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Record No. 6137

In the Supreme Court of Appeals of Virginia at Richmond

JOSEPH M. WHITE

v.

JOHN DOE

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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. 6137

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 28th day of April, 1965.

JOSEPH M. WHITE, Plaintiff in Error,

against

JOHN DOE, Defendant in Error.

From the Circuit Court of the City of Portsmouth
Henry W. MacKenzie, Jr., Judge

Upon the petition of Joseph M. White a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Portsmouth on the 15th day of January, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and John Doe was defendant; upon the petitioner, or some one for him, 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 18 } INSTRUCTION NO. 1.

The Court instructs the jury that in determining whether or not a motorist is guilty of negligence that proximately causes an accident, it is not necessary to prove that there has been actual physical contact or a collision between the vehicles.

Therefore, you are instructed that if you believe from a preponderance of the evidence that John Doe was negligent and that such negligence was the sole proximate cause of the injuries to the plaintiff, then you shall find your verdict for the plaintiff and against John Doe, whether there was contact or a collision between the vehicles or not.

Granted 12/4/63.

H. W. M.

page 19 } INSTRUCTION NO. 2.

The Court instructs the jury that at the time and place of the accident involved herein it was the duty of the Defendant, John Doe, to exercise ordinary care:

1. To keep his vehicle under proper control:
2. To keep a proper lookout.
3. To operate his vehicle at a reasonable speed under all the circumstances having due regard to the width, surfaces and other conditions on the street then and there existing.
4. Not to turn, or partly turn, his vehicle from its direct line of travel without first determining that it was reasonably safe to do so.

And if the jury believe from the evidence that the defendant, John Doe, failed to exercise ordinary care in the performance of any one or more of the foregoing duties, then he was guilty of negligence; and if you further believe from the evidence that any such negligence was the sole proximate cause of the injuries for which claim is made, then you shall find your verdict in favor of the plaintiff.

Granted 12/4/63.

H. W. M.

* * * * *

page 21 } INSTRUCTION NO. A.

The mere fact that there has been an accident and that as a result thereof the plaintiff has been injured, does not of itself entitle the plaintiff to recover. In order to recover against the defendant, the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that any such negligence was a proximate cause of the collision.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendant was not guilty of any such negligence as it is that he was, then you shall return your verdict in favor of the defendant.

Granted 12/4/63.

H. W. M.

page 22 } INSTRUCTION NO. B.

At the time and place of the collision involved herein, it was the duty of the plaintiff to exercise reasonable care:

1. To keep his vehicle under proper control;
2. To keep a proper lookout;
3. To operate his vehicle at a reasonable speed under all the circumstances having due regard to the width, surface and other conditions on the street then and there existing.

And if the jury believe from the evidence that the plaintiff failed to exercise reasonable care under the circumstances in the performance of any one or more of the foregoing duties, then he was negligent; and if you further believe from the evidence that any such negligence was either the sole proximate cause of the collision, or that it efficiently contributed to cause it, then you shall return your verdict for the defendant.

Granted 12/4/63.

H. W. M.

page 23 } INSTRUCTION NO. C.

The Court instructs the jury that speed limitation laws shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law, but this exemption shall apply only when the operator of such vehicle displays a flashing, blinking or alternating red light and sounds a siren, bell or exhaust whistle, as may be reasonably necessary under the circumstances.

If you believe from a preponderance of the evidence in this case that the plaintiff failed to bring himself within the said exemption in this regard then he was guilty of negligence and if you further believe that such negligence was a proximate cause of the accident then you shall find your verdict in favor of the defendant, John Doe.

Granted 12/4/63.

H. W. M.

page 24 } INSTRUCTION NO. B-1.

The maximum speed limit at the time and place of the collision involved herein was 25 miles per hour; and if you believe from the evidence that the plaintiff was driving his vehicle in excess of this limit, then the plaintiff was negligent; and if you further believe from the evidence that any such negligence was the sole proximate cause of the collision, or that it efficiently contributed to cause it, then you shall return your verdict in favor of the defendant.

Refused 12/4/63.

H. W. M.

page 25 } INSTRUCTION NO. B-2.

The Court instructs the jury that a motorist shall not overtake or pass a vehicle proceeding in the same direction at any intersection of streets unless such vehicles are being operated on a highway having two or more designated lanes of roadway for each direction of travel or on a designated one-way street. If you believe from a preponderance of the evidence in this case that the plaintiff violated this duty and that such

violation was a proximate cause of the accident, then your verdict shall be in favor of the defendant.

Refused 12/4/63.

H. W. M.

page 26 } INSTRUCTION NO. B-3.

The Court instructs the jury that the mere fact that the defendant was speeding and as a result thereof the plaintiff exceeded the speed limit in an effort to apprehend him could not, without more, be a proximate cause of the accident in question.

Refused 12/4/63.

H. W. M.

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* * * * *

Virginia:

In the Circuit Court of the City of Portsmouth, on the 4th day December, 1963.

At this day came the parties by their Attorneys and thereupon, came a jury, to-wit: Norman L. Brinkley, Maupin C. L. Bailey, Alfred T. Willoughby, Charles E. West, E. H. B. Carlsen, Jr., Joseph E. White, and Minnie Oliver, who being duly sworn the truth to speak, upon the issue joined, and having fully heard the evidence and argument of counsel, retired to their room to consult of their verdict and after sometime returned into Court, having found the following verdict: "We, the jury, find John Doe, the defendant, guilty as charged and award the plaintiff, Joseph M. White, $6,-250.00 compensation. Jury Foreman, Charles E. West"; whereupon, the defendant, by counsel, moved the Court to set aside the verdict on the grounds that the said verdict is contrary to the law and evidence, and enter summary judgment

for the said defendant, or in the alternative to grant a trial on the grounds that the said damages are excessive, which motion is continued generally.

* * * * *

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* * * * *

MEMORANDUM
November 18, 1964.

The defendant's motion to set aside the jury's verdict in favor of plaintiff is based upon the construction of Code Section 46.1-226 and its application to the facts of this case. The essence of his contention is that the plaintiff was in the act of violating Code Section 46.1-190 of the Code of Virginia at the time he was injured, and that such action on his part constituted negligence *per se,* there being no provision of the Virginia law in general, and of Code Section 46.1-226 in particular, exempting a police officer from such result. It is contended that the specific act of negligence is not excused to police officers engaged in a chase, and further that the evidence does not establish that the plaintiff's motorcycle was being operated under emergency conditions in such manner as to invoke the statutory exception.

The evidence discloses that the plaintiff was in pursuit of a car traveling in considerable excess of the speed limit westwardly on Hartford Street in the City of Portsmouth, at approximately 7:30 P.M., on the evening of April 24, 1963. After the officer, in the course of some four blocks, had reached a point some fifty or sixty feet behind the car, he set his speed so that he was neither gaining nor fall-
page 30 } ing behind the car and locked his speedometer at forty-four or forty-five miles per hour. He then turned on his red blinker, but did not sound his siren and attempted to pull up beside the car to order the driver to pull over and stop. Upon reaching Willet Drive, a "T" intersection to the south, the plaintiff moved over into the left-hand lane, and the driver of the car, without signalling, abruptly applied his brakes and made a left turn into Willet Drive. Plaintiff likewise applied his brakes and turned sharply left to avoid collision with the car, and in so doing, lost control of his motorcycle which threw him to the pavement causing his injuries. The car continued without stopping.

Section 46.1-190 provides that a person shall be guilty of reckless driving who among other things shall "overtake or pass any other vehicle proceeding in the same direction * * * at any intersection of highways * * *" Section 46.1-226 provides that a police officer in the chase or apprehension of violators of the law may, when such vehicle is being operated under emergency conditions, without subjecting himself to criminal prosecution: (1) Proceed past signals and stop signs; (2) Park or stand notwithstanding other provisions of law; and (3) Disregard regulations governing a direction of movement of vehicles turning in specified directions so long as the operator does not endanger life or property. It is further provided that such exemption shall apply only when the operator of the vehicle displays a flashing or blinking red light and sounds his siren, bell, or exhaust whistle.

To properly construe Section 46.1-226, it is necessary to examine briefly the history of the law in Virginia as applied to emergency vehicles. In 1952, and before the enactment of this Code Section, the Court of Appeals in *Virginia Transit Company* v. *Tidd,* 194 Va. 418, decided that police vehicles were subject to the same statutory rules of the road that bound all other vehicles, and no exception existed in their favor either by common law or by statutory provision.

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Probably as a result of this decision, the Legislature in 1954 enacted as Section 46-241.1, the present exemption section, in substantially its present form. By Act of 1956 the exemption was broadened to include ambulances and other rescue vehicles, and in 1958 with the recodification of the Motor Vehicle Code, Section 46.1-226 in its present form was enacted with only minor changes in phraseology.

The conclusion is inescapable, therefore, that no exception exists in favor of emergency vehicles from the operation of the statutory rules of the road except under the conditions and to the extent provided in Section 46.1-226. It is poignant that the Legislature, with the Tidd decision before it, did not undertake to give a blanket exemption to police and fire vehicles as some other states have done, but saw fit to limit the exemption to proceeding past traffic control signals, illegal parking, and regulations governing turning movements in specified directions. Exceptions to speed limitations had already been provided in favor of emergency vehicles under Section 46.1-199.

Thus, whether by design or inadvertance there is no pro-

vision of law which permits a police officer on a chase to overtake or pass another vehicle at an intersection. Having spelled out the rules of the road which an emergency vehicle is not bound to observe, it necessarily follows that no intent can be imputed to the Legislature to exclude this violation by inference.

page 32 } Having decided that the plaintiff was acting in violation of the statute, he was guilty of negligence *per se,* and it was error for this Court to have refused the granting of Instruction B-2.

Since the verdict must be set aside for that reason, and there is no conflict in the evidence, it is now incumbent upon the Court to rule as a matter of law that the plaintiff was guilty of negligence proximately contributing to the accident.

It, thus, becomes unnecessary to rule upon the defendant's other contention that it was not established by the evidence that the plaintiff's vehicle was being operated under emergency conditions so as to bring the statute into play, if it were otherwise applicable. The gist of his contention is that there was no occasion for the plaintiff to overtake the speeding vehicle at the street intersection, as he could have held back for a few more instants to make his arrest. This Court cannot agree with such a constricted construction of a vehicle being operated under emergency conditions. In my opinion it is enough that there be an active chase of an existing violator and the officer certainly insofar as the violator himself is concerned would not be charged under the conditions with having to make such nice decisions as the defendant would impose upon him here.

It is ironic that the decision in this case must be to deprive the plaintiff of his verdict and enter judgment for the defendant. Although the defendant is "John Doe," he nevertheless represents the actual driver of the speeding car. To allow the driver of a car being driven in violation of the law and to the hazard of citizens, and whose further violation of the law has caused the pursuing officer to be injured, to avoid responsibility for the officer's damages when the officer was forced by such action to violate the rules

page 33 } o fthe road in order to do his duty, offends this Court's sense of justice. However, counsel has been able to cite no case or principle which would prevent this result, and a diligent search by the Court has likewise been fruitless. As a matter of fact, not a single decision has come to the Court's attention in which the police officer has sued the motorist he was chasing. There is certainly a differ-

ence between the case in which an innocent third party is hurt by the policeman in a chase and a case such as we have here, but this Court can discover no means whereby it can avoid applying the ordinary principles of contributory negligence to the facts of this case.

Accordingly, the verdict is being set aside and judgment is being entered for the defendant. If the plaintiff intends to seek a writ of error, the Clerk should be immediately notified and the bond will be Three Hundred ($300.00) Dollars.

H. W. MacKENZIE, JR.

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* * * * *

In the Circuit Court of the City of Portsmouth, on the 20th day of November, 1964.

* * * * *

At this day came again the parties by their Attorneys, and the Court having fully heard the motion of the defendant heretofore entered herein to set the verdict aside on the grounds that the said verdict is contrary to the law and evidence, and enter summary judgment for the said defendant, or in the alternative to grant a new trial on the grounds that the said damages are excessive, doth sustain the motion to set the verdict aside and enter summary judgment for said defendant; it is, therefore, ordered that a summary judgment be entered for the said defendant, and this case is removed from the docket.

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NOTICE.

PLEASE TAKE NOTICE that on January 8th, 1965, at 9:00 A. M., or as soon thereafter as I may be heard, I shall appear before the Honorable Judge of the Circuit Court of the City of Portsmouth, Virginia, and shall present the Pe-

tion and Motion and Order, true copies of which are attached hereto.

Dated: This 6th day of January, 1965.

JOSEPH M. WHITE
By WILLARD J. MOODY
Of Counsel.

MOODY, MATTOX, YOUNG, &
WEST, p. q.
704 Professional Building
Portsmouth, Virginia.

I hereby certify that a true copy of the above Notice, together with copies of the Petition, Motion and Order attached thereto, was delivered to the office of Mr. Allen S. Reynolds, Attorney for Defendant, One Main Plaza East Norfolk 10, Virginia, this 6th day of January, 1965.

WILLARD J. MOODY.

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* * * * *

MOTION AND PETITION.

Now comes the plaintiff and moves the Court to vacate the Judgment Order heretofore entered on November 20, 1964, in the above-styled matter, and to hear further argument of Counsel upon the Motion to set aside the jury's verdict, and the Court's Memorandum of November 18, 1964, entering a judgment for the defendant, for the following reasons, to-wit:

1. The Court heard argument of counsel and received memorandum of counsel primarily directed toward the issue of the Court refusing to grant Instruction B-2, while the Court in the Memorandum dated November 18, 1964, proceeded far beyond this issue and ruled as a matter of law that the plaintiff was guilty of negligence and such negligence proximately contributed to the accident, thereby removing the entire case from consideration by the jury; that on November 20, 1964, a judgment was accordingly entered and placed upon the Order Book pursuant to the aforesaid Memorandum; that within a few days thereafter, and well within the twenty-one

(21) days during which time the Court could vacate such Order, counsel for plaintiff verbally requested the Court to reconsider its action and hear further argument on the question of submitting the matter to the jury, which the Court agreed to do; that this information was conveyed by plaintiff's counsel to counsel for defendant and it was discussed between them as to a possible agreeable time for such further argument.

On November 6, 1964, a Special Session of the General Assembly of Virginia was proclaimed by the Governor, and counsel for plaintiff, Willard J. Moody, a member page 37 } of the General Assembly of Virginia, was notified that the Special Session would convene on November 30, 1964; that as a result of such Special Session of the General Assembly being called, counsel for plaintiff was compelled to commence preparations for same and therefore found it impossible to proceed with a further hearing upon his Oral Motion or to file a Written Motion to vacate the Judgment Order entered herein on November 20, 1964; that said Special Session of the General Assembly convened on November 30, 1964, and did not adjourn until December 12, 1964.

That Section 30-5 of the 1950 Code of Va., As Amended, provides that any party who has retained an attorney to represent him who is a member of the General Assembly of Virginia, shall be entitled to an extension of thirty (30) days after any Session of the General Assembly for the filing of any pleading or the performance of any act relating thereto, and that it shall constitute reversible error to require such filing or act during the period specified; that plaintiff's counsel is within the thirty (30) day provision for filing his Motion to vacate the Judgment heretofore entered in this matter.

WHEREFORE, plaintiff, by counsel, hereby moves the Court to vacate said Judgment and hear further argument.

JOSEPH M. WHITE
By WILLARD J. MOODY
Of Counsel.

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* * * * *

ORDER.

Plaintiff, by counsel, having moved the Court to vacate the Judgment heretofore entered on November 20, 1964, in this matter, and was argued by counsel,

And it appearing that counsel for plaintiff, being a member of the General Assembly of Virginia, and therefore, pursuant to Section 30-5 of the 1950 Code of Va., As Amended, having a period of thirty (30) days beyond December 12, 1964, at which time a Special Session of the General Assembly adjourned, to file his Motion to vacate herein, is within the Statutory provision for filing such pleading,

And it further appearing that the said Motion should be granted, the Court doth hereby

ADJUDGE, ORDER and DECREE that the Judgment Order heretofore entered in this matter on November 20, 1964, is hereby vacated and the matter placed upon the Docket of the Court.

Enter 1/8/65.

H. W. M.

Entered 1/8/65.

D. M.

Seen and excepted to:

ALLAN S. REYNOLDS
Of Counsel for John Doe.

Seen:

WILLARD J. MOODY

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* * * * *

MEMORANDUM
January 15, 1965.

Since the decision of the Court in this matter in setting aside a verdict for the plaintiff and entering judgment for

the defendant for the reasons set forth in its memorandum of November 18, 1964, plaintiff has asked for and obtained the right to further argue the question whether the plaintiff's contributory negligence, if any, was properly a matter to be decided by the Court as a matter of law, or whether the jury should still have the right to pass upon the issue.

It is first contended by the plaintiff that even though the plaintiff were in the act of overtaking or passing the defendant's car at the intersection, such is not negligence *per se,* but only *evidence* of negligence which would leave resolution of the question to the jury. He suggests while violation of the "rules of the road" contained in Article 4 of Section 46.1 of the Code may be negligence *per se,* the plaintiff's offense here met one of the definitions of reckless driving in 46.1-190, which is within Article 3 of said chapter, a penal section, which does not require a holding as a matter of law that a violation necessarily gives rise to civil liability. This contention is not only untenable but the reverse is true. In the case of *Richardson* v. *Commonwealth,* 192 Va. 55, it is stated "the violation of one of more of the statutes defining page 40 } reckless driving, and the statutes prescribing 'the rules of the road' is negligence sufficient to support a civil action if such negligence was the proximate cause of the injury or damage sustained." Although this opinion was rendered in a prosecution for manslaughter, the court very aptly pointed out that the only fundamental difference between reckless driving and the rules of the road was that in the former the negligence must be accompanied by recklessness to render the act a crime, while the negligence alone that is the consequence of a violation of the rules of the road, does not constitute an offense under the criminal law. All of the conduct proscribed by Articles 3 and 4 is made so for the protection of the users of the highway, and the offenses designated as reckless driving are the more aggravated set which will also support a criminal prosecution.

The plaintiff also contends that under this evidence the act of the unknown driver in making the left turn, as he did, might be taken as an intervening act which supersedes the plaintiff's negligence as the proximate cause of the injury, or that such act could be taken as a deliberate attempt on the part of the driver to injure or at least confuse the pursuing officer. The Court cannot agree with either position. By the plaintiff's own testimony, he had taken a position opposite the left rear wheel of the John Doe car at the time the latter made his left turn. There is no room for the jury to assume that he was doing anything else than overtaking this car at

the intersection as prohibited by the statute. This evidence fails to establish any fact from which it could be inferred that the driver of the John Doe car was guilty of any wilful act toward the plaintiff, or that he had any knowledge of the plaintiff's presence. The proof of the turn alone will not justify these inferences.

page 41 } Judgment was entered in this case on November 20, 1964, and vacated by order entered on January 8, 1965, pursuant to a motion of the plaintiff founded on the fact that it was made within thirty (30) days after the adjournment of a special session of the General Assembly on December 12, 1964, the plaintiff's counsel being a member thereof and entitled to make his motion under Section 30-5 of the Code. The order was entered vacating the judgment not because this Court was satisfied that Section 30-5 applied thereto, but in order that both questions might be considered on one appeal if necessary. In view of this Court's conclusion that it was incumbent upon it to rule that the plaintiff was guilty of contributory negligence as a matter of law in its original judgment, the question has become moot.

This Court is still of the opinion that in having to rule that the reckless driver who injures a police officer attempting to apprehend him, can escape civil responsibility for his act because the officer is also violating the traffic laws is a patent injustice, but it can find no legal basis for reaching a contrary result.

H. W. MacKENZIE, JR.

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* * * * *

In the Circuit Court of the City of Portsmouth, on the 15th day of January, 1965.

* * * * *

At this day came the parties by their Attorneys and the Court having fully heard the motion of the defendant, by counsel, heretofore entered herein to set aside the verdict of the jury heretofore rendered herein, on the grounds that the said verdict is contrary to the law and evidence, and enter summary judgment for the defendant, doth sustain the same, and the previous judgment of the Court entered on the 20th

day of November, 1964, for the defendant is re-instated as of this date, for reasons appearing in the Court's memorandum as of this date, and this case is removed from the docket.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To Kenneth L. Dietrick, Clerk The Circuit Court of the City of Portsmouth:

NOTICE is given that Joseph M. White, Plaintiff herein, Appeals from the Orders entered herein on November 20, 1964, and January 15, 1965 to the Supreme Court of Appeals of Virginia, and will apply for a writ of error.

ASSIGNMENTS OF ERROR.

The following is the errors assigned:

1. The Court erred in sustaining the defendant's motion to set aside the verdict in favor of the plaintiff and in entering summary judgment for the defendant, as set forth in its Memorandum of November 18, 1964, and the Order entered pursuant thereto on November 20, 1964.

2. The Court erred in sustaining the defendant's motion to set aside the verdict in favor of the plaintiff and in reinstating, as of January 15, 1965, the summary judgment for the defendant heretofor entered on November 20, 1964 by Order entered on January 15, 1965.

JOSEPH M. WHITE
By RICHARD D. MATTOX
Of Counsel.

Filed Jan. 18, 1965 Circuit Court, Portsmouth, Va.

KENNETH L. DIETRICK, Clerk
By D. M., D. C.

* * * * *

page 4 } GEORGE L. SUMNER,

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

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please.

A. George L. Sumner, Portsmouth Police Department.

Q. And your address?

A. 622 Broad Street.

Q. And you are an officer with the Portsmouth City Police Department?

A. Yes, sir.

Q. And were you so employed on April 24, 1963—

A. Yes, sir.

Q. —in that category. Did you have an occasion to investigate an accident that happened at Willett Drive and Hartford Street?

A. Yes, sir.

Q. Now, would you state, please, whether or not that was the accident in which Mr. Joseph M. White was involved.

A. Yes, he was.

page 5 } Q. Would you state first of all how you happened to investigate it; were you called or what?

A. I had a call from the dispatcher who dispatched me to investigate an accident which involved Mr. White at Hartford and Willett.

Q. And when you arrived was Mr. White at the scene?

A. Mr. White had left and gone on his way to the hospital.

Q. Was any other operator of a vehicle at the scene at that time?

A. No, sir.

Q. And from your investigation did you locate any other driver who appeared or gave his name as being the driver?

A. No, sir.

Q. All right, sir. Did you see Officer Joseph M. White's vehicle at the scene?

A. Yes, I did.

Q. What type vehicle was it?

A. A motorcycle, Harley Davidson.

Q. And where was it located?

A. It was on the side of the street when I got there; it was off the street.

George L. Sumner.

Q. All right, sir. Now, going back so to speak
page 6 } here, what were the weather conditions and the time
of day this happened and the other information
that you would normally get?

A. It was clear; night; it was at night.

Q. Do you recall the time of night approximately?

A. No, sir, not right offhand I don't.

Q. Now, would you describe the location of the accident.

A. Well, from my investigation he was—Mr. White was coming off Hartford onto Willett—

Mr. Reynolds: Your Honor, I object to him reciting how the accident occurred. He has testified he wasn't there.

The Court: I sustain the objection. Officer, only tell what you saw.

By Mr. Moody:

Q. Officer, tell us, if you will, the direction of the streets that are located at the scene of this accident and the names and—

A. Willett goes east and west, Hartford north and south.

Q. All right, sir. Now, would you describe those streets in a general sense.

A. Willett Drive comes into Hartford, runs into
page 7 } Hartford, and then you have to make a left-hand
turn, right or left onto Hartford, and when I got
there the statement that I received—

Q. You are not permitted to testify to any statement, but were there any markings on the highway or anything of that nature?

A. Where the motorcycle skidded, yes, sir; where he fell down.

Q. Can you state where they were approximately?

A. Approximately thirty to forty feet from Hartford Street when he—

Q. Do you remember the direction of the skid marks or anything of that kind there?

A. The skid marks was on Willett, Willett Drive.

Q. All right, sir. Do you recall if they were in a straight line or whether they crossed in any direction?

A. I don't recall, Mr. Moody.

Q. All right, sir. Did you see any other markings of any kind at the intersection from anything else?

A. No, sir.

George L. Sumner.

Q. Now, what is the shoulder of the road composed of at that point? Can you describe the shoulder on Willett Drive?

A. When you come off of Hartford, right there at Hartford I am speaking of, the shoulder of the road is page 8 } just a slight shoulder there. There is no embankment or anything.

Q. All right, sir. What is the speed limit?

A. Twenty-five miles an hour.

Q. All right, now, one other question. In connection with the matter here today, how long have you been on the Police Department?

A. Three years.

Q. Are you familiar with the procedures followed in stopping a motorist who is speeding?

A. Yes, sir, my procedure is to—and in fact all the officers on the Portsmouth Police Department, to my knowledge, as I rode with and worked with several police officers—the procedure is when you go to pull any violator or possible violator, we pull up beside of them to pull over.

Q. All right, sir. Now, suppose this driver is attempting, obviously attempting to get away or evade you, do you use different procedures?

A. Then you use different procedures.

Q. What do you do then?

A. You use your red lights, and then when we come right down on them we have to use the siren, but that is the last thing we do is use the siren because on the Department the policy on this Department, I was informed when I come on the Department is to use the best procedure without page 9 } causing any confusion.

Mr. Moody: All right, sir. Answer Mr. Reynolds.

CROSS EXAMINATION.

By Mr. Reynolds:

Q. Hartford Street at the point where the accident occurred is roughly 25 feet wide, isn't it?

A. Yes, sir.

Q. And Willett Drive, after you leave the immediate area of the intersection, is roughly 18 feet wide?

A. 18 to 20, yes, sir.

Q. And right at the intersection Willett Drive has a curb and gutter until you get out—

George L. Sumner.

A. Onto Willett?
Q. —away from the intersection, is that right?
A. Yes, sir.
Q. And as you leave the intersection then there are gravel and dirt shoulders?
A. Yes, sir.
Q. Now, I take it that you are still on the Police Department, aren't you?
A. Yes, sir, I am.
page 10 } Q. And Officer White is still on the Department?
A. Yes, sir.
Q. On the night that the accident occurred, I take it you were on duty?
A. Yes, sir.
Q. And he was on duty at that time?
A. Yes, sir.
Q. Now, you talked to him with reference to the accident, didn't you?
A. Yes, sir.
Q. And I believe he told you that he had been following a speeder, is that right?
A. Yes, sir.
Q. And that at the time that he went around this corner he was half a block behind the speeder. is that right?
A. Yes, sir.
Q. Now, don't show this to the jury now, but let me show you a rough sketch and ask you if that sketch shows the intersection of Willett Drive and Hartford Street approximately.

(Sketch shown to the witness for examination.)

A. Yes, sir, the school sits right over here. (Indicating)
Q. Is that sketch accurate as far as you know?
A. Yes, sir.

page 11 } Mr. Reynolds: I would like to offer this in evidence, Your Honor.
Mr. Moody: Your Honor, this is probably not to scale, and I think we can let the Officer draw it. I object to it.
The Court: I sustain your objection to that. There is nothing in the world on that sketch that would indicate that it is accurate.
Mr. Reynolds: All right.

George L. Sumner.

Q. Officer, let me ask you to take this pad, and will you to the best of your ability make a rough sketch of the intersection showing the long way of the pad as being east and west and let this be the north. In other words let Hartford be at the top and show Willett Drive and how the intersection is.

(Witness complied by drawing a sketch.)

Q. And may I interrupt your drawing to ask you this question: Does Willett Drive intersect Hartford Street at a right angle, or is there any angle involved in the way the two streets come together?

A. You are speaking of—

Q. Willett Drive now, does it come right straight into Hartford, or is there an angle there?

A. There is a small angle there.

page 12 } Q. And as you leave Hartford Street traveling in a southerly direction at what angle does the road go? In other words, if you had been traveling in a westerly direction on Hartford and you turned to your left, wouldn't you have to cut back to the east some?

A. When you come off of Hartford, Mister? Are you speaking when you come off Hartford?

Q. Coming off Hartford making a left turn onto Willett?

A. Onto Willett?

Q. Yes, sir.

A. It's just right straight up in there.

Q. Are you sure of that?

A. I am pretty sure it is.

Q. All right, go ahead, make your diagram the best you can.

A. I am no artist.

Q. All right. Would you indicate north on there, which way is north?

A. North is this way. (Indicating)

Q. Draw an arrow there.

(A. (Witness complied.)

Q. Now, where did you find the motorcycle when you arrived?

A. Right over here. (Indicating)

page 13 } Q. Could you draw two circles with a line between as if they were the two wheels of a motorcycle?

A. (Witness complied.)

George L. Sumner.

Q. In other words you found the motorcycle to the west of Willett Drive?

A. That is right.

Q. And you testified, I believe, that it was some thirty or forty feet from Hartford Street?

A. Right up in here, just—between thirty and forty feet. (Demonstrating)

Q. Now, where does this gravel shoulder of that street begin?

A. It comes—it starts right along in here. (Indicating)

Q. And this is right at the intersection is a curb and gutter?

A. There is a curbing, yes, sir.

Q. And the hard surface of the road is more narrow?

A. It's narrow.

Q. Than this; but would you draw the edge of the hard surface on that diagram where the edge of the hard surface would be; that is, the paved portion of the street.

A. Uh-huh. (Witness complied.)

Q. And the other side.

A. (Witness complied.)

page 14 } Q. Now, are you saying that Willett Drive widens out as it leaves that intersection?

A. No, it doesn't widen out.

Q. Well, haven't you drawn it widening out?

A. When you come off of Hartford you've got more of a turn here than you have over here. (Indicating)

Mr. Reynolds: All right. I am not going to introduce that. You can if you want to.

Mr. Moody: All right.

Mr. Reynolds: Excuse me just a minute, Judge. That is all I have.

RE-DIRECT EXAMINATION.

By Mr. Moody:

Q. Officer Sumner, you say you talked with Joseph M. White? Where did you see him?

A. Over at the hospital.

Q. And can you describe his condition at the time you talked to him?

A. In agony and pain, complaining about his lower—right below the belt, right along in here he was. (Demonstrating)

George L. Sumner.

Q. All right, sir. And at that time did he appear
page 15 } to be in a dazed or shocked condition?

Mr. Reynolds: I object to the leading.

By Mr. Moody:

Q. State whether or not he appeared to be in a shocked or dazed condition at that time.

A. He was—he appeared to me that he was in pain, Mr. Moody.

Q. Uh-huh. All right, sir. Now, with reference to the question about the location of Mr. Joseph M. White as this car approached and made a turn into Willett Street, do you recall the details as to where Mr. White was at the time the car actually turned with reference to his statement?

A. He said he was in pursuit of the automobile and had got up on the automobile when he lost control—he lost control of the motorcycle.

Q. Now, you say he got up on the car. Did he say how close he got up on it as he went into the turn?

A. No, sir.

Mr. Moody: That is all.

RE-CROSS EXAMINATION.

page 16 } By Mr. Reynolds:

Q. Now, you say on my cross examination, in answer to my question, that he was a half a block behind the car. You are not changing that statement, are you?

A. No, sir, I am not changing that.

Mr. Moody: I want to clarify that. That is what I am trying to find out, where he was when he was half a block, when you are talking about he was half a block. Do you know?

The Witness: What are you speaking of, Mr. Moody?

Mr. Moody: I am speaking of—you say he was a half a block behind it. Where are you talking about; where were these motorcycles—this motorcycle and this car when there was a half a block between them?

Mr. Reynolds: I think he would have to restrict that to what the officer told him.

The Court: That is right, what the officer told him.

Mr. Moody: That is what I want.

Q. Do you recall?
A. No, sir.

Mr. Moody: Uh-huh. All right, sir, that is all.
page 17 } Mr. Reynolds: I am not going to offer it.
Mr. Moody: No further questions. Step down. May he be excused?
The Court: Yes.
Mr. Moody: Call Mr. Manzione.

J. P. MANZIONE,
called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Moody:
Q. State your name, please, sir.
A. J. P. Manzione, Sergeant, Portsmouth Police Department.
Q. What is your address?
A. 749 Lanier Crescent.
Q. All right, sir. I ask you how far is that from the intersection of Willett Drive and Hartford Street?
A. That's right in my back yard.
Q. All right, sir. On April the 24th of this year
page 18 } state whether or not you went to that intersection in connection with, or at a time when an accident had happened in which Mr. Joseph M. White was involved.
A. Yes, sir, I had just left my home where I had been for supper. It was approximately 7:30 P. M. As I approached Hartford and Willett Drive I observed Officer White laying on the edge of the road, and some people were there. I stopped there and rendered assistance.
Officer White was in pain. He crawled to my car. I tried to lift him but I couldn't. I managed to get him in the back seat of the car, and I took him to the Portsmouth General Hospital.
Q. Uh-huh. All right, sir. Did you investigate the accident as an investigating officer, or did someone else handle that?
A. Someone else handled that.
Q. Did you take him immediately to the hospital?
A. Yes, sir, I did.
Q. To Portsmouth General?

Ernest D. Ricketts.

A. That is correct.

Q. Now, did anyone—did you see any other operator of a motor vehicle on the scene, or did anyone identify themselves as the operator?

A. It was some other people there prior to my arrival. There was a car; whether it was a car that the page 19 } officer was allegedly in pursuit or not, I am not familiar, but they were rendering assistance.

Q. Did you obtain the names of any of the people who were there?

A. No, I took him to the hospital because he appeared to be in pain.

Q. All right, sir. And at that time where was his motorcycle, do you recall?

A. It was on the edge of the road; yes, sir.

Q. And when you first got there where was he; that is Mr. White relative to the motorcycle?

A. He was laying on the road. The motorcycle was near him. I don't recall exactly because the other officer was in pain and my main intentions was to get him to the hospital.

Mr. Moody: All right, sir, answer Mr. Reynolds.

Mr. Reynolds: I have no questions, sir.

Mr. Moody: Thank you, sir. May the officer be excused?

The Court: Are you all agreeable to excusing the officer?

Mr. Reynolds: Yes, sir.

Mr. Moody: Captain Ricketts.

page 20 } ERNEST D. RICKETTS,

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

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please, sir.

A. Ernest D. Ricketts.

Q. Are you a captain on the Portsmouth Police Department?

A. Yes, sir.

Q. Captain Ricketts, on April 24th of this year, did you have occasion to go to the scene of an accident at Hartford and Willett Street?

Ernest D. Ricketts.

A. Yes, sir.

Q. At that time was this an accident in which Mr. Joseph M. White was involved?

A. That is correct, yes, sir.

Q. And when you arrived was Mr. White there at the time?

A. Yes, sir.

Q. He was. Can you state to His Honor and the gentlemen of the jury just what brought you on the scene

page 21 } when you arrived and what you found.

A. Well, I arrived there about the same time that Sergeant Manzione got there, and Mr. White was laying on the side of the road there and he was in about a half sitting position; he had his elbow down and he was complaining of pain, and at first he wouldn't let us move him and finally we stayed there a few minutes and got him in the car and got him on the way to the hospital.

Q. All right, sir. Was there any other motorist there who was involved in the accident to your knowledge?

A. No, sir, nothing but the motorcycle.

Q. Now, in this case here, I want to ask you about, first of all, the procedures used in stopping a motorist. How long have you been with the Police Department?

A. Twenty-five years.

Mr. Reynolds: Your Honor, let me—I want to object to any statement as to general procedure of the Portsmouth Police Department. I think we are concerned with what happened on this particular night. I think it is irrelevant in this case. I object to it.

Mr. Moody: Your Honor, we would say to that that if counsel agrees that Officer White used the normal, customary and usual procedures which is within the confines

page 22 } of that which is proper under the circumstances we would certainly say we would agree with him, but as I understand it they intend to question the fact as to whether or not he should have blown his siren.

The Court: I think that this matter is relevant provided it is properly tied in.

Mr. Moody: Yes, sir.

Mr. Reynolds: I note an exception.

By Mr. Moody:

Q. Captain Ricketts, you have been with the Department

twenty-five years?

A. Yes, sir.

Q. During that period of time have you either had occasion to act as a motorcycle officer or been in charge of those who are acting as a motorcycle officer?

A. Both.

Q. Both. Now, would you state—I will ask you a specific question first: Whether or not when you are attempting to stop a motorist who is speeding and not apparently attempting to get away, whether under those circumstances you would use a siren, or not.

A. No, sir, we do not.

Q. Would you state, if you will then, what procedures are used under such circumstances.

page 23 } A. Well, in these cases where a person is made, or is in the act of violation, our men are instructed, and we try to see that they do this, drive up beside the motorist and wave him over or turn the red lights on while he is behind him so that the person in the back can look in his mirror and can see the red light. A lot of times sirens excite people and get them nervous and we try not to do that.

Mr. Moody: All right, sir, we have no further questions.

CROSS EXAMINATION.

By Mr. Reynolds:

Q. Captain Ricketts, of course you instruct all police officers to obey all traffic laws, do you not?

A. Yes, sir.

Mr. Reynolds: All right, thank you. That is all.

Mr. Moody: No further questions. Wait a minute, wait a minute; one second.

RE-DIRECT EXAMINATION.

page 24 } By Mr. Moody:

Q. Officer Ricketts, maybe to clarify one question that was asked you at this time, can you clarify what you mean when you say officers are instructed to obey the law with specific reference to a situation where a man is going above the speed limit. Is an officer not to go above the speed limit in order to stop him?

Ernest D. Ricketts.

A. No, sir, he'd better go above it.

Q. What does he do there?

A. Well, he is out there for the specific purpose of arresting law violators, and if he is in the act of apprehending one he does it just like I told you. He drives alongside and waves him over. In case of a person that is trying to make a getaway or trying to get away from the police officer, then we use other methods such as the siren and we call for help and try to block him off and so forth like that.

Q. One more question. In a case where the party is apparently not attempting to get away and you are coming up in a normal stop, do you try to get the license number when you are back behind him?

A. Yes, sir, they are instructed when they stop a vehicle before they leave their vehicle they radio headquarters and give us the license number and where they are at, the location, and we do that for a lot of reasons.

Q. Do you take that number after you stop him
page 25 } formally?

A. After he is stopped; but the officer is to give that before he goes to the person he stopped.

Q. After he stops he gets his number and he calls headquarters?

A. Then he goes up and speaks to the person.

Mr. Moody: All right, sir, that is all we have.

Mr. Reynolds: Let me ask you a further question, Captain.

The Witness: Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Reynolds:

Q. Police officers are trained as a general rule to be observant as to license numbers of vehicles for a number of different reasons, aren't they?

A. Yes, sir.

Q. In fact when you get real good you can remember and hold a whole lot of them in your head, can't you?

A. Some of them, yes.

Q. And if you sight a vehicle and recognize it as to the license number then you would apprehend that
page 26 } person?

A. That is correct.

Joseph M. White.

Mr. Reynolds: All right, that is all.
Mr. Moody: One other question along the same line.

RE-DIRECT EXAMINATION.

By Mr. Moody:
Q. If this is a normal stopping of a person who apparently is not trying to get away, and as you proceeded on up, do you have any occasion to take a license number under the circumstances?
A. Not until we actually stop the vehicle.
Q. All right.
A. And get the license number and radio headquarters as to the location.

Mr. Moody: No further questions.
Mr. Reynolds: I have nothing further. He may be excused.

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page 31 }

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JOSEPH M. WHITE,
the plaintiff, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Moody:
Q. State your name, sir.
A. Joseph M. White.
Q. And your address?
A. 3650 Western Branch Boulevard.
Q. And you are employed with the Portsmouth City Police Department?
A. Yes, sir.
Q. How long have you been with the Police De-
page 32 } partment?
A. Just a little over twelve years.
Q. And how long have you been acting as a motorcycle officer?
A. Approximately six years.

Joseph M. White.

Q. And on the 24th of April this year, were you acting as a motorcycle officer with the Police Department?

A. Yes, sir.

Q. Now, tell us in your own words where you first—strike that. I think perhaps I had better—now, in what area were you patrolling on the 24th of April?

A. I was in the Port Norfolk area.

Q. Did you have occasion to attempt to stop a motorist on Hartford Street on that date?

A. Yes, sir, I did.

Q. Approximately what time was it?

A. Approximately 7:30.

Q. P. M.?

A. Yes, sir.

Q. And was it dark or light?

A. It was dark.

Q. Did you have the light on? What were you riding or driving?

A. I was riding a motorcycle.

Q. What type?

page 33 } A. Harley Davidson.

Q. That is a two-wheeled motorcycle?

A. Two wheels.

Q. Did you have your lights on or not?

A. Yes, sir, I had headlights on.

Q. All right. Now, where were you when you first observed this motorist?

A. I had just made a turn off Mount Vernon Avenue onto Hartford, and I observed this car turn out of Florida onto Hartford.

Q. Where would that be relative to you?

A. I was approximately three-quarters of a block from him or from that intersection when the car turned out.

Q. Which way did he go?

A. He was headed in the same direction I was, which was more or less westerly direction.

Q. He turned from Florida onto Hartford and headed the same way you were going?

A. Yes, sir.

Q. And can you describe the manner that he turned into that intersection.

A. What attracted my attention was that when I saw the car it appeared to be coming at a very fast rate of speed and I knew there was a stop and go light at that corner, and at the

Joseph M. White.

rate of speed he was traveling—I couldn't swear
page 34 } that the man went through the red light or stopped
for it, but he was coming at a very fast rate of speed and that is what made me drop behind him and check his speed.

Q. All right, describe Hartford Street, if you will, the street that you were on.

A. Well, it travels in a westerly direction, and from where I *forst* dropped in behind him it is approximately a half a mile from there to Willett Drive, and—that I followed the man.

Q. And what is the approximate width of that street?

A. It's say roughly thirty feet; approximately that.

Q. And what type of area or neighborhood is it?

A. It's residential.

Q. And what is the speed limit?

A. Twenty-five.

Q. All right, sir. Now, as you proceeded behind the motorist approximately what was his speed?

A. I locked the speedometer and when I glanced down and checked it, it was approximately 44 or 45 miles an hour.

Q. All right. And can you tell us where you were when you were able to get a check on him, about how far you had gone
along.
page 35 } A. I would say approximately roughly four
blocks.

Q. Now, in order to get a check on a car that you think is speeding, can you tell us—do you have to get a certain distance from him and follow a certain distance before you could tell he is speeding or check his speed exactly?

A. Well, my ownself is the only one I can speak for, I try to get within fifty or sixty feet behind the car and set my speed to where I am not either gaining or falling behind, and that's when I lock my speedometer so I can tell.

Q. And in this case here is that the procedure you followed?

A. Yes, sir.

Q. And then after you ascertained that he was speeding you checked and locked your speedometer; what did you do then?

A. I turned—I had two red blinking lights on the front of the motorcycle—I turned the red lights on and attempted to pull up beside him to tell him to pull over and stop.

Joseph M. White.

Q. All right, sir. Would you, if you recall, testify as to the type of car, whatever you may recall about this car?

A. It appeared to me to be a '60 or '61 model Chevrolet. It was dark in color. It was either real dark blue or
page 36 } black, and I know it had Virginia license on it. I don't know the number.

Q. All right, sir. Could you tell whether there was more than one person in the car; do you recall?

A. From the way I could tell there was only one person. That is what it appeared to me, just the driver.

Q. Was it a man or a woman?

A. I took it to be a man.

Q. All right, sir. And as you started—you were saying, I believe, you started to come up beside him. Where were you at that time?

A. As best I could tell we had passed where Wallace Circle comes up, or Cambridge Street is. We had just passed that, and that would be approximately another three blocks before you get to Willett.

Q. And what did you do, go ahead and testify in your own words exactly what happened.

A. I was approximately fifty feet behind the car when I turned my red lights on and pulled over—there was no cars oncoming, meeting me headon, and I started up to get beside the man to pull him over, and just as we reached Willett Drive—he had not slowed down a bit that I could tell—and I had my red lights on and I was directly behind him when I had turned the lights on, and I moved over into the left-hand lane to pull up beside him, and just as we got
page 37 } to Hartford Street—to Willett Drive—he had never gave any signal at all to turn, and I felt like I was safe pulling up beside him, and the next thing I knew I heard the tires squealing and the man had abruptly put on brakes and had made a turn into Willett Drive. I had gotten approximately right by the left rear wheel when he made his turn. I could hear the car sliding. The car did slide on the street; I could hear that. I put on brakes. I got front wheel brakes. I put them both on and I tried to lay the motorcycle down to keep from hitting the automobile. I braked it enough going in the turn that I didn't hit the automobile. He went on, and I just did go past him, and at the rate of speed that I was going in trying to stop the best I could, when I went in the turn I lost control of the motorcycle.

Joseph M. White.

Q. Now, can you describe the angle of that intersection that comes in where you were proceeding in this instance. It comes in from your left, Willett Drive does, is that correct?

A. Yes, sir.

Q. And that is a dead end, or the intersection where the street comes in and doesn't cross, is that correct?

A. Yes, sir—well, there is a slight turn on Hartford. It has a very very slight turn to the right. It is right in there close to that turn and it is rated as a 90 degree angle. I couldn't tell you how much greater, but it's 90 degrees. It page 38 } is a very very sharp turn.

Q. It is a very sharp turn to get into Willett Drive?

A. Yes, sir.

Q. Now, going back again, did you get the license number of this vehicle?

A. No, sir.

Q. And can you state whether or not you normally get license numbers under such circumstances?

A. No, sir, I don't.

Q. And why? When do you get license numbers on cars that you stop for ordinary speeding?

A. Well, as far as the license number is concerned I don't bother to get that until the car has stopped and I have no reason to get it before it stops unless I have a reason to think that the man would be trying to get away or something along those lines.

Q. And suppose you have a call of some suspicious automobile with a particular number and you are looking for that number, in those cases do you try to make a mental note of the number when you see it?

A. Yes, sir, I do.

Q. But in this case you said you had no reason to take his number until such time as you had gotten him over?

A. That is right.

page 39 } Q. All right, sir. Now, Mr. White, was there any obstruction to his view, to keep him from seeing you or not?

A. No, sir, because I was directly behind him and, I mean in my own mind I felt like that the average person driving would be watching the rearview mirror, and I felt in my own mind with the noise and everything else that goes along with a motorcycle when you finally get close to a car it would attract his attention to where he would have seen me back there.

Joseph M. White.

Q. And do you usually use a siren under such circumstances?

A. No, sir, I don't unless it is absolutely necessary. I have found in the years that I have been in police work, and I have had a number of occasions where it scared people very much.

Q. By using it?

A. By using the siren; the sudden noise. It has actually caused accidents in years past. People are so frightened of them I refrain from using them. And it has been a Department policy for that for some years.

Q. All right, sir. Now, Mr. White, would you have turned at this intersection if this car had not forced you to do so?

Did you have any intention to turn here or not?

page 40 } A. No, sir.

Q. You did not?

A. I did not.

Q. Your intention was to proceed forward?

A. Yes, because I did not know he was going to turn.

Q. Right. Were you attempting to pass him or just to pull him over?

A. No, sir, I was trying to overtake him, to get up beside him. I had no intentions of passing him.

Q. And were you in a position to see his signal if he gave a signal?

A. Yes, sir, right up till the last few feet, right till I got up beside his rear wheel; but before that I could have.

Q. All right, sir. Now, do you recall after you were in the turn what happened from then on to you and your motorcycle?

A. Well, I had passed so close to the car that I realized then that I had lost control. I was trying to—I had leaned the motorcycle to the left and the next thing I knew I was off the road and on the shoulder of the road. There is very deep ruts which was, I would say approximately two feet, three feet off the pavement, and when I hit that it seemed to me like

I had rode for several feet till I hit these ruts, and

page 41 } the next thing I knew I went over the handle bars.

I went right over the island on the ground and I remember the motorcycle landing on me. It felt like it hit my ankle.

Q. What caused you to lose control of your motorcycle?

A. Well, I feel like in my mind the speed more than anything else.

Joseph M. White.

Q. And would you have attempted to take this turn at that speed if it had not been forced upon you?

A. No, sir.

Q. Do you know whether or not this man stopped?

A. Of my own knowledge, I don't. The last time I saw the car it was just still moving on. It was going on Willett Drive towards the high school.

Q. And did anyone come back to identify themselves later on as being the operator of the vehicle?

A. No, sir.

Q. And have you in the normal investigation been able to ascertain the name of this person or who the person was?

A. No, sir.

* * * * *

page 49 } CROSS EXAMINATION.

By Mr. Reynolds:

Q. I think the testimony is pretty clear on this, but so the record will be straight, Hartford Street at the point where the accident happened has one lane of traffic in each direction with room for cars to park on both sides, is that right?

A. Yes, sir.

Q. And Willett Drive is the same way, except that it is a little bit narrower than Hartford, is that right?

A. Yes, sir.

Q. And the street, as you have said, is something more or less than a 90 degree angle where it intersects Hartford, is that right?

A. Yes, sir.

Q. And in the direction that you were going on Hartford you have to turn something sharper than a 90 degree angle to go to your left on Willett, is that right?

A. Yes, sir.

Q. And I believe that you have stated that you don't know whether or not the driver of this car you were pursuing ever saw you or not, do you?

A. No, sir, I couldn't swear that he actually
page 50 } saw me.

Q. Now, you started off chasing him somewhere between Mt. Vernon Avenue and Florida, is that right?

A. No, sir, I started chasing him or got behind him after Florida.

Joseph M. White.

Q. After Florida?

A. Because I had turned off Mt. Vernon myself and he turned out of Florida onto Hartford.

Q. Well, I mean as soon as he turned off you decided you would at least see what he was doing?

A. Yes, sir.

Q. So you traveled along behind from roughly Florida to the point where the accident happened, is that right?

A. Yes, sir.

Q. And after you had gotten a clock on him at about 45 miles an hour you increased your speed in order to come up alongside of him, is that right?

A. Yes, sir.

Q. And you had reached a point approximately opposite the left rear wheel of his car when he suddenly turned on you?

A. Yes, sir.

Q. And at that time you were at the intersection of Willett Drive?

A. Yes, sir.

page 51 } Q. All right. Now, if you kept going at that point—Hartford Street continues on in a westerly direction, doesn't it?

A. Yes, sir.

Q. Or a couple of blocks anyway?

A. Approximately another block.

Q. And when this happened you say at that time you had not gotten the license number on the vehicle?

A. No, sir.

Q. Well, you heard Captain Ricketts say that officers pay a lot of attention to license numbers particularly when there might be a stolen vehicle involved. Do you follow that practice of looking out for stolen vehicles—

A. Yes, sir.

Q. —when you are on patrol?

A. Yes, sir.

Q. Did you check this particular vehicle to see if it might have a license number that may be you were looking for on that particular night?

A. Well, during the course of a night you could look at many an automobile and see many a license number and it would probably not mean anything to you unless you had actually—when we go to work we have a sheet there that we look at and take the numbers down.

Joseph M. White.

Q. Did you have such a sheet with you that
page 52 } night?
A. Yes, sir.

Q. Now, you say your practice varies according to whether or not the person is attempting to flee or whether he is just a routine speeder, is that right?

A. Well, conditions would vary on every one so to speak.

Q. Well, now, when you saw this car come out at a high rate of speed and travel some twenty miles an hour in excess of the speed limit you didn't know what this fellow was doing, did you?

A. No, sir.

Q. He might have just robbed a store or been involved in a hit-and-run accident or any number of things; isn't that right?

A. Yes, sir, he could have.

Q. And you don't know whether he saw you or not?

A. No, sir.

Q. So you don't know whether he was fleeing or not, do you?

A. No, sir, I don't know.

Q. And yet you tell the jury that even though you rode up right within fifty or sixty feet behind him and came up beside him you never glanced at the license number so you would be able to identify him in the event he did flee?

A. Well, in my own mind if he had attempted to
page 53 } flee I would still have plenty of time to get his license number.

Q. All right. Now, the first thing that alerted you to something being wrong is that you say you heard him putting on brakes, is that right?

A. No, sir, I said I heard the tires actually sliding on the pavement.

Q. And at that time you had not put on your brakes, had you?

A. No, sir.

Q. Well, now, why didn't your motorcycle go on past him when he put on brakes and you had not put on your brakes and you were catching up with him; how do you explain the fact that your vehicle did not go on past him?

A. Well, that I couldn't tell you except that I applied my brakes too, and it was almost instantaneous as far as I was concerned to him putting his on, and when he made his turn I did not have no course but to turn with him.

Joseph M. White.

Q. All right. Now, then he made this left turn with his brakes on and you also cut left, is that correct?

A. Yes, sir.

Q. And yet you say you went behind him, didn't you?

A. Yes, sir.

page 54 } Q. Well, if he turned across in front of you—were you right beside him and he had his brakes on before you did, how did you get around behind him?

A. Well, I never took my brakes off, and the only thing that I could tell you would be that my momentum carried me to the edge of the road or more or less straight after I had started in the turn and more or less straightened the turn out whereas he was still going ahead.

Q. So, in some manner you got from a position beside him behind him and you were carried over to the far side of the road, is that right?

A. Yes, sir.

Q. And then you hit the ruts at the edge of the road and lost control?

A. No, sir, I feel like that I had actually lost control at the time I started in that turn.

Q. And that was because of the speed that you were traveling?

A. Yes, sir.

Mr. Reynolds: That is all I have.

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page 62 } (The Court, counsel for both sides and the reporter retired in chambers where the following took place:)

Mr. Reynolds: The defendant, John Doe. moves the Court to strike the plaintiff's evidence and to enter summary judgment for the defendant on the grounds that the plaintiff by his own testimony has conclusively proved that he was guilty of contributory negligence which was the proximate cause of the accident. He has shown that he violated two statutory provisions, and that the violations were the proximate cause of the accident.

The first is that he exceeded the speed limit. There is no question but that he was traveling in a twenty-five mile an

hour zone at a speed of forty-five miles an hour or better since he was attempting to overtake a vehicle which he had clocked at a speed of about forty-five miles an hour.

Now, it is true that Section 46.1-199, under subsection (e) does grant an exception to police officers pursuing law violators on the condition that they are displaying a flashing, blinking or alternating red light, or that they are sounding a siren, bell or whistle, and the testimony here is page 63 } that he had his lights on but he wasn't sounding any siren, bell or whistle and, therefore, he does not come within this exception, and I don't feel that the City of Portsmouth's Police Department can change the statutory law of Virginia by some general practice that they have adopted. So. he is violating the speed limit, and he said the speed was the cause of him losing control. There is no contradiction on that.

Furthermore, he was overtaking a vehicle at an intersection which is a violation of Code 46.1-190, subsection (e), which says that a person is guilty of reckless driving who overtakes or passes any vehicle proceeding in the same direction at any intersection, and I don't have the cases with me, but you have them here, and the annotations are plain, and I have read the cases and the annotations are correct.

It says pulling around a car at an intersection violates subsection (e) and subsection (e) is directed against cars running abreast at an intersection, so there is no contradiction but that it is not a two-way road. It is a one-way road. He pulls up beside this vehicle at an intersection. There is no reason why he couldn't have done it anywhere else before the intersection, between where he started pursuing it page 64 } and where he stopped, and being beside that vehicle as he says he was at this intersection was the proximate cause of the accident, and under the facts, I don't think there is any question for the jury.

The Court: How about this thing?

Mr. Mattox: May I see it, Judge?

Mr. Moody: As I read it, Judge, it isn't mandatory. It says as may be reasonably necessary, which I assume is the very thing that we have been dealing with here, that the officer ascertain over a period of time that it is better just to use the flashing light rather than both. They leave that language in there for the obvious purpose of using some reasonable—

Mr. Reynolds: Judge, I think it is obvious that he doesn't have to keep the thing at a high blast for a hundred per cent of the time, and you know that police officers and fire engines too turn it up and down and up and down. The statutes says

that he doesn't have to run it full blast all the time but that condition is put in there, the red light and siren as may be reasonably necessary, and he has got to do it some to give him some minimum degree of warning, and just the
page 65 } slightest toot might have avoided this accident.

Mr. Moody: Well, I think the very reason for placing this in here, why did they put in "as may be reasonably necessary" if it isn't going to be a matter of discretion or a matter, you might say, for a jury or court to consider as to whether or not it was reasonably necessary under the particular circumstances. They wouldn't have put that in there if it meant to make it a mandatory provision as I read it.

The Court: Well, the testimony here is, and I believe that common experience will bear it out, that under certain conditions the release of a siren could be calculated to have more serious and dangerous effects than the failure to use it. I am inclined to think now that the qualification that is put in that statute doesn't mean that you have to either sound a siren or a bell or an exhaust whistle in order to bring the interpretation into play, and whether the use of any of these devices would have played any part in the avoidance of this accident would clearly be a jury question, so as of now I am going to hold that that duty is not absolute to give some audible signal as applied to this case. I will be glad to
page 66 } consider that again in more detail if it is necessary to do it.

Mr. Moody: Off the record.

(Discussion off the record.)

Mr. Reynolds: I note an exception to ruling of the Court.

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OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS.

Mr. Reynolds: The defendant objects and ex-
page 72 } cepts to the refusal of the Court to grant Instruction B-1 as the evidence is uncontradicted that the plaintiff was exceeding the speed limit and that even though he was a police officer pursuing a violator he was not sounding his siren, bell or whistle and did not come within the exemption granted to police officers for exceeding the speed

limit, and the evidence was uncontradicted that the excessive speed was a proximate cause of the accident.

The defendant excepts to the refusal of the Court to grant Instruction B-2 as the evidence was uncontradicted that the plaintiff was overtaking and running abreast of the defendant's vehicle at the intersection of Hartford Street and Willett Drive in violation of the statute against overtaking at an intersection. There was no evidence that the plaintiff came within any exemption to this rule and there could be no conflict in the evidence or any question for the jury as to whether or not such a violation was a proximate cause of the accident.

The defendant excepts to the refusal of the Court to grant Instruction B-3 as the jury should not be allowed to fall into the error of believing that the mere fact that the
page 73 } defendant was speeding and that as a result thereof the plaintiff was chasing him at a high rate of speed which caused him to lose control of the motorcycle was a proximate cause of the accident. This instruction would clarify this matter for the jury and is a correct statement of the law.

Mr. Moody: The plaintiff objects and excepts to the granting of Instruction C on the ground that the said instruction is not applicable to the facts of this case. This instruction incorporates the provisions of a statute that was not intended to protect the interest of a person in the position of the defendant in this case, and that it is not applicable to the facts of this case, and obviously the statute was provided for a situation where a police officer or other person in the position of authority is attempting to apprehend a law violator, and in the process of so doing, whether proceeding at a speed above the speed limit, must turn on his siren and blink his lights, and in so doing is reasonable under the circumstances in order to protect the interest of the public, not to protect the interest of that person that he is attempting to apprehend.

The plaintiff objects and excepts to the granting
page 74 } of Instruction B for the reason that said instruction setting forth certain duties on the part of the plaintiff is not applicable in a case where a police officer in the performance of his duty is attempting to overtake and apprehend a law violator, who is the defendant in this case.

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A Copy—Teste:

H. G. TURNER, Clerk.

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