriented.
A. (Drawing)

Mr. Cummins: All right. I think what you have got is probably sufficient, Mr. Garrett.
The Court: That is Exhibit 4.

(The drawing was received in evidence as Plaintiff's Exhibit No. 4.)

By Mr. Cummins:

Q. You might hold that and tell the jury which direction that is as to Crewe and Blackstone. Tell where Rice's store is. In other words, explain it to them.
A. This sketch here, that is Route 460. I might add in here (indicating) there is a little section that is broken, there are

Charles T. Darnell.

no marks at all, which is customary for the highway markers that we do have in the state. This is in the direction of Blackstone, this would be Nottoway Courthouse here, this is Route 607.

Q. Stick pretty much, if you will, to the area of the accident.

A. All right, sir. Directly in this location is

page 12 } grocery, there is a store there; this is the apron here that I drew that automobiles can pass over this area.

Q. That is more or less the driveway; is that what you mentioned?

A. Yes, that is the driveway. I have an X here, which you will note there is a Coca-Cola sign. I don't know the dimensions of the sign or anything, but it is placed right at the edge of the driveway here.

This diagram here represents Mrs.—Mr. Allen's vehicle after the impact is what I found in this position. The right front wheels more or less was resting on the double solid line here. Mrs. Adams' vehicle was slightly behind Mr. Allen's on the left shoulder and possibly in the ditch.

Q. Headed toward Blackstone?

A. Headed toward Blackstone?

Q. And Mr. Allen's car was headed in general toward Blackstone, but at kind of an angle?

A. Yes, it was headed in a northeasterly direction.

Q. Tell the jury while they are looking at this where did Mr. Allen tell you in your investigation that he had come from?

A. He told me that he was pulling out of the driveway attempting to get into the westbound lane of traffic and headed in the direction of Crewe.

page 13 } Q. That would be, I take it, now he would—I am not trying to speak for you—

A. Yes, sir.

Q. —but are you telling these gentlemen of the jury that Mr. Allen stated that he was trying to leave the area of Rice's grocery store and get back into the highway and cross over and get into the westbound lane to go to Crewe? That is what you are telling us?

A. That is correct, yes, sir.

Q. And that is the way that you found the cars?

A. That is the position.

Q. Both of the automobiles, Mr. Darnell, and the debris I

take it were found across from and adjacent to the driveway?

A. They were.

Q. Nothing was down below the driveway or anything?

A. No.

Q. All right in front of the natural and normal driveway?

A. Yes, sir.

By Juror No. 4:

Q. Whose car was in the driveway?

A. This is Mr. Allen's car.

Mr. Cummins: Mr. Allen, the defendant.

page 14 } By Mr. Cummins:

Q. Mr. Darnell, if you will, sir, I hand you Plaintiff's Exhibit No 3 and ask you if you recognize what it is? Hold it so that the gentlemen of the jury can see it.

A This is Route 460 here. This is Rice's grocery. This is the Coca-Cola sign that I was speaking of a while ago. It is placed down at the south entrance of Route 607 as on the notes runs in this direction (indicating).

Q. This is an intersecting road, coming in here?

A. That is correct, yes, sir.

Q. I ask you to tell me what this is and what this is, Plaintiff's Exhibit No. 1.

A. This is a shot of practically the same location except this is the apron of the driveway.

Q. Showing the driveway of Rice's grocery?

A. Yes, sir, and Route 460.

Q. Looking generally in the direction of Crewe, is it?

A. Yes, it would be looking almost west.

Q. All right, sir. Now, if you will, Mr. Darnell, please take your pen and on Plaintiff's Exhibit No. 1 mark as best you can where the area of the highway with reference to that Coca-Cola sign and the driveway you found those automobiles to have come together.

page 15 } Mr. Garnett: No. The officer may indicate where he found the automobiles, period, but not where they came together.

Mr. Cummins: I beg your pardon.

By Mr. Cummins:

Q. Show them where the automobiles were found by you

and where you found the debris of the accident. Do you know what I mean by debris?

A. Judge, the only way that I can answer that question would be the distance from a sign—

Q. Hold the phone. Would another exhibit be of any assistance to you? Would Plaintiff's Exhibit No. 2 assist you in any way? Hold it just a minute, Mr. Darnell.

Mr. Cummins: Gentlemen, I am going to introduce this.

Mr. Garrett: I suggest that the Judge mark it for identification and have the trooper identify it and we will proceed from there.

The Court: All right. No. 5.

(The photograph was received in evidence as Plaintiff's Exhibit No. 5.)

By Mr. Cummins:

Q. Mr. Darnell, I hand you, with reference to the
page 16 } question that you have under consideration, Plaintiff's Exhibit No. 5 which purports to show a rather more close-up view of the Coca-Cola sign that you mentioned and the edge of the apron of the drive; can you take either of the four exhibits that you have in your hand and help the jury understand with reference to the driveway where you found the automobiles and the debris therefrom? Take any of the photographs you want. None of them are any better than the others.

A. May I stand up and look at the other photographs that I do have?

The Court: Yes, sir.

Mr. Cummins: Spread them all out.

A. I don't know whether I am going to be able to answer that question or not.

By Mr. Cummins:

Q. Have you not, Mr. Darnell, substantially answered it? Did I understand you a moment ago to state that you found the automobiles in front of the driveway?

A. Yes, sir.

Q. All I am trying to do now is to get you to show these gentlemen on the photographs about where in front of the driveway you found the cars.

Charles T. Darnell.

A. All right, sir. One minute. Do you want me to mark that?

page 17 } Q. If you can do so.

A. Or would it be all right if I pointed it out to the jury?

Q. I imagine it would be all right if you pointed it out where you found the cars in front of the driveway.

Mr. Gravatt: If Your Honor please, the officer has photographs showing where he found the car, which is the best evidence.

Mr. Cummins: We will let you gentlemen introduce them.

Mr. Gravatt: He is your witness and he is testifying from them.

Mr. Cummins: He is testifying from these photographs.

Mr. Garrett: We are just trying to help you out of your difficulty.

Mr. Cummins: I understand what you are trying to do.

Mr. Clarke: Judge, these are larger.

Mr. Cummins: These are larger and show it more clearly, that is all. It is perfectly all right if he uses any of them. I am just trying to speed things along.

Mr. Gravatt: You sure are confusing your witness.

page 18 } By the Court:

Q. Do you think you can put them on that?

A. Judge, it would be right hard for me to locate them on that large photograph.

Mr. Cummins: All right, Mr. Darnell. That is perfectly all right. We will withdraw any further question about pinpointing on the picture.

By Mr. Cummins:

Q. I do understand so far from your testimony when you arrived at the scene of this accident you found the automobiles substantially as you have indicated here in Plaintiff's Exhibit No. 4?

A. Yes, sir.

Q. Is that correct?

A. That is approximately it.

Q. That being the store, this area being the driveway, you found them out in front of the driveway?

A. Yes, sir.

Q. Was anyone injured in this accident, Mr. Darnell?

Charles T. Darnell.

A. The occupant of each vehicle was injured and taken to the Southside Hospital in Farmville.

Q. Did you see either of the occupants at the scene?

A. Not at the scene, no, sir.

page 19 } Q. Did you, Mr. Darnell, when you arrived at the scene, discover any marks, any skid marks, made by either of the motor vehicles?

A. Yes, sir, I did.

Q. By which motor vehicle were the skid marks made?

Mr. Garrett: Just a minute.

By Mr. Cummins:

Q. (continuing) If you can tell.

Mr. Garrett: Your Honor, I think he would have to confine himself to just saying what he saw there on the road.

Mr. Cummins: That is what I have asked him.

The Court: There isn't any skid marks go up to the cars on the road?

The Witness: They were directly behind one of the vehicles.

The Court: Go ahead and tell.

By Mr. Cummins:

Q. Continue, Mr. Darnell.

A. There were approximately 6 feet of marks which were—could have been skid marks made by the transmission or rear end on the No. 1 vehicle, which is the Mrs. Adams vehicle.

Q. Mrs. Adams, the plaintiff?

page 20 } A. I don't know whether they were brake marks or what caused the marks.

Q. Were they marks made by her tires?

A. Yes, they were.

Q. Would you take this diagram of yours, which is Plaintiff's Exhibit No. 4 that you have prepared, and introduced, and mark on there in sort of a little fashion with a pencil how you found the skid marks to be, what way they were, and so forth?

A. (Marking) These marks were directly — they were very faint, approximately 6 feet of them. They were on the surface right directly along the shoulder line.

Q. Mr. Darnell, with reference to your skid marks that you think were made by the Adams vehicle, did you have any indication there on the highway as to the course that the Adams vehicle had taken during the skid mark placing?

Charles T. Darnell.

A. I don't know whether I would be able to answer that question fairly, Mr. Cummins.

Q. Don't answer it if you can't answer it fairly.

A. I would have to give my opinion.

Q. We are not here on that, much as I would like to.

Mr. Garrett: I would like it, too, Mr. Cummins, but it is not proper.

Mr. Cummins: I know and I did not ask it.

By Mr. Cummins:

page 21 } Q. From your investigation of the scene of the accident, Mr. Darnell, and now with reference to the driveway and the Coca-Cola sign and those items, was it at that time possible for a motorist who was coming out of the driveway attempting to go in a westerly direction to see any eastbound traffic coming toward him from Crewe?

Mr. Gravatt: Just a minute, Your Honor, that takes into account an awful lot of factors that may or may not be present.

Mr. Cummins: I am asking him whether his vision was blocked.

The Court: If you ask it in a different way, that is all right.

Mr. Cummins: All right, sir. I am sorry, let me restate my question. I was trying to do it so he would be sure and understand it.

By Mr. Cummins:

Q. From your investigation, if you come out of the driveway there can you see up the road to Crewe? That is the simplest way I know how to ask it.

Mr. Gravatt: I have no objection to these simple questions.

Mr. Cummins: All right.

By Mr. Cummins:

page 22 } Q. (Continuing) When you come out of the driveway of Rice's grocery store, Mr. Darnell, before you get into highway, towards Crewe can you see up the highway towards Crewe?

A. It would all depend on which direction you came out, which course you took after you left the building. At a certain point, possibly your vision would be obscured.

Q. At what point would that be?

A. The Coca-Cola sign would obscure your vision.

Q. If you stopped beside it?

Charles T. Darnell.

A. If you stopped beside it.

Q. In other words, you say if you stopped beside the Coca-Cola sign and then went out in the road you would have to go out into the road without seeing?

A. You could not see looking west, your vision would be obscured.

Q. So if you stopped there you would be stopping at a place where you couldn't see; is that right?

A. You couldn't see.

Q. In a place further up the driveway towards Nottoway Courthouse, you are talking about the Coca-Cola sign which is down in the lefthand corner of the driveway closest to Crewe?

A. Yes, sir.

Q. That is a long, wide driveway. If you get further up the driveway towards Nottoway Courthouse, are you able to see any cars coming from Crewe?

page 23 } A. I think you could see much better, your vision wouldn't be obscured.

Q. You say your vision would not be obscured?

A. I don't think it would if you would get up there.

Q. In the course of your investigation, you did discuss this accident with Mr. Allen?

A. Yes, and Mrs. Adams.

Q. And Mrs. Adams. Did Mr. Allen or not, on any occasion, tell you that he did not see any oncoming cars when he pulled out?

A. I talked to Mr. Allen in the Farmville Hospital as soon as I left the scene and could travel to the hospital and his statement to me was that he didn't see anything at all.

Q. Didn't see anything at all?

A. No, sir.

Q. I take it—did he tell you in addition to that he didn't know how the accident happened?

Mr. Gravatt: Just a minute. Is he leading this witness here, Judge?

Mr. Cummins: No, I am asking him if he told him that he didn't know how the accident happened.

The Court: I reckon that will pass.

A. I don't recall. The only thing he told me this, page 24 } he did not see anything at all.

By Mr. Cummins:

Q. Didn't see anything at all?

A. No, he did not. I may have testified to that before, but I don't remember now.

Charles T. Darnell.

Q. He has told you this business about not seeing any cars on several occasions, has he not?

A. I talked with him on two occasions, talked with him at the hospital and he told me that, and I also went to his home and it was mentioned again at his home on his front porch.

Q. Did *me*, Mr. Darnell, or did he not, tell you in the course of your investigation that he was easing into the highway at about 5 miles an hour?

A. The only thing he told me was that he didn't see anything at all, and further, that he was attempting to get into—onto Route 460 to head west in the direction of Crewe.

Q. Did he use the word "attempting"?

A. That may be my word that I used.

Q. Is it possible that it was his word?

A. It could have been, or may have not, I don't know.

Mr. Cummins: These gentlemen may want to ask you some questions.

page 25 } CROSS EXAMINATION.

By Mr. Garrett:

Q. Trooper, let's see if we cannot now find another mark here on this road. Isn't there a gouge mark that you found on the highway there that is actually still up there on the road, isn't it?

A. I don't know whether it is there now or not.

Q. Well, it may have been patched over, but you can see it?

A. It was at that time. I think there were two of those. May I see those pictures, Judge? It's not visible in these. I believe the gouge mark was to the rear here in the westbound lane of traffic. It was made by an automobile or rather by an object striking the surface, by one of the vehicles.

Q. Won't you locate that on your diagram or can you do that? Just approximately

A. I believe that is visible in one of the photographs.

Q. Let's try it on the diagram, too, Officer.

A. This may or may not be correct. I am not sure on it. But the only thing that I do remember, it is some where in this neighborhood in the east—in the westbound lane of traffic. I may or may not be right.

Q. That was not a tire mark, but it was a mark,
page 26 } the road was actually gouged out, wasn't it?

A. It was made by apparently some part of one of the automobiles scraping the surface.

Q. Let me ask you one question while we are talking about

Charles T. Darnell.

that. This car of Mrs. Adams was damaged extensively in the front and I believe the righthand side was down on the road, wasn't it, wheel crumpled in and down on the road?

A. Yes, sir, you are correct.

Q. Officer, we may seem to be playing hide and seek with these pictures, let's see if we can't get them—

Mr. Clarke: If Your Honor please, I think that is thoroughly uncalled for.

Mr. Cummins: That is all right, let him say it.

The Court: Are you objecting to the pictures coming in?

Mr. Clarke: No, object to his saying hide and seek with them.

Mr. Garrett: I just didn't mean that.

The Court: You are talking about some mighty trifling things.

(A series of photographs were received in evidence as Defendant's Exhibits A, to F, both inclusive.)

page 27 } Mr. Clarke: Judge, may I suggest to the Court that the officer label those two marks. He has gouge marks and skid marks. He ought to put "S" by the skid marks and "G" by the gouge marks. Is that all right with you?

Mr. Garrett: That is all right.

The Witness: (Marking)

By Mr. Garrett:

Q. Just to get these in the record, Officer, the Judge has identified these as A through F and they are the small pictures that someone took in your presence, or you used the camera?

A. I used their camera, yes, sir.

Q. And you took all of these pictures?

A. I took all except two.

Q. And they adequately represent what you found there?

A. Yes.

Q. Referring now to Plaintiff's Exhibit No. 5, isn't that the gouge mark that I just now referred to? It has been refilled, but isn't it right there?

A. That appears to be the same gouge mark.

Mr. Cummins: I object to his statement that it has been refilled. Mr. Garrett is not competent on that.

Charles T. Darnell.

page 28 } By Mr. Garrett:

Q. Do you know whether it has?

A. I can't tell you now. I know sometime after the accident I stopped there and the mark was still in the highway.

Q. Have you looked at it recently?

A. Not recently, no.

Q. Do you know when these pictures were taken?

A. I do not.

Q. Officer, this Plaintiff's Exhibit No. 5 shows the Coca-Cola sign, shows some bushes in here, there is a little ditch right in here, isn't there a culvert runs across the road and there is a ditch in there?

A. I am not familiar with that, no, sir I don't know.

Q. Referring to Defendant's Exhibit No. D—hold this up—doesn't that show this ditch much better? Don't you remember that bank there?

A. I don't remember that. That same question was brought up here before and I don't recall the ditch being there and I have not stopped by there to look.

Q. Isn't this area that shows in the picture well west of the mailbox and the Coca-Cola sign and the driveway?

A. You can see the edge of the driveway right here.

Q. Begins down here, doesn't it?

page 29 } A. Comes out right here.

Q. All right, now. Let's take this man's shadow across the road and that comes out to right here, doesn't it?

A. The shadow, yes, it comes out, but it is at an angle.

Q. Which angle is it, westward?

A. It would be in a northeasterly direction, the same direction Mr. Allen's car was headed after the impact.

Q. Isn't it true, Trooper, that this car is setting well west of this area right here? Isn't it?

A. It is west. Now how far, I do not know. The rear end.

Q. Then your diagram is not entirely accurate or to scale, is it? You have got the car sitting well east of the end of that driveway whereas the pictures which you took yourself show that the car was somewhat west of the driveway?

A. There is a possibility that, as I stated before, this is the approximate location, not the exact.

Q. Officer, that is a right material thing. Now you have testified that the car was stopped opposite the driveway and here the picture shows that it is down in here somewhere; isn't that true?

A. It is not down in here, the rear end is more or less in this

Charles T. Darnell.

page 30 } manner here. It could be back just a little bit further because the picture will show you better than I can draw the diagram. I am not an artist.

Mr. Garrett: Well, I would like for the jury to take a look at this picture.

(The exhibit was handed the jury.)

Q. Trooper, Defendant's Exhibit No. A is a picture taken in the other direction; is that true?

A. Yes, sir, that is looking east.

Q. Can you make out some marks on the road there? This right here, do you see that? And this in here, are they the gouge marks that you are referring to?

A. Those are the gouge marks which you can see the surface has been gouged here.

Q. Let's look at this again now. Those gouge marks are right there beside of the car; isn't that true?

A. Yes, to the left of the vehicle.

Q. Is that the same mark as this here?

A. It appears to be. Now I cannot say whether it's the same mark or not.

Q. Officer, wouldn't that necessarily put the car right here in the middle of this picture?

A. It's a posibility it would, yes, sir.

Q. I ask you again, don't you think that your diagram is right much out of scale there to bring the car way
page 31 } up in here when it should be more properly back here? Of course, you couldn't make it to scale then.

A. This could be extended in here. This is a diagram. I am not a good artist, as I said before. It could come out in this manner, this line. I can draw the line again to more or less conform with the picture.

Q. Wouldn't you actually have to bring it out somewhere along in here, Officer, and then it would be right much out of scale, wouldn't it?

A. I can't answer that question.

Q. We won't pursue it any further right now. Officer, just one other question. When you talked to Mr. Adams at the hospital, what was his physical condition?

A. You mean Mr. Allen?

Q. Mr. Allen, I'm sorry.

A. He was very upset, sir.

Mr. Garrett: I think that is all—just one minute.

Charles H. Allen.

Q. Did you check the brakes or were you able to check the brakes on the Adams car?

A. No, I did not check them. I don't think that I could have even gotten inside of the vehicle to check the brakes.

Mr. Garrett: That is all.

Mr. Cummins: I have one question, Mr. Darnell.

page 32 } RE-DIRECT EXAMINATION.

By Mr. Cummins:

Q. Q. This is a reiteration, I am going to repeat. When you got to the scene of this accident and saw these automobiles and this debris and so forth, were the automobiles and the debris in front of the driveway of Rice's grocery?

A. I would say they were right at the end of the driveway there where you come out.

Q. But would they be in front of the end of the driveway?

A. They would be in front of the end of the driveway.

Q. So they would be in front of the driveway; is that right?

A. Yes, they would be in the front of the end where you can come out, you can take an automobile and drive through there.

Q. So while the debris—I don't mean to ask you two or three, I hoped I could stop at one—but while the driveway is a rather long driveway and has two ends of course, like anything does, the accident did happen in front of the driveway at one end of the driveway?

A. Yes, sir.

Mr. Cummins: I thank you. That is all I want to ask you.

Mr. Garrett: No further questions.

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* * * * *

Mr. Clarke: We would like to call Mr. Allen as an adverse witness.

Mr. Cummins: Adverse, hostile witness.

CHARLES H. ALLEN

was sworn in behalf of the plaintiff and, as an adverse witness, testified as follows:

DIRECT EXAMINATION.

By Mr. Clarke:

Charles H. Allen.

Q. You are Mr. Charles H. Allen, the defendant in this case?
A. Yes, sir.
Q. Where do you live, Mr. Allen?
A. Crewe, Virginia.
Q. What time of day did this accident happen?
A. About 5:45 in the afternoon.
Q. Where had you been?
A. Beg your pardon?
Q. Where had you been?
A. Oh, I had been at my job in Blackstone.
Q. You were on your way home?
A. I was on my way home, yes, sir.
Q. You stopped at Rice's?
A. Right.
page 34 } Q. What did you stop at Rice's for?
A. To get some gas and a little purchases.
Q. How long were you there?
A. Oh, probably it took me maybe ten minutes, but what I mean is I got there previous to that. I thought you had reference to the accident. I thought the accident would be about 5:45 because I got there a little bit earlier than that.
Q. All right, sir. Where was your car parked when you were there?
A. At the gas pumps.
Q. Headed in what way?
A. Headed toward Crewe.
Q. When you pulled out, you pulled off, which way did you head?
A. Toward Crewe.
Q. Along the driveway?
A. Yes, sir.
Q. You traversed the driveway in a slanting manner then?
A. No. You mean entered the driveway?
Q. No, sir, I am talking about leaving the driveway or leaving the gas pumps.
A. Well, I pulled down toward the east end of the driveway.
page 35 } Q. That is right. Then you pulled slantwise to the road, you didn't pull directly?
A. No, I did not pull slantwise to the road, I made a turn and my wheels, front wheels, were practically—you have got like up against these gentlemen's feet—(indicating) up against there pulling on the edge of the road.
Q. Is that directly opposite the gas pumps?

Charles H. Allen.

A. No.
Q. Then you did go west?
A. No, I didn't go west.
Q. Well, the gas pumps are a good distance?
A. Oh, yes, west, towards Crewe?
Q. Yes.
A. Yes.
Q. Then you did not go straight to the road, you went somewhat parallel and toward the road?
A. Right.
Q. At an angle to the road?
A. Well, it could be a slight angle, yes.
Q. Then you entered the highway at an angle, didn't you?
A. No, sir.
Q. When did you turn straight?
A. Well, my wheels were up against the edge of
page 36 } the roadway.
Q. Both of them, both front wheels?
A. Both front wheels, practically, yes, very closely, because I had made a turn, after I come down, I made a turn toward the highway.
Q. Then your car was then at right angles to the road?
A. Yes, approximately. Yes, sir.
Q. Now, sir, did you look to your right or to your left?
A. Yes.
Q. Which way did you look first?
A. To the right.
Q. Did you see anything coming?
A. No, sir.
Q. Did you look to the left?
A. Yes, sir.
Q. How far could you see?
A. Well, I could see approximately to the curve, I guess.
Q. How far is that?
A. Oh, approximately 3- or 400 yards in there. I wouldn't know definitely.
Q. Did you see any cars in there?
A. No, sir.
page 37 } Q. What did you do then?
A. I entered the highway.
Q. And then you got hit; is that right?
A. Got into my lane and straightened around and started on my momentum to go again.
Q. You say you had just started on your momentum to go?
A. After I had entered the highway, yes. I turned and ready to go forward.

Mary Louise Adams.

(The photographs were received in evidence as Plaintiff's Exhibits No. 6 and No. 7, respectively.)

By Mr. Cummins:

Q. Mrs. Adams, I hand you a photograph marked
page 61 } Plaintiff's Exhibit No. 7 and I ask you not to say anything about it until you have looked at it for a moment. You don't have to say anything until I ask you. I first want you to look at it to make sure that you understand the picture. Do you understand that picture, what it is?

A. Yes, sir.

Q. Let's turn it this way to the jury and tell the jury whose automobile is that?

A. That is my automobile.

(Another photograph was received in evidence as Plaintiff's Exhibit No. 8.)

Q. Mrs. Adams, without saying anything further, just look at that picture for a moment and see if you understand it. Now, after looking at it, if you do understand it, it is marked Plaintiff's Exhibt No. 8, tell us what that is a picture of?

A. That is a picture of my car after I wrecked.

Q. What part of your car? Outside? Inside?

A. That is the inside, the steering wheel point.

Q. You say Plaintiff's Exhibit No. 8 is a photograph of the inside of your car showing the steering wheel?

A. Steering wheel.

Q. While that is going around, I show you Plaintiff's Exhibit No. 6 and ask you to first look at it and see if
page 62 } you understand it. If after you look at it and you do understand it, please tell the jury, by holding it up for them to see, what it shows. What is Plaintiff's Exhibit No. 6 a picture of?

A. That is the car after I wrecked.

Q. Whose car?

A. That is my car after I wrecked.

Q. Are you sure of that, Mrs. Adams? Take another look.

A. No, sir, I am—

Q. Look first and understand the picture.

A. No, sir, I am sorry. This is Mr. Allen's car after it wrecked.

Q. All right. That is a great difference.

A. I am sorry. I did look at the front. I was looking at the

Mary Louise Adams.

A. Paul's Lobster and Steak House.
page 59 } Q. Incidentally, are you also employed in Crewe?
A. Crewe Garment Factory.

Q. At the time that I have mentioned and up to about Cherry Tree Crossing, tell us, Mrs. Adams, as best you can, how you were operating your automobile and what you first noticed that put you on any alert and what you thereafter did. In other words, tell us about how this accident happened, starting from your trip down the highway.

A. Well, I was driving down the road just before you get to Rice's grocery store around 50 miles an hour and just before I got to the place I looked up and I seen a car, looking over to the service—to the grocery store, I had seen a car just coming slowly just before it entered the road and I—

Q. Whose car was that that you saw? Do you know?

A. That was the car that I wrecked with, Mr. Allen's.

Q. You said you saw it slowly coming toward the highway, was it coming straight, at a straight line, directly at right-angles to the highway, or was it coming drifting in at an angle, or what?

Mr. Garrett: Mr. Cummins is leading the witness.
The Court: Yes, I think it is.

A. All right. Coming down at the end of the driveway as you go out, at the Coca-Cola sign, just up beyond
page 60 } it, was a car slowly coming on and as I got up, come on up I reckon about three or four car lengths of the car, I thought the car was going to stop, it gradually come in a V-shape out in the highway, come slanting in a V-shape. As I saw this car coming out, I thought it was going to stop. I could see it come right on out. I blowed the horn and just as I blowed the horn and turned my wheels, because I thought we was going to hit head on, give my wheels a slant to the left, the car went up in the air and from then on I never did know nothing.

Q. What part of the cars hit each other, Mrs. Adams?

A. Well, it seemed to me that my right fender kind of hit the side—hit his car in the side, just in the part of his front and part of his side that the car went right together and I remember the cars kind of reared up. I remember my car rearing completely up.

Mr. Cummins: Wait a minute. Maybe we can explain that this way. Mark these, Judge, if you will, please, sir.

Mary Louise Adams.

RE-DIRECT EXAMINATION.

By Mr. Cummins:

Q. One other question. This is Plaintiff's Exhibit No. 4 and this is a diagram, Perkins, made by the State Police Officer. This shows Rice's service station and here is the Cherry Tree Crossing here, and this is the driveway, this is the Coca-Cola sign as you go in, and the police investigator has placed both of the cars out here in the front of this end of the driveway. Is that where those cars were when you saw them after the wreck?

A. Yes, sir.

Q. Just like the police officer said?

A. Yes, just like he said.

Mr. Cummins: That is all.

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MARY LOUISE ADAMS

was sworn and in her own behalf testified as follows:

DIRECT EXAMINATION.

By Mr. Cummins:

Q. You are Mary Louise Adams from Crewe?

A. Yes, sir.

Q. What is your age, Mrs. Adams?

A. Forty-five.

Q. You are married and have children?

A. Yes, sir.

Q. How many children do you have?

A. Eight children.

Q. With reference to May 6, 1959, at about 5:30 that afternoon, were you operating your automobile on the highway out here on 460 going to Blackstone?

A. Yes, sir, I was.

Q. What was the purpose of your trip to Blackstone?

A. Going to work.

Q Where do you work in Blackstone?

Perkins Foster.

A. Down lower.
Q. In front of the lower end of the station?
A. That's right.

RE-CROSS EXAMINATION.

By Mr. Garrett:
Q. Perkins, let me ask you a little about that now. This defendant's Exhibit No. D, does that show about
page 56 } the way it was when you looked at it there at the scene? Does that show where the vehicles came to rest and all?
A. That is after they had the crash, that is the way it was.
Q. Perkins, isn't that down below the driveway? Do you know where that ditch is?
A. Yes, sir.
Q. And then there is a bank on the Crewe side of the ditch, isn't it?
A. Yes, sir.
Q. And the automobile is actually down below that bank, isn't it? You look at it and tell me where it is from that ditch. Isn't it west of that ditch?
A. No, sir, I don't think so.

Mr. Cummins: The pictures are so small you can't see nothing.
A. (Continuing) No, sir, I don't think so.

By Mr. Garrett:
Q. You can't see that?
A. No, sir.
Q. Did you actually see them hit together, Perkins?
A. No, sir, I did not.
Q. Were they still moving when you looked around?
A. The last I seen, Mr. Allen was still moving.
page 57 } Q. Wasn't his car swung back this way (indicating)?
A. After the wreck.
Q. Pushed backwards?
A. I don't know if it was pushed backwards or sideways. I don't know which way it was because I didn't see it when it hit.

Mr. Garrett: Thank you very much.

Perkins Foster.

Q. Did Mr. Gravatt ask you any questions?
A. No, he didn't ask very many. He didn't have much to say.
page 54 } Q. This man here was doing all of the talking?
A. Well, he didn't do so much, but he asked me several questions and I told him as best I know how.
Q. We are talking now about the courtroom, we are not out, we are talking now for this record and these gentlemen of this jury. When the car operated by Mrs. Adams and the car operated by Mr. Allen hit together, was your horse and wagon completely up in the driveway?
A. Yes, sir, clean off the hard surface altogether.
Q. Was it well up in the driveway?

Mr. Garrett: I suggest that he not lead the witness, Your Honor. I think that is improper.

By Mr. Cummins:
Q. What part of the driveway were the wagon and horse in when they hit together?
A. East end—west end.
Q. What part?
A. Right at that Coca-Cola sign, right at the mail box.
Q. Let me ask you this way. How far—

Mr. Garrett: I think he has answered, he said it was right at the Coca-Cola sign.
Mr. Cummins: You don't mind if I ask him a question?
page 55 } Mr. Garrett: You keep pursuing the same point. He is your witness.

By Mr. Cummins:
Q. From what you could see there when Mr. Allen was coming out and you were going in and you all were beside each other, did I understand you a while ago to say that you were both at that time completely off the hard surface?
A. I was clean off the hard surface. He were, too, the last I seen him. He was coming from the gas. He hadn't never hit the hard surface.
Q. Do you know who Mrs. Allen was blowing her horn at?
A. No, sir, I do not.
Q. I mean, Mrs. Adams. Did both of these automobiles hit together in front of the driveway or garage in front of the station.

Perkins Foster.

RE-DIRECT EXAMINATION.

By Mr. Cummins:

Q. Perkins, Mr. Garrett asked you if you recalled him being down there to see you Friday; is that correct?

A. Yes, sir.

Q. And Mr. Garrett told you in such a way as to get you to back up the fact that—

Mr. Garrett: Wait a minute—

Mr. Cummins: Wait a minute. Now you took him on that, I have a right to clear him up.

The Court: He is your witness. There is a difference in cross-examination.

Mr. Cummins: Let me go about it this way:

By Mr. Cummins:

Q. Mr. Garrett did come down to see you Friday; is that correct?

A. Yes, sir.

Mr. Garrett: As a matter of fact, it was Thursday.

Mr. Cummins: All right, Thursday. Excuse me.

page 53 } By Mr. Cummins:

Q. He came to see you Thursday?

A. Yes, sir.

Q. Was that the only lawyer there at that time?

A. It was another man with him.

Q. Was that man named Mr. Gravatt?

A. Mr. Gravatt.

Q. So there were two lawyers there talking to you, weren't there?

A. Yes, that's right.

Q. Where were they talking?

A. Well, they asked I drive up. I was out cutting wood, at least, I had a turn of wood to go in the house.

Q. Where were they talking to you?

A. In the yard. In the yard and a little bit up there at the store where he asked me to show him about where I was on the driveway when the accident happened.

Q. Mr. Garrett has stated that he didn't ask you any questions, that you just came and told him all of this; did Mr. Garrett ask you any questions or not?

A. He asked me several questions.

Perkins Foster.

The Court: He has got a right to examine the man.

Mr. Clarke: I object to the Court's ruling and except to it because I think it is improper cross-examination for him, in effect, to be testifying.

By Mr. Garrett:

Q. Perkins, didn't you tell us that before you heard the horn blow—this is before you even got to the mail box—that you saw Mr. Allen leave the gas tanks?

A. That's true.

Q. That is what you are telling this jury now?

A. That is what I am telling them.

Q. And didn't you tell us that you did not pay any more attention to him until you heard the horn blow or the crash?

page 51 } A. When I heard the horn blow, I looked back just like that (indicating) to see was my wagon in the clear and I turned around to look back to see how far I was from the stob so I could tie and the crash happened.

Q. Then there wasn't just a second between the horn blowing and the crash, was there?

A. It was a good second, I reckon.

Q. A good second?

A. I reckon a second.

Q. Where was your wagon between the mail box and the stake when the crash took place? How far had you gotten?

A. It had gotten by the mail box, the wagon by the mail box, and then at that time the crash come up. Yes, sir.

Q. Where was Mr. Allen when the horn was blowing?

A. He was coming off on the gas tank when I seen him. When I looked around and seen him, I wasn't paying any attention whether he stopped, whether he was keeping going, or what.

Q. You don't know where he was when the horn blew?

A. No. Between the road and the gas tank. I know.

Q. But you don't know exactly where?

A. No, sir.

Q. You were not paying any attention?

A. No, I won't paying no attention, I was getting

page 52 } my horse in the clear where I could tie.

Mr. Garrett: Thank you, Perkins. Your Honor, we have no further questions.

Q. That is true, isn't it?

A. That's true. I told you I was right at the mail box, the head of the horse had passed the mail box about that much (indicating).

Q. Wait a minute. That is what you are telling us now, that the head of the horse was just that far past the mail box when the horn blew?

A. When the horn blew.

Q. And you were getting ready to go into the driveway?

A. I was already in the driveway. The mail box is off the driveway.

Q. Well, let's see these pictures here and we will try to get that cleared up.

page 49 } Mr. Clarke: If Your Honor please, I do think that it is unfair for counsel to question the witness on the basis of conversations allegedly taking place between them when he is not going to testify under oath about what happened. All he is doing is throwing out a lot of gambits that are not going to be accountable for.

Mr. Cummins: That is all right.

The Court: He is on cross-examination.

By Mr. Garrett:

Q. (Continuing) Perkins, you are saying that the head of your horse was right by this mail box?

A. That mail box right here. There is a vacant between—you can drive a car between that mail box and hard surface.

Q. You didn't drive in here (indicating)?

A. No, I drove on that side of the mail box.

Q. The head of your horse was past the mail box?

A. About that much, (Indicating).

Q. Say a foot and a half by the mail box. That would put the rest of your horse and wagon back here, wouldn't it?

A. Yes, sir, put it back there.

Q. And that is where you were when the horn blew?

A. Yes, sir.

page 50 } Q. Didn't you also tell us that you had gotten over to the stake before the collision occurred?

A. No, sir, I did not, I said I was on the way to the stake to tie.

Q. Didn't you measure off—

Mr. Clarke: If Your Honor please, I think if the witness denies that he made those statements, then it is proper to require Mr. Garrett to get on and submit his own testimony.

Perkins Foster.

Q. You didn't have to go, you just decided that you would go?

A. You asked me to go and I went up with you up there.

Q. Right. You remember that you told us that you knew Mrs. Adams, used to plow her garden for her?

A. I plowed it once or twice, but I don't know her. I go up —anybody ask me to plow for them, I go up and do the work. A whole lot of people I plow for I don't know their name today.

Q. Didn't you tell us that you had known her for
page 47 } a long time?

A. I have been knowing of her, yes, sir. I have been knowing her for a long time.

Q. And she lived up there right near you?

A. She lives a right good ways from me.

Mr. Cummins: I didn't ask him if he knew her.

By Mr. Garrett:

Q. Perkins, didn't you also tell us when you went up to the scene with us—we didn't ask you any questions, you just told us what you saw; isn't that right?

A. I told you exactly what you asked me as near as I could.

Q. Right. We asked you as to how it happened and you went from there?

A. Yes, sir.

Q. Don't you remember that you told me, and I recall asking you about this several times, that the head of your horse was right at the mail box?

A. Past the mail box.

Q. When the horn blew?

A. That's right.

Q. And the rest of your horse and wagon was on the west of the mail box and on the road?

A. East.

page 48 } Q. Towards Crewe?

A. No, sir, I was coming from Crewe.

Q. I know you were.

A. I was coming from Crewe.

Q. Well, if the head of your horse was at the mail box the tail of the horse and wagon would have been in the direction of Crewe. wouldn't it?

A. Yes, sir.

Q. Don't you remember now you told me that the head of your horse was at the mail box when the horn blew?

A. I showed you exactly where I was.

Perkins Foster.

Q. Are you any particular friend of Mr. Allen's or Mrs. Adams'?

A. No, sir.

page 45 } Q. Do you know either one of them to amount to anything?

A. Not to amount to anything. I know of them, but I don't know nary one of them, I just know their name and that is all.

Q. But you were there when that accident happened?

A. Yes, sir.

Mr. Cummins: All right. These gentlemen may want to ask you a question. Just a minute.

Q. The sound of the horn that you heard, did it come from behind you, in front of you, or over to your left, or the Allen car, or Adams car, or do you know?

A. Behind me.

Q. The sound was behind you?

A. The sound of the horn was behind me.

Q. And at the time that the sound of the horn was made, was Mr. Allen still on your left just about beside of you going down?

A. Yes, sir.

Q. You ought to know if he was that close if it was his horn; was it his horn?

A. No, it wasn't his horn.

Q. It wasn't his horn?

A. No, the horn was behind me.

Q. Behind you from the highway?

page 46 } A. From the highway.

Mr. Cummins: That is all.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Perkins, do you remember Thursday afternoon Mr. Gravatt and I met you up at your house?

A. Yes, sir.

Q. And the Sheriff had just been by and served you a subpoena; do you remember that?

A. That's right.

Q. And we asked you if you minded going up to the scene with us?

A. Yes, sir.

Perkins Foster.

page 43 } off the driveway, off the hard surface. I seen I was in the clear altogether. I turned around like that (indicating) and no sooner I turned around to look to see where I was going with my horse the accident occurred.

Q. They done hit?

A. They done hit.

Q. How much time would you say went by between the time that the horn blew and the time they hit together?

A. It wasn't a second.

Q. About a second?

A. Yes.

Q. In other words, it was right quick?

A. Right quick.

Q. And that was the time that you were down at the corner of the driveway?

A. Yes, sir.

Q. And Mr. Allen was coming on past you at the corner?

A. Yes, sir.

Q. And are you telling us that you heard a horn and a bang of those two cars right quick?

A. Right quick.

Q. Do you know, Perkins, whether or not Mr. Allen stopped at the edge of the highway before he drove in it? Do you know whether or not he did?

page 44 } A. No, sir, I do not.

Q. You do not know whether he did?

A. I do not know whether he stopped.

Q. You do not know whether he did?

A. No, sir, I don't.

Q. You just don't know?

A. I don't know because I looked to see where I was going with my horse and wagon and it happened. I didn't have time to look to see how it happened. I didn't see them when they went together.

Q. All right, hold the phone just a minute. When you last saw Mr. Allen before you heard the cars bang together, was he moving when you last saw him?

A. Yes, sir.

Q. Moving slowly down?

A. Moving slowly along. He wasn't driving fast, just—

Q. Easing on out of the driveway?

A. Yes, sir.

Q. At that time, was he on the driveway or on the highway?

A. The last I seen him, he was on the driveway, on the driveway.

as Plaintiff's Exhibit No. 3 and *a* ask you to hold that in your hand a minute and look at it before you say anything. Do you understand what the picture is?

A. Yes, sir.

Q. It shows a picture of the driveway, doesn't it?

A. Shows a picture of the driveway.

Q. Hold it so these gentlemen behind you can see and tell these gentlemen which way was Mr. Allen going out of the driveway when you saw him.

A. Coming over this way, coming out by the Coca-Cola sign. I was going in to the Coca-Cola sign. I was coming from south—coming west, and he was coming from the east.

Q. Now, Mr. Allen has testified—no, you weren't here and didn't hear him, but Mr. Allen has said that he came down the driveway here, down in the area of this end, and came out—

Mr. Gravatt: Just a minute.

Mr. Garrett: I don't recall that.

Mr. Gravatt: He didn't say what end.

Mr. Cummins: We have got a reporter. My recollection and yours differ.

page 42 } Mr. Gravatt: Often do.

Mr. Cummins: Very often.

By Mr. Cummins:

Q. Let me ask the question this way, Perkins. As you were going in the driveway and Mr. Allen was coming down and out of the driveway, how far over on your left was Mr. Allen from you?

A. Oh, about 8 feet.

Q. Eight feet?

A. About 8 feet above me.

Q. In other words, he was right close to you?

A. Well, he wasn't very far.

Q. Passed right by you as you were going in the corner of the driveway and he was coming out?

A. That's right.

Q. All right. Forget the first question I asked you. At about that time, Perkins, did you hear any horns blowing or anything like that?

A. I did so.

Q. You did hear a horn blow?

A. Yes, sir.

Q. Tell us what you know about the case from then on?

A. When the horn blew, I looked back to see how far I was

Perkins Foster.

Q. On a horse and wagon coming from Crewe?
A. Yes, sir.
Q. Is it correct or not that when you come from Crewe you occasionally pull into Rice's grocery there?
A. Yes, sir.
Q. Do you have a steady place that you kind of park your horse and wagon?
A. Yes, sir, a little west of the store there. There used to be a row of stobs there and I used to go in there and tie the horse.
Q. I show you a picture here which has been identified as Plaintiff's Exhibit No. 5 and I want you to hold that picture in your hand and study it first. Don't say a word until you take a good look at the picture. Don't be cutting your eyes around at these men moving in on you, they won't hurt you. Have you taken a good look at the picture?
A. Yes, sir.
Q. Do you understand what the picture shows?
A. Yes, sir, I do.
Q. I want you to tell the gentlemen of the jury where, about, on that picture you were pulling in as you say?
page 40 } A. Right in here, right along in here.
Q. Right along by the mail box?
A. By the mail box. I had a stob right in there.
Q. That is the stob right there that you were going to hook your horse to?
A. Hook the horse to.
Q. That stob where I have got my left thumb is where you were going?
A. That is where I aimed to tie the horse.
Q. And that stob is up at the top of the picture; right?
A. That's right. That's right, I was coming right off out there (indicating).
Q. Had you got your horse and wagon all of the way up in there all right? Were you off the highway?
A. Off the hard surface altogether.
Q. While you were off the hard surface and getting off the hard surface, and getting up there like that, had anything happened yet?
A. No, sir, hadn't nothing happened.
Q. While you were up there where you say parking your horse and wagon, did you see the 1950 Pontiac operated by Mr. Charles Allen? Did you see Mr. Allen's car any place?
A. He was coming off from the gas tank.
page 41 } Q. Coming off from the gas tank?
A. Coming off from the gas tank.
Q. Now I show you a picture here which has been identified

Q. I see, but you had not really started, you were just getting your momentum?

A. Well, no, I can't say that I was just getting my momentum because I was under momentum when I entered the highway.

Q. How fast were you going?

A. Well, I don't believe that I was going over 3 to 5 miles, not over.

Q. Do you have standard shift or—

A. Automatic.

Q. So, in other words, you had just started forward?

A. Yes, sir.

Q. From your position before you entered the highway?

A. Yes, sir.

Mr. Clark: That is all.

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PERKINS FOSTER

was sworn in behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Cummins:

Q. Your name is Perkins Foster?

A. That's right.

Q. Where do you live, Perk?

A. I live a little ways from Cherry Tree Crossing.

Q. A little ways from Cherry Tree Crossing?

A. About a half a mile.

Q. On the afternoon of May 6, 1959, at about 5:30 that evening, were you up there around Cherry Tree Crossing?

A. I pulled right into the store.

Q. You were pulling into the store?

A. Yes, sir.

Q. Where had you been coming from?

A. Crewe.

Q. You had been coming from Crewe?

A. Yes, sir.

page 39 } Q. How were you traveling, Perkins?

A. On a horse and wagon.

Mary Louise Adams.

front and when I looked back I knew it wasn't my car, it was Mr. Allen's car.

Q. Always think before you speak. That is Mr. Allen's car. Mrs. Adams, my last question, before we started passing the pictures around, was which part of the cars struck each other. Now we have seen the photographs and it is correct, is it not, that the front end of both of those—

page 63 } Mr. Garrett: Just a minute. Don't go leading the witness. She testified that she hit the side of the car.

Mr. Clarke: She said the side and the front. Mr. Garrett, I think you ought to quote her right if you are making an objection.

Mr. Garrett: Your Honor, I object to him taking pictures and then asking the witness to change her testimony.

The Court: The pictures I marked show the car.

Mr. Garrett: I think so, too.

The Court: Without any further ado, I reckon more accurately than anybody can testify.

Mr. Cummins: All right, sir.

By Mr. Cummins:

Q. Mrs. Adams, as you were coming down the highway and first saw the car easing into the highway in front of you, as you say, tell us how far was the Allen car in front of you, how far ahead of you was it, when he first came into the highway?

A. It was the average of around 50 feet.

Q. Fifty feet?

A. Yes, sir.

Q. How many car lengths would you say it would be?

A. I would say it would be about 3 or 4 car lengths.

page 64 } Q. Ahead of you?

A. Ahead of me, my car, when he entered.

Q. And at that instant, what did you do?

A. I blowed the horn and turned my wheels kind of to the left to get rid of him and up in the air we went at the white line.

Q. What made you turn your wheel to the left, Mrs. Adams?

A. Because he was coming right at me and that was the only thing I could just think to do. He was coming right in me and I was trying to get rid of him.

Q. So far as you know, judging from your knowledge of this

accident, do you know of anything else at that instant that you could have done that you didn't do?

A. I did all I could do. I couldn't do any more. I didn't have time.

Q. You were traveling at 50 miles an hour?

A. Yes, sir.

Q. How much time would you say, Mrs. Adams, elapsed from the time he started into the highway and you blew your horn, from that instant, until the crash? How much time would you think went by?

A. Well, just such a little while that I can't judge a little while like that.

Q. Just a flash?

A. Just in a little while, just in a flash. I page 65 } couldn't do no more. I did all I could do.

Q. Mrs. Adams, was there on the highway in front of you at the time that Mr. Allen came out any horse and wagon?

A. There was nothing on the highway no way, shape, nor form when he come out.

Q. Were you blowing your horn at Mr. Allen or were you blowing your horn at something else besides Mr. Allen?

A. I was blowing my horn at Mr. Allen and I did know we were going to wreck.

Q. You could see you were going to wreck?

A. I could realize that we were going to wreck and he just pulled on out.

Q. You were not blowing your horn at any horse and wagon?

A. No, sir, I blew it at him because I knew we were going to wreck, and he came on and we hit with me blowing the horn.

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CROSS EXAMINATION.

By Mr. Garrett:

Mary Louise Adams.

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Q. I want to ask you a few questions about at the scene of the accident. Did you ever apply your brakes?

A. No, sir, I didn't have time.

Q. Do I understand that you are saying that you did not see Perkins Foster or his wagon there at the scene?

A. I only glimpsed the wagon, I didn't see him.

Q. Isn't it true, Mrs. Adams, that you blew your horn for Perkins Foster's wagon and then you pulled out on the wrong side of the road to pass his wagon? Isn't that true?

A. No, sir, his wagon ain't never been in no road, not when I was on it. I blowed at the car direct in front of me ready to hit.

Q. Is it true, as he says, that the head of his horse was at the mail box when you blew your horn?

A. I didn't pay any attention to the wagon.

page 77 } Q. Well, it must have been on the road, wasn't it, Mrs. Adams?

A. It wasn't on the road, the road was clear, nothing on the road. That man had done got wherever he was going when I went by. Nothing on the road whatsoever in front of me and just the car pulled out in front.

Q. You are now telling us that Perkins Foster's wagon was not on that highway when you blew your horn?

A. It was not on there, no, sir.

Q. You heard him testify?

A. Yes, sir, I heard him testify.

Q. And you deny that you pulled out to pass his wagon and went on the other side of the road?

A. I never passed his wagon, his wagon wont on the road.

Q. How fast was Mr. Allen going?

A. Well, I couldn't tell you, but he was just slowly moving. He didn't seem to be running fast.

Q. Isn't it true, Mrs. Adams, that he had gotten his car straight on the highway when you all collided?

A. No, sir, he did not. We wrecked right at the center of the white line. I was even looking at the white line when the cars went up.

Charles T. Darnell.

Q. Didn't the right front side of your car go down to the road when the accident occurred?

page 78 } A. I don't know whether it went down, but it seemed like the wheels reared up, reared up like a horse reared up. We went up was all I ever knew. The car went up. I give a lick and my car went up. I don't know where his went.

Q. You do identify this as your car?

A. Let me see good.

Mr. Cummins: We will stipulate that is her car.

A. Yes, sir, that is my car right there.

Mr. Garrett: Thank you very much.

Mr. Cummins: That is all.

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CHARLES T. DARNELL

was recalled in behalf of the plaintiff and testified further as follows:

DIRECT EXAMINATION.

By Mr. Clarke:

Q. Mr. Darnell, was this highway on which Mrs. Adams was driving a part of the state primary highway system?

A. Yes, sir.

Q. What is the speed limit at the point where the accident happened?

A. Fifty-five miles per hour.

Mr. Clarke: That is all, sir.

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J. W. BIRDSONG

was sworn in behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION.

By Mr. Cummins:

Q. Would you please tell us your name, your age, and where you live?

A. J. W. Birdsong; age, thirty-five.

Q. Where do you live?

A. Sunnyside Road.

Q. Is that the road behind the golf course at Crewe?

A. Yes, sir.

Q. On the evening of May 6, 1959, at about 5:30 p. m., were you in the vicinity of Cherry Tree Crossing?

A. Yes, sir.

Q. At that time and place did you have any occasion to notice an automobile accident?

A. Yes, sir.

Q. You did see an automobile accident?

A. Yes, sir.

Q. At that time and place, did you see an automobile operated by this lady here, Mary Louise Adams?

A. If that is the one that was in the wreck, page 88 } yes, sir.

Q. Tell us first where you were in the road or on the road or where you may have been; tell us where you were and what you saw.

A. Yes, sir. Well, I was in the road coming facing—coming east.

Q. Coming east?

A. West, coming this way.

Q. Coming towards Nottoway?

A. Yes, sir.

Q. From Crewe?

A. Yes, sir. My business out on this roadway was going down to see Goen what lived right on that road from in front of the Rice store. I was going down there to see him about pulpwood. We were cleaning off.

Q. Getting away from the pulpwood, tell us, if you will, getting right down to this accident, what did you see happen?

A. Well, what I actually seen happen was first the car horn blowed.

Q. What car horn?

A. The horn where had done passed me.

Q. Who was that?

A. That was Mrs. Adams. I presume that was her because

J. W. Birdsong.

the car that was hit, that passed me. So the car
page 89 } horn started blowing. I was already facing that way
so I looked and that time I seen a car rolling on out in the road.

Q. From where did it roll on out?

A. It rolled out on an angle from the store.

Q. From Rice's grocery?

A. Yes, sir, where he came out on an angle.

Q. What then happened?

A. Then it smacked together, the cars smacked together.

Q. Whereabouts in the road were they so far as you could see when it looked like they smacked together?

A. From my opinion, it was right a little bit by that mail box or right up above it.

Q. Whereabouts in the road was it?

A. Oh, in the middle of the road.

Q. In the middle of the road?

A. Just about on the white line.

Q. Looked like they smacked together on the white line?

A. Yes, sir.

Q. While you were looking up that way, how far were you from it?

A. I would say about—

Q. Look in this courtroom. The length of the
page 90 } courtroom, two courtroom lengths, or how long?

A. It was about—I was just about three courtroom lengths from this way.

Q. Facing the accident?

A. Yes, sir.

Q. Walking toward it?

A. Yes, sir.

Q. Which side of the road were you on walking on?

A. Walking on the right side.

Q. Righthand side?

A. Yes, sir, because I just had turned out of them little pines up there and coming out in the road.

Q. Is it correct that I understand you to have had a good clear view of it?

A. Yes, sir.

Q. Did you see at that time when you heard the horn blow and when you saw the two automobiles bang together in the center of the road like you say, did you see any horse and wagon in the road?

A. No, sir.

Q. Did you see any horse and wagon around there at all that caused that wreck?

J. W. Birdsong.

Mr. Garrett: Just a minute now.
Mr. Cummins: I am just questioning him about it.
Mr. Garrett: Improperly questioning him.
page 91 } The Court: Ask him if he saw any horse.

By the Court:
Q. Did you see any horse and buggy anywhere.
A. Not in the road, no, sir.
Q. Did you see it anywhere else?
A. Not until after I got down to the wreck.

By Mr. Cummins:
Q. What did you see after you got down to the wreck?
A. After I got down to the wreck I seen the horse, or Mr. Foster's horse, or whoever's horse it was, over by the post.
Q. Was that up past behind the Coke sign or not?
A. Yes, sir, it was past the Coke sign when I seen it. He had passed.
Q. At the time of the accident, when you first heard the horn blow, did you see any horse or any wagon in the road?
A. No, sir. No, sir.

Mr. Cummins: I thank you.

CROSS EXAMINATION.

By Mr. Gravatt:
Q. You live up near Crewe?
A. Yes, sir.
page 92 } Q. Were you driving an automobile or walking or how would you get down in this place?
A. If I were walking?
Q. How did you get down there? Were you walking, riding, or—
A. Walking.
Q. Did you walk all the way down there from Crewe?
A. No, sir.
Q. Where did you walk from?
A. I came on down the old road.
Q. The old road?
A. Yes, sir.
Q. In other words, you came the long way?
A. I came down the old road because I was going over to see about a job at Mr. Whitner's.
Q. What time of day did this accident happen?

J. W. Birdsong.

A. As near as I can get to it, it had to be around four-thirty or five o'clock.

Q. About four-thirty?

A. Or five o'clock. That is as close as I can get to it.

Q. All right. You say you saw all about the accident, now what color car was it that passed you, black, red, green, or what?

A. No, sir.

page 93 } Q. What color was it?

A. I didn't pay much attention to this car. Green, if I ain't mistaken.

Q. Green car?

A. Green and black.

Q. That passed you? That is the one this lady was driving was a green car?

A. I didn't pay much attention to the car.

Q. You didn't pay any attention to the color of it, did you?

Mr. Clarke: If Your Honor please, I do think in fairness to the witness he ought to let the witness answer the question before he cuts him off.

A. Yes, that's right.

The Court: Yes, that is—

By Mr. Gravatt:

Q. What color was it?

Mr. Clarke: Just a minute. Is my objection proper?

The Court: Yes, the objection is proper.

By Mr. Gravatt:

Q. Do you know what the color of the car was?

A. No, sir.

Q. Do you know what color the car was that you

page 94 } said came out from the service station?

A. The color of the car that came out from the service station?

Q. Yes, sir.

A. No, sir, I don't.

Q. Do you know what kind of car came out from the service station?

A. No, sir, I didn't pay too much attention to it.

Q. Do you know what kind of car that lady was driving?

A. No, sir.

J. W. Birdsong.

Q. As a matter of fact, you never were there when this accident happened, were you?

A. When the car hit I was facing the accident, when it hit. I was facing it.

Q. Well, you say you were there about four-thirty or five?

A. Yes, sir, because I was coming on down the road walking, yes, sir.

Q. And you didn't see any horse and wagon?

A. Not on the road, no, sir. No, sir.

Q. All right. Suppose that Perkins Foster had testified here —you saw the mail box, didn't you?

A. I seen the sign and the mail box.

Q. You saw the sign and you saw the mail box?

page 95 } A. Yes, sir, but at that particular moment, I—

Q. Do not get ahead of me. You saw the sign and you saw the mail box; right?

A. I seen the two cars.

Q. All right. You saw the two cars?

A. Yes, sir.

Q. But you don't know what kind or what color they were?

A. No, sir, I didn't pay much attention to the mail box or the sign at the time or the cars either one.

Q. Did you see any officers there at the accident, police officers there later?

A. Yes, sir.

Q. Did you stay around there?

A. I didn't stay there—I stayed there until I believe Mr. Porter or Mr. Shepherd phoned the wrecker, Mr. Campbell.

Q. Did you ever tell any of the officers that you saw this accident?

A. No, sir, I did not.

Q. When is the first time you ever told anybody about seeing this accident?

A. About seeing this accident?

Q. Yes.

A. Well—

page 96 } Q. How did anybody find out that you knew about the accident?

A. About the accident? I was busy and I went by to see it. I work over here for her. After I knowed it was her in the accident, I asked her.

Q. You know Mrs. Adams and are a friend of her husband?

A. I know her husband, I don't know her too good.

Q. And you went over there sometime after that?

A. I worked over there.

J. W. Birdsong.

Q. You worked for them?
A. No, I worked over that way.
Q. So then you come in here now and say you saw this accident?
A. Yes, sir.
Q. Around 4:30 in the afternoon?
A. Around 4:30 or 5:00 o'clock, as close as I can get to it.
Q. You know Perkins Foster; you have been sitting there in the room with him all morning?
A. Yes, sir.
Q. If he testified here today that his horse and wagon were out there on the road at the mail box—

Mr. Garrett: Do you want to say something?
Mr. Clarke: I am going to object to the question
page 97 } after he finishes with it. Go ahead. It's clearly improper.

By Mr. Gravatt:
Q. If he testified that his wagon was out there on the road at the mail box with the head of his horse up near the mail box at the time the horn blew, would that have been right or not?

Mr. Clarke: Hold on just a minute. If Your Honor please, I object to the question because it is an inaccurate statement of what the witness Perkins Foster said. Perkins Foster has told the court here—wait a minute, you have given your version, now it is time for me to give mine—he said when he heard the horn blow he looked back and his wagon was clear of the road. Now I think you have got to tell the witness that.
Mr. Gravatt: That is not what he said. He said when the horn blew the head of his horse was at the mailbox.
Mr. Cummins: That is your advice of what he said.
The Court: We can easily find out by going back to it.
My recollection is that he said when he heard the
page 98 } horn that his horse's head was at the mail box.
Mr. Clarke: He also said that he looked back to see if his wagon and horse were clear of the road and they were clear.
The Court: Afterwards he said this man passed him, after he had gone on.
Mr. Gravatt: Maybe I can rephrase my question, Your Honor.

J. W. Birdsong.

By Mr. Gravatt:

Q. If a horse and wagon, which is a pretty good size object, had been on the highway in the vicinity of that mail box at the time the horn blew, would you have seen it?

A. At the time that the horn blew and from the time I looked, if there had been a horse on that road in that highway, I would have seen it. I should have seen it without the car would have got between me and the view of the horse.

Q. You say you were 3 or 4 courtroom lengths from the accident?

A. Two or three, if I ain't mistaken. I was two or three.

Q. When the cars ended up, can you remember after the accident where they ended up on the road or near the road?

page 99 } A. One of them—part of them were both with part on the road.

Q. Both of them were part on the road?

A. Yes, but I wouldn't say for sure on that. No, sir, I wouldn't say for sure.

Q. You are not very sure?

A. Not on that, no, sir.

Q. Can you place either one of the cars where they were after the accident? You are very sure about where they hit in the middle of the road, but can you explain where they were when they got through hitting?

A. Well, one of them was off, parked off the road on that side, if I ain't mistaken. I think both of them was on that side.

Q. Both of them were in the westbound lane when you last saw them after the accident?

A. Yes, sir. I wouldn't say for sure. That is as close as I can put it.

Q. Did you see a car that you say was coming on the road come on the road fast or slow or what?

A. It was rolling, it won't—it was just rolling, it won't coming too fast.

Q. You had plenty of time to see it and you were further back toward Crewe than Mrs. Adams' car, were you not? She was ahead of you?

page 100 } A. Yes, sir.

Q. And you saw this car coming out?

A. Yes, sir, I seen it coming out. I seen the car when it come on out partway on the road, when I seen it.

Q. Did you see him when he left the gas tanks?

A. No, sir; no, sir.

J. W. Birdsong.

Q. But you saw him coming on out slowly?

A. Out rolling, the car was rolling. Yes, sir, I could tell the car was rolling.

Q. Rolling out on the highway?

A. It was on the highway, the front end was right on the highway.

Q. Where was it when you first saw it?

A. It was coming right up on the highway, rolling right on the highway, coming on an angle on the highway, trying to make it to the other side.

Q. Right next to the other side?

A. Trying to make it on the other side. That was my opinion.

Q. But you saw him on the other side of the highway?

A. No, sir, I couldn't have seen him on the other side when he hit in the middle.

Q. When you first saw him, where was he?

A. He was—

Q. Was he on the hard surface or not?

page 101 } A. On the hard surface.

Q. When you first saw him?

A. Yes, sir.

Q. Did you notice that car before the horn blew or after the horn blew?

A. It was after the horn blew.

Q. After the horn blew?

A. Yes, sir, because I was facing—

Q. After the horn blew, then you noticed the car on the highway?

A. Yes, sir.

Q. And you say he was going slow?

A. Yes, sir, to my opinion.

Q. Was Mrs. Adams going slow or fast?

A. To my opinion, Mrs. Adams was running around about, I would say, from the way she passed me, she had been running about 45, or maybe a little bit better, but she was running around 45, in my opinion.

Q. You noticed her good enough to make a good judgment of how fast she was going?

A. Just judgment. I would say 45 miles an hour.

Q. But you don't know what color and what kind of car it was?

A. No, sir, I didn't pay no attention.

Q. But you always notice how fast a car is

page 102 } going?

J. W. Birdsong.

A. I could tell by the vapor of a vehicle and the wind when it came by.

Q. The vapor and the wind?

A. Yes, sir, from the exhaust, I would say.

Q. Why didn't you tell any of the officers that you saw this accident?

A. Well—

Q. You know they always want an eye witness, don't you?

A. Yes, sir, but I was available. They at least seen me around there. But they didn't never say anything to me about it, so I never said anything.

Q. Did Mrs. Adams make any noise with her brakes when she put them on, did you notice?

A. Well, her brakes, yes, sir, her brakes always do make noise.

Q. Did it make a screech?

A. Just a little bit, not too much. She tried—I mean, she tried to, it didn't make much of a squeak, but it could have been the other man's car just as good as it could have been Mrs. Adams. I just heard a screech.

Q. Brakes screech pretty good if she is putting on the brakes?

A. Yes, sir.

Q. And you heard a pretty good screech, didn't
page 103 } you?

A. Not too good a screech.

Q. Did she make any marks when she put her brakes on?

A. I didn't pay no attention to that.

Q. What?

A. I did not pay no attention to that.

Q. How long did she blow the horn? Was it a toot toot of the horn?

A. No, the horn was blowed.

Q. Blowing long steady blowing?

A. It blowed, yes, sir.

Q. Long steady blow?

A. It blowed, yes, sir.

Q. Did you notice whether Mrs. Adams kept in her lane of the road or whether she veered to the right or to the left?

A. Well, from the way it was hit she would have to be pulling a little bit to the left for the car to be hit on the center of the line. She would have to be over there.

Q. Did you see the brake lights turn on on Mrs. Adams'

J. W. Birdsong.

car, I mean, like, you know, when somebody puts their foot on the brake a light comes on the back?

A. Well, I didn't pay no attention to that.

Q. You didn't pay no attention?

A. No, sir.

page 104 } Q. Did you see either one of these people after the accident?

A. I came on down to the scene.

Q. Did you see Mrs. Adams after the accident?

A. No. When I seen Mrs. Adams—I seen Mrs. Adams, they had taken her out.

Q. Who had taken her out?

A. I don't know who had taken her out. I don't know who.

Q. Well, you say that she is a friend and you knew her, it seemed like you would have helped with her over there if she was hurt, wouldn't you?

A. If I had known it was her at that time. No, sir, I didn't know it was Mrs. Adams at that time.

Q. You didn't know it was her at that time?

A. No, sir, I didn't know it.

Q. When did you first find it out?

A. After I got down there.

Q. Did you help with her any way?

A. No, sir; no, sir.

Q. Did you help with the other man that was there?

A. No, sir.

Q. How many people were in the car?

A. In whose car?

Q. In the two cars. How many people were in

page 105 } the car?

A. Well, in Mrs. Adams' car—Mrs. Adams' car there wasn't nobody in there but Mrs. Adams.

Q. How many people were in the other car?

A. Well, I don't know how many was in there in that car.

Q. You don't know how many?

A. No, sir. I know the driver was in it.

Q. There had to be a driver, didn't there?

A. Yes, sir.

Mr. Gravatt: All right, he is with you.

Perkins Foster.

RE-DIRECT EXAMINATION.

By Mr. Cummins:

Q. Robert, there seems to be a little bit of question raised about whether you were there. You were there, weren't you?

A. Yes, sir, I was coming on down.

Q. Are you any particularly good friend of Mary Adams'?

A. No, sir, no, sir.

Q. Have you ever seen me before today?

A. No, sir.

Q. Have you ever put your eyes on me before today?

A. No, sir. No, sir, I haven't.

page 106 } Q. How about this gentleman here?

A. No, sir, I have not.

Mr. Garrett: Can I get into the act?

Mr. Cummins: I will let you get in when you get him on.

Mr. Clarke: Ask him if he would commit perjury for a person he knows as little as he does her.

Mr. Cummins: I don't think that is a proper question.

By Mr. Cummins:

Q. Is there any question in your mind that Mr. Allen's car came out of that driveway and hit this car? Is there any question in your mind about it?

A. No, sir, there is no question in my mind.

Mr. Cummins: That is all I want to ask you.

The Court: You may stand down.

* * * * *

page 107 } PERKINS FOSTER,

was recalled in behalf of the plaintiff and testified further as follows:

DIRECT EXAMINATION.

By Mr. Cummins:

Q. Did you see Robert Birdsong around there any place the day of the accident?

A. Yes, sir, I seen him after the accident happened.

Perkins Foster.

Q. You did?
A. Yes, sir.
Q. What was he doing?
A. Standing in the road when I seen him.
Q. He was at the scene of the accident?
A. Yes, sir.
Q. Did he get there right about the time that the accident had happened?
A. I tied the horse and got back there. He was standing in the road right behind me and come back and talked to me a few minutes then.
Q. You know it was him?
A. Yes, sir.
Q. It wasn't one of his brothers or something?
A. No, sir, it was him.

Mr. Cummins: That is all I wanted to ask him.

page 108 } CROSS EXAMINATION.

By Mr. Gravatt:
Q. I guess you passed Birdsong coming up the road, too, didn't you?
A. I was ahead of him He said he come over to see Mr. Lester about looking at some pulpwood.
Q. Well, you are bound to have passed Robert Birdsong somewhere along that road if you came from Crewe, too, didn't you?
A. I certainly did, but he said—
Q. What?
A. He said he come out from over there looking at some pulpwood.
Q. When did he say that? When did he say that?
A. He said he come back looking for some pulpwood and he was looking at some pulpwood.
Q. When did he say that? When did he tell you that?
A. He told me that day he was looking for some pulpwood.
Q. Told you that day?
A. He told me that day that he was looking for some pulpwood and he bound to have come out because I didn't pass him.
Q. Came out of what woods?

Charles H. Allen.

A. Well, plenty of woods on each side of the
page 109 } road right there next to Mr. Lester's, Mr. Rice,
and Mr. Staples over there on each side of the road. I didn't pass him.

Q. If he was walking down the road, you are bound to have seen him; can you get that straight?

A. Yes, I have got that straight.

Q. If he was on that highway, you would have seen him?

A. I didn't see him until after the accident had happened.

Mr. Gravatt: That is all.

RE-DIRECT EXAMINATION.

By Mr. Clarke:

Q. Were you running your horse or walking him?

A. No, sir, I was walking him. He has got a fast-walking gait.

Q. There is more than one road coming from Crewe, as I understand it. Is there some back road?

Mr. Gravatt: Not along there.

A. Not but one. Then they turned down to the old CC Road. Not but one road there.

Mr. Clarke: That is all.

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Evidence adduced in behalf of the defendant.

Mr. Garrett: Mr. Allen, will you take the stand now?

CHARLES H. ALLEN,

having been previously sworn, was called in his own behalf and testified as follows:

Charles H. Allen.

DIRECT EXAMINATION.

By Mr. Garrett:

Q. Mr. Allen, I believe you have already stated your name. I don't know whether you stated your occupation. Can you hear me?

A. Yes.

Q. What is your occupation?

page 142 } A. My occupation is linotype operator and printer.

Q. How old are you, sir?

A. Seventy-two.

Q. Where do you reside?

A. At Crewe, Virginia.

Q. Mr. Allen, where do you work? Where is the location of your place of business?

A. I work with the Nottoway Publishing Company, the *Career Record,* of Blackstone, Virginia.

Q. On the afternoon of the day of this accident, where were you going from, where had you left from, and where were you going?

A. Well, I was on the way home from work. I live at Crewe and consequently I drive back and forth, or did at that time.

Q. And you stopped at this store, Rice's store?

A. Yes, sir.

Q. Do you know how long you were there?

A. Well, I would say not over approximately ten or fifteen minutes.

Q. Where did you stop at the store?

A. I stopped at the gas pump.

Q. Did you get some gas?

A. Got some gas and then went in the store and made a few little purchases.

page 143 } Q. Were there any other vehicles there at the time, parked there?

A. Yes, there was a bottle truck, a soft drink truck, and another car behind that.

Q. Which way was the bottle truck headed?

A. That was headed toward Blackstone.

Q. Do you know which way the other car was headed?

A. Well, that was headed toward Blackstone, but approximately at the rear of the bottle truck.

Charles H. Allen.

Q. Where was the bottle truck with reference to the gas pumps?

A. Well, I would say approximately two car lengths toward Crewe from the gas pump.

Q. When you left, would you tell us, sir, the course of travel you took before you came onto the highway?

A. Well, I went fairly straight from the gas pump to get a good approach.

Q. Let me ask you this. Were you on the inside of the gas tanks, that is, on the side of the gas tanks toward the store or were you on the outside?

A. I was towards the highway.

Q. You were on the outside then?

A. Yes, sir.

Q. Then you went forward?

page 144 } A. Then I drove down to get a good location because it was more or less rough spots between the gas pumps and the lower end of the—of that highway or driveway and I went down to approach the highway.

Q. How did you approach that highway, sir?

A. Well, I stopped first, of course, and—

Q. Let me ask you this. You say you went down. Did you go straight or did you turn or just how did you go down to approach the highway?

A. Well, I went down to the distance that I intended to and then made the turn toward the right, that is, so that the front wheels were approximately against the roadside.

Q. Were you facing the road then?

A. I was facing the road, yes, sir.

Q. Could you tell us how far that was from where the Coca-Cola sign is? Have you paced that for me and Mr. Gravatt?

A. That will be approximately 90 feet in there, approximately.

Q. You were 90 feet from the Coca-Cola sign?

A. On the Blackstone side of the Coca-Cola sign.

Q. You were facing out perpendicular to the road?

A. Yes, sir.

Q. And you say you stopped?

page 145 } A. I stopped.

Q. What did you do then?

A. I looked to the right, saw nothing coming, looked to the left and saw nothing coming.

Q. Then what did you do?

Charles H. Allen.

A. Then I approached the highway to get on my lane to proceed towards Crewe.

Q. What is the last thing you recall?

A. Well, getting hit.

Q. Tell us what you recall from the time you started off to go onto the highway and when you were hit now.

A. Tell what?

Q. What did you see? What did you do and what did you see?

A. Well, I pulled over to get into my lane and I saw I was in my lane okay.

Q. Did you get into your lane?

A. Yes, sir.

Q. How do you know that?

A. Because of the white stripe.

Q. Did you at that time see any other vehicles?

A. Well, I will have to say this: I got on the stand and took an oath to say nothing but the truth.

Q. I understand that, sir. Now you tell us the truth.

A. Well, I am telling the truth.

page 146 } Q. All right, sir.

A. But vaguely, if I am permitted—

Q. Tell me what you can recall.

A. Vaguely, it seems to me that I did see a couple of vehicles coming from Crewe.

Q. You were then over in your lane?

A. I was then over in my lane, yes, sir.

Q. Do you know how far those vehicles were?

A. Well, it would be—no, I couldn't say. It was a fairly good distance at least, a fair distance.

Q. Do you know if one was a horse and wagon?

A. No, I don't. I couldn't swear to that. I haven't seen the wreck to know whether it was a car or horse and wagon or what the nature of the two vehicles were.

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Q. I will hand you Plaintiff's Exhibit No. 1 and will you show to the jury—I know you cannot do it exactly to scale, but will you show them generally how you left the pumps?

Charles H. Allen.

The pumps don't show, but what course did you
page 158 } take going to the highway and where you last
remember when you say you have a hazy remembrance of two vehicles approaching?

A. Well, I went in about from here or approximately 90 feet this side of the Coca-Cola sign and I made a turn, my usual turn that any of us make to go onto the highway, and I imagine that I got just about, as near as I can recall, about opposite this Coca-Cola sign when I was hit. I remember the Coca-Cola sign being barely to my left. Now it is possible that I got a little past that. I cannot recall seeing anything that I could describe as Cola, so I imagine I was just about to the right of that and possibly a little bit further on. That is as true as I can give it to you.

Q. You were positive you were wholly in your proper driving lane?

A. Yes, sir.

Mr. Garrett: We have no further questions.

CROSS EXAMINATION.

By Mr. Clarke:

Q. Mr. Allen, do you recall being in this courtroom on January 4, this year?

A. January 4?

Q. Yes, sir.

A. I couldn't tell you the date, but in there
page 159 } somewhere.

Q. Yes, sir; at the trial of a companion matter in the County Court?

A. Yes, sir.

Q. And you were represented by Mr. Bill Gravatt?

A. Yes, sir.

Q. At the time, were you not? You recall that Mr. Gravatt asked you during the trial of that case, which was about this same matter, the question, "Did you look in both directions?" And you answered, "Yes."

Then he asked you: "What did you see?"

And you answered: "Nothing."

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Charles H. Allen.

Q. And then he said: "Is it fairly good visibility there or not? Can you see a reasonable distance?"

And you answered: "I would say so, yes, sir."

Do you recall that?

A. Yes, sir.

Q. Now then he asked you again, Mr. Gravatt again questioning you, he is your lawyer, said, "Did you see this other vehicle before it struck you?"

A. Yes, sir.

Q. Answer: "No, sir."

page 160 } A. Yes, sir, but let me supplement that, please. At that particular time, it was my understanding that you couldn't say anything on the witness stand except that you could swear by oath, and that before God I couldn't swear to. That is vaguely my recollection. I couldn't swear to it before God and be honest.

Q. That is true today, isn't it?

A. Yes, sir, that is why I supplemented it today, that I had vaguely recalled or could vaguely, but I couldn't swear to it.

Q. Well you are under oath now, aren't you?

A. Yes, sir.

Q. Then let me go back a minute. Mr. Gravatt said: "Did you see this other car before it struck you?" And you said: "No, sir."

A. That's right.

Q. He said: "It had to be there before it hit you, didn't it?" And you answered and said: "Well, it didn't. I swore to tell the truth. I can't say that I did."

That is exactly word for word?

A. Right.

Q. He asked you later: "You don't know whether another car was there or what happened; is that correct?"

A. That is right.

Q. That is word for word your lawyer's ques-

page 161 } tions and your answers?

A. Yes, sir.

Q. And you were telling the truth on that date?

A. I was telling the truth.

Q. And you do not know whether there was another car?

A. I couldn't swear to it under oath, no, sir.

Q. When you pulled out in the highway?

A. I knew that I pulled out in the highway.

Charles H. Allen.

Q. I say, when you pulled out into the highway, you don't know whether another car was there or not?
A. Yes, sir, I do.
Q. You know it now because you got hit?
A. I knew at that time there wasn't anything to obstruct me.
Q. And how far you say you could see, 3 or 400 yards?
A. You could see 3 or 400 yards, yes, sir, approximately that.
Q. And you never did see it. All right. Your lawyer asked you this: "Was there any obstruction that you know of which would have kept another vehicle from seeing you?" And you said: "No, sir."
A. That is right.
Q. "Any obstruction there which would have
page 162 } kept you from seeing another vehicle if it had been
there?" And you said: "No."
A. Right.
Q. And he said: "Did you hear anyone blow a horn or give any warning or anything of that kind?" And you said: "No, sir."
A. Yes, sir.
Q. And all of those answers were right?
A. Right.
Q. They are just as true today as they were on January 4?
A. Yes, sir.
Q. And that was when Mr. Gravatt was representing you?
A. With the exception of that supplementary vague recollection.
Q. That you can't swear to?
A. I can't swear to, no, sir.

Mr. Gravatt: I am still representing him; don't put that in there.
Mr. Clarke: By lawyers.
Mr. Gravatt: You have disemployed me already.
Mr. Clarke: Mr. Gravatt was representing you by himself.
Mr. Garrett: I believe I have been represent-
page 163 } ing him since this suit was started.
Mr. Cummins: Not in this case.
Mr. Garrett: You and I seem not to have the right understanding, Bill, maybe we had better go.

Charles H. Allen.

By Mr. Clarke:

Q. Let me ask you this: The question was: "And you didn't see anything coming?" This was on my cross examination. You said: "That is right."

I said: "You said you looked to your right and to your left. Which way did you look first?" You said: "I looked to the right first."

"Then you looked to your left?"

And you said: "Yes, sir."

"And you didn't see anything coming?" And you said: "That is right."

My question was: "Did you immediately start forward?"

Answer: "Yes, sir."

The next question was: "How long was it after that that the impact occurred?" And you said: "Well, I couldn't tell you about the time, but I had entirely gotten into the opposite lane or into my lane and righted around ready to proceed and approximately under momentum, so it would be at least five minutes in there somewhere."

page 164 } A. Oh, not necessarily.

Q. Isn't that what you said?

A. Well, maybe I did.

Q. You still think it was five minutes?

A. It might have been five minutes and might not. I said approximately. I wouldn't know. I couldn't give you anything definite on that nohow.

Q. Didn't I ask you: "I take it from your testimony that the crash or the impact or whatever it was occurred just as you got over on your side of the highway, as you said, or the westbound lane?"

Answer: "Very shortly afterwards. I was just about getting momentum—"

Mr. Garrett: Mr. Clarke, I wonder if we couldn't read that whole transcript in the record?

Mr. Clarke: Do you want a copy of it?

Mr. Garrett: Incidentally, if you had asked me a little while—

A. It's pretty hard to get away from lightning. The way the car was coming, it was like lightning.

By Mr. Clarke:

Q. You are under oath. Can you honestly tell these gentlemen of the jury that that car was coming like lightning?

Charles H. Allen.

A. I just got through telling you that I couldn't swear what hit me.

page 165 } Q. And you couldn't honestly swear to the gentlemen of jury under oath that that car was coming like lightning either, could you, in all honesty?

A. I couldn't swear it, no.

Q. That is exactly correct. And you were just getting momentum up at the time that this accident happened?

A. Yes.

Mr. Clarke: That is all.

A. (Continuing) And that if I couldn't see a car coming, it must have been coming right fast if it hit me.

By Mr. Clarke:

Q. That is your guess, isn't it?

A. It would have to be my guess. It would have to be anybody's guess.

Mr. Clarke: That is all.

RE-DIRECT EXAMINATION.

By Mr. Garrett:

Q. Mr. Allen, you also testified there that you had gotten wholly in your lane when this accident occurred?

A. Yes, sir.

Mr. Clarke: I read that.

By Mr. Garrett:

Q. This idea about your having a vague recollection of these two vehicles approaching you, that was nothing

page 166 } that I suggested to you or Mr. Gravatt suggested to you, was it?

A. No, sir.

Q. You have always had that vague recollection?

A. Yes, sir, I have.

Mr. Clarke: Now, Your Honor, he hasn't testified to that. I think that is leading the witness and I certainly object to it.

The Court: He is not on cross examination, certainly. Is that all you want to ask him?

Mr. Garrett: All right, sir. Mr. Allen, come on down and take your seat over here.

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OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS—PLAINTIFF.

Mr. Clarke: Mrs. Adams, in both cases, objects and excepts to the Court's granting any instructions for Mr. Allen in either case on the ground that there is no showing of any primary negligence on the part of Mrs. Adams by any evidence of a probative nature and on which reasonable men might differ; and, further, as to the case in which Mr. Allen is plaintiff, on the ground just recited, and on the ground that he has convicted himself of negligence as a matter of law by his failure to maintain a proper lookout and to see that which should have been obvious to him; and on the further ground that he did not keep his vehicle under control and did not apply brakes in the exercise of reasonable care and failed to yield to Mrs. Adams the right of way to which she was entitled.

Plaintiff, Mrs. Adams, in her own case, where she is plaintiff and in the case where she is defendant, in both capacities, objects and excepts to the Court's

page 181 } failure to change the word in paragraph numbered 1 of Instruction C from "proper" to "reasonable."

She objects and excepts to the Court's giving of paragraph numbered 3 of Instruction C on the ground that it is only necessary that she exercise reasonable care in the application of her brakes and that it was not her duty in this case, as such, to avoid a collision. The language "in order to avoid a collision" puts a burden on her which is not hers in law or in fact and such burden and duties as she does have have been properly and completely covered by other instructions of the Court.

Mrs. Adams, in both of her capacities, further objects and excepts to the Court's giving of Instruction D on the ground that there is no evidence of any probative value that she was attempting to pass a horse and wagon or that she crossed the double white line other than in response to a situation created by Mr. Allen.

She further objects to the instruction in that it does not relate her negligence as to proximate or remote cause, nor does it tell the jury that such negligence, if any, might not be material to the case; and on the further ground that Mr. Allen is, himself, bound by his own evidence, which was to the effect that he saw no horse and wagon in the highway himself.

page 182 } Mrs. Adams, in both capacities, objects and excepts to the giving of Instruction No. F on the ground that the evidence in this case is not responsive to the statement of the Court that a *prima facie* case of negligence has been made against Mrs. Adams merely on a finding that the accident occurred on Mrs. Adams' side of the highway. By his own evidence, he never saw the Adams car and is thus unable to state where the impact occurred. The only evidence of any probative nature was that the impact occurred in the center of the road.

While the Court of Appeals has ruled in several cases that the finding of a car on the wrong side of the road is *prima facie* evidence of negligence, it has done so in cases where there was no immediately explainable reason for such an occurrence, which is certainly not applicable to this case.

Mrs. Adams, in both of her capacities, objects and excepts to the Court's granting Instruction G in that the instruction discusses or undertakes to discuss the law applicable to intersections when the evidence in this case was that the defendant, Mr. Allen, came onto the highway from the driveway, not from an intersecting road. The language in the instruction states: "He is not negligent as a matter of law if he attempts to enter the intersection under the reason-

page 183 } able belief that he has time or opportunity to cross safely," and this language fails to clearly state to the jury that which is necessary in defining the opportunity to cross safely as being such that no car, if traveling within the legal rate of speed, would reach the point where the defendant, Mr. Allen, was attempting to cross the road before he could safely execute such a crossing. The jury is therefore misguided by the instruction.

Mrs. Adams, in both capacities in both suits, objects and excepts to the granting of Instruction J on the ground that it is merely repetitious of Instruction 5 which the Court granted. It is repetitious of the fact that she must be free of negligence before she can invoke for her benefit the emergency rule.

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Mr. Clarke: Judge, before we go back in here I want to make this motion. Plaintiff, Mrs. Adams, in the case in which she is plaintiff, respectfully moves the Court to strike the defendant's evidence in that case and enter summary judgment for the plaintiff and instruct the jury solely on the matter of damages and ask them to fix the dam-
page 186 } ages; and, in the case in which Mrs. Adams is defendant, she respectfully moves the Court to strike the plaintiff's, Mr. Allen's, testimony and to enter up summary judgment for the defendant, Mrs. Adams. Both of these motions are made on the ground that there is absolutely no testimony of any negligence on the part of Mrs. Adams, there is no evidence of any speed on her part, there is no evidence of any lack of proper lookout on her part, there is no evidence of any improper control on her part, and the sole evidence of any probative nature before this Court is that Mr. Allen came out from a service station driveway and violated the right of way of Mrs. Adams. Mr. Allen has convicted himself of negligence and as a matter of law, by virtue of his failure to see that which must have been obvious to him, and our Supreme Court of Appeals has held time and again that such failure to observe that which must have been obvious is negligence.

We feel, therefore, sir, that Mrs. Adams is free of negligence under any construction of the testimony in this case and Mr. Allen is guilty of negligence not only by the testimony of all the witnesses, but also of his own testimony in that he failed to see.

The Court: I do not care to hear anything. You all can argue that after you have a verdict.

Mr. Cummins: To the overruling of the two motions on behalf of Mrs. Adams as plaintiff and Mrs.
page 187 } Adams as defendant, we respectfully except for the reasons stated.

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(Mr. Gravatt then closed the defendant's summation to the jury, during which the following occurred:)

Mr. Gravatt: * * * Just to begin with, I would like to point out on these pictures a little bit before I get into this thing. You gentlemen went up there and looked at this accident yourself and one thing that bothered me—we are not entitled, the attorneys are not entitled, to say one word to the jurors that go on the scene of an accident. One thing that bothered me a little bit about it, when you gentlemen went to look at the scene, was didn't any of you get up there far enough up the road towards Crewe to see the marks on the road. I am not sure whether you all saw the marks on the road or not.

Mr. Cummins: We have to object to that, Judge. That is not evidence in the case.

Mr. Garrett: Are you going to heckle us all
page 191 } day?

The Court: I don't know what happened up there and I can't say whether they saw it or did not see it.

Mr. Cummins: Your Honor knows that is not evidence in the case.

The Court: What Mr. Gravatt says is not evidence and what none of these lawyers has said—

Mr. Cummins: He should not comment on it.

Mr. Gravatt: I am not trying—

The Court: I said nothing that any lawyer says in the case is evidence. The only evidence is what these witnesses say on the stand.

Mr. Garrett: I will buy that.

Mr. Gravatt: Judge, you are not going to dock my time for this heckling, are you?

(Mr. Gravatt continued with his closing summation, during which the following occurred as to another incident:)

Mr. Gravatt: * * * Now this picture right here that Mrs. Adams took, or had somebody take, and called Exhibit No. 5, you can see a great big splotch there in the road where something was repaired. I don't know whether anybody testified—I can't say whether Mr. Darnell testified as to whether that was the mark put in the road by the automobile of this lady or not, but I have been up
page 192 } there and looked at it and there is a little old patch, you can see in this picture here, where the acid out of the battery killed the grass.

Mr. Cummins: I object to that.

Mr. Clarke: I object to that as outside of the record.

The Court: That is not proper.

Mr. Clarke: Judge, I move for a mistrial.

The Court: I will not grant a mistrial, but that is not proper evidence.

* * * * *

Mr. Gravatt: You gentlemen went up there and looked at the accident and if you think I poured anything down there, I certainly want you to decide this case against us. Here is a mark in the road where something has been page 193 } patched up there, there is a gouge in the road. Naturally these men wouldn't be jumping up and hollering so if we hadn't touched a spark—

Mr. Clarke: Judge, I do object to that. It is my duty to my client to make every valid objection, and Your Honor has ruled that it is not a valid—

The Court: No, I haven't ruled that that mark in the road is not evidence.

Mr. Clarke: No, sir, but these other lines—

Mr. Cummins: You are ruling about the acid.

The Court: I said there was no evidence about acid.

Mr. Gravatt: No evidence here about acid and I beg your pardon about acid, but there is a place over here that looks like maybe the grass had been killed on the side of this picture.

Mr. Cummins: When was it killed?

Mr. Gravatt: I don't know anything about any acid. There is also a mark here on this picture where somebody tried to patch the road.

(Mr. Gravatt continued with his closing summation, during which the following occurred as to another incident:)

Mr. Gravatt: * * * Now I didn't tell the camera man where to take his pictures, I wasn't there when the page 194 } camera man took these pictures, but I notice in one of these pictures here that Mr. Cummins' automobile is parked in the driveway.

Mr. Cummins: There is no evidence about that, if Your Honor please, not a bit.

The Court: No, there is no evidence about that.

Mr. Cummins: When are you going to stop, Mr. Gravatt?

Mr. Gravatt: There is the car.

Mr. Cummins: How do you know whose car it is?

Mr. Gravatt: Well, there is an Oldsmobile.

Mr. Cummins: I don't believe you ever heard anything like that. Is that the only one in the state?

(Mr. Garrett then concluded his summation for the defendant.)

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(Whereupon the jury retired to consider of its verdict.)

Mr. Clarke: Mrs. Adams, by counsel, wishes to make the record clear that she objects to each instance in which counsel brought to the Court's attention in argument by Mr. Allen's counsel argument that went beyond the evidence; and Mrs. Adams objects to the fact that the Court did not instruct the jury in each specific instance that they should disregard the remarks of counsel and did not instruct counsel fully not to comment on matters that were beyond the record and outside of the evidence; and objects to the Court's refusal to grant the mistrial which was moved during argument.

The Court: The Court says that he told the jury that nothing that the lawyers said was evidence and in each instance told them that the matter complained of was not evidence at the time it was said.

Mr. Clarke: Note the exception.

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(Whereupon the Court stood recessed to await the return of the jury, and upon it's return the following occurred:)

The Court: Gentlemen, who is your foreman?

A Juror: I am, Your Honor. We don't know how to word it, but the jury finds both parties guilty of negligence.

The Court: All right, sir. And that neither one of them shall recover anything from the other?

The Foreman: That is right.

page 199 } The Court: Gentlemen, this is the case in which Mrs. Adams is suing Mr. Allen and I have got

your verdict "We, the jury, in the case of Mary Louise Adams *v.* Charles Harrison Allen, find for the defendant, Charles Harrison Allen." That is correct, is it?

Mr. Garrett: Yes, sir, and should be signed by the foreman, I believe.

The Court: Oh, yes. I will put the same thing on the other one.

This is the case of Allen against Adams: "We, the jury, in the case of Charles Harrison Allen *v.* Mary Louise Adams, find for the defendant, Mary Louise Adams."

Now, if you will just sign those as foreman, please, sir.

(The two verdicts were so signed.)

(The jury was discharged and retired from the courtroom.)

Mr Cummins: The plaintiff, Mary Louise Adams, would respectfully move the Court to set aside the verdict of the jury in the case of Mary Louise Adams *v.* Charles Harrison Allen and enter up judgment N. O. V., and reserves of course the right to be heard more completely on the
page 200 } motion.

The Court: You want to be heard?

Mr. Cummins: Yes, sir, I would like to be heard on the motion for the usual reasons.

The Court: All right. If you want, you can express your reasons later. I don't require you to do it right now. I reckon it would be better in this case for one of you all to prepare the orders in the case rather than to let the Clerk do it.

Mr. Garrett: I take it you are not going to enter judgment now?

The Court: No.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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