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Clerk, Supreme Court of Appeals
Richmond, Va.

Record Nos. 6159, 6160

In the Supreme Court of Appeals of Virginia at Richmond

ROBERT LEE SHELTON, AN INFANT, ETC.

v.

KATHRYN NELSON MULLINS

CHARLES L. SHELTON,

v.

KATHRYN NELSON MULLINS

FROM THE CIRCUIT COURT OF THE CITY OF RADFORD

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.

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6159

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 10th day of June, 1965.

ROBERT LEE SHELTON, AN INFANT, WHO SUES BY HIS MOTHER AND NEXT FRIEND, PAULINE SHELTON, Plaintiff in Error,

against

KATHRYN NELSON MULLINS, Defendant in error.

From the Circuit Court of the City of Radford
William S. Jordan, Judge

Upon the petition of Robert Lee Shelton, an infant, who sues by his mother and next friend, Pauline Shelton, a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Radford on the 19th day of January, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Kathryn Nelson Mullins was defendant; no bond being required.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6160

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 10th day of June, 1965.

CHARLES L. SHELTON, Plaintiff in Error,

against

KATHRYN NELSON MULLINS, Defendant in Error.

From the Circuit Court of the City of Radford

Upon the petition of Charles L. Shelton a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Radford on the 19th day of January, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Kathryn Nelson Mullins 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 NO. 6159

* * * * *

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* * * * *

ORDER.

On the 12th day of January, 1965, came the parties of the above-styled action on the claim of Robert Lee Shelton against Kathryn Nelson Mullins, the said Robert Lee Shelton in person and by James C. Turk and John N. Dalton, his attorneys, and the said Kathryn Nelson Mullins in person and by John B. Spiers, Jr. and Duane E. Mink, her attorneys, and issue being joined, came a jury, a panel of thirteen, which were selected from the regular venire summoned for this term of Court, who were examined by the court and found free from all legal exceptions and qualified to serve as jurors; thereupon, the plaintiff, by counsel, and the defendant, by counsel, struck three each from said panel, and the remaining seven composed the jury for the trial of this case, against whom no objections were raised, to-wit: Phillip M. Carr, Elwood Buckland, Robert S. Linkous, Harry W. Anderson, A. A. Hall, Melburn S. Williams and Allen E. Cloyd, Jr., who were sworn to well and truly try the issue joined between the said Robert Lee Shelton and Kathryn Nelson Mullins and a true verdict render according to the law and evidence.

Whereupon, the plaintiff proceeded to introduce his evidence, and having rested, the defendant moved the court to strike the plaintiff's evidence and enter summary judgment for the defendant, on the grounds assigned at bar, which motion the court overruled, to which action defendant, by counsel, duly excepted on the grounds assigned at bar.

Thereupon, the defendant proceeded to introduce her evidence, and having rested, renewed her motion to strike the evidence of the plaintiff and for summary judgment in favor of the defendant, which motion the court overruled, to which action the defendant excepted on grounds assigned

page 32 } at bar.

Whereupon, the plaintiff, by counsel, moved the court to strike the evidence of the defendant as to the liability

of the defendant, and to submit to the jury only the question of damages, which motion the court overruled, to which action the plaintiff excepted on grounds assigned at bar.

Both sides having completed their case and the jury having heard all the evidence, the instructions of the court and arguments of counsel, the jury retired to its room to consider of its verdict, and after a time returned to the bar of the court and rendered the following verdict:

"Robert Lee Shelton, an infant, age 6, who sues by his mother, and next friend, Pauline Shelton

"*v.*

"Kathryn Nelson Mullins

"We the jury upon the issue joined find in favor of the defendant.

/s/ A. E. CLOYD, JR., Foreman"

Thereupon, the plaintiff moved the court to set aside the verdict of the jury on the grounds that the same was contrary to the law and the evidence, without evidence to support it, for the refusal to give proper instructions and the giving of improper instructions, which motion the court overruled, to which action of the court the plaintiff, by counsel, duly excepted on grounds assigned at bar.

Upon consideration whereof, and pursuant to the verdict of the jury, the court doth adjudge and order that the plaintiff herein, Robert Lee Shelton, infant who sued by Pauline Tolley Shelton, his next friend, shall have and recover nothing of the defendant, Kathryn Nelson Mullins, but that said defendant shall have and recover of the plaintiff her costs in this behalf expended.

Enter this order: January 19, 1965.

W. S. JORDAN, Judge.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To Giles W. Goodykoontz, Clerk, Circuit Court of the City of Radford, Radford, Virginia:

Counsel for Robert Lee Shelton, an infant, etc. and Charles L. Shelton, the plaintiffs in the above-styled actions, hereby gives Notice of Appeal from the final orders entered on January 19, 1965 in the above-styled cases which were consolidated and tried together, and they will apply to the Virginia Supreme Court of Appeals for a writ of error and *supersedeas.*

The following are the errors assigned:

(1) The Trial Court erred in granting Instruction Nos. B, C-la, D, F, G, H, I, and J offered on behalf of the defendant, this assignment being as to each of such instruc-
page 34 } tions.

(2) The Trial Court erred in failing to grant Instruction No. 6 offered on behalf of the plaintiffs.

(3) The Trial Court erred in not setting aside the verdicts of the jury as contrary to the law and the evidence, without evidence to support them and plainly wrong, and in not granting to plaintiffs a new trial, and in entering up judgments in favor of the defendant.

JAMES C. TURK
Of Counsel for Robert Lee Shelton, an infant, etc. and Charles L. Shelton.

Filed in the Clerk's Office Circuit Court, City of Radford the 5th day of March 1965 at .... o'clock ..M.

Teste:

FRANCES N. HUTTON
Deputy Clerk.

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RECORD NO. 6160

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* * * * *

ORDER.

On the 12th day of January, 1965, came the parties of the above-styled action on the claim of Charles L. Shelton against Kathryn Nelson Mullins, the said Charles L. Shelton in person and by James C. Turk and John N. Dalton, his attorneys, and the said Kathryn Nelson Mullins in person and by John B. Spiers, Jr. and Duane E. Mink, her attorneys, and issue being joined, came a jury, a panel of thirteen, which were selected from the regular venire summoned for this term of Court, who were examined by the court and found free from all legal exceptions and qualified to serve as jurors; thereupon, the plaintiff, by counsel, and the defendant, by counsel, struck three each from said panel, and the remaining seven composed the jury for the trial of this case, against whom no objections were raised, to-wit: Phillip M. Carr, Elwood Buckland, Robert S. Linkous, Harry W. Anderson, A. A. Hall, Melburn S. Williams and Allen E. Cloyd, Jr., who were sworn to well and truly try the issue joined between the said Charles L. Shelton and Kathryn Nelson Mullins and a true verdict render according to the law and evidence.

Whereupon, the plaintiff proceeded to introduce his evidence, and having rested, the defendant moved the court to strike the plaintiff's evidence and enter summary judgment for the defendant, on the grounds assigned at bar, which motion the court overruled, to which action defendant, by counsel, duly excepted on the grounds assigned at bar.

Thereupon, the defendant proceeded to introduce her evidence, and having rested, renewed her motion to strike the evidence of the plaintiff and for summary judgment in favor of the defendant, which motion the court overruled, to which action the defendant excepted on grounds assigned

page 10 } at bar.

Whereupon, the plaintiff, by counsel, moved the court to strike the evidence of the defendant as to the liability of the defendant, and to submit to the jury only the question of damages, which motion the court overruled, to which action the plaintiff excepted on grounds assigned at bar.

Both sides having completed their case and the jury having heard all the evidence, the instructions of the court and argu-

ments of counsel, the jury retired to its room to consider of its verdict, and after a time returned to the bar of the court and rendered the following verdict:

"Charles L. Shelton,

"*v.*

"Kathryn Nelson Mullins.

"We the jury, upon the issue joined, find in favor of the defendant.

/s/ A. E. CLOYD, JR., Foreman."

Thereupon, the plaintiff moved the court to set aside the verdict of the jury on the grounds that the same was contrary to the law and the evidence, without evidence to support it, for the refusal to give proper instructions and the giving of improper instructions, which motion the court overruled, to which action of the court the plaintiff, by counsel, duly excepted on grounds assigned at bar.

Upon consideration whereof, and pursuant to the verdict of the jury, the court doth adjudge and order that the plaintiff herein, Charles L. Shelton, shall have and recover nothing of the defendant, Kathryn Nelson Mullins, but that said defendant shall have and recover of the plaintiff her costs in this behalf expended.

Enter this order: January 19, 1965.

W. S. JORDAN, Judge.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To Giles W. Goodykoontz, Clerk Circuit Court of the City of Radford, Radford, Virginia:

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uary 19, 1965 in the above-styled cases which were consolidated and tried together, and they will apply to the Virginia Supreme Court of Appeals for a writ of error and *supersedeas.*

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(1) The Trial Court erred in granting Instruction Nos. B, C-la, D. F, G, H, I, and J offered on behalf of the defendant, this assignment being as to each of such instruc-
page 12 } tions.

(2) The Trial Court erred in failing to grant Instruction No. 6 offered on behalf of the plaintiffs.

(3) The Trial Court erred in not setting aside the verdicts of the jury as contrary to the law and the evidence, without evidence to support them and plainly wrong, and in not granting to plaintiffs a new trial, and in entering up judgments in favor of the defendants.

JAMES C. TURK
Of Counsel for Robert Lee Shelton an infant, etc. and Charles L. Shelton.

Filed in the Clerk's Office Circuit Court, City of Radford the 5 day of March 1965 at .. o'clock ..M.

Teste:

FRANCES N. HUTTON, Deputy Clerk.

* * * * *

RECORD NOS. 6159 and 6160

page 9 } INSTRUCTION NO. 1.

The Court instructs the jury that a child under the age of 7 years cannot be guilty of any negligence, and the jury is instructed that the child, Robert Lee Shelton, being under the age of 7 years was not guilty of negligence as a matter of law.

Given.

W. S. J.

page 10 } INSTRUCTION NO. 2.

The Court instructs the jury that if you believe from a preponderance of the evidence in this case that Kathryn Mullins was negligent in the operation of her automobile and that such negligence proximately caused, or efficiently contributed to the accident in which Robert Lee Shelton was injured, then you should find for the plaintiff.

Given.

W. S. J.

page 11 } INSTRUCTION NO. 3.

The Court instructs the jury that while the driver of a motor vehicle is not an insurer of the safety of children he may encounter along the streets or highways, nevertheless his duty is not measured by the standards applicable to adults. The duty of ordinary care required of the driver of a motor vehicle toward children is commensurate with the danger and probability of injury under circumstances. This degree of care is proportionate to the apparent ability of the child to foresee and avoid the perils which may be encountered, if those perils are such as to have become apparent to, or in the exercise of ordinary care should have been discovered by, the motorist under all the circumstances.

Given.

W. S. J.

page 12 } INSTRUCTION NO. 4.

The Court instructs the jury that if you believe from the evidence in this case that the defendant, Kathryn Mullins, saw, or in the exercise of ordinary care should have seen, the plaintiff, Robert Lee Shelton, in or near the street ahead of her, at or near the place where the collision occurred, that alone was notice to her of the risk and danger of the situation, and she had no right to assume that a child of tender age would remain in a place of safety, but on the contrary was required, in the exercise of ordinary care, to anticipate that the plaintiff, Robert Lee Shelton, acting upon some childish impulse, heedless of danger and incapable of exercising pre-

caution expected of adults, might, through his thoughtlessness, expose himself in some way to danger of injury, and it became the duty of the defendant, Kathryn Mullins, to increase her vigilance as she approached the child and to exercise that degree of care that a person of ordinary prudence would have exercised under similar facts and circumstances to avoid danger of injuring the child; and if the jury believe from the evidence that the defendant violated the foregoing duty, then she was negligent, and if you further believe that such negligence proximately caused or efficiently contributed to the collision, then she would be responsible to the plaintiff, Robert Lee Shelton, in damages.

Given.

W. S. J.

pag 13 } INSTRUCTION NO. 5.

Th Court instructs the jury that the maximum speed limit at the time and place of the collision in question was 25 miles per hour; and if you believe from the evidence that the defendant, Kathryn Mullins, was driving her vehicle in excess of 25 miles per hour, then she was guilty of negligence; and if you further believe from the evidence that any such negligence was a proximate cause of, or efficiently contributed, to cause the collision, then you shall find your verdict in favor of the plaintiff, Robert Lee Shelton.

Given.

W. S. J.

page 14 } INSTRUCTION NO. 7.

The Court instructs the jury that if from the evidence and the other instructions of the court, you find your verdict for the plaintiff, Robert Lee Shelton, then in assessing the damages to which he is entitled, you may take into consideration any of the following which vou believe from the evidence to have resulted from the collision:

(a) Any bodily injuries sustained and the extent and duration thereof;

(b) Any effect, if any, of any such injuries upon his health according to its degree and probable duration;

(c) Any physical pain and mental anguish suffered by him in the past and any which will be suffered by him in the future;

(d) Any disfigurement or deformity resulting to him and any humiliation or embarrassment associated therewith;

(e) Any loss of earning capacity, if any, he may reasonably be expected to sustain in the future;

(f) Any inconvenience and discomfort caused in the past and any which will probably be caused in the future.

And from these as proven by a preponderance of the evidence your verdict should be for such sum as will fully and fairly compensate the plaintiff, Robert Lee Shelton, for the damages sustained by him as a result of the collision, not to exceed the sum sued for in the Motion for Judgment.

Given.

W. S. J.

page 15 } INSTRUCTION NO. 8.

The Court instructs the jury that if from the evidence and the other instructions of the Court you find your verdict for the plaintiff, Robert Lee Shelton, then the plaintiff, Charles L. Shelton, is also entitled to recover in his action, and in assessing the damages to which Charles L. Shelton is entitled to recover, you may take into consideration the following:

(a) The medical and other expenses incurred to date amounting to $2,516.83;

(b) Any additional medical expenses that can be reasonably foreseen between now and the time the said infant reaches his majority.

And from these as proven by a preponderance of the evidence, your verdict should be for such sum as will fully and fairly compensate the plaintiff, Charles L. Shelton, for the damages sustained by him, not to exceed the sum sued for in the Motion for Judgment.

Given.

W. S. J.

page 16 } INSTRUCTION NO. A.

The Court instructs the jury that, in determining this case, you cannot act upon mere guess or conjecture, but your verdict must be founded solely on the evidence presented before you, and fair inferences therefrom, and if the plaintiff does not prove by a preponderance of the evidence that the accident and resulting injury to Bobby Lee Shelton were the result of negligence on the part of Mrs. Mullins, then your verdict should be in favor of the defendant, Mrs. Mullins.

In this connection, the Court further tells the jury that your deliberations in the determination of this case must not be influenced by sympathy, passion or prejudice, or any one of these.

Given.

W. S. J.

page 17 } INSTRUCTION NO. B.

It is incumbent on the plaintiff not only to prove by a preponderance of the evidence that Mrs. Mullins was negligent, but also to prove by a preponderance of the evidence that any such negligence was a proximate cause of the accident, i.e. that the occurence was a natural and probable consequence of any such negligence. A person is not charged with foreseeing that which could not reasonably be expected to happen, nor for casualties which, though possible, were wholly improbable, nor for intervening efficient causes which could not have been reasonably foreseen. Therefore, even though you may believe from a preponderance of the evidence that Mrs. Mullins was negligent, yet unless you further believe from a preponderance of the evidence that any such negligence was the sole proximate cause of the accident, you must find your verdict in favor of Mrs. Mullins.

Given.

W. S. J.

page 18 } INSTRUCTION C-La.

The Court tells the jury that a motorist has a superior right of way over pedestrians between intersections; and further instructs you that in this case Mrs. Mullins had a right to as-

sume that no pedestrian would attempt to cross seventh street in front of her between intersections, and she had a right to rely on that assumption insofar as Robert Lee Shelton was concerned until she saw, or in the exercise of reasonable care, she should have seen the Shelton child near or approaching the street; and if you believe she saw or should have seen the child, in the exercise of reasonable care, in or near the street, then she was no longer justified in assuming that he would not attempt to cross the road.

Given.

W. S. J.

page 19 } INSTRUCTION NO. D.

The Court tells you that in this case the defendant, Mrs. Mullins, was not an insurer of the safety of the Shelton child, and the duty did not arise to exercise the increased care required for the safety of children as mentioned in the preceding instructions until such time as she saw, or in the exercise of ordinary care should have seen that the Shelton child was close to or approaching the street, at which time it then became her duty to increase her diligence as she approached the child and to exercise the degree of care that a person of ordinary prudence would have exercised under the same circumstances to avoid injury to him.

And if you believe from the evidence that Mrs. Mullins did not see, and could not in the exercise of ordinary care have seen Bobby Lee Shelton near the street, and that he suddenly entered the street either into the side of her vehicle or into its path and so closely that Mrs. Mullins had no reasonable opportunity to avoid striking the child after seeing him and that she was otherwise exercising ordinary care, then you shall return your verdict for the defendant.

Given.

W. S. J.

page 20 } INSTRUCTION NO. F.

The Court tells the jury that when a person is faced with a sudden emergency created by the act or acts of others, without negligence on his part, the driver of a motor vehicle is not

required to exercise the same good judgment in the emergency which would be required of him if there had been no sudden emergency. He is required merely to exercise such reasonable judgment and care as an ordinarily prudent person would exercise in the same situation of emergency, and is not responsible for errors in judgment even though it appears that an accident might have been avoided had he reacted differently.

In this connection, the Court tells you that if you believe that Kathryn Mullins, in proceeding along Seventh Street, was, without negligence on her part, confronted with a sudden emergency created by the actions of the Shelton child, and that she acted reasonably under such circumstances of sudden emergency, then she was not guilty of negligence merely because she failed to avoid the accident, even though you may also believe she made an error of judgment, or it may appear that the accident would have been avoided had she taken a different course of action.

Given.

W. S. J.

page 21 } INSTRUCTION NO. G.

The Court tells the jury that the mere happening of an accident resulting in injury to Robert Lee Shelton raises no inference that it was due to negligence on the part of anyone.

The law recognizes that there are unavoidable accidents, which are defined in law as accidents which occur without negligence on the part of anyone legally responsible therefor. If, therefore, you believe from the evidence that this accident was an unavoidable one, that is, without negligence on the part of anyone legally liable therefor, then you must find for the defendant.

Given.

W. S. J.

page 22 } INSTRUCTION NO. H.

The Court tells the jury in this case that if you believe that it is just as probable that the injuries to Robert Lee Shelton resulted from or were caused by the acts of some third person, or from some cause for which Mrs. Mullins is not responsible,

as it is that such injuries resulted from a cause for which she is responsible, then your verdict should be for the defendant.

Given.

W. S. J.

page 23 } INSTRUCTION NO. I.

The Court tells the jury that, in considering the evidence in this case and in arriving at your verdict, you may take into consideration the following tables of speed and stopping distances of motor vehicles, which shall not raise a presumption:

Speed in miles per hour	Speed in feet per second	Auto brakes in feet	Average Stopping distances average driver reaction time 3/4 second in feet	Total stopping distances: Driver and automobile in feet
20	29.34	21	22	43
25	36.62	32	27	59
30	44.0	47	33	80
35	51.3	63	38	101
40	58.7	82	44	126
45	66.0	104	50	154
50	73.3	128	55	183
55	80.7	155	61	216
60	88.0	185	66	251
65	95.3	217	71	288
70	102.6	252	77	329
75	109.9	289	82	371
80	117.2	328	88	416
90	132.0	425	99	524
100	146.6	514	109	623

You are further instructed that the above tables are the result of experiments made with motor vehicles, unloaded except for the driver, equipped with four wheel brakes, in good condition, on dry, hard, approximately level stretches of highway free from loose material.

Given.

W. S. J.

page, (24 } INSTRUCTION NO. J.

The Court tells the jury that a witness may be impeached and discredited by prior inconsistent statements, and if you

believe from the evidence in this case that any witness made inconsistent and contrary statements concerning the events in this case, then you have the right to disregard the whole testimony or give it such weight to which you think it is entitled.

Given.

W. S. J.

page 25 } INSTRUCTION NO. C.

The Court tells you that a motorist has a superior right of way over pedestrians between intersections; and further instructs you that in this case Mrs. Mullins had a right to assume that no pedestrian, whether minor or adult, would attempt to cross Seventh Street in front of her between intersections, and she had a right to rely on that assumption insofar as Robert Lee Shelton was concerned until she saw, or in the exercise of ordinary care, she should have seen the Shelton child near or approaching the street.

Refused.

W. S. J.

page 26 } INSTRUCTION NO. 6.

The Court instructs the jury that at the time and place of the collision involved herein, it was the duty of the defendant, Kathryn Mullins, to exercise ordinary care:

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

The Court instructs the jury that ordinary care is the exercise of that care which a reasonably prudent person would have exercised under the same or similar circumstances, taking into consideration what is common knowledge—that the actions of children are erratic and unpredictable and that a child may act thoughtlessly and upon a childish impulse. The younger the child and the less able to look out for himself, the greater the care which may reasonably be expected of a driver of a motor vehicle to avoid injuring him.

If you believe from the evidence in this case that the defendant, Kathryn Mullins, violated any one or more of these duties, then she was guilty of negligence; and if you further believe from the evidence that any such negligence was a proximate cause of, or efficiently contributed, to cause the collision in question, then you should find your verdict in favor of the plaintiff, Robert Lee Shelton.

Refused.

W. S. J.

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* * * * *

INSTRUCTION NO. C-1.

The Court tells you that a motorist has a superior right of way over pedestrians between intersections; and further instructs you that in this case Mrs. Mullins had a right to assume that no pedestrian, whether minor or adult, would attempt to cross Seventh Street in front of her between intersections, and she had a right to rely on that assumption insofar as Robert Lee Shelton was concerned until she saw, or in the exercise of ordinary care, she should have seen the Shelton child near or approaching the street at which time she was no longer justified in relying upon this assumption.

Gabbard v. *Knight*, 202 Va. 40, 116 S. E. 2d 73
Baker v. *Richardson,* 201 Va. 834, 114 S. E. 2d 599
Lucas v .*Craft,* 161 Va. 228, 170 S. E. 836
Tolston v. *Reeves,* 200 Va. 179, 104 S. E. 2d 754
Spugilman v. *Birch,* 204 Va. 96, 129 S. E. 2d 119
Ward v. *Lewis,* 197 Va. 811, 91 S. E. 2d 393
Nosay v. *Owens,* 193 Va. 343, 68 S. E. 2d 531
Va. Transit Co. v. *Schain,* 205 Va. 373, 137 S. E. 2d 22

Refused.

W. S. J.

page 28 } INSTRUCTION NO. E.

The Court further tells the jury that even though you may

believe from the evidence in this case that Mrs. Mullins saw, or in the exercise of ordinary care should have seen the Shelton child near the street prior to the accident, such fact did not make her an insurer of his safety, but imposed upon her only the duty to exercise increased diligence as she approached the child and to exercise that degree of care that a person of ordinary prudence would have exercised under the same circumstances to avoid injury to him, as more fully set out in Instruction 4, and she had no duty to stop, but could proceed if, in the exercise of reasonable care under such circumstances it appeared safe to do so.

And if you believe that with the child near the street she did proceed in the exercise of reasonable care under such circumstances, and the child suddenly entered the street, for whatever reason, either into her fender or into the path of her vehicle and so closely thereto that Mrs. Mullins had no reasonable opportunity to avoid the child, then Mrs. Mullins is not liable for the injuries sustained by Robert Lee Shelton.

Refused.

W. S. J.

page 29 }

* * * * *

INSTRUCTION NO. E-1.

The Court further tells the jury that even though you may believe from the evidence in this case that Mrs. Mullins in the exercise of ordinary care should have seen the Shelton child near the street prior to the accident, she had no duty to stop, but could proceed if, in the exercise of reasonable care under such circumstances it appeared safe to do so.

And if you believe that with the child near the street she did proceed in the exercise of reasonable care under such circumstances, and the child suddenly entered the street, for whatever reason, either into her fender or into the path of her vehicle and so closely thereto that Mrs. Mullins had no reasonable opportunity to avoid the child, then Mrs. Mullins is not liable for the injuries sustained by Robert Lee Shelton.

Nosay v. *Owens*, 193 Va. 343, 68 S. E. 2d 531
Va. Transit v. *Schain*, 205 Va. 373, 137 S. E. 2d 22

E. Staley Clements.

Refused.

W. S. J.

* * * * *

(Opening statements were made to the jury by Mr. Turk for the Plaintiff, and by Mr. Spiers for the Defendant.)

E. STALEY CLEMENTS,
a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:

Q. I bellieve you are E. Staley Clements, Jr.?

A. Yes, sir.

Q. And where do you live?

A. Christiansburg.

Q. And what is your profession?

A. I am a land surveyor.

Q. Have you had occasion to make a map of 7th Street, of the West Ward of the City of Radford there near its intersection with Denby Street?

A. Yes, sir.

Q. Did you or did you not go on the road there and take measurements concerning all of the trees and the other objects there, and show them on the map, as well as the layout of the road?

A. Yes, sir; I did.

Q. You have a copy of the map you've prepared?

A. Yes, I have two copies here, and you have
page 2 } one—yours is just exactly like the two I have.

Q. And this was made from your measurements by going up to 7th Street there and making measurements and then drawing that plat out?

A. That's correct, sir.

Q. Would you open up a copy of the map you have made?

Mr. Turk: I would like to introduce a copy.

E. Staley Clements.

Q. How about giving Mr. Spiers one?

The Court: Mark the map as Plaintiff's Exhibit No. 1.

(Plaintiff's Exhibit No. 1—map prepared by E. Staley Clements.)

Mr. Spiers: As long as it's shown the condition existed on January 9, 1965.

The Court: It should be understood it reflects the condition as of the day he examined the property, whatever day it was.

A. Ninth of January.

Mr. Spiers: I don't know, I guess the situation was the same—I don't know, frankly.

Mr. Turk: I have some pictures that were taken the morning after, that will be introduced.

By Mr. Turk: (Continuing)

Q. Would you point out on this map, now, the directions?

A. This map is drawn as if you were looking
page 3 } straight down on the ground, and drawn at a scale
of one inch equals ten feet; that means every direction on this map of one inch equals ten feet, five inches equals fifty feet. As you are facing the map, you are looking east up the page, north to your left, and south to your right. That is how the map is drawn. What else, sir?

Q. What is the width of 7th Street there?

A. The pavement?

Q. Yes?

A. The pavement varies in width. The average width of 7th Street pavement is approximately eighteen feet wide.

Q. Approximately eighteen feet wide? Now, would you point out where the Tolley residence is located there on your map?

A. Alfred Tolley's residence—the Tolley residence is located as my pencil is indicating to you here, it being house No. 1702.

Q. 1702? What is in the front yard there at the Tolley residence?

A. There's a front porch, a sidewalk, two stone columns just about at the street end of the sidewalk.

E. Staley Clements.

Q. Do you know the height of those?

A. They are about two feet and three or four inches high.

Q. The stone columns?

page 4 } A. Yes.

Q. Approximately as high as this railing here?

A. Also in front of the Tolley house there are two trees—I called them pine trees—and I'm sorry I don't know what kind of trees they are; they are approximately eighteen inches in diameter, each trunk located as I am indicating here, one tree—one twin tree, and the other set of twin trees as I am indicating now with my pencil. Also in front of the house is a water meter and another stone column just south of the driveway to Tolley's residence, a stone column that's identical to the two that are by the sidewalk.

Q. Approximately what distance are the trees set back from the paved portion of the driveway there?

A. They are ten feet from the edge of the pavement.

Q. The two trees are each ten feet from the edge of the pavement?

A. That's right, sir.

Q. Now, how about the two stone posts on the edge of each sidewalk?

A. On each edge of the sidewalk?

Q. Um-hum.

A. They would be nine feet back from the edge of the pavement.

Q. Nine feet back from the edge of the pavement?

A. That's right.

page 5 } Q. How about the stone column out at the driveway; is it set back?

A. That's approximately nine feet, also.

Q. That's nine feet, also?

A. Um-hum.

Q. Now, looking south on 7th Street, Mr. Clements, what is the condition or lay of the road looking—

A. South?

Q. Looking south.

A. The pavement—the road rises gradually for a distance of approximately six hundred feet from a point just opposite the sidewalk here. I have made an indication on my map approximately five hundred eighty feet from the brow of a hill to the south—and that's some twenty feet from the sidewalk.

Q. Let me ask you this question: Anything in front of the

trees or the post here, either on the bank or out in the road, could be seen for what distance?

Mr. Spiers: I object. We are again talking about the 9th of January, 1965, and I don't think—I think it's prejudicial.

The Court: He's testified to the sight distance of the road.

Q. What is the sight distance of the road?

Mr. Spiers: Five hundred eighty feet.

A. Plus twenty to the sidewalk—about six hun-
page 6 } dred feet. May I say my map, in order to indicate trees, I have shown as if it were leaves and branches on the trees. However, that is not the situation today—the trees have been cut back—but in order that you may see the trees.

Q. They have been cut back?

A. Yes.

Q. And you have shown the Tolley driveway going into this house?

A. Denby Street over here; this is Denby Street, as I am indicating now.

Q. You know what the width of the Tolley driveway is?

A. It's approximately ten feet wide.

Q. Approximately ten feet wide? I believe that's all.

CROSS EXAMINATION.

By Mr. Spiers:

Q. Mr. Clements, you continue looking at that one from the corner of 1702, which is the Tolley residence; can you tell us the approximate distance between the tree and this point over here?

A. You indicated the stone column?

Q. Yes.

A. South of the driveway?

Q. Yes, from the middle of that tree to the—

A. That would be twenty-one feet, sir.

page 7 } Q. Twenty-one feet? And that's roughly at the edge of the house, isn't it?

A. Yes, sir—the tree is on the line of the house.

Q. And how far is the tree from the sidewalk; can you tell us?

E. Staley Clements.

A. Ten and one-half feet.

Q. Did you tell them what the diameter of those trees was, roughly?

A. They are approximately eighteen inches each—quite a large tree.

Q. You say they have been cut?

A. They have been trimmed.

Q. Trimmed? That is trimmed up?

A. Um-hum.

Q. Can you tell the jury—you said those columns in front of the sidewalk are two feet three inches, I believe you said?

A. High, and one foot and two-tenths square. They are leaning a little bit—actually it's hard to get how high they may be.

Q. When you looked at the scene were there any pots on the top of the columns?

A. No, sir.

Q. Now, the road you have shown there is Denby Street, which is generally—what do you call it, north of here?

A. That's right.

page 8 } Q. Was this paved when you saw it?

A. Yes, sir.

Q. And you don't know whether or not it was paved at the time of this accident, or not?

A. I don't know.

Q. Can you tell us how far back from the roadway the fence, that you have indicated, is?

A. The fence, to the edge of the pavement?

Q. Yes.

A. It varies in width. At the closest place it's six feet; at the widest place it's eight and one-half feet.

Q. Could you tell the jury the distance between the Tolley house and the house next door—which is Sutphin—?

A. This distance here, sir?

Q. Yes.

A. Twenty-three and one-half feet.

Q. Can you tell how far back from the tree the Sutphin house is, and the Tolley house?

A. From the edge of the pavement, sir?

Q. Yes.

A. The Tolley house is back from the edge of the pavement forty-seven feet, the Sutphin house is back from the edge of

E. Staley Clements.

the pavement forty-four and a half feet—I beg your pardon: forty-three and a half.

page 9 } Q. The point on the Tolley house, was that the front of the porch, or was that the house itself?

A. That was to the house itself, sir.

Q. And the porch would be—

A. The porch is approximately six feet wide.

Q. Forty-seven less six?

A. Forty-seven less six to the porch.

Q. In the area is a bank, is it not?

A. That is a bank; yes, sir.

Q. Do you recall, roughly, how high that bank is?

A. I would—I did not measure it; I would estimate it to be three and a half feet.

Q. Does that bank go out to the hard surface?

A. It goes out to about a foot and a half of the hard surface—there is a little gravel edge there. The water meter itself is on the bank, then that gravel surface is about a foot and a half.

Q. About a foot and a half, you think?

A. About a foot, yes.

Q. A foot or foot and a half?

A. Very narrow.

Q. Thank you.

RE-DIRECT EXAMINATION.

By Mr. Turk:

Q. Mr. Clements, would you measure there and

page 10 } tell the Court and the jury what the distance would be from the water meter? The water meter is just a round steel plate?

A. Yes.

Q. Would you measure, and tell the Court and jury what the distance would be from the water meter to a point fourteen feet north of the extreme edge of the Tolley driveway?

A. Give me the point again?

Q. From the water meter.

A. All right.

Q. Going north.

A. All right.

Q. To a point fourteen feet north of the extreme edge of the driveway?

A. You realize the driveway flares a little bit there?

Q. Yes.
A. (Measuring) Fifty feet, sir.
Q. It would be fifty feet from the water meter down here to a point fourteen feet north of the edge of the gravel driveway?
A. That's right, sir.
Q. I believe that's all.

The witness stands aside.

Mr. Turk: The Plaintiff would like to call Mrs. Mullins as an adverse party or witness, with the privilege
page 11 } of examining her as upon cross-examination.)

KATHRYN NELSON MULLINS,
a witness of lawful age, sworn as an adverse witness in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:
Q. You are Mrs. Kathryn Mullins?
A. Yes.
Q. And you are the Defendant in these two actions?
A. Yes.
Q. You are going to have to talk loud enough so the Court and the jury can hear you, Mrs. Mullins. Mrs. Mullins, on September 2, 1960, I believe you were operating your automobile according to the map in a northerly direction on 7th Street in the westward in the City of Radford, weren't you?
A. Yes.
Q. And you were headed in a general direction— headed towards town, weren't you?
A. Yes.
Q. Now, what time of the day was this, Mrs. Mullins?
A. Around six.
Q. Around six?
A. Yeah, about five til, or something like that.
Q. And it was on September 2, 1960?
page 12 } A. Yes.
Q. It was daylight and all, wasn't it?
A. Oh, yeah.

Kathryn Nelson Mullins.

Q. And the sun hadn't gone down?
A. No.
Q. There wasn't any necessity for lights, or anything, at that time?
A. No.
Q. That's a residential area of the city?
A. Yes.
Q. Where were you headed, Mrs. Mullins?
A. (The witness does not respond)
Q. Where were you going?
A. I was going to Umbergers.
Q. Going to Umbergers? Now, you come over a rise, do you not, Mrs. Mullins before you get down there to Denby Street?
A. Yes.
Q. All right. And when you topped the rise back up here, some five hundred eighty or six hundred feet from where the collision occurred—didn't you?
A. Yes.
Q. Now, and at that time when you came over the rise here at 7th Street you could see all the way down here, and even on past Denby Street, couldn't you, down the road?
A. Yes.
page 13 } Q. And there were trees here in the Tolley yard, but they did not come out to the edge of the road, or anything, did they?
A. No. They've been cut—the branches were pretty low.
Q. As a matter of fact, aren't those two fast-growing trees? Weren't these trees much smaller, the trunks and all?
A. I don't know about the trunks—awful big leaves.
Q. Those trees have big leaves?
A. Um-hum.
Q. And they are set back here, according to what the surveyor said, approximately ten feet from the road?
A. I suppose.
Q. And there is a bank leading up from the road to these trees and to this pillar, wasn't it?
A. Um-hum.
Q. You had a clear view, did you not, Mrs. Nelson, of the road and of the bank here, up here to these trees and to these posts?
A. Yes.
Q. You had a clear view of the road and of the bank here in front of the Tolley house, and all, as you were going along, didn't you?

Kathryn Nelson Mullins.

A. Um-hum.

Q. Now, Mrs. Mullins, when—let me ask you
page 14 } this: When you came over the top of the rise here,
and was some six hundred feet here, did you see the little Shelton boy anywhere along on the bank here?

A. No.

Q. You did not see him?

A. No.

Q. Now, as you came along down here you did hear Mrs. Shelton hollering and yelling, didn't you?

A. Yes.

Q. And did you know what she was saying or what not?

A. No. She was waving her arms and hollering, and I thought she was hollering at me, and I waved at her and slowed up, and I heard her holler, "Bobby, go back."

Q. You heard her holler?

A. About that time the boy came over the little embankment.

Q. Came from over the embankment?

A. Came, you know, from behind a post, some way, down a little embankment.

Q. Where was the little boy, Mrs. Mullins, when you first saw him?

A. Coming down the bank.

Q. Coming down the bank?

A. Um-hum.

Q. How far down the bank was he?
page 15 } A. Well, I don't know how far down. My car
hit before I could stop. When I saw him coming I stopped the car right then.

Q. And you saw him coming?

A. To the right.

Q. Where was he, Mrs. Mullins, as best you remember, in the Tolley yard when you saw him coming down the bank?

A. I am not sure. He came from, seemed from behind the trees or the post or something.

Q. You know? You couldn't see? You think he came from behind these trees here?

A. Yes, or the post, maybe, maybe in between those, or here, somewhere in here.

Q. You just saw him coming down the bank?

A. Um-hum.

Q. Was the first recollection you have of ever seeing him?

Kathryn Nelson Mullins.

A. That's right.

Q. And at that time you were almost on top of him, weren't you?

A. That's right.

Q. And you put on your brakes?

A. And I turned the car to the left, thinking I could avoid hitting him.

Q. And you brought your car to a stop, did you not, north of the Tolley driveway; do you remember that?

page 16 } A. Almost in the middle, I think—I am not sure. But the little boy—

Q. You don't know whether or not you'd completely cleared the driveway with your car?

A. No.

Q. You don't know?

A. Not for sure.

Q. You wouldn't say? And the little Shelton boy then was lying here in the road in front of your automobile, wasn't he?

A. Um-hum.

Q. When you stopped?

A. Um-hum.

Q. Do you know how far you had either knocked him or carried him on your automobile down the road?

A. I heard him hit, and then I cut the car to the left and stopped—and I don't know that I carried him at all—it must have threw him a little.

Q. Must have thrown him? He was lying in the road here in front of your automobile north of the Tolley driveway. and you don't remember whether you had completely cleared the driveway or whether you were partially in the driveway?

A. Um-hum.

Q. You could have been completely on past?

A. I don't think so; I don't think I went that

page 17 } far, I don't believe—I mean, I think I stopped right along in here somewhere, and he was on the center of the driveway.

Q. As best you remember now, the little boy was lying in the center of the driveway?

A. Um-hum.

Q. You know whether or not there was any blood in the road at the point the little boy was lying?

A. I am not sure right then, because we picked him up and took him to the hospital.

Kathryn Nelson Mullins.

Q. You think he was lying about in the middle of the Tolley driveway?

A. Um-hum.

Q. And you never saw the little boy until you were almost on top of him, did you?

A. No, I didn't.

Q. And so you don't know where he came from, if you didn't see him until then, do you?

A. No.

Q. You just don't know, do you?

A. No.

Q. You can't tell this jury where he came from, can you? You can't tell the jury he ran out from behind the tree or post, because you honestly don't know?

A. I didn't see him until he was running down the little embankment there.

page 18 } CROSS EXAMINATION.

By Mr. Spiers:

Q. Just before you got to the scene of the accident, can you tell the jury approximately what speed you were going?

A. I was driving about 20 or 25 miles.

Q. And as you approached the area there you say you heard or saw Mrs. Shelton? Where was she?

A. She was running through the field.

Q. On the opposite side of the road?

A. Yes.

Q. And where do you think that your car was, with reference to the two houses, that is?

A. When I saw Mrs. Shelton?

Q. With reference to these houses?

A. Probably right along here, you know—maybe in between.

Q. Roughly in between the two houses when you saw Mrs. Shelton?

A. Um-hum.

Q. And she was—what was she doing, waving?

A. Running and waving.

Q. (Gesturing) Like that?

A. Yes.

Q. And running toward you or toward the street?

A. Um-hum.

Kathryn Nelson Mullins.

page 19 } Q. And you heard her yell, you said?
A. Yes.
Q. And what did you do?
A. Well, I started to stop, and then, you know, I saw the little boy then, and I did stop.
Q. When you first saw her waving, and all, I believe you said you waved at her?
A. Yes.
Q. And what did you do, with reference to driving your car—did you continue on at the same speed?
A. No. I started slowing down.
Q. In what manner did you slow or brake—take your foot off the accelerator?
A. Taken my foot off the accelerator.
Q. And when you heard her yell, "Bobby, go back," tell us what happened then.
A. When I heard her yell the little boy came down the embankment then.
Q. Had you, as you approached her, been able to see up on the bank, out towards the road, from the trees and posts?
A. Could I see up on the bank from out here? Oh, yes.
Q. Was the child standing there?
A. No.
Q. When you first saw him was he running, or was he—
A. He was running.
page 20 } Q. Running?
A. Down over the bank when I first saw him.
Q. Then what did you do?
A. I stopped the car and tried to avoid hitting him—but it didn't work.
Q. Did you cut in either direction?
A. I cut to the left.
Q. I believe you said you thought he came from somewhere in this area?
A. Yes.
Q. Do you recall whether or not you skidded when you stopped?
A. I don't know. I slammed the brakes on real hard.
Q. What kind of car were you driving?
A. 1956 Buick.
Q. What color was it?
A. Black and white.
Q. Black and white?
A. Um-hum.

Kathryn Nelson Mullins.

Q. Was the car—what was the mechanical condition of the car? Anything wrong with your brakes, or anything?

A. No.

Q. Was your windshield clouded, or anything that prevented you from seeing anything?

page 21 } A. No.

Q. As you topped this hill there, I believe you testified that you could see down the street? Did you see anything up in the Tolley yard? Describe to the jury what the nature of the shrubbery and all this was.

A. It was just the trees—and it must have been a cigar tree or something like that—they have awful big leaves; and the branches were low—they have been cut since then, I think. I'm pretty sure there was concrete pots on those columns with, maybe, flowers in them.

Q. Now, further back away from the Tolley house, as you approach it, are there trees and shrubs along this side of the street?

A. Yes.

Q. From back here that can affect your vision towards this part of the Tolley house?

A. Well, yes, there's trees all here in the Sutphins', and in here.

Q. After this accident, would you tell the jury exactly what you did after you stopped? Was anyone else around?

A. Mr. Tolley came out real quick and we picked up the baby and took him to the hospital—he was crying.

Q. Where was Mrs. Shelton?

A. I don't know, I really don't.

Q. The first thing you knew, Mrs. Tolley was

page 22 } coming out?

A. Mr. Tolley.

Q. Coming out? Did you go to the child?

A. Yes.

Q. Immediately? Who drove to the hospital?

A. I did.

Q. Mr. Alfred Tolley was—

A. He held the baby.

Q. He held the baby? All right. You tell the jury what the condition of the road was, with reference to being dry or wet.

A. It was dry.

Q. How about the weather?

A. It was dry, September dry weather.

Kathryn Nelson Mullins.

Q. The trees were still full of leaves?
A. Oh, yes.
Q. Was Denby Street—which is now paved—was that a paved street at the time?
A. No.
Q. Can you tell us whether or not there were any marks on your car which indicated the point at which it came in contact?
A. No.
Q. After this accident occurred, can you remember whether or not it rained?
page 23 } A. I think so, yes.
Q. You never examined—or did you examine the scene to see whether there were any skid marks or debris, or any thing like that?
A. No.
Q. You just left? And I assume that you later saw the police at the hospital, did you?
A. Yes.
Q. That's all.

RE-DIRECT EXAMINATION.

By Mr. Turk:
Q. Mrs. Mullins, do you remember seeing Mrs. Shelton before you heard her hollering and saying, "Bobby, go back"?
A. I saw her running through the field, you know—
Q. And hollering?
A. Um-hum—waving.
Q. And you know how close you were on her when you saw her?
A. When I first saw her?
Q. Um-hum.
A. I was about at the Sutphin house.
Q. About at the Sutphin house?
A. Um-hum.
Q. You don't remember, though, as you were coming down the road, as having seen her before that?
page 24 } A. There's trees along there, you know; I believe they have a row of trees through there—if I'm not mistaken, trees all along the road on that side, too.
Q. You don't remember seeing her until she was hollering or waving?
A. No.

Officer Jim Whitt.

Q. And you say that these trees obstruct your view of the yard and everything? I want to ask you, there is nothing to obstruct your view of anything here on the bank or side?
A. No.
Q. West of the trees, and these posts, are there?
A. Not if there is something there to see—you can see it.
Q. You can see if from up here at the top of this hill, can't you?
A. Yes.
Q. Six hundred feet away?
A. Um-hum.
Q. That's all.

The witness stands aside.

OFFICER JIM WHITT,
a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

page 25 } By Mr. Dalton:
Q. I believe you are Officer Jim Whitt?
A. Yes, sir.
Q. And you are a Lieutenant on the Radford Police Force?
A. Yes, sir.
Q. On September 2, 1960, how were you employed, Mr. Whitt?
A. As a police officer.
Q. You were an officer on the Radford City Police Force on September 2, 1960?
A. Yes, sir.
Q. I believe that was the day that the little Shelton boy over here was injured up here on 7th Street?
A. Yes, sir.
Q. Did you have occasion to investigate the accident there where this little boy was injured?
A. Yes, sir; I did.
Q. What time did you arrive at the scene of the accident, Officer Whitt?
A. I don't know the exact time I arrived at the scene. I received the call at 6:43 P. M.
Q. You received the call at 6:43?

Officer Jim Whitt.

A. Yes, sir.

Q. Did you go on up to the scene of the accident
page 26 } that evening?

A. Yes, sir. I went to the hospital first, and then went to the scene.

Q. You went to the hospital and then visited the scene after that?

A. Yes, sir.

Q. I believe they already had taken the little boy to the hospital when you received the call?

A. Yes, sir.

Q. Is that correct? When you got to the scene of the accident did you find any debris in the road?

A. The only thing I found was a small spot of blood in the road.

Q. Where was this blood spot?

A. It was just east of Mr. Tolley's driveway in the hard surface part.

Q. How many feet east of Mr. Tolley's driveway?

The Court: In order to keep the record straight, suppose we use map directions, rather than what we generally term east and west.

Q. We have had Staley Clements to draw a map here, and while the residents of Radford normally refer to traveling east on 7th Street when traveling toward town, the map shows you are going north?

A. Yes, sir.

page 27 } Q. So on your examination I'd appreciate your referring to north as coming back this way toward town on 7th Street.

A. Yes. sir.

Q. As it is shown on the map. Would you take a pencil here and mark the place on this map that you found the blood spot, the approximate place?

A. (Indicating on map) I think this would be Mr. Tolley's driveway, and this would be Denby Street, and it was right along in here somewhere.

Q. Please put your initials right beside that point on 7th Street, please.

A. (Marking on map)

Officer Jim Whitt.

Q. Now, approximately how many feet from the driveway was this north on 7th Street?

A. That would be 14 foot from the corner of Tolley's driveway to the blood spot.

Q. Fourteen feet?

A. Yes. sir.

Q. Now, approximately how far from the east edge of the pavement was this spot over on the pavement; in other words, from the edge of the pavement?

A. From the edge of the pavement out to here?

Q. From right here on the edge of the pavement, how far was it over?

A. Two foot and three inches.

page 28 } Q. Two feet and three inches from the edge of the pavement to the blood spot, and the blood spot was fourteen feet from the corner of Mr. Tolley's driveway up to where the blood spot was?

A. Yes. sir.

Q. Did you find any other skid marks, or any other marks in the road which could have been left by this accident?

A. No, there was nothing else that I could find. By the time I arrived up there it had been a slight drizzle rain, and there wasn't anything, other than this small spot of blood—no skid marks at all.

Q. To the best of your knowledge, has 7th Street there been changed? Is the pavement still as it was at the time of accident?

A. It's changed a good deal; yes, sir some. I have pictures which were taken the next day, of the road, which will show that it has changed some.

Q. Would you show the—let's see what pictures you have here, and we'll introduce them so the jury will see what it looked like at the time of the accident.

A. This picture was taken standing back in the direction in which Mrs. Mullins was traveling.

Q. Come up—

The Court: For the purpose of identification?

Mr. Dalton: This will be Plaintiff's Exhibit
page 29 } No. 2 for identification.

Plaintiff's Exhibit No. 2, for identification—Photograph.

Officer Jim Whitt.

Q. Show the jury what this shows.

A. (Indicating to the jury) It shows the road, also the trees up here, how they lean over, shows how wide the road is.

Q. Where was this particular picture taken from, Officer Whitt?

A. It was taken back on the first knoll, back in that direction in which she was traveling.

Q. In other words, that is the view that she would have as she approached the scene of the accident?

A. As she approached the scene of the accident; yes, sir.

Q. Now, you have—

A. Several hundred feet back.

Q. You have in this picture on the right-hand side of the road down here something white; would you identify that?

A. Yes, sir. There are columns, I think three columns built up there in Mr. Tolley's yard. That's Mr. Tolley's yard here.

Q. The white item there on the right-hand side at the—practically at the end of the road there is the white column—one of the white columns in Mr. Tolley's front yard?

A. Yes, sir.

page 30 } Q. His house is just back behind that white column?

A. (The witness does not respond)

Q. Let's pass that around to the jury and let them take a look at that.

(Plaintiff's Exhibit No. 3 for identification—Photograph)

Q. Officer Whitt, I hand you another photograph here, and ask you if you also took this picture?

A. Yes, sir. I was there when this was taken—I didn't take it myself; I was there.

Q. You were there when this was taken?

A. Yes. sir.

Q. Show the jury what this picture shows, Officer Whitt?

A. This picture shows Mr. Tolley's driveway leading out onto 7th Street, and also shows Denby Street intersecting 7th Street, and the approximate area in which we found the blood along here.

Q. I would appreciate your showing the jury on the map up here approximately where this picture was taken from—where the photographer was standing when he took this picture.

Officer Jim Whitt.

A. Back up in here—the second picture I am talking about; the second picture was taken from that area right in here.

Q. Right near the southern edge of the Tolley driveway?

A. Yes, sir.

page 31 } Q. And out on 7th Street?

A. Yes, sir.

Q. Officer Whitt, did you prepare a map of the scene of the accident in your own handwriting, and showing the distances that you measured at the scene of the accident?

A. Yes, sir; I did.

Mr. Dalton: I'd like to introduce that map as Plaintiff's Exhibit No. 4.

Mr. Spiers: I object to the introduction of this exhibit.

The Court: I don't believe that would be very helpful in that way. You can examine him on it.

Mr. Dalton: We object to the Court's refusal.

The Court: I don't think it would be of assistance to the jury as an exhibit, without further information.

Mr. Dalton: We except to the ruling of the Court.

Mr. Dalton: Witness with you.

CROSS EXAMINATION.

By Mr. Spiers:

Q. Mr. Whitt, if you refer to Plaintiff's Exhibit No. 2. Would you come up here, please. and show the jury, and indicate to them whether or not on these columns there is a rather large concrete pot sitting on top of it—

page 32 } and look at the picture, and tell them, Mr. Whitt.

A. Yes, sir; there is a large one.

Q. The best you know, is that on both of them at the time of the accident?

A. I don't recall.

Q. Apparently the scene, however, on the day you took these pictures was identical?

A. Yes, sir.

Q. Referring to Exhibit No. 3, which is the picture which looks north towards downtown from the edge of this driveway, is this supposed to be any particular thing? You said you found a small spot?

A. No, sir. This was white. The large spot of blood, at

Officer Jim Whitt.

the time these pictures was made, would have been washed away.

Q. In other words, it was in this general area of the picture, and this is not meant to be it?

A. That's just a—

Q. Just a picture of the blood? You went to the scene of this accident after you went to the hospital?

A. Yes, sir.

Q. At which time it was drizzling?

A. It had drizzled while I was in the hospital.

Q. Did you examine the roadway for skid marks?

A. Yes, sir; I did.

Q. And did you find any skid marks?

page 33 } A. None whatsoever.

Q. From your information, the scene—or the road was dry at the time of the accident?

A. Yes, sir.

Q. On the following day after the road was completely dry, when these pictures were taken, was there any black rubber mark laid down, or any visible which you could connect with this accident?

A. No, sir: there was nothing. It had rained hard during the night. This picture shows the water here.

Q. Um-hum.

A. And the next day when I went up there, it had drizzled somewhat, and there was nothing.

Q. But it had not rained hard when you went to the scene, had it?

A. No.

Q. I believe, Mr. Whitt, that you did go to the hospital and did see the parties involved here, did you not?

A. Yes, sir; I did.

Q. What was Mrs. Mullins' condition with reference to whether she was hysterical or exicted?

A. She appeared to be very excited and hysterical, and was unable to actually talk to me at that time.

Q. Did you examine her automobile?

A. Yes, sir; I did.

page 34 } Q. And where did you examine it?

A. In front and on the sides.

Q. Were you at the hospital or at her house?

A. At the hospital.

Q. At the hospital? Why were you examining it? What were you looking for?

Officer Jim Whitt.

A. I was looking for some kind of indication of impact where the child had been struck by the car.

Q. Did you find anything at all—blood or anything which would indicate the point of impact?

A. No, sir; I didn't.

Q. Did you talk with Mrs. Shelton on this particular occasion at the hospital?

A. I think I did.

Q. Did you subsequently get a statement from her?

A. Later I did; yes, sir.

Q. Did she relate to you what occurred?

A. Yes, sir; she did.

Q. And do you have that statement?

A. Yes, sir—it's right here.

Q. Tell the jury when this statement was made, with reference to the time of the accident.

A. Oh, that statement was taken on the 9/4/60 at 4:15 P. M.

Q. Taken in the City of Radford?

page 35 } A. Yes, it was.

Q. Who all—

A. 602 Denby Street.

Q. Who all was present, do you remember?

A. Officer Bolling and myself, Mrs. Shelton—and I don't recall whether there was anyone else there or not. We did this on her front porch.

Q. Did she sign the statement?

A. Yes, sir; she did.

Q. And was it witnessed?

A. Sir?

Q. Was it witnessed by you and Mr. Bolling?

A. Witnessed by me and Officer Bolling.

Q. You have the original of the statement?

A. Yes, sir; I do have.

Q. All right.

Mr. Spiers: I'd like to offer that as an exhibit.

Mr. Turk: I would object to offering a statement as evidence in here as to a party that is actually not the Plaintiff.

(Mr. Spiers passes statement to the Court.)

The Court: I sustain the objection.

Mr. Spiers: We except to the Court's ruling, and ask the Court if that also includes an examination of just oral statements?

page 36 } The Court: No, sir.

Mr. Spiers: It does not include that?

The Court: Yes, sir.

Mr. Spiers: In other words, I can ask him that?

The Court: Yes, sir.

Mr. Turk: I don't think it's proper for him to examine what another witness says, unless the witness testifies to something different.

The Court: In making my ruling, I was assuming that that witness would be called either as an adverse witness, if not put on by you.

Mr. Turk: I plan to put Mrs. Shelton on.

The Court: You may examine her, and if the occasion demands, the statement may be introduced.

Mr. Turk: I am willing to withdraw my objection, and we'll let her statement come in.

The Court: Mark the statement as Defendant's Exhibit A.

(Defendant's Exhibit A—statement of Mrs. Charles Shelton, dated September 4, 1960.)

By Mr. Spiers: (Continuing)

Q. This Exhibit has been entered by agreement; give the jury the benefit of what it contains.

A. Yes, sir. (Reading)

page 37 } "September 4, 1960
TIME: 4:15 P.M.

I, Mrs. Charlie Shelton, age 35, residing at 602 Denby Street, Radford, Va., hereby make the following statement of my own free will, knowing what I say may be used in a court of law on a future date. I, Mrs. Charlie Shelton, was going from my home at 602 Denby Street with my son Bobby Lee Shelton, aged 3, to Mr. Alfred Tolley's home, 1702 7th Street, Radford, Va., and my son was running along in front of me. He crossed 7th Street in front of Mr. Tolley's home, he got up on the grass in the front of Mr. Tolley's home. Bobby Lee

Shelton turned around and started back across the street. I saw a car coming east on 7th Street, and I tried to get my son's attention by saying, 'Go back, go back,' and motioning to him. He continued out and was struck by the car which was driven by Mrs. Kathryn Nelson Mullins. I ran to my son who was lying in the road, and hollered for help. Mrs. Mullins got out of the car and came over to where my son and I were. Mr. Alfred Tolley came out of his home and picked up the child. He and Mrs. Mullins took my son to the hospital emergency room in Mrs. Mullins' car. I,
page 38 } Mrs. Charlie Shelton, have read this page of this statement given by me to Police Officers Sgt. Whitt and M. V. Bolling, willingly sign my name to this page this 4th day of September, 1960."

Q. Is that in summary all of what she told you about what happened at the time of the accident?

A. Yes, sir; that's it.

Q. Did she indicate to you anything about excessive speed, or anything, on the part of the Mullins car?

A. Not that I can recall.

Q. Mr. Whitt, just to clarify one little point, Denby Street, as it exists now, is a paved road?

A. Yes, sir.

Q. Was it a paved street at the time of this accident?

A. Yes, it was paved.

Q. Paved?

A. No, sir; it was not—it was unpaved at that time.

Q. Unpaved road?

A. Yes, sir.

Q. I believe you have been up to the scene of this accident on yesterday with counsel for the Plaintiff?

A. Yes, sir; I was.

Q. Does the surface of 7th Street look substantially the same or similiar to what it did at the time of the accident?

A. Similiar, but not—I wouldn't say it was
page 39 } exactly the same as at the time of the accident.

Q. What's happened?

A. It's been widened out a little more; it appears that the hard top is widened out some more than it was, where it intersects into Seventh.

Alfred Tolley.

Q. But looking at the scene itself, it would show the trees and location of trees and houses?

A. Yes, sir.

Q. And things of that type? I believe the trees have been cropped or shaped?

A. Yes, sir; they have.

Q. And on the posts of the walkway of the Tolley house, do you recall whether there are now the pot or pots that we saw on this picture, which is Exhibit No. 2?

A. No, sir; I don't recall them—the pots.

Q. That's all.

Mr. Dalton: That's all.

The witness stands aside.

ALFRED TOLLEY,

a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:

Q. I believe you are Mr. Alfred Tolley?

page 40 } A. That's right.

Q. You will have to speak loud enough so the jury and the Court can hear you. Where do you live?

A. 1702 7th Street.

Q. 1702 7th Street and Pendleton?

A. Um-hum.

Q. I believe an automobile struck a child there in front of your house back on September 2, 1960, did it not?

A. That's correct.

Q. Where were you, Mr. Tolley, at the time the collision took place?

A. I was in the house when it happened, and I heard the tires crying on the hard surface, and so I went running out, but she had already hit the child at that time, and I actually didn't see that happen. All I did—

Q. You heard tires crying from your house?

A. That's right.

Q. Where were you, outside or in the house?

A. I was in the house.

Q. In the house?

Alfred Tolley.

A. Yes.

Q. And when you went running out what did you see?

A. He was there, and Kathryn was—she had gotten out of her car and was standing at the front.

Q. Where was the little boy lying, Mr. Tolley, page 41 } in relation to her car?

A. Well, it's kind of right over to the right side of the front of it, kind of angling from it, like he'd been knocked over.

Q. Um-hum.

A. As well as I remember now, I believe that was the position.

Q. You remember, Mr. Tolley, where, in relation to your driveway, the little boy was lying?

A. It was about just a little—actually, I couldn't tell you.

Q. On by it, this way?

A. Um-hum.

Q. You didn't measure the distance, or anything?

A. No, I didn't.

Q. All right. And what did you do then?

A. Well, I don't know which car—he was taken to the hospital, anyway—we did; and when we got over there it was a nurse standing in the door, and I hollered at them to get a doctor, and, of course, in a matter of a few minutes they had a doctor down there with him from then on.

Q. Was the little boy conscious or unconscious when you came out and found him lying there?

A. He was unconscious.

Q. Was he or was he not bleeding anywhere?

page 42 } A. He was bleeding.

Q. Bleeding there on the road?

A. Um-hum.

Q. Do you know what parts of his body, or what not, were bleeding?

A. I got blood on me from his head, I believe—I couldn't be positive. The nurse told me to wash my arms after they had taken him.

Q. Mr. Tolley, you know how far back from the street those trees are in your yard?

A. No, I couldn't say, because I don't know where the street line is along there. I'd say, guessing offhanded, from the hard surface back, about, I'd say maybe six or seven foot, guessing at it.

Alfred Tolley.

Q. You haven't measured, or anything?
A. No.
Q. And it's sort of a bank up from your house, sort of a slight bank, isn't it?
A. Yes.
Q. You know whether the little Shelton boy had been over to your house earlier in the day, or anything?
A. No.
Q. You don't know?
A. No.

page 43 } Q. You know whether or not there were any other children in the vicinity of your house there when you came out?

A. Yes, there were some children playing there—I don't know whether they was in my yard or the yard adjoining. I knew they was out there playing.
Q. Some children playing?
A. Yes.
Q. What was the age, or whatnot, of these children that were playing there, either in your yard or the yard right—
A. They were all small, but actually their age, I couldn't tell you.
Q. All small?
A. All small children.
Q. Would they have been over or under school age, you think?
A. I think maybe one of them was in school at that time —I couldn't be positive of that.
Q. You don't know exactly where they were, in relation to you house?
A. No, I don't.
Q. You just remember seeing them when you came out? Did you examine the road for skid marks, or anything there?
A. Well, no. I didn't. I seen the skid marks there, you know, later on, but not at that time. I didn't pay any attention to skid marks, because—

page 44 } Q. You just picked the child up?

A. I went to the hospital, and I knew the officers had been there.

Q. You didn't see the Mullins car before the collision occurred?
A. No, I didn't.

Alfred Tolley.

Q. And you don't know whether the little Shelton boy was in the yard?
A. No, I do not.

CROSS EXAMINATION.

By Mr. Spiers:
Q. Mr. Tolley, you say you saw skid marks later?
A. There was—
Q. How much later did you see these skid marks?
A. The next morning.
Q. The next morning?
A. Um-hum.
Q. You were there when the officers were there taking pictures?
A. No, I wasn't.
Q. How early the next morning was it that you saw these skid marks?
A. Well, I couldn't answer that for certain. I know it was early at that time. I couldn't tell you.
Q. Where were the skid marks in the road?
A. Well, I'd say they was more or less running
page 45 } in the middle, or a little to the right side, maybe heading the same way she was going.
Q. The middle or right side, a little over towards the right side of the road? Did they tend in any direction?
A. Well, no, I couldn't answer that for certain, of what direction they turned in—whether she skidded or not—I just don't remember that.
Q. You do know she did turn in—
A. Turned to the right, the way she was heading, I imagine, when she skidded—now, that is, I wouldn't say that for positive.
Q. You came out of the house and you saw her car sitting in the road at an angle, didn't you?
A. Just a little, I believe.
Q. A little to the left?
A. To the right.
Q. The way she was heading—the right, towards the child?
A. Um-hum.
Q. Was she out on the road two or three feet, or how?
A. I believe the skid marks would show how far she was out. I actually couldn't answer.

Alfred Tolley.

Q. You are the only one who saw any skid marks. The police didn't see any.

page 46 } A. The pictures don't show it?

Q. No, sir. And you are sure those skid marks were there, and they were Mrs. Mullins' skid marks?

A. I couldn't swear whose they were.

Q. You don't know?

A. No.

Q. With reference to your driveway, where were those skid marks?

A. Went across in front of my driveway.

Q. Across in front of the driveway?

A. Yes.

Q. When you came outside, you said you saw Mrs. Mullins standing in the road.

A. She had gotten out of the car about the time I went out of the door.

Q. You must have come right quick.

A. I was in the room next to the porch.

Q. Did you hear Pauline calling to you?

A. No, I didn't.

Q. She did call for you, didn't she?

A. I couldn't say.

Q. Did you ever hear Pauline or see her at that time?

A. No, I didn't.

Q. You just came out of the house and you saw this car?

page 47 } A. I seen the child laying there, and I went running out there, and to tell you whether Pauline was there, or not, I don't know.

Q. At any rate, you and Mrs. Mullins both went to the child?

A. That's right.

Q. And did you pick the child up?

A. That's right.

Q. And Mrs. Mullins said, "Let's get him to the hospital"?

A. That's right.

Q. And you all then went to the hospital, with her driving the car?

A. That's right.

Q. And you never looked at the car, or noticed any marks or anything on it?

A. No.

Q. No debris, or anything?

A. No.

Alfred Tolley.

Q. At the time the car was stopped, where was it, with reference to your driveway?

A. It was back just a little bit, that is, the front of it. I don't—I couldn't say whether it was all the way clear of the driveway, or not; in other words, I didn't pay that much attention to it.

page 48 } Q. The best you could tell, the front end of the car then was beyond your driveway?

A. Yes.

Q. And you don't know whether the backend cleared the driveway, or not?

A. I do not.

Q. The front was just a little way beyond the driveway, wasn't it?

A. I think it was.

Q. You think it was?

A. Yes, sir.

Q. You know whether the car was blocking the driveway at all?

A. No, I couldn't say for sure it was.

Q. Couldn't say it wasn't nor that it was?

A. No, I couldn't.

Q. Was the child in front of the car?

A. No. It was over on the bank, kind of from the right front wheel.

Q. Was it on the grass?

A. No. He was laying on the hard surface.

Q. And then there wasn't any bank there?

A. There is—well, not too much where he was laying, but a little bit.

Q. A little bit of a bank?

page 49 } A. Yes—just grassed up, a little bank there.

Q. It was grassed up?

A. I mean from the hard surface up to the fence line, where it's fenced.

Q. This is Plaintiff's Exhibit No. 3; this would show the fence you are talking about, and a little grass?

A. Where he was? Well, I can't say for sure.

Q. With reference to this fence and the roadway?

A. This is my driveway here. I'd say he was laying right along here somewhere—I can't be positive of that. I didn't pay that much—take that much notice of any of it.

Q. Was any portion of his body on the grass?

Alfred Tolley.

A. I couldn't tell you.
Q. Right at the edge of the roadway, at any rate?
A. I would say he was pretty close to the edge of the hard surface.
Q. Who was in the house with you?
A. My two daughters—three daughters and wife.
Q. All of them were inside at the time this happened?
A. That's right.
Q. And what are your daugthers' names?
A. Shirley and Barbara and Linda.
Q. Shirley and Barbara and Linda? And your wife?
A. That's right.
Q. Were you all eating supper?
page 50 } A. They were still eating; I was through—that's how come me in the other room—I was in there looking at a paper.
Q. Was the room you were in towards the street?
A. Yes, sir.
Q. And where is your dining room?
A. Next room from it.
Q. Back?
A. Back.
Q. Toward the back? And the room you were in was between the dining room and the street?
A. That's right.
Q. And they were all in there at the time this happened?
A. Correct.
Q. Did you all come out?
A. They didn't get out till I was leaving.
Q. Got out when you were leaving?
A. They didn't see—I don't think they seen any part of it at all.
Q. You say you heard some children—did you say you heard some children playing?
A. Yes, they were out there playing.
Q. Outside? But you can't tell us where they were?
A. No, I can't.
page 51 } Q. You know whether they were between your house and the Sutphin house?
A. No, I don't know where they was at out there.
Q. They weren't in the front yard?
A. Not in my—you mean in my front—
Q. Yeah.
A. I couldn't tell you that.

Barbara Tolley Baxley.

Q. They weren't there when you came outside?
A. They was all standing there then.
Q. Where?
A. In my yard on the wall.
Q. How many of them were there?
A. I don't know.
Q. Thank you, sir.

The witness stands aside.

BARBARA TOLLEY BAXLEY,
a witness of lawful age, sworn in behalf of the Plaintiff testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:
Q. I believe you are Barbara Tolley Baxley?
A. (The witness nods her head)
Q. And you now live up here on Pulaski Street?
A. Yes.
page 52 } Q. I believe on September 2, 1960, you were living with your father Alfred Tolley up on 7th Street?
A. Yes.
A. That's right.
Q. This is your father that just testified?
A. Let's see, I guess there were five of us.
Q. How many people were in the house at the time this accident happened, as best you can remember?
Q. You and your mother and father and two sisters?
A. Right.
Q. Did you actually see the accident?
A. No.
Q. Did you hear any tires squealing?
A. Yes, we heard the car.
Q. You heard the tires from the car?
A. Yes.
Q Could you tell whether this was before or after the impact?
A. I don't know. I guess it was before.
Q. You just don't know?
A. (The witness nods her head)

Officer Milton V. Bolling.

Q. You do remember hearing the tires squealing?
A. Yes.
Q. Was the child still lying up there on the street, or had he been picked up?
page 53 } A. He had already been picked up.
Q. And what did you see when you came out of the house?
A. The car going out the road.
Q. Your father had already picked up the child and Mrs. Mullins and he—
A. Were on the way to the hospital.
Q. Do you know anything else that you feel would enlighten the jury?
A. No.
Q. You didn't see the accident, and you just heard the tires, and when you got out the car was going up the road?
A. Yes.

The witness stands aside.

OFFICER MILTON V. BOLLING,
a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:
Q. Please state your name.
A. Milton V. Bolling.
Q. Milton Bolling?
A. Yes, sir.
Q. And what was your business or occupation on
page 54 } September 6, 1960. Mr. Bolling?
A. Police officer.
Q. How long had you been a police officer of the City of Radford at that time?
A. I started to work the 24th of March, 1960.
Q. Twenty-fourth of March, 1960?
A. Um-hum.
Q. Did you assist, as a police officer of the City of Radford, Officer Whitt, in investigating this mishap that occurred up there on 7th Street, involving the little Shelton boy?
A. Yes, sir: I did.
Q. Do you know how old the little boy was at that time?

Officer Milton V. Bolling.

A. According to our report, he was three years old.
Q. Three years old?
A. Yes.
Q. That's a residential area of the city, isn't it?
A. Yes.
Q. What is the speed limit in that area?
A. Twenty-five.
Q. Twenty-five miles per hour?
A. Yes, sir.
Q. Do you know what the weather conditions were on the day that this thing happened?
A. It was cloudy.
page 55 } Q. It was cloudy?
A. Yes.
Q. You know whether or not it had been raining prior to the mishap, or not?
A. No. It rained afterwards.
Q. Had it rained before you got up there, or do you know?
A. I recall the road was damp. Whenever I marked the spot of blood in the road with chalk, it was hard to mark—the road was damp as—due to humidity and cloudy weather, I guess.
Q. You could see some blood in the road?
A. Yes, sir.
Q. How far was the blood located on or off the hard surface?
A. It was on the hard surface.
Q. On the hard surface? Now, could you refer to your notes, Officer Bolling, and tell us how far from the edge or shoulder of the hard surface this blood was—how far over on the paved portion of the road it was?
A. Two foot and three inches.
Q. The blood was two foot and three inches over on the road?
A. Yes, sir.
Q. All right. And do you know how far it was
page 56 } there from the edge of the Tolley driveway—how many feet down there?
A. Fifteen feet and nine inches.
Q. Fifteen feet and nine inches from the edge of the Tolley driveway, coming toward town?
A. That's right.
Q. And two feet three inches over on the road?

Officer Milton V. Bolling.

A. Yes, sir.

Q. Officer, do you remember one way or the other about any skid marks that were there?

A. No, sir; I don't recall any skid marks.

Q. Don't recall any skid marks?

A. No, sir.

CROSS EXAMINATION.

By Mr. Spiers:

Q. Officer Bolling, just to keep things correct, would you refer to the measurements you have there? You said the spot you noticed was fifteen feet nine inches from the corner of the driveway?

A. Yes, sir.

Q. Was that correct? Is that the width of the driveway itself?

A. Let's see—that was wrong. (Apparently reading) "From blood to corner of Tolley driveway is fourteen feet." That was the width of the driveway—fifteen feet.

Q. The width of the driveway itself is fifteen
page 57 } feet nine inches; and I assume that is the flared-
out part of it?

A. That's right.

Q. You and Mr. Whitt did check for skid marks, did you not, in the vicinity of the scene?

A. Yes, sir.

Q. And you said you don't remember seeing any?

A. That's right.

Q. Is there any record there were skid marks, on your notes, or independently, that you might recall?

A. No, sir; I don't—

Q. Would that be one of the things you would normally look for in a police investigation?

A. That's right.

Q. And according to you, at the time you checked there, the road was damp, but it was not raining?

A. That's right. It was a cloudy day and with the humidity and all, you know how hard surfaces will do—it will sweat through, and I'd say that it was in a dampened condition.

Q. It would be nothing to keep you from seeing skid marks

if they were—if there were nothing other than moisture?
A. That's right.
Q. The skid marks would still be there, in other words?
A. (The witness does not respond)

Q. Did you examine the car which was in-
page 58 } volved, you remember?

A. Sgt. Whitt and I looked it over at the hospital. We didn't see any visual damage on it.
Q And this time you are speaking of that you went and saw the spot of blood, and did not see any skid marks, was that on the same day it happened?
A. Yes, sir.
Q. That evening? Did you go back the following day, do you remember?
A. Mr. Whitt went and made some photographs.
Q. I was just wondering if you remember whether you were there?
A. I don't remember being present when the photographs were made.
Q. You were with Mr. Whitt when he talked with Mrs. Shelton about this accident?
A. Yes, sir.
Q. And did Mrs. Shelton say anything to indicate excessive speed, or anything like that, on the part of the car?
A. Not that I recall.
Q. That is also something you look for in investigating accidents, is it not?
A. That's right.

RE-DIRECT EXAMINATION.

By Mr. Turk:
page 59 } Q. You don't know what speed Mrs. Shelton was going, do you—Mrs. Mullins?
A. No, sir.
Q. That's all.

The witness stands aside.

CHARLES R. DUNCAN,
a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

Charles R. Duncan.

DIRECT EXAMINATION.

By Mr. Dalton:

Q. I believe you are Dr. Charles R. Duncan?

A. Yes, sir.

Q. And you are a surgeon here in Radford at the Radford Community Hospital?

A. Yes, sir.

Q. Please go forward and tell the Court and jury where you took your medical training and your qualifications, Dr. Duncan.

A. I graduated from medical training at Duke Medical School, and had four years of post-graduate training in surgery, and have been practicing surgery since 1941.

Q. And what medical societies did you belong to?

A. Southwest Virginia, Virginia Medical Society, American College of Surgeons.

Q. And you have been practicing surgery here page 60 } in Radford Community Hospital since then?

A. 1941.

Q. Since 1941?

A. Off and on, gone for a time in the Navy.

Q. During World War II?

A. Yes, sir.

Q. On September 2, 1960, Dr. Duncan, did you have occasion to treat the little Shelton boy over here, that evening?

A. Yes, sir.

Q. Please go forward and tell the jury what you found when the boy was brought to the hospital.

A. This youngster was brought to the emergency room in a semi-conscious state—by that, I don't mean he was totally unconscious, but would respond to stimuli; but otherwise, for all intents and purposes, he was out. And he had a severe laceration over his left eye, and had a contusion with hematoma over the back of the skull.

Q. What do you mean by "contusion with hematoma"?

A. Obviously caused by a blow—and bleeding under the scalp is a hematoma. And was treated in the emergency room, with repair of the deep laceration over his left eye, and was admitted to the hospital for further observation and management; remained in the hospital for about sixteen days.

Mr Dalton: (Addressing Robert Lee Shelton) I wonder

Charles R. Duncan.

if you'd step over here and let the Doctor show
page 61 } the jury—right up next to the Doctor, and turn
around and face the jury and let the Doctor show
the jury what the laceration was.

(By the witness)

A. (Indicating on the Plaintiff) This is the laceration over the upper outer surface of his left eye.

Q. And he remained there in the Radford Community Hospital for some sixteen days?

A. Yes, sir.

Q. What treatment did you give him during the time he was there, Dr. Duncan?

A. Nothing other than the original repair of the laceration, and observation, and keeping him quiet for the fractured skull.

Q. He had a fractured skull?

A. Yes.

Q. And did you or did you not find an eye injury while he was there in the hospital?

A. Yes. His left pupil was dilated on admission, and remained dilated during his entire stay in the hospital.

Q. How long did you treat the boy after he was discharged from the hospital?

A. I didn't treat him too long. The last time I saw him in the office was in December of the same year, December 2nd,
approximately two months.
page 62 } Q. He was injured on September 2, 1960, and
was in the hospital for sixteen days—which would
have put it through the 18th of September, and you continued to see him until December 2?

A. Yes, sir.

Q. And what happened after December 2? Did you refer him to Dr. Young?

A. Yes, sir; I did—I may have referred him before that. I don't know. Yes, he was seen by Dr. Charles Young of Roanoke, for the first time on 9/27/60.

Q. On September 27?

A. That's right.

Q. Which was some 25 days after the accident? So shortly —as I understand—shortly after he was discharged, you sent him to Dr. Young in Roanoke?

A. Yes, sir.

Charles A. Young, Jr.

Q. And why you feel it necessary to send him to Dr. Young?

A. I was disturbed about the dilation of that pupil, and also disturbed a little bit about the movements of his left eye. He showed some improvement all the time, but it reached a point after a period of 15 or 20 days where he didn't seem to be getting any better, and I referred him to Dr. Young.

Q. Is Dr. Young a specialist?

A. Ophthalmologist, a specialist in the eye.

page 63 } Q. And he's practicing in Roanoke?

A. Yes, sir.

Q. And you referred him down there? And you have not had occasion to treat the child for this injury since December 2?

A. That's correct.

Q. Where was the fracture to his skull, Dr. Duncan, and what part of the skull was fractured?

A. Well, he had two fractures, as far as I was able to determine. One fracture was right beneath this laceration over his superorbital ridge—at the time I repaired this area. The fracture was visible and palpable, but the fragments of bone was in good position. But the X-ray man reported fracture of the basilar portion of the skull, presumably from this blow, back in the occipital region—and this is the main reason I kept him in the hospital for sixteen days—because of this basal fracture.

Q. (Indicating on Plaintiff) Back here?

A. Yes.

Q. He had a fracture here on the front of the skull, and a fracture at the back of the skull?

A. That is correct.

Q. Two fractures to the skull, as well as laceration to the eye?

A. Yes, sir.

Mr. Dalton: Witness with you.

page 64 } Mr. Spiers: No questions.

The witness stands aside.

CHARLES A. YOUNG, JR.,

a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

Charles A. Young, Jr.

DIRECT EXAMINATION.

By Mr. Turk:

Q. Would you please state your name?

A. Charles A. Young, Jr.

Q. And what is your profession?

A Ophthalmologist.

Q. And would you explain to the Court and jury exactly what that is?

A. I graduated from the Medical School at the University of Virginia in 1942; I took a year of surgery then—

Q. General surgery?

A. Yes. Then served in the Armed Forces for several years, then I spent three years at Columbia Medical Center.

Mr. Spiers: I will stipulate he's a qualified ophthamologist—if they want to define that for the jury. He's widely known, and accepted as such.

Q. What is an ophthamologist, Dr. Young?

A. That is a man who has completed his medical training, licensed to practice medicine and surgery, and he
page 65 } spends usually three years just in eye—just specializing in eye diseases, surgery, and medical treatment of eye diseases.

Q. And how long have you been practicing this profession, Doctor?

A. Since 1950.

Q Since 1950?

A. Um-hum.

Q. I believe little Robert Lee Shelton was referred to you by Dr. Charles Duncan here in Radford; is that correct?

A. That's correct.

Q. When did you have occasion to first see little Bobby Lee Shelton?

A. September 27, 1960.

Q. September 27, 1960?

A. Yes, sir.

Q. How old was he at that time?

A. Three years old, according to my record.

Q. Did you give him an examination at that time?

A. Yes, sir.

Q. Would you go forward and tell the Court and jury what the results of your examination was?

Charles A. Young, Jr.

A. Well, the left eye was turned out—

Q. And what do you mean by "turned out"?

A. The right eye was gazing straight ahead, the left eye was turned out.

page 66 } Q. And the one eye was directed straight ahead, the left eye was turned out? Which was the injured eye?

A. The left eye. The pupil was dilated, the pupil was enlarged from what it normally should be.

Q. Was the pupil in the left eye larger than the pupil in the right eye?

A. Yes, sir. The eye was sunken back in the orbit—it was sunken down. The upper eyelid was slightly drooped, and we weren't able to determine the vision at that particular visit.

Q. Why couldn't you tell anything about the vision at that particular visit?

A. He was too young to cooperate. We determined he could count fingers at five feet, but he probably had better vision than that.

Q. Did you determine what the vision was in his right eye?

A. Not the first time—a few days later we did.

Q. And you saw him the time on September 27, 1960?

A. Right.

Q. And did you have him come back to your office?

A. Many times, yes.

Q. When was the next visit back to see you?

A. October 5.

Q. And what did you find at that time?

page 67 } A. Well, his vision, without glasses, was approximately 20/20 with the right eye, and 20/80 with the left?

Q. Had he given you—his parents given you any history of eye trouble prior to this accident?

A. No.

Q. What was your opinion, Doctor, as to the nature and extent of injury at that time to his left eye?

A. We had X-rays made, and these showed fractures of several bones around the eye. The eye was sunken down because the bone which separates the eye cavity from the sinus cavity was broken, and that had allowed the eye to fall down somewhat, and also to go backwards—which creates a very unsightly deformity, as well as causes some difficulty in turning the eyes together, because it's out of place.

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Q. What treatment did you first attempt, to better the condition of his eye, or to correct this deformity?

A. After several visits, and after consulting with ear, eye, nose and throat specialist Dr. Wallenborn, both of us felt it wasn't advisable to attempt to improve the position of the bones at that time. I patched the right eye enough to bring up the vision of the left eye; in other words, I put—had a bandage placed over the right eye, so that forced the boy to use the left eye, and hoped to improve his vision that way.

Q. And what were the results in closing off the vision in his right eye?

page 68 } A. It improved the vision eventually.

Q. Was he wearing glasses, Doctor, when he first came to you?

A. No.

Q. And then how long did you continue the treatment here of blocking off the good eye?

A. Well, that was done intermittently; we started in September, 1961, we continued it for two weeks.

Q. Now, when you started this treatment in '61, what was the vision like in his left eye before you started the treatment?

A. The vision was questionable, was in the range of about 20/140; in other words, a little bit better than 22/100—and 22/100 is legal blindness in the State of Virginia.

Q. 22/100 is legal blindness?

A. Below 22/100 is.

Q. What was the vision in that eye?

A. 22/140.

Q. 22/140?

A. Approximately.

Q. And then how much were you able to get it improved?

A. We brought it up to 20/30.

Q. Brought it up to 20/30?

A. Um-hum.

Q Did it remain up to 20/30?

page 69 } A. No. It went back down when we stopped the treatment.

Q. When you took the blockage off the right eye?

A. Um-hum.

Q. The vision in the left eye would go back down?

A. That's right.

Q. Doctor, when did you decide it was necessary to do something in the way of an operation there to improve the

appearance of his eye and to try to correct the defect?

A. Well, I had him seen also in consultation by a plastic surgeon, Dr. Henry Brobst of Roanoke, with the idea of taking some bone from the rib and putting it under the eye, and elevating the eye in that way—thought it was a good idea, so we did that.

Q. When was this operation performed?

A. It was in March 7, 1962.

Q. March 7, 1962? And where was it performed?

A. Jefferson Hospital.

Q. Was it necessary to hospitalize the little boy to do this?

A. Yes, sir.

Q. Exactly what occurred, and what did you and Dr. Brobst do in the first operation there?

A. We took a piece of rib out and put it under the eye—under the left eye.

page 70 } Q. Did that have anything to do with his sight, or was it just to improve the physical appearance, or both?

A. Well, mostly to improve his appearance, also hoping to be able to get the eyes in a better position to work together.

Q. And what did you think about the results that you obtained from this first operation?

A Excellent.

Q. You thought they were excellent? Doctor, did you take any pictures of the little boy's eye at any time before the operation was preformed?

A. Yes, I took some.

Q. I wonder if I might see those?

A. The dates of the pictures are written on the back. Those are the same pictures. On one of them I drew a line, attempting to show the true horizontal position to attempt to demonstrate how one eye was dropped down. The other one has not been touched.

Q. Did you have other pictures, other than these two?

A. I have some taken of the bone graft.

Q. Are these two pictures, I hold in my hand, taken prior to the bone graft?

A. They are the same picture; and these two here were taken after the bone graft.

Mr. Turk: (Passing to Mr. Spiers) You want page 71 } to see these?

Mr. Spiers: Yes.

A. Shows the difference.

By Mr. Spiers:
Q. Two of each, is that right?
A. Yes. Two copies there. Two photos made after surgery, and just one before surgery.

Mr. Spiers: I think one of each, unmarked, would be satisfactory.
Mr. Turk: I want him to explain what this marking is and why he put it there.
The Court: He just testified to why he put it there—if that's the same thing as the unmarked picture. I think only one should be introduced of each.
Mr. Turk: I would like to introduce the marked picture as the Plaintiff's next Exhibit, No. 4.

(Plaintiff's Exhibit No. 4—Photograph.)

By Mr. Turk: (Continuing)
Q. I hand you Plaintiff's Exhibit No. 4, and will ask you what the blue mark, that you have placed across the picture, indicates? Will you turn around?
A. Well, not being a true head-on picture, it was a little difficult to determine exactly what the true horizontal was, but judging by the tops of the ears, and by the
page 72 } brow, that marking comes fairly close. And this is approximately life size, and it would show that this eye is dropped about one-fifteenth of an inch lower than this one. That doesn't sound like a great distance—and, indeed, it isn't. But in this case it makes a lot of difference, because it allows the eye to sink back in the orbit—the eyeball cavity; it allows the upper lid to droop. And he still has about a 2 mm. droop of this left upper lid. Although the position of the eye has been raised somewhat, the eye has been forced forward somewhat by this insertion of bone. It still is not perfect. You see this eye is situated a little higher than that eye, about one-fifteenth of an inch—about one-tenth of an inch—make that correction about one-tenth of an inch.

(Plaintiff's Exhibit No. 5—Photograph.)

Q. Doctor, do your records indicate how many times you have seen the little boy from September 27, '60, up till the

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time you put him in the hospital to perform this first operation?

A. I think I submitted an account on that one.

Q. Is that a copy you gave me?

A. That's the copy of mine.

Q. Would you tell how many times you have seen him—how many office visits he had been to your place up till you hospitalized him the first time, approximately?

A. Looks like 36.

Q. 36 times he'd been in your office?

A. Wait a minute, wait a minute. Fifteen times

page 73 } before the first operation.

Q. Fifteen times before the first operation?

A. Yes.

Q. Had you put glasses on him at that time?

A. No, I don't believe we had put glasses on him at the time.

Q. You had not?

A. No.

Q. Did the operation then, that was performed in '62, did it or did it not improve his vision or function of the eye?

A. Well, the eye is still turned out.

Q. After the operation?

A. That's right—still turned out.

Q. To what extent?

A. Well, it measured, I believe, about 15 degrees, but let me—about 15 degrees, yes.

Q. Turned out about 15 degrees?

A. Um-hum.

Q. After the operation?

A. After the bone graft.

Q. After the bone graft?

A. Um-hum.

Q. And then did you continue to see the little fellow in your office?

A. Yes, I did.

page 74 } Q. How long, Doctor, do your records indicate you kept him in the Jefferson Hospital the first time?

A. 12 days.

Q. 12 days? All right. And you continued to see him after having him come to your office, after you discharged him from the hosiptal?

A. Um-hum.

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Q. What treatment—what were you doing for the eye, then, after he got out of the hospital?

A. We tried blocking off the good eye again, because it seemed like his eye had gone down to about 22/100.

Q. And that is the line you call anyone blind in this eye, is that right?

A. Um-hum.

Q. In other words, at this time he was legally what you could call blind in this one eye?

A. That's right.

Q. And what did you do to try to improve the situation.

A. We blocked off the right eye for two weeks, and his vision came back to about 20/30.

Q. All right. How was the little boy's ability at that time to coordinate and use the eyes together, or could you tell at that time?

page 75 } A. The eyes couldn't be brought together, but he had some signs that they could be brought together if the situation were improved mechanically.

Q. By another operation?

A. By another operation.

Q. And did you suggest another operation, Doctor?

A. That's right.

Q. And when did you suggest that this be done?

A. That was June 20, 1962, that that was performed.

Q. June *28*, 1962?

A. That's right.

Q. Had you put glasses on him at that time?

A. Looks like we first tried glasses September of '62.

Q. That was after the second operation?

A. That's right.

Q. Was he hospitalized for the second operation?

A. Yes.

Q. Where was he hospitalized that time?

A. At the Jefferson Hospital—I believe it was the Jefferson Hospital.

Q. And would you go forward and explain to the Court and jury what you did in the second operation?

A. In the second operation we took off the muscle which turns the eye outward, from the outer side of the eye, and

page 76 } set it back about one-third of an inch; we took off the muscle from the eyeball, that turns the eyeball in, and brought it forward, giving him greater

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power to turn the eye in; we set the eye—the muscle which turns the eye out, about a third of an inch back, and we set this muscle up a little bit over a third of an inch, and cut a piece of it away so that the muscle was made shorter.

Q. All right. And what was the real purpose of the second operation? The first operation, as I understand it, was to elevate the eye to get it back up as near as possible to its normal position?

A. And forward.

Q. What was the purpose, then, of the second operation?

A. Was to direct the eye inward.

Q. To keep from turning it out as much as possible?

A. Not to move it forward or backward, but to turn it inward.

Q. And you did something there with two muscles in the eye in order to do that?

A. That's right.

Q. What did you think about the results you obtained from that operation?

A. They were excellent for awhile, but the eye began to wander back out, so we, in September that year, we tried glasses.

Q. September of '62?

A. Yes, September 4, '62.

Q. You put glasses on him?

page 77 } A. Um-hum.

Q. And he was about 5 years old at the time, wasn't he?

A. Yes.

Q. All right. And were you able to obtain the desired results then with the glasses?

A. Yes, for awhile the glasses were of considerable benefit.

Q. Now, what was the purpose of the glasses, Doctor? What kind of lens did you put over each eye?

A. We put near-sighted lenses over his eyes, although Bobby's eyes are actually a little far-sighted; we put near-sighted lenses over his eyes to increase the amount of power that was needed for focusing, and therefore at the same time also increasing the stimulus for the eye to turn inward.

Q. How about the ability to focus at that time, Doctor?

A. As far as we could tell, it was all right, but he wasn't able to turn the eye. He could focus for near and distant objects, but he couldn't turn it.

Q. Couldn't turn the left eye?

A. Couldn't turn the left eye as far as he should.

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Q. Now, there was nothing wrong with the movement in his right eye; is that right?

A. That's right.

page 78 } Q. And then did you continue to see him, Doctor?

A. Yes, sir.

Q. Have you changed the lens at any time on the glasses since you first prescribed them?

A. Once we gave him a weaker glass because we thought we'd done enough, but this weaker glass didn't prove to do the job.

Q. What happened when you put the weaker lens on his eye?

A. He began to turn out again.

Q. And how about the vision in his left eye? Did that remain stable, or did it start—the vision start decreasing?

A. It varied a lot. It's now 20/30. And I think during most of that period we could get about 20/30.

Q. With the weak lens or strong lens?

A. With either lens we got that vision problem.

Q. What is the vision in that eye now without the glasses?

A. 20/30 minus 2.

Q. This is two letters on the 20/30 line—30 minus 2?

A. That's right.

Q. How about his ability to focus now, Doctor?

A. With the glasses he has some ability to use the two eyes together, not perfect, but he can draw them in together with the glasses.

page 79 } Q. What happens when he doesn't draw them in together; what does he see—two pictures, or one picture? If his isn't properly focused, what does he see?

A. Well, now, he doesn't see double; he ignores the image from the left eye.

Q. Which eye does he use primarily to see through now?

A. The right eye.

Q. The right eye?

A. Yes.

Q. All right. And now, what do you mean by third dimension, Doctor?

A. That's the ability to see—perceive depth, to be able to tell if one object is close and the other object is further away.

Q. Has the third dimension been impaired in any way?

A. That's right he does not have third dimension. He can

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see the two objects simultaneously, the way he should, but he cannot perceive depth.

Q. He can't tell how far something is in front of him, or anything?

A. That's right.

Q. Or the depth of the object itself?

A. Several objects are at various positions away; he is not able to accurately determine which is the clos-
page 80 } est, which is the intermediate distance, and which is the furthest away.

Q. Now, is the left eye in the desired position now at this time, or is it turned, or anything, in any way?

A. Without the glasses it's turned out, so it's really not in quite the desired position.

Q. It is not?

A. That's right—without the glasses. Also, it is turned slightly downward.

Q. Turned slightly downward?

A. That's right; it's situated a little down and turned a little down.

Q. In other words, it's a little below the right eye and turned down slightly?

A. That's right.

Q. Now, about his third dimension there, would you expect that to improve in time, or do you think that visibility with his eye will remain?

A. I think it will remain, and he may lose what he has in that regard.

Q. What do you anticipate for the future for this eye? How is this boy going to able to use this eye in the future, and so forth?

A. Well, the eye was hurt badly, as evidenced by the fact that the pupil was dilated and didn't come back to normal; in other words, the muscle which brings the size of
page 81 } the pupil down was probably torn, and that indicates a rather severe blow to the eye. So there may be other damage to the eye that isn't detectable now that may lead to trouble later on.

Q. How would you think it would affect his ability to read and do his normal school duties, and all, at the present time?

A. I think that it would be slightly impaired at the present time.

Q. All right. And now, how much of a permanent reduction in his vision would you say he had suffered?

A. He's suffered from the normal 20/20 down to 20/30.

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Q. What do you mean by—he's suffered a loss of his ability to properly use the two eyes together?

A. I was referring there to the loss of third dimension—the ability to perceive space.

Q. Does he or does he not have a drooping of the eyelid at the present time?

A. Yes, he does have a slight droop.

Q. What do you think causes that?

A. Well, two factors could be involved, either a damage to the nerve which raises and lowers the eyelid, or the slight downward displacement and backward displacement of the eye—it could be either one or both.

Q. Doctor, if you were asked to put a percentage of loss of the use of this eye, is there anyway you could do that?

A. Well, you have several factors there. The
page 82 } acute—

Q. What do you mean by "acute"?

A. The sharpness of vision.

Q. It's been lessened, hasn't it?

A. Which has been lessened. You have the loss of binocular vision—which is lost.

Q. What do you mean by the loss of "binocular vision"?

A. Excuse me; the loss of third dimension—ability to perceive space has been lost. And he has a cosmetic defect due to the drooping of the lid, and the turning out of the eye, without glasses.

Q. And do you expect these deformities—these three that you speak of—to more or less be of a permanent nature?

A. Yes, I do.

Q. In other words, you don't expect that eye to improve from what it now is?

A. No, I think what he has now, with glasses, is about as good as he's going to get.

Q. Will it or will it not be necessary for him to have to wear glasses?

A. I think he will have to continue to wear them.

Q. Will they or will they not have to be changed from time to time—the lenses?

A. I think they will have to be changed from
page 83 } time to time.

Q. About how often?

A. Maybe once a year, or something like that.

Q. What's the cost involved there?

A. I don't know—maybe $30.

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Q. About $30?
A. $40.
Q. $30 or $40?
A. Um-hum.
Q. And you would anticipate he'd have to have them changed about once a year?
A. Right.
Q. Now, how many total visits has the mother or father brought the boy down to your office?
A. We counted 36.
Q. Up until '63?
A. 8/19/63, there were 36.
Q. You know how many times he's been back since then?
A. Yes. I have counted five more trips since then.
Q. Five more since then?
A. Yes, sir.
Q. You anticipate having to see him from time to time in the future?
A. Yes.

page 84 } Q. How often do you say it will probably be necessary for him to come back to your office for a year?

A. I think about three or four trips a year.
Q. Three or four trips a year?
A. Yes.
Q. And what are your normal charges per visit for him?
A. It depends on how much work is involved. I'd say it varies between six and $12.
Q. Six and $12 a visit?
A. Yes.
Q. You remember offhand, Doctor, how long you kept him in the hospital the second time?
A. I think we just kept him in two days the second time. I don't know whether he went in the day before surgery, or the same day of surgery.
Q. Doctor Young, Dr. Duncan testified there about a fracture up over the eye, and then one at the base of the skull; the one you repaired, or whatnot, to lift the eye, that was below the eye, was it?
A. That's right.
Q. Was it a fracture of the skull, or bone below the eye itself?
A. That's right; there were fractures all around the eye. But the bone that forms the floor of the eyeball socket is a very thin bone, and it was impossible to determine what hap-

pened to that right away. There were fractures
page 85 } all around, and this bone back inside which forms
the roof of the sinus, and the floor of the orbit—

Mr. Turk: Your witness.

CROSS EXAMINATION.

By Mr. Spiers:

Q. Dr. Young, you attribute all of what you have testified to from this particular accident, or can you say?

A. I would attribute all of it to the accident, with the possible exception of the droop of the eyelid—and only make that exception because drooping eyelids are fairly common, and unless I'd seen the child prior to the time I did see him, I wouldn't be able to say whether he'd had a drooping eyelid from birth.

Q. Is the drifting of the eye out or in also fairly common among children?

A. We see it commonly, because we are dealing with people with bad eyes all the time. But I think it's—

Q. It's not an unusual occurrence, is it? I have got one in my family, and you know lots of people who do?

A. Um-hum.

Q. And you don't know what this young fellow's vision was prior to the accident, either?

A. That's right.

RE-DIRECT EXAMINATION.

By Mr. Turk:

Q. There's no question in your mind but what
page 86 } all of the complaints came from this accident?

Mr. Spiers: He's answered the question.

The Court: You have been over that.

Mr. Turk: You asked him about it?

The Court: You have been over that. That's not responsive to cross-examination.

Mr. Turk: I except to the ruling of the Court.

The witness stands aside.

CHARLES L. SHELTON,
a witness of lawful age, sworn, in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:
Q. Would you please state your name?
A. Charley L. Shelton.
Q. Charley Shelton?
A. Yes.
Q. And what is your relationship, Charley, to Bobby Lee Shelton?
A. My son.
Q. He is your son?
A. Yes.
Q. And how old was he at the time this mishap occurred?
A. Three.
page 87 } Q. Three years old?
A. Yes.
Q. And where was he hospitalized following the accident?
A. Over here at Radford Hospital.
Q. Now, you were his father, and responsible for his support and maintenance?
A. Yes.
Q. Have you or have you not incurred certain hospital, doctor, medical bills, and so forth in connection with the injury that the little boy received?
A. Yes.
Q. Have you compiled a list of those, showing the total amounts that you have incurred at various places?
A. Yes, sir.
Q. Would you read off there the names of the doctors?

Mr. Spiers: I think that is improper. And I believe that with an adjournment or recess, and a statement showing these bills, probably we can agree on them.

(The following examination of the witness Charles L. Shelton took place in chambers:)

By Mr. Turk:
Q. Charley, would you go forward and tell how
page 88 } many times it was necessary to take the little boy down to Dr. Young?

Charles L. Shelton.

A. From here?
Q. Um-hum.

Mr. Spiers: I agree to that.

Q. Was it necessary to make any trips to Roanoke, other than the times you took the little boy to see Dr. Young or Dr. Brobst? Why was it necessary?
A. Well, when he was in the hospital we had to come back home and go down again.
Q. Was it necessary for you to go visit him?
A. Yes, sir.
Q. One of you had to stay with him all the time?
A. One of us had to stay all the time.

The Court: In other words, these trips are the 30 days he was in the hospital? The testimony is not 30 days in the hospital in Roanoke; the testimony is 16 days in Radford, and 12 days and 2 days in Roanoke.

Q. Did you have to make any other trips, Charley?
A. I expect there'd been two trips a day, one of them coming, and going.

Mr. Spiers: I don't think the Defendant is liable for that.
The Court: I am inclined to agree with him on that. I think he would be entitled to have someone stay
page 89 } in the hospital with a three- or four- or five-year-child.
Mr. Spiers: I don't think you can anticipate that the father would have to lose 25 days from work.

Q. How many days did you lose?
A. About 25.
Q. Why was it necessary for you to stay off?
A. Well, wife, she had to stay there day and night—she couldn't do it—she had to get some rest.
Q. And how much did you average a day where you work?
A. Roanoke Electric Steel—I averaged twenty-five or $30 a day.
Q. At Roanoke Electric Steel? Charley, you had to go to Roanoke every day, didn't you?
A. That's right. (Indicating paper) And there are in-

cluded in here eight trips to the doctor. When he was in the hospital over there, didn't have nobody to stay with him but the wife.

The Court: I interpret this to mean the 20 days lost from work for Roanoke Electric Steel he wasn't working. How was it lost?

Mr. Turk: He had to stay off. He was supposed to be working, but he couldn't work because he had to stay there. You can question him.

The Court: Let me ask him this:

page 90 } By the Court:

Q. These 25 days lost, are those the days you took the boy to visit Dr. Young down at the hospital, or down to his office, and brought him back?

A. And while he was in there.

Q. And while he was in the hospital?

A. Because one of us had to stay there all the time—and some of us when he was up here in Radford.

The Court: Well, he's had 40 trips to Dr. Young's office, besides the time he was in the hospital. I would think he would have missed 25 days taking him down and back.

Mr. Turk: I want to be honest with the Court—she took him most of the time for the office visits. It was necessary for him to lose work—a kid that small, around the clock, one of them had to stay with him.

Mr. Spiers: The maximum was 14 days he was in the hospital.

Mr. Turk: He was in 16 up here.

Mr. Spiers: You are counting up here, too?

Mr. Turk: You can question him as much as you want to about that.

The Court: Here's the quandry that the Court's in: The jury can only return a verdict, if they find a ver-
page 91 } dict in your favor for proven damages, they can't speculate on it. As of right now, it's not clear to me where he was on those days, or the reason for it. You examine him and see if you can understand.

By Mr. Turk: (Continuing)

Q. Charley, when the boy—were you working at Roanoke Electric Steel at the time this accident occurred?

A. Yes.

Charles L. Shelton.

Q. Did you or did you not—were you required to lose any time from work during the 16 days he was up here in the hospital?

A. Yes, I was.

Q. And if so, how many days did you lose during the 16-day period he was in the hospital?

A. Best I recall, was either 10 or 11 days.

Q. The first time? Why was it necessary for you to take off from work 10 or 11 days?

A. So me and my wife taken turns about staying with him.

Q. Did you stay with him half the time and your wife half?

A. Yes.

Q. Did you have anybody else in your family that could do it? You have any other children, or anything?

page 92 } A. Her sister, she come in the daytime and let us go to the house and rest.

Q. Now, then, how about the time when he was hospitalized on the two occasions in Roanoke; was it or was it not necessary for somebody to be with the little child at all times?

A. It was.

Q. And who were the people that stayed and took care of him?

A. Me and my wife.

Q. Did you or did you not have to lose any time from work during the two periods he was in the Roanoke hospital?

A. Yes, sir.

Q. How many days did you lose from work then?

A. I believe it's 7 days they let me off when he had that first operation.

Q. Seven days when the first—

A. Yes.

Q. What were you making per day then?

A. Average twenty-five or $30.

Q. Twenty-five or $30? Then—

Mr. Spiers: A lot of difference between those two figures. Twenty-five or $30 a day, that's a lot of money $5 a day difference.

Q. How much did you run up to sometimes on your earnings per day?

page 93 } A. Some days I have made $50.

Q. What was your average daily wage?

A. It average twenty-five.

Charles L. Shelton.

Q. Did you ever make any less than twenty-five?

A. No, sir.

Q. Then during the second operation how many days, if any, did you lose?

A. I don't know. I believe it was two the last time he was—

Q. Two days?

A. (The witness nods his head).

Q. Did you or did you not lose any other time from work, other than the time he was in the hospital at three different times?

A. Yes. When they first wanted to bring him down to the hosiptal, I got off from work to take him down there to take him to the hospital.

Q. Were you off any other time?

A. After he got out I went back two or three times and taken him down there to see the doctor and see what they thought about it.

Q. You work in Roanoke?

A. Yes, sir.

Q. All right. On any of the days you got down here—you have got trips to Roanoke to see Dr. Young

page 94 } and Dr. Brobst, and you were going to Roanoke anyway to work?

A. Yes, to work.

Q. And some of those trips down included the same day you now say you lost time from work, do they not?

A. I didn't get that.

Q. Some of the days that you say that you lost time from work to take your son to Roanoke you have added into your trips also, haven't you?

A. I didn't work that day.

Q. You have added a trip to Roanoke as cost, and yet you were going to Roanoke to earn the money in the first place?

A. Yes.

Q. And you have here 30 trips from Radford to Roanoke for visiting your son in the hospital?

A. Yes, sir.

Q. And he was there 14 days, right?

A. (The witness does not respond)

Mr. Spiers: That would have meant he went back and forth an average of more than two a day, all the way from Radford to Roanoke and back.

Q. Now, you didn't do that, did you, Charley?

Charles L. Shelton.

A. No.

Q. So you went to Roanoke, you saw Dr. Young 40 times, and you saw Dr. Brobst 6 times—that's out of the hospital, but at their offices; is that correct?

page 95 } A. Um-hum.

Q. Did you ever go, or did Pauline take him all the time?

A. She took him part of the time and I went with him part of the time.

Q. And the part of the time you went with her you took off from work?

A. That's right.

Q. But the part of the time that she took him, you didn't have to go, did you? You just—

A. I felt it was necessary for me to go.

Q. What caused you to think that? Didn't she do it satisfactorily all the other times?

A. I wanted to talk to the doctor.

Q. You wanted to?

A. Yes.

Q. Now, you said you took off a day once when you took him to the hospital?

A. Well, took him down one evening—that was the last time I had to stay two days.

Q. Took him down at night?

A. Late one evening about 4:00 o'clock, in the evening.

Q. Well, had you worked that day?

A. No.

Q. And you took the whole day off to take him

page 96 } down in the evening?

A. (The witness does not respond)

Q. And you work right there in Roanoke?

A. Salem.

Q. Hum?

A. Work in Salem.

Q. Out from Roanoke, Roanoke Electric Steel? And what's your hourly wage?

A. Well—

Q. What was it in 1960, let's put it that way?

A. $1.25 an hour.

Q. $1.25?

A. Plus tonnage.

Q. Plus tonnage?

Charles L. Shelton.

A. Well, they got it set up, more steel you run, the more money I—

Q. Is that what you run, or what your crew runs, or—

A. What the mill men run.

Q. What the mill men run?

A. Um-hum.

Q. And you get the tonnage after a certain point, is that right?

A. Yes.

Q. But your base wage was $1.25?

page 97 } A. Base was $1.25.

Q. And your base day was 8 hours, wasn't it?

A. Sometimes nine, and eight and a half.

Q. Eight to nine hours, at any rate?

A. Yes.

The Court: If you can stipulate a figure here—if you cannot, we'll have to let him testify to it, and let the jury decide.

Mr. Spiers: I'd like to point this out to the Court now: Here he has in here—and you're going to allow it to go before the jury—whether you exclude it subsequently or not—30 trips to see the boy in the hospital.

The Court: I am not allowing that paper to go to the jury. If you can't agree on the figure covering those items, then he'll have to testify to them before the jury—and you have the right to cross-examine him on each.

Mr. Spiers: I don't want it before the jury. Here's a man who says he averages $25 a day, and on the basis of his base pay, he worked anywhere from 16 to 20 hours a day.

Mr. Turk: He gets tonnage, he told me.

The Court: I will allow him to prove the damages, and the jury, of course, will be instructed, as they al-

page 98 } ways are, not to speculate. What are you willing to stipulate on that?

Mr. Spiers: I am willing to stipulate—and I don't think, really—I might be going overboard— I am willing to stipulate 46 trips to Roanoke, round trips, at 7¢ a mile, which is $270.48. I am not willing to stipulate, and I object to any lost days from work at $25, or any other figure, on the part of Mr. Shelton, other than maybe right in the beginning when the child was first hurt.

The Court: I think they have a right to show the necessary lost time.

Mr. Spiers: And then you are going to allow him to talk

about 30 trips to Roanoke to visit that child in the hospital, and *et cetera*—I have no idea what that is.

The Court: I don't know what he's going to testify. That sheet will not go in. I don't know what Mr. Turk is going to ask him.

Mr. Spiers: I assume he will ask him what expense was incurred—and I'd like the Court to know ahead of time that I object to this type evidence on lost wages, on the basis of what he's already testified to, as well as those additional 30 trips, as not necessary or not forseeable for any
page 99 } Roanoke doctor.

The Court: I am going to let him examine him on his lost wages for necessary days in looking after the care of the child—what they were, I don't know—I can't tell.

Mr. Spiers: I except to the ruling of the Court.

The Court: He's entitled to some lost wages.

Mr. Spiers: I don't think so.

The Court: He's entitled to whatever he can prove.

Mr. Spiers: I am like you—you don't know what he's going to testify to. I know what he testified to in chambers—and not shown to be necessary. Under the conditions, the Court can't tell—and the jury can't tell, and shouldn't be allowed to speculate about that. I except to the Court's ruling.

Mr. Dalton: Can we stipulate on 62.35 years as the remaining life expectancy?

Mr Spiers: If you say that's what this table shows, I will believe it.

Mr. Dalton: That's what it shows.

The witness stands aside.

(Court and counsel return to open court.)

The Court: It has been stipulated between both sides that the travel and loss of time and wages of the father of the boy during the three times he was in the hospital, amounted—and the doctor bills and the hospital bills—
page 100 } amount to $2516.83.

MRS. MAMIE EPPERLY,

a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

Mamie Epperly.

DIRECT EXAMINATION.

By Mr. Turk:

Q. Would you please state your name?

A. Mamie Epperly.

Q. Mamie Epperly? And what is your profession?

A. I teach the second grade.

Q. And how long have you been a school teacher in the public schools?

A. 35 years.

Q. 35 years?

A. Um-hum.

Q. Do you have in your class one Robert Lee Shelton?

A. Yes, I do.

Q. And that is he sitting over here?

A. Yes.

Q. All right. Would you go forward and tell the Court and jury what you have found from the test, and everything that you have around, what his intellectual ability, or whatnot, is?

A. We give mental maturity tests each year,
page 101 } and he was above average in intelligence; he was
at the top of my class—one of the top ones.

Q. Intelligence-wise?

A. Intelligence-wise.

Q. What group do you have him in in the various reading groups in your room?

A. I have him in my lower group.

Q. In the lower group?

A. Yes.

Q. And why do you have him in the lower group?

A. He doesn't see well, and he calls words wrong and gets them confused.

Q. How long have you noticed, has it been noticeable to you, Mrs. Epperly, that the little boy couldn't see right?

A. From the beginning.

Q. From the beginning?

A. Yes—I have taught too long. I began to observe immediately.

Q. How much of a problem have you observed that he has there with his seeing?

A. Well, in his oral work he is very good.

Q. Just ask him questions and things?

A. Yes, in the arithmetic and spelling and the work that I teach him. But in the work where he has to use his notebook

Pauline Tolley Shelton.

—his reading book, he is—I have some very, very
page 102 } good readers, excellent, above average, and he can't keep up with them. He is slow. But his intelligence is right at the top, in comparison with my other children. He's at the top—one of those at the top, and he's very alert and very eager to learn, does not waste time. He's a nice little boy.

Mr Spiers: No questions.

The witness stands aside.

Mr. Dalton: I believe we agreed to stipulate the life expectancy of the child to be 62.35 years—he has 62.35 years.
The Court: Let the record so show.

MRS. PAULINE TOLLEY SHELTON,
a witness of lawful age, sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Turk:
Q. Would you please state your name?
A. Pauline Tolley Shelton.
Q. And how old are you, Mrs. Shelton?
A. 35.
Q. And what relation are you to little Bobby Lee Shelton?
A. He's my son.
Q. I believe the evidence is that he was injured
page 103 } in an automobile accident on September 2, 1960?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. Where did this accident occur?
A. Up on 7th Street.
Q. Up on 7th Street?
A. Yes, sir.
Q. How old was Bobby Lee at that time?
A. Three.
Q. Three years old?
A. Yes, sir.
Q. And where had he been prior to this accident, for an hour or so before?

Pauline Tolley Shelton.

A. Well, he'd been up playing with this other little boy.
Q. What little boy was this?
A. Little David Sutphin.
Q. David Sutphin?
A. Yes, sir.
Q. Where did David Sutphin live?
A. Right beside of Alfred's.
Q. Beside of Alfred's house?
A. Yes, sir.

Q. And then had he come home, or had you
page 104 } gone and gotten him?
A. Yes.

Q. You had gone and gotten him?
A. Yes, sir.
Q. And he came on home?
A. Yes, sir.
Q. And then what did you discover when you got home, or whatnot?
A. When he had gotten home I noticed he had a toy that belonged to the other little boy.
Q. How old a little boy is that little Sutphin boy, approximately?
A. I don't know now.
Q. You know then?
A. Six or seven, I think—I'm not sure. I don't know how old the child is.
Q. Six or seven at the time?
A. Um-hum.
Q. And that's the little boy he had been playing with?
A. Yes, sir.
Q. You say you discovered he brought a toy home?
A. Yes, sir.
Q. And then what did you intend to do, or what did you do then?

A. I told him he shouldn't have brought it,
page 105 } we'd have to take it back, and I started on back
up the road with him.

Q. You say "up the road"; how did you go from your—point out to the Court and jury where your house is located in relation to this map. Do you see how the map is drawn now?
A. Um-hum. Here's the mail box, and it's a path—I don't know whether I'm pointing—right across here, then we was going up this path. And I could see it wasn't any cars coming, and he was several feet in front of me, and I told him

Pauline Tolley Shelton.

to go ahead and cross the street. And he was standing right along here.

Q. Now, when you say "he was standing"—would you take this pencil and mark there where he was standing?

A. I would think he was standing right along here.

Q. That's in close proximity to the water meter, isn't it?

A. Yes, sir.

Q. Would you put your initials there beside that dot? Now, when he went on across the road there, Pauline, you say there was no traffic coming in either direction?

A. No, sir.

Q. Then how far up, or whatnot, on the bank did the little boy go?

A. Well, I would say six or seven feet.

Q. Did he or did he not ever get back as far as the post or the tree?

A. No.

page 106 } Q. He did not?

A. No, sir.

Q. You say there was another little boy there somewhere in the vicinity?

A. Yes. He was standing right beside of him.

Q. Where was this other little boy standing?

A. He was in the—say Bobby was standing here, the other little boy was standing up in the yard a little bit further than he was.

Q. Do you remember whether or not the other little boy was level, even with, or back of the tree or post, or—

A. No; he wasn't standing behind them, either.

Q. Was he in front, or to the side of them, or where was the other little boy?

A. As best I can—well, he had to be standing right here next to Bobby, because he was close enough to hand the toy back.

Q. He handed the top back?

A. Um-hum.

Q. And he was there on the bank?

A. Yes, sir.

Q. And then what happened, Pauline?

A. Well, I was—kept walking on towards the street, and I seen Bobby turn—well I didn't know what he was going to do, when I seen her coming, and I hollered,

page 107 } "Bobby, go back," and throwed up my hand and motioned.

Pauline Tolley Shelton.

Q. How long, Pauline, would you say that Bobby had been over there where you marked with that pencil mark there between the post and the tree and the road?

A. Well, every bit of five minutes, maybe a little longer.

Q. (Indicating) There?

A. On the other side of the street.

Q. On the other side of the street?

A. Yes, sir.

Q. All right. And you hollered for him to stay back, or something?

A. Yes.

Q. And where was this car then that you saw approaching?

A. She was just a little bit past Sutphin's house when I noticed the car coming.

Q. You noticed the car coming?

A. Um-hum.

Q. Well, now, was or was not the little boy in plain sight?

Mr. Spiers: If Your Honor please, I object to the nature of these questions. She's testified to where he was, and he's leading the witness.

The Court: You can question her, Mr. Turk.

page 108 } Mr. Turk: I apologize.

The Court: It calls for a conclusion of the witness from the point of view of the driver of the automobile.

Mr. Spiers: That's the point I had in mind.

Mr. Turk: I would except to the ruling of the Court, Your Honor, in not being permitted to ask the question.

The Court: All right.

By Mr. Turk: (Continuing)

Q. You saw the car coming; had it or had it not slowed down, or anything, at that time?

A. No, sir.

Q. Had not?

A. No, sir.

Q. And how fast, Pauline, would you estimate that car was traveling?

Mr. Spiers: If Your Honor please, I would like to object to the questions, and I'd like to state in chambers my reason therefor.

The Court: I will sustain the objection. I will see you in chambers.

Pauline Tolley Shelton.

(The following took place in chambers:)

Mr. Spiers: My objection is twofold, Your Honor. In the place, the witness testified she first saw the car
page 109 } when it was between the two houses, as I remember, or just beyond.

The Court: At the Sutphin house.

Mr. Spiers: And that she looked at it and then looked back at her son and told him to go back. There's no indication from her that she saw the car travelling for a sufficient length of time to judge the speed—and that she did so. And my second ground of this objection is something that is in the Court record, but of which the Court is not cognizant. Pursuant to your Order, we took discovery depositions, in which Mrs. Tolley testified that the basis of her estimate for speed was experiments conducted over a month—about a month later, I believe, when she had her husband drive a car up the street; and that she recalls telling the police that it was around 25 or 30 miles per hour— now it's 40 miles per hour. These discovery depositions are part of the Court record. If that's the basis of her opinion, I think it should be excluded.

The Court: The basis of my sustaining your objection was the form of the question: "did the car ever slow down?" And she had just said the first time she saw the car was at Sutphin's house—not having seen it prior to
page 110 } then, she couldn't testify as to whether it had slowed down.

Mr. Spiers: That's the first ground of the objection. I wanted to go further, because if the jury hears her say 40 miles per hour—in fact I can bring out it's based on a late experiment.

Mr. Turk: Similar cases say an ordinary person is qualified to give their layman's estimation of speed—it doesn't take an expert to judge it.

Mr. Spiers: Your client on discovery said she didn't know, except based on experiments.

Mr. Turk: You can contradict her.

Mr. Spiers: I don't think it's admissible; and I think that if that is going to be what her testimony is based on, it's certainly not admissible.

Mr. Turk: You have got the right to cross-examine her.

Mr. Spiers: I am objecting now on a matter in the Court record.

Pauline Tolley Shelton.

The Court: As the testimony stands, I'd have to sustain the objection right now. As I understood her testimony, she was looking at the children, and noticed the car at the Sutphin residence. It's been testified that was how many feet?

Mr. Turk: She just said about the Sutphin
page 111 } residence.

Mr. Spiers: Mr. Clements has testified that the distance between them was—I don't remember now.

The Court: It's a very close distance in there.

Mr. Turk: And then assuming it was at the beginning—put it up close to 200 feet.

Mr. Spiers: I think this, Judge: Why I am so concerned about this point, they can get around the Court ruling by a little more foundation. Her estimate is based on an experiment a month later—which she testified to under oath before this gentleman. It is not admissible. I believe Pauline is honest enough to state she didn't form any opinion at the time, and told the police it was 25 miles an hour.

Mr. Turk: She told what?

Mr. Spiers: In the discovery depositions.

Mr. Turk: I haven't seen them.

Mr. Spiers: I am advising the Court.

Mr. Turk: When did you file them with the Court? Have you ever filed them?

Mr. Spiers: I have got them on my table.

Mr. Turk: They are not part of the record, or anything, unless they are filed with the Court papers.

page 112 } Mr. Spiers: They were taken pursuant to an order.

Mr. Turk: Taken pursuant to agreement, but they have never been filed, or anything.

Mr Spiers: You can mark them filed right now. I am going to use them.

Mr. Turk: As I understand, the Court has sustained the objection to the question that I asked, and I except to the ruling of the Court, and we will proceed to examine the witness. I am not, as I understand it—you are not precluding me from asking any more questions regarding speed?

The Court: No.

(Court and counsel return to open court.)

By Mr. Turk: (Continuing)

Q. Pauline, you noticed the approaching car; was it to your right or to your left?

Pauline Tolley Shelton.

A. It was to my right.
Q. Coming down the road to your right?
A. Yes.
Q. Now, how far up the road would you estimate, in feet, the car was away, just roughly, to your right up there?
A. Before I seen it?
Q. At the time you saw it?
A. (The witness does not respond)

page 113 } Q. You can point out, if you don't know feet; you can point out here some distance, or something.

A. I'd say every bit of 350 feet back from where I was.
Q. About 350 feet back from where you was?
A. Yes.
Q. To your right?
A. Yes.
Q. How long—then did you or did you not observe the automobile, Mrs. Shelton, as it came on down the road?
A. I knew she was coming at a very fast speed.
Q. When you saw it coming there?
A. Yes.
Q. And where was your little boy at that time?
A. He was still on the bank.
Q. Was he or was he not—was he in front or in back of the trees and posts?
A. No, sir.
Q. Where was he?
A. I mean not in the back of them; he was standing—
Q. How many feet would you say he was standing there from the edge of the hard surface?
A. Six or seven.
Q. Six or seven feet?
A. Yes.

page 114 } Q. And what did you do, Mrs. Shelton?
A. Well, when I seen Mrs. Mullins coming, and Bobby had turned around, and I motioned for Bobby like this (the witness gestures) and hollered for him to stay over there.

Q. To stay there?
A. Yes, sir.
Q. And what happened to the Mullins car?
A. I don't know. Next thing I knew she had stopped, and I seen Bobby laying in the road.
Q. When did you first notice she started to slow down her

Pauline Tolley Shelton.

automobile and stop?

A. Well, I don't know whether she did, or not, because I was watching him.

Q Um-hum. Did you see him at the—did you see the impact—could you see it?

A. No, sir.

Q. Why couldn't you?

A. It was between the car—her car was between me and him.

Q. As you were standing there was the little boy to your left or to your right?

A. Well, he was diagonally straight in front of me—he would be a little bit to my left.

Q. He was to your left?

A. Right.

Q. And you saw her coming to your right?

page 115 } A. Yes, sir.

Q. And then she was between your line of vision and the little boy?

A. Yes, sir.

Q. And then can you remember, Pauline, where the little boy was lying in the street?

A. He was past Alfred's driveway; he was just about along here where Mr. Whitt pointed out.

Q. Where Mr. Whitt pointed out?

A. Um-hum.

Q. And where did Mrs. Mullins stop her car?

A. She was back here, back behind Bobby a little bit.

Q. Back behind Bobby?

A. Um-hum.

Q. Did she or did she not clear the driveway, going—

A. If you make a sharp turn you could have gone in Alfred's driveway.

Q. You could have gotten in Alfred's driveway?

A. Yes, sir.

Q. She wasn't blocking the driveway?

A. No, sir.

Q. Now, Mrs. Shelton, do you drive an automobile?

A. Yes, sir.

Q. You do?

A. Yes, sir.

page 116 } Q. Do you observe automobiles, and you drive? How long have you been driving?

A. Ever since '44.

Q. Ever since '44?

Pauline Tolley Shelton.

A. Yes, sir.
Q. Now, based on your experience as a driver and observing automobiles, and everything, would you say, to the best of your knowledge and belief, that this lady was or was not speeding?

Mr. Spiers: If Your Honor please, he's leading the witness—been phrasing his questions that way all day.
The Court: Yes.

Q. Mrs. Shelton, based on your knowledge as a driver, and your observance from automobiles, and everything, how fast would be your best estimate as to the speed that this automobile was making when you first saw it?
A. Every bit of 30 or 35 miles an hour.
Q. 30 or 35 miles an hour?
A. Yes, sir.
Q. Now, what happened there when—after the accident happened, and the little boy was lying there in the street?
A. I didn't hear you.
Q. What did you do then after the mishap occurred there?
A. I run to Bobby, and he wouldn't answer me,
page 117 } and I went running into Alfred's yard, and he met me, and he seen what had happened, and he grabbed him and says—I don't know whether it was Mrs. Mullins or him said, "Let's get him to the hospital"; and Alfred picked him up, and Mrs. Mullins drove to the hospital.
Q. Hum. All right. And then did you go on to the hospital?
A. Later; yes, sir.
Q. Later?
A. Yes, sir.
Q. How much later?
A. Well, it seemed like a long time, but I guess it was every bit of ten or fifteen minutes before I could get there.
Q. But you could get there?
A. Yes, sir.
Q. And how long did the little boy stay in the hospital?
A. No, sir.
Q. He did not?
A. No, sir.
Q And how long did he stay in the hospital?
A. 16 days.
Q. 16 days?
A. Yes, sir.

Pauline Tolley Shelton.

Q. And was it necessary for somebody to stay with him, and all, when he was in the hospital?

page 118 } A. Yes, sir.

Q. And how was he when he came home?

A. Well, he was all right. We had to watch him so that he wouldn't fall and get a lick on his head.

Q. And how were his eyes when he came home?

A. Well, we hadn't noticed his eyes until Dr. Duncan mentioned it, and then after he did, we could see it ourselves.

Q. And did—

A. Of course, he had that deep wound there, you know, and had that skwinch or draw on it—you could tell that. But as far as the sight or pupil, or anything like that, we hadn't noticed it.

Q. Now, Pauline, how does it affect him now—his vision and seeing things? What problems do you notice that you have with him?

A. Bobby gets nervous at times, and as far as his playing and things, he does real good in doing his homework from school; he does real good except his reading. He can't—his words that he knows, he wants to call them something else. One time he will read it right, and maybe the word will be down in there he had missed.

Q. Um-hum. Does he do anything else that tells you that he can't see right out of both eyes?

A. Well, it comes and goes, where I notice it—like if he was going to sit something down, he missed it

page 119 } —and he just don't judge the distance, or something.

Q. Um-hum?

A. At least not seeing so many different things.

Q. Bumps into objects?

A. Yes.

Q. How long has he been wearing glasses?

A. The glasses that Dr. Young put on him, I guess it was '61 or '62—I don't remember.

Q. Has he been wearing glasses ever since that time?

A. Yes.

Q. Did he have to wear glasses before this thing occurred?

A. No, sir.

Q. Do you have any trouble keeping glasses on him?

A. Right at first we did. I felt like it was because he had to get used to them. And sometimes now he takes them off. And in playing—and he says they rub his ears—and I reckon he's working up an excuse to get them off.

Pauline Tolley Shelton.

Mr. Turk: Your witness.

CROSS EXAMINATION.

By Mr. Spiers:

Q. Mrs. Shelton, I believe you said that the Mullins' car, when you first saw it, was a little past the Sutphin house?

A. Yes, sir.

Q. Is that what I understood you to say? And
page 120 } I believe you testified here that at that time she was 350 feet away?

A. Roughly.

Q. From what?

A. From where I was.

Q. That would be to your right?

A. Yes, sir.

Q. Then how far was she from where Bobby was?

A. Well, Bobby was just straight across in front of me.

Q. You told Mr. Turk he was a little to your left?

A. That's right—but wasn't that much off, I wouldn't think.

Q. Well, it would be around 350 feet, you think?

A. Yes, I do.

Q. And you saw her then while she was coming down a little hill, didn't you?

A. No, sir; I didn't see her car—she had done come off the hill before I noticed her coming.

Q. How far back is the hill, you know?

A. No, sir; I don't.

Q. But she had already come off the hill?

A. Yes, sir.

Q. And then is there a slight dip, or anything?

A. I don't know.

Q. I believe you testified in this case earlier,
page 121 } did you not, in a criminal hearing which was held September of 1960?

A. Yes, sir.

Q. And did you not also give to the police a statement shortly after this accident, within two days after this accident?

A. Yes, sir.

Q. In connection with the event? And did you not also testify on discovery depositions on October 17, 1964?

Pauline Tolley Shelton.

A. Yes, sir.

Q. With reference to the distance, do you recall, when you testified in the criminal hearing of this case, that your estimate of distance, when you first saw the vehicle operated by Mrs. Mullins, was 90 feet from where the accident occurred?

A. I don't know.

Q. Do you deny that that was your estimate?

A. No, I don't deny it. I don't know.

Q. Let me ask you: Do you recall when you testified October 17 of 1964, you were sworn and you were under oath, were you not?

A. Yes, sir.

Q. And do you recall what your estimate of distance was at that time?

A. No, sir; I don't.

Q. Do you recall testifying that it was 150 feet from the point of impact where you saw the Mullins car

page 122 } first?

A. I don't remember.

Q. Do you deny that you made that statement under oath?

A. No. I remember you asking me, but as far as the figure, I don't remember.

Q. You do not remember? And, now, since October 17, 1964, have you discussed this case with anyone?

A. No, sir.

Q. Have you discussed it with your attorneys?

A. Yes, sir.

Q. Have you discussed it with your husband?

A. Yes, sir.

Q. Have you discussed it with Barbara Tolley Baxley?

A. They have asked questions, and I would answer them.

Q. Have you discussed it with Shirley?

A. Maybe—yes.

Q. As a matter of fact, you discussed it within the family quite some time before this suit was even brought, did you not?

A. Yes, because she had asked about different things.

Q. Isn't it correct that in all your discussions with Barbara Baxley that you never at any time indicated any speed in excess of the speed limit?

A. I don't remember that I did.

Q. Isn't it also true that at the time of your

page 123 } testimony in the lower court you did not testify to any excessive speed?

Pauline Tolley Shelton.

A. When they had the hearing before I told them I didn't know.

Q. You did not know at the time? This was right after the accident, was it not?

A. That's right.

Q. And isn't it correct that also when the officers interviewed you on the day, two days after this accident, you told them nothing whatever about any speed in excess of the speed limit?

A. That's right.

Q. As a matter of fact, you told them 25 miles per hour, did you not?

A. I don't remember.

Q. Do you deny that is what you told them?

A. No. I don't deny it.

Q. Do you recall that on October 17, 1964, when we were taking this discovery evidence, you then testified you had told the officers 25 miles per hour right after it happened?

A. No, I don't remember telling them, but I think I did—that she was doing that.

Q. And you say you do not recall about the distance at all, whether 90 feet or 150 feet on these previous occasions?

A. No.

Q. And you do not deny that was your testimony?

A. No, I do not.

page 124 } Q. Now, I show you Plaintiff's Exhibit No. 2, and ask you if that accurately represents the scene at the time this accident occurred?

A. Yes.

Q. And that's looking down the hill towards the Tolley house, is it not?

A. This is.

Q. The direction from which Mrs. Mullins came?

A. She was going this way, right.

Q. Is this the Tolley house down here?

A. Down here, yes.

Q. Would you mind walking up here, so we can show the jury a couple of things. If you will hold this so the jury can see it. Is the mail box you are talking about this mail box right here?

A. Yes.

Q. When you look back—now, going a little further, you were down in this field over in here?

A. Yes.

Pauline Tolley Shelton.

Q. When you were in that field and looking to your right, do you tell the jury that you were right up against the road, or how far back away from the road?

A. I don't know my feet.

Q. Haven't you testified on three different occasions it was anywhere from 35 to 50 feet back away from the page 125 } road at the time you first saw the car operated by Mrs. Mullins?

A. I say every bit of 25 feet.

Q. Do you deny that you have already testified twice that it was 35 to 50 feet?

A. No. sir; I don't deny it.

Q. It could very well be 35 to 50 feet, could it not?—The most recent testimony being on the 17th of October.

A. Well, I was further enough back that I couldn't have gotten to him.

Q. You were some distance back in the field?

A. Yes.

Q. And heading in the direction of this mail box?

A. Yes.

Q. And right adjacent to it? Now, the walk or path you speak of is on the west or east side of that mail box?

A. It's on this side.

Q. That is towards east Radford?

A. Um-hum.

Q. It doesn't show on here—or does it?

A. No.

Q. Is this the walk?

A. It comes out right up above here on the other side, I say, three or four feet from the mail box.

Q. And back in this field, I asume that your view was what the jury could perceive—that there were trees page 126 } along this side of the street?

A. Yes.

Q. You saw Mrs. Mullins down at the bottom of the hill?

A. She was right along here—that is Sutphin's driveway, I asume—she was right along here when I seen her.

Q. And she had gotten to the Sutphins?

A. She wasn't right at Sutphin's house.

Q. And what kind of car was she driving?

A. I remember it was a black and white Buick. The year I don't know.

Q. It was a four-door car, wasn't it?

A. I couldn't tell you.

Pauline Tolley Shelton.

Q. At any rate, when you saw her she was traveling, you now testify, at an excessive rate of speed?

A. (The witness does not respond).

Q. Is that what you said?

A. Yes, I think she was doing what I said.

Q. You did not think that the day it happened? You thought that about a month later for the first time?

A. Right when they—Officer Whitt and them come to see me, I couldn't think straight.

Q. You didn't arrive at your estimate of speed until over a month after this thing happened, did you?

A. Well, I would watch cars, and I'd ask differ-
page 127 } ent ones how fast.

Q. Isn't it correct, Mrs. Shelton, that the only time that you ever sought to tell anyone what this speed was, was more than a month later, when you and your husband got together, and he drove a car up and down on this street?

A. That's right.

Q. That's right? Now, you did not at the time of the accident think anything about that whatever—it was only this month later? You did not accuse Mrs. Mullins, or did you testify in court she was going 35, 40, or even 25 miles an hour?

A. I didn't hear.

Q. You never testified in court proceedings she was going in excess of 25 miles per hour until today, and until October 17?

A. Not a court; no, sir.

Q. This is based on the tests you and your husband ran a month later?

A. Yes.

Q. And was that in the daytime or at night?

A. Daytime.

Q. And what kind of car?

A. We had a '57 Chevrolet, I think it was.

Q. What color?

A. We had two about that time; one was green and white, and one was black.

page 128 } Q. You don't know whether you had the green and white or black?

A. No, I don't.

Q. And who was driving it?

A. He was.

Pauline Tolley Shelton.

Q. And do you know what speed he was traveling, other than what he might have told you?
A. No, sir; I do not.
Q. Was it in the morning or afternoon?
A. It was in the afternoon.
Q. Was it cloudy or bright?
A. No, sir; it was bright.
Q. Were the leaves on the trees, or not?
A. That I can't tell.
Q. On the day of this accident it was cloudy and overcast, wasn't it?
A. Yes, sir.
Q. And on the day of your test it was bright, you said—bright and sunshine?
A. Um-hum.

Mr. Spiers: If Your Honor please, on the basis of this examination, I move that the testimony, with reference to speed, be excluded, and the jury be so instructed.

The Court: I overrule it, and let the evidence page 129 } stand for what it's worth.

Mr. Spiers: I except to the ruling of the Court.

Q. Mrs. Shelton, when did your estimate of the distance go from 90 feet to 350 feet? Has that been a recent development? You feel it was 350 feet?
A. Yes.
Q. Now, at the time you and Bobby were walking through this field, you were heading back towards Alfred's house, you say, to take this toy?
A. Yes, sir.
Q. Is that correct? And you say he went on ahead of you?
A. Yes, sir.
Q. Did you continue to walk?
A. I continued to walk on, yes.
Q. At the time he crossed the street were you in the middle of that field heading towards Alfred's house? Where were you? Were you still in sight of the boy?
A. Yes.
Q. And then you say that no cars were coming in either direction?
A. That's right.
Q. And you allowed him to cross the street?
A. That's right.

Pauline Tolley Shelton.

Q. And you say he went across the street and
page 130 } stood in this yard for some five minutes?
A. I would say that, yes.

Q. I believe your words were "every bit of five minutes"?
A. Yes.

Q. And then did you continue to walk towards him, or were you just going to wait for him?

A. I continued to walk on towards him.

Q. Any other children around?

A. No, sir—other than this one little boy.

Q. Just this one child?

A. Yes, sir.

Q. Where was he when you first saw him?

A. He was already in the yard.

Q. Which part of the yard?

A. Well, he was standing up in the yard.

Q. Now, I don't want to get you confused, Pauline.

A. I am looking at it wrong, I think.

Q. You mean over here?

A. He was up in the yard, and Bobby hollered to him—and it was a little toy gun, is what he had—and he hollered to him as Bobby crossed to go up in Alfred's yard; David came down in the yard more and met him.

Q. Weren't there other children playing here between these two houses?
page 131 } A. No, sir.
Q. There were absolutely none?

A. None.

Q. And if Alfred testified he heard them playing there, is he mistaken?

A. They were probably playing in the yard when he came home from work.

Q. I believe he testified that immediately after the accident there was a whole group?

A. No, sir; it was not.

Q. He's mistaken in that, also?

A. Yes.

Q. Now, you say this child was somewhere in this area, and came out towards where Bobby was heading, to?

A. Yes, sir.

Q. When they came together and met one another, was Bobby up on the bank?

A. No, sir; he wasn't all the way up on the bank, no.

Q. He never got to the top of the bank?

Pauline Tolley Shelton.

A. No.
Q. He just got part way up the bank?
A. Yes, sir.
Q. And you think he was about six feet or seven feet up?
A. Yes, I do.
page 132 } Q. Is that estimate changed since October 17?
A. Since we had this?
Q. Since you had this?
A. Yes.
Q. This was made three days ago, your estimate?
A. I had shown Mr. Turk prior, where it was.
Q. You showed me, also, didn't you, at the time we took discovery depositions?
A. Yes, I marked it.
Q. Do you remember this sheet of paper you used?
A. Yes, I do.
Q. Does that show the end of the walk at the Tolley house?
A. I guess. You mean that is the walk?
Q. Over here?
A. This is Alfred's house.
Q. Where?
A. Right here.
Q. This is Alfred's driveway. Now, we had this at my office when you were testifying under oath, with your attorney present?
A. Yes.
Q. And it was in this condition when you put a couple of marks on it, wasn't it?
A. Yes.
page 133 } Q. Now, this is the end of Alfred's walkway, as shown on that diagram—correct or incorrect as shown there, is it not?
A. Yes, sir.
Q. Was your son nearer the walk or nearer the driveway?
A. He was nearer the driveway.
Q. And did you put an X on this drawing to indicate where your son was?
A. Yes, sir.
Q. Would you come up and show the jury where that was, with reference to the end of the sidewalk?
A. Like this is for the sidewalk, and this is Alfred's driveway, and this is where I put my X.
Q. You drew that X, didn't you?
A. Yes, sir.

Pauline Tolley Shelton.

Q. And there is another X on there; can you tell us what that might represent?
A. If I'm not mistaken, it's where I was showing you I was walking.
Q. And this is supposed to represent your approximate location?
A. Yes.

Mr. Spiers: I'd like to offer this as an exhibit, please.

(Defendant's Exhibit B—Diagram produced
page 134 } during the deposition of Mrs. Pauline Tolley Shelton on October 17, 1964.)

Q. Mrs. Shelton, you say you located the position Bobby occupied just before this trial today, and showed it, or pointed it out to Mr. Turk; is that right?
A. Yes, sir.
Q. Did you testify about the distance from the street, in the discovery deposition we took on October 17?
A. What do you mean, sir?
Q. Did you testify, or were you asked how far back from the roadway your son was at this time?
A. No, sir.
Q. You were not asked?
A. I was shown—I mean I showed it. But just roughly, I think it was what we have testified now as seven or eight feet.
Q. Seven or eight feet?
A. I mean six or seven feet.
Q. Six or seven?
A. Yes.
Q. Isn't it correct that the following questions were asked: (Reading)

"Q. With reference to the porch, where was the Sutphin boy?
A. He was standing right with Bobby.
page 135 } Q. Were they at the porch?
A. They were standing about eight feet from the street."
Q. Was that your answer to the question as propounded to you?

Pauline Tolley Shelton.

A It could have been eight feet—I wouldn't be sure. I just took one of these measurements here.

Q. Your testimony, until your counsel had a map drawn, was eight feet; isn't that right?

A. Yes.

Q. And then this followed: (Reading)

"Q. I believe that at the Tolley home there are a couple of brick or concrete columns?

A. Yes, sir.

Q. Are they right at the road?

A. No, sir.

Q. How far back from the road are they?

A. I'd say they are every bit of eight or ten feet back from the road. My estimate might be wrong."

A. I was guessing on the distance, because—

Q. We are all still giving our best estimates?

A. That's right.

Q. Getting back to the speed on the occasion of this discovery deposition, I asked you this question: (Reading)

page 136 } "Q. Based on your own estimates, you don't know?"

Q. And your answer was, "No, sir," about the speed; do you remember that?

A. Um-hum.

Q. All right. Now, you have testified that Bobby crossed the street, that he did not go up the bank, but was somewhere between the road and the top of the bank?

A. That's right.

Q. And the other boy was right beside him a little further into the road—into the yard?

A. Yes, sir.

Q. You recall whether there was anything sitting on top of those columns in the way of concrete urns, or flower pots?

A. Not at that time; no, sir.

Q. They were not, or you don't remember?

A. I don't know.

Q. You recall testifying on October 17, 1964, in the discovery deposition, that I asked you about the position which your son occupied at the time of the accident, and you described how he went toward the yard, and crossed the street; you remember that, don't you?

A. How?

Pauline Tolley Shelton.

Q. Your son crossed the street and went toward the yard. You remember describing that to me?

A. Going to Alfred's?

page 137 } Q. Yes.

A. Yes.

Q. I'd like to ask you if these questions were asked, and if you gave the following answers: (Reading)

"Q. As the boy went up towards Alfred's yard, you said there was no cars coming?

A. That's right.

Q. And he went ahead and crossed the street? I believe at that time he was about three, was he?

A. Yes, sir.

Q. As he got to Alfred's yard—is it above or below the level of the street?

A. It's a little above the street.

Q. Do you remember these questions and answers?

A. Yes, sir.

Q. They are correct, are they not?

A. (The witness does not respond)

"Q. Did he go up the bank?

A. Yes, sir.

Q. Went up the bank?

A. Um-hum."

Q. Do you remember that answer?

A. Yes. And he went up to the bank, but he didn't go all the way up to the top.

Q. He didn't go all the way up?

page 138 } A. No, sir.

Q. And you didn't bother to say anything about that? (Reading)

"Q. With reference to the porch, where was the Sutphin boy?

A. He was standing with Bobby."

A. That's right.

Q. He was standing with Bobby?

A. That's right.

Q. The Sutphin boy—your son with the Sutphin boy?

A. Um-hum.

Q. Let me ask you if these questions were asked—and you may stop me at any time when I say something you don't remember. (Reading)

Pauline Tolley Shelton.

"Q. Tell us then what happened. When you saw her, where was she, with reference to the house—that is, Mrs. Mullins?
A. Alfred's house?
Q. Yes.
A. She could see him as far back—around 500 feet.
Q. I didn't ask you that. I asked you where she was when you saw her car?
A. I'd say about 150 feet back."

Q. Do you remember that answer?
page 139 } A. Yes, sir; I remember telling that.
Q. That is not correct?
A. Well, I was just roughly speaking of the feet. I don't know, really, how far.
Q. Are you roughly speaking now—today?
A. Roughly.

"Q. From the house, or from the point at which she struck the boy, which?
A. From where she hit him.
Q. 150 feet back?
A. Um-hum.
Q. And he was standing on the bank then?
A. Yes.
Q. Talking to the—
A. Little Sutphin boy."
Q. You remember that?
A. Yes.
Q. And those answers were correct when you gave them, were they not?
A. Yes, sir.
Q. Now, when you first saw Mrs. Mullins, you said her car was proceeding towards downtown Radford, and your son was over there in that yard talking with the other boy?
A. Yes, sir.
Q. Did you immediately start running towards
page 140 } your son as soon as you saw this car?
A. No, I didn't—don't know whether I started running. I remember hollering and waving back to him.
Q. Were you still some distance from the street?
A. Yes.
Q. You were still far enough—you could have gotten to him?
A. If I had, she'd have to have hit me.
Q. She was 300 feet back at that time?

Pauline Tolley Shelton.

A. I would think so.

Q. Did you look at her car again?

A. No, sir—I just looked up and seen her car, because I was watching him, because I didn't know what he was going to do.

Q. You did not know whether she slowed. or did anything?

A. I don't think she slowed down.

Q. Do you know? You just told the jury you didn't watch the car?

A. Well, as the car kept coming I naturally—and you vision a car coming.

Q. Were you running toward your son at all times?

A. Yes, sir.

Q. And you were waving?

A. Yes, to him like that. (Gesturing)

page 141 } Q. And you were hollering?

A. I hollered for him to stay over there, yes.

Q. About the time you hollered, what did he do?

A. He was just still standing there.

Q. Still on the bank, was he?

A. Yes, sir.

Q. He had not moved?

A. No, sir.

Q. And he had not started toward the car, or anything?

A. No, sir.

Q. And he was six or seven feet from the road?

A. Yes.

Q. And according to your testimony in October, eight feet or more away from the road? At any rate, he was not at the road?

A. No, sir.

Q. He was not even on the shoulder of the road, was he?

A. No, sir.

Q. Did you ever look back to the car, or continue watching your son?

A. I watched him. Of course, she was—kept coming—naturally, you'd see the car, too.

Q. The car was actually between you and your son at the time of the accident?

A. Yes, sir.

page 142 } Q. And at the last moment you saw your son when the car came between you and him?

A. That's right.

Q. Where was your son?

Pauline Tolley Shelton.

A. The last time I seen him he was standing on the bank.
Q. And he had not moved?
A. No.
Q. He was not running toward the road?
A. No, sir.
Q. Let me ask you if, on October 17, the following questions were asked, and you gave the following answers?
A. When?
Q. When we took the discovery deposition October 17, 1964, in my office. (Reading)

"Q. And he was standing on the bank then?
A. Yes.
Q. Talking to the—
A. Little Sutphin boy.
Q. Then what happened?
A. Well, when I seen her, I guess I just froze, because I didn't have a chance to get to him, and she still didn't slow up.
Q. He was just standing there, wasn't he?
A. Yes, sir. But I guess she seen him make
page 143 } a move, and she started slowing up then."

Q. Do you remember that?
A. No, sir; I don't.

"Q. What kind of a move did he make?
A. I don't know.
Q. You were watching him, weren't you?
A. It happened between me and him.
Q. Between you and him?
A. That's right.
Q. What do you mean, "between you and him"?
A. She had got up with him, and I don't know whether he had stepped off the bank, or not.
Q. In other words, the last you saw him—saw of him, he was standing on the bank?
A. That's right.
Q. And had not moved?
A. That's right.
Q. And she came down the road, and you said that she proceeded at her rate of speed—whatever it was—and then she started slowing?
A. Not until she got up closer to him.
Q. Closer to him?

Pauline Tolley Shelton.

A. Um-hum.
Q. And then she did start slowing?
A. That's right.
page 144 } Q. And you don't know why?
A. No, sir."

Q. Those were your answers, were they not?
A. I guess.
Q. Were they, or not?
A. Yes.
Q. They were true at the time you made them?
A. Yes, sir.
Q. Mrs. Shelton, do you know Mrs. Mullins stopped her car suddenly?
A. No, sir.
Q. She did apply her brakes? Did she come to a stop quickly?
A. I couldn't tell you, sir. I don't know.
Q. Well, you were looking right at the car?
A. Yes.
Q. Did she skid?
A. Did she skid?
Q. Yes.
A. I don't know.
Q. Did you hear any skid marks?
A. No—I don't recall them, if I did.
Q. You heard no brakes, and you saw no skid marks?
A. I didn't look for skid marks.
Q. At least you didn't hear any skidding?
page 145 } A. Not that I recall, no.
Q. And you say she stopped? According to the police, the child came to rest about 14 feet from the driveway, and according to you, she had stopped—Mrs. Mullins had—somewhat behind your son?
A. Yes, sir.
Q. Was it a foot or two feet or three feet, or can you show us?
A. I'd say about from here to—I don't know whether it would be from here to that baseboard, or not.
Q. Do you think it would—is that your best estimate?
A. Yes, I would think so, yes.
Q. Be at least that far, from the front of the witness box to the front of the jury box, would it not?

Pauline Tolley Shelton.

Mr. Turk: She didn't say that. He's putting words in her mouth, and saying at least that much.
The Court: He's cross-examining her.
Mr. Turk: I haven't said a word.
The Court: He's cross-examing her, Mr. Turk.
Mr. Turk: Over and over, the same thing.
Mr. Spiers: I'm not the witness.

Q. Pauline, just your best estimate?
A. That's what I am trying to give you. Where Bobby was laying, and where her car was, I would say
page 146 } two or three feet, maybe.
Q. Two or three feet?
A. Yes.
Q. Back from him?
A. Yes.
Q. And you say the back end of her car did not obstruct the driveway?
A. No, sir. But you would have to make a sharp turn to have gotten in the driveway.
Q. It didn't cover the travelled portion of the highway, according to your testimony?
A. What do you mean, "the highway"?
Q. The driveway?
A. Yes, I would say that the back end was right along here (Indicating on map)—you call it "spanned" out here.
Q. Flared out?
A. Um-hum.
Q. It didn't cover any of the main travelled part?
A. No, sir.
Q. That was a regular standard automobile, wasn't it?
A. That she was driving?
Q. About 16 feet long?
A. I don't know. It was a Buick. I couldn't tell you.
Q. When the car stopped, could you tell the
page 147 } jury whether it was at a slight angle? Did Mrs. Mullins cut in either direction?
A. I don't recollect that at all, because after seeing him I just—I don't know, because after Alfred picked him up, and they left immediately.
Q. Did you run in and get Alfred?
A. I started, and he come out.
Q. And you saw no other children?
A. No, sir.
Q. I believe that's all.

Pauline Tolley Shelton.

RE-DIRECT EXAMINATION.

By Mr. Turk:

Q. Pauline, just where was the little boy standing there when Mrs. Mullins' car came over the hill up there?

A. Bobby?

Q. Where was Bobby standing, yes; is it where you put your X?

A. And I have got my initials here beside it.

Q. And you tell the Court and jury Bobby was never at any time up level with or behind any of the posts or trees?

A. No, sir.

Q. He was between, at all times, between the posts and the road and between the trees and the road?

A. Yes, sir.

page 148 } Q. And the little Sutphin boy came down between the posts and road, too?

A. They were close enough for Bobby to hand him the toy.

Q. And neither one of them was behind any post or tree?

A. No, sir.

Q. And they were in that position when the lady came over the top of the hill?

A. They were still standing there; yes, sir.

The witness stands aside.

Mr. Turk: Plaintiff rests, Your Honor.

Mr. Spiers: I have a motion I'd like to make, Your Honor.

(The following took place in chambers:)

Mr. Spiers: If Your Honor please, I'd like to move to strike the evidence of the Plaintiff on the ground the evidence does not show negligence on the part of Mrs. Mullins, particularly with reference to two points. In the first place, one of the apparent bases for negligence is speed, which I have asked the Court to exclude from consideration of the jury, and which I deem to be well founded, because of the basis upon which that opinion was reached; and

page 149 } secondly, on the ground that the balance of the evidence does not show negligence on the part of Mrs. Mullins. In the first place, she was proceeding along a street which was, as the Court can see from Exhibit No. 2

offered by the Plaintiff, taken from the brow of the hill; the vision was obstructed, if you take the evidence of Mrs. Shelton—at its best, it proved this: Her son was somewhere in the yard, according to the mark she has placed on the map—he was within a couple of feet of the roadway—which she has contradicted herself in her own evidence. At any rate, he was somewhere along that bank as this car proceeded along. She has now testified that it did slow, and at the time the car got between her—she was at this point at this mail box—she was almost directly across the road from her son at the point at which the accident happened; the car came between her and her son at that time he was still standing on the bank, and had not made a move; and that basis—I think that even though Mrs. Mullins, had she seen the child—or was she required to see him in the exercise of ordinary care, was not an insurer; and she had a right to proceed, in the exercise of ordinary care, and she did everything
page 150 } that was reasonable under the circumstances, particularly in view of the fact there was a woman running from that direction, distracting her from what she normally may have seen. I think that the cause of this accident is Mrs. Shelton's action herself. I don't think there is any showing of negligence on the part of Mrs. Mullins.

The Court: I think the issue is one for the jury to determine whether or not she saw or in the exercise of reasonable care, ordinary care, should have seen the child or could have seen the child. It is not one of law for the Court to strike. I will overrule your motion.

Mr. Spiers: We except, sir, and wish to cite some recent cases, among them *Virginia Transit Company* v. *Schain,* 205 Va. 373; 137 SE 2d 22,—decided in September, which reversed the jury verdict in the case in which a child ran from the street all the way from this side and was struck by a bus. There is *Gabbard* v. *Knight* and *Hosey* v. *Owens,* both of which cases under those peculiar circumstances sustained the jury verdict—I think it was in Hosey. No, it wasn't; it was another one. 137 S. E. 2d, *Gabbard* v. *Knight.* The most recent case in the Commonwealth of Virginia is
page 151 } *Virginia Transit Company* v. *Schain,* in 205 Va. 373; 137 S.E. 2d p. 22. Another case in point which sustains me, I misquoted a moment ago—*Nosay* v. *Owens*, 193 Va. p. 343; 68 S.E. 2d, Page 531—contrary case. *Gabbard* v. *Knight,* which is most recent, 202 Va. 40, 116 S. E. 2d, Page 73, which cites the Gabbard case, and the other one I will get the citation for in just a minute—based on evidence

which was much different, which showed the child was walking toward the street, and was obviously in sight, and so forth, and the acts should have been anticipated. *Baker* v. *Richardson,* the one I had in mind, 201 Va. 834, 114 S.E. 2d, Page 599. The last two cases, based strictly on the facts, it it was a jury issue. The first two I cited said it was not evidence—

The Court: On the evidence as presented so far, Mrs. Shelton has indicated by a mark very close to the road—her testimony put the child back six or seven feet, she standing in a field across the road—no exact scientific way of determining. It's a question for the jury to determine, to give such weight to the evidence as they see fit. It's not a question of law.

Mr. Spiers: We except to the Court's rul-
page 152 } ing. I'd like to move the Court for a view.

The Court: All right, I'll grant you a view.

(Court and counsel return to open court.)

Mr. Spiers: I'd like to recall Mrs. Shelton.

Mr. Turk: I would object to putting her back on. He had announced he finished with her.

Mr. Spiers: I don't know anything that says I can't use her as my own witness.

The Court: I don't know, either.

Mr. Turk: I except to the ruling of the Court.

(Mrs. Pauline Tolley Shelton, having been previously sworn in this cause, is recalled to the witness stand.)

DIRECT EXAMINATION.

By Mr. Spiers:

Q. Mrs. Shelton, I just have a couple of questions. I believe you testified that this path goes near that mail box? (Indicating on map)

A. Yes, sir.

Q. That you were on?

A. Yes, sir.

Q. Within three or four feet of it?

A. No. I expect further than that, where the path is and where the mail box is.

Pauline Tolley Shelton.

Q. It's beside the mail box?

page 153 } A. You come out up, you know, I'd say right along here.

Q. About here?

A. Um-hum.

Q. Will you mark that?

A. (Marking map) I think that's right; I'm not sure, really.

Q. In other words, this would be where you have a circled X?

A. Yes.

Q. Would be where it comes out into the road?

A. I think so.

Q. Could you estimate where you were with reference to the road when you saw Mrs. Mullins, and started running toward your son?

A. What's that again?

Q. Where were you, with reference to the road, when you saw Mrs. Mullins?

A. I was down here.

Q. Would you put an X there, and run two circles around it?

A. (Marking diagram) I don't know how far back, I mean.

The witness stands aside.

page 154 } Mr. Turk: Exception to the Court's ruling, allowing the witness to repeat her testimony.

(The next witness called to the witness stand was John H. Spangler, Notary Public for the State of Virginia at Large, who was then duly sworn. and questioned by Mr. Spiers regarding his qualification as a Notary Public for the State of Virginia at Large, whether he administered the oath to Pauline Tolley Shelton prior to taking her deposition on the 17th day of October, 1964, and was then asked to read the following excerpts from the deposition of Pauline Tolley Shelton:)

"Q. And where was he? Was he in his own yard, or in Alfred's?

A. They were in Alfred's yard.

Q. As you came—as the boy went up towards Alfred's yard, you said there was no cars coming?

A. That's right.

Pauline Tolley Shelton.

Q. And he went ahead and crossed the street? I believe at that time he was about three, was he?
A. Yes, sir.
Q. As he got to Alfred's yard—is it above or below the level of the street?
A. It's a little bit above the street.
page 155 } Q. Did he go up the bank?
A. Yes, sir.
Q. Went up the bank?
A. Um-hum."

"A. They were standing about—oh, no—8 feet from the street.
Q. I believe that at the Tolley home there are a couple of brick or concrete columns?
A. Yes, sir.
Q. Are they right at the road?
A. No, sir.
Q. How far back from the road are they?
A. I'd say they are every bit of 8 or 10 feet back from the road. My estimate might be wrong."

"Q. And he was standing on the bank then?
A. Yes.
Q. Talking to the—
A. Little Sutphin boy."

(Mr. Turk objected to the reading of the deposition, and then withdrew his objection.

page 156 } "Q. Then what happened?
A. Well, when I seen her, I guess I just froze, because I didn't have a chance to get to him, and she still didn't slow up.
Q. He was just standing there, wasn't he?
A. Yes, sir. But I guess she seen him make a move, and she started slowing up then.
Q. What kind of a move did he make?
A. I don't know.
Q. You were watching him, weren't you?
A. It happened between me and him.
Q. Between you and him?
A. That's right.
Q. What do you mean, "between you and him"?

Officer Jim Whitt.

A. She had got up with him, and I don't know whether he had stepped off the bank, or not.

Q. In other words, the last you saw him—saw of him, he was standing on the bank?

A. That's right.

Q. With his friend?

A. That's right."

OFFICER JIM WHITT,

(having been sworn previously in this cause, is recalled to the witness stand.)

DIRECT EXAMINATION.

page 157 } By Mr. Spiers:

Q. Mr. Whitt, I believe you previously testified that Mrs. Mullins on this occasion was operating a Buick, '56 Buick Sedan automobile?

A. Yes, sir.

Q. Black and white?

A. That is true.

Q. And you testified you examined this car?

A. Yes, sir.

Q. Would you tell the jury your best judgment as to the length of the car?

A. I'd say about 15 foot.

Q. 15 feet long?

A. Yes, sir.

Q. That's all.

Mr. Turk: No questions.

The witness stands aside.

Mr. Spiers: The Defendant rests.

The Court: Any rebuttal?

Mr. Turk: No rebuttal. Let me put the little boy on the stand.

Mr. Spiers: If this is not in the nature of rebuttal—

Mr. Turk: I want to show the jury he didn't

page 158 } remember anything about the happening of the accident.

The Court: He was three years old at the time, and I think the jury can draw their conclusion, since it's been five years since the happening of the accident.

Mr. Turk: That's all right.

(At 6:00 P.M. the proceedings were adjourned pending completion of instructions. The Court admonished the jury not to discuss this case during adjournment.)

(The following took place in chambers:)

Mr. Spiers: I want at this time to renew the motion to strike the evidence and grant summary judgment on behalf of the Defendant, on the grounds which have been previously assigned—no showing of negligence, speed or lack of proper lookout, but just a showing of mere unavoidable accident, as far as Mrs. Mullins is concerned.

The Court: I will overrule it.

Mr. Spiers: Except to the ruling of the Court.

Mr. Turk: We respectfully ask the Court to strike the evidence of the Defendant, insofar as it pertains to liability, on the grounds that the Defendant herself convicts
page 159 } herself of negligence in that she says she never saw the child until he was running off the bank—
Mr. Spiers in his opening statement said he had come from behind a post: the first time she saw the child, he was running down the bank, and she didn't ever attempt to put him back of the post, or anything else. And the clear uncontradicted evidence is that there is clear visibility down the road there for 580 or 600 feet. And this woman testified that she never saw the child until it was almost on her—until she was almost up level with the child. And we take the position, Your Honor, that convicts the Defendant of failure to keep a lookout as a matter of law. and in the sense the little boy could not be guilty of contributory negligence. The Court should instruct the jury that the Plaintiff is entitled to recover, and send to the jury only the question of damages.

The Court: Well, the pictures show there was quite an overhang of limbs: the physical view also shows that there was an overhang of the limbs from the trunks of the trees, and it's a question for the jury as to where the boy was standing, whether she could see him, or by the exercise of ordinary care should have seen him—for that
page 160 } reason I will overrule your motion.

Mr. Turk: We except to the ruling of the Court.

Instruction No. 1—given without objection.

Instruction No. 2.

Mr. Spiers: I think the instruction is misleading for the jury. I think they have to show she was negligent, and that is the cause of the accident—after you take into account that he could not be guilty of negligence. There is no allegation of contributory negligence.

The Court: What was the proximate cause?

Mr. Turk: It has to be "efficiently contributing" to cause, even though he isn't charged with it.

The Court: He can't be guilty of contributory negligence.

Mr. Turk: All her negilgence had to do was efficiently contribute to the cause.

Mr. Spiers: It has to be the proximate cause.

Mr. Spiers: You haven't said "efficiently contributed"; you said "contributed".

Mr. Turk: Take out "proximate" and put "efficiently contributed to the accident"—it's all right with me. This case was given and approved—

The Court: It should have preponderance of the evidence —hasn't raised that question, though.

page 161 } Mr. Spiers: I didn't even notice it. I will raise that question. Let's see the case in which that was approved.

Mr. Turk: It doesn't set it forth in here.

Mr. Spiers: There is nothing in this case that indicates that language at all.

Mr. Turk: It hadn't been given.

The Court: I think that's all right.

Mr. Spiers: I except to the ruling of the Court. It doesn't tell what her duties were, or anything else.

(Instruction No. 2 given as amended, over objection.)

Instruction No. 3.

Mr. Spiers: The gist of this Instruction No. 3, Your Honor, regardless of whether it's in Mr. Double's book, or not—It goes on down and talks about perils which should have been apparent. You have got to see the child, assuming there are going to be perils; and my client has testified—irrespective of Mr. Turk's statement—that that child came out from behind a column. I remember her using that phrase

page 162 } "column or tree, because he wasn't on the bank," and she did not see him.

The Court: You are entitled to an Instruction covering that point.

Mr. Spiers: I agree with that, but it's going to be complete and full. This one is not.

Mr. Turk: This sets forth the standard of care that is required; once she sees or should have seen the child—

Mr. Spiers: Danger and probability—you don't have to assume there is any danger or probability until you see or should see the child.

Mr. Turk: Until you first see.

Mr. Spiers: This degree of care is proportionate to the ability of the child to perceive. There isn't any degree of extra care arising until the child should be seen. The extra care doesn't even arise. You can see a child in a tree and figure he's in danger; that doesn't mean you have to do a thing. The peril is there. But if you see a child in close proximity to a street, then a duty arises to do certain things. You can't ignore all the circumstances.

The Court: That's right. You have got a woman running at her hollering, and the car in dangerous proximity to a child which she says is hidden. I am going to page 163 } give it, and you can give the other one which you are talking about.

Mr. Spiers: I except to the ruling of the Court. It is confusing and incomplete.

Instruction No. 4—given as amended.

Mr. Spiers: I object to the "efficiently contributed", and on the same ground I objected to—

The Court: I think that "efficiently contributed" has got to go through all the instructions.

Mr. Spiers: I except to the ruling of the Court.

The Court: The same as "efficiently contributed" to the speed.

Mr. Spiers: There is absolutely nothing, even if you assume speed, there is absolutely nothing or no showing that such speed had anything whatsoever to do with this accident. I think the instruction is objectionable on that part. And in the second place, there is no evidence of excessive speed, which is credible, which should be submitted to the jury. There is Mrs. Shelton's statement, now, that it was 30 to 35 miles per hour, based on experiments more than a month later—and that she did not so indicate to the officers; that she testified to a different speed in discovery depositions—

still on the basis of the experiments, which is not
page 164 } admissible evidence, and anything based on it is
inadmisible. And I think it's highly prejudicial
to the Defendant.

The Court: I think you've got a point there. You don't have any credible evidence, according to speed.

Mr. Turk: I was careful to say, based on her experience, what, in her opinion, was the speed of that automobile. Now, Mr. Spiers, I think, is overlooking the fact that she is not the Plaintiff in this case.

Mr. Spiers: No—looking at her evidence.

Mr. Turk: Other evidence—she said she had run tests—it all goes to the credibility and what—she testified in no uncertain terms that based on her experience as a driver, I believe she said, since 1944. And she saw this car 350 feet away, and her range of vision—even though she was watching the boy—and Mr. Spiers asked her about speed on discovery deposition himself, and evidently cross-examined her about that when she testified in the criminal hearing. I think it's one of the elements to be considered by the jury.

Mr. Spiers: The fallacy of Mr. Turk's reasoning—you
are bound by it from then on—and I am not a
page 165 } criminal for getting this out of her: She testi-
fied that estimate was based entirely on an experiment conducted a month later. I don't care what she said in response to his question.

Mr. Turk: She said both ways; based on her experience as a driver—

Mr. Spiers: You said that she didn't, and she then came along and testified that she was basing it on an experiment.

Mr. Turk: I asked her to state the basis, and was it on her experience as a driver, and she testified to that speed.

The Court: You have got a lot of evidence as to the credibility of that. You can argue that. I am going to give this Instruction.

Mr. Spiers: Except to the ruling of the Court on both grounds.

The Court: I am giving Instruction No. 5.

Instruction No. 6.

Mr. Spiers: You are bringing it in again in another way. Look at 4 and compare it. Part of it's covered in 3. If you keep hammering at it, to get it to the jury, you got it made.

The Court: That part's covered—the middle part of this

Instruction No. 6.

page 166 } Mr. Turk: It's all right with me to put "exercise ordinary care as defined in Instruction 3, if you believe from the evidence in this case—"

The Court: Well, how are you going to do that?

Mr. Spiers: You have control and lookout and speed.

Mr. Turk: Where is control?

Mr. Spiers: That's the same as in 4—to increase her diligence to avoid danger. I think it's just repetitive, and keeps re-emphasizing.

The Court: In 6 it hasn't been covered. In 3 and 4—

Mr. Spiers: —and 5, counting speed—5 has speed.

The Court: I was looking at control—and lookout is your whole case.

Mr. Spiers: That's what I think—lookout.

Mr. Turk: You refuse, Your Honor, and I will state my exception.

The Court: The reasons, so I won't have to write them on here. Instruction No. 6 is refused in that Instruction No. 3 covers the ordinary care, and No. 4 covers the duty of lookout, and No. 5 covers the duty of speed, and to give No. 6 would be a repetition of 3, 4 and 5.

page 167 } Mr. Turk: Counsel for the Plaintiff would respectfully point out to the Court that Instruction No. 6 is an instruction dealing with the duties of the operator of a vehicle that is not covered in any other instruction, I don't believe. There is another instruction on proper lookout. But there is nothing in there about the reasonable speed under the circumstances. And I think this instruction is proper, and I don't believe it's a duplication of any other instruction, and I believe that the Plaintiff is entitled to have this instruction given.

The Court: Ordinary care required of the driver of a motor vehicle towards children is commensurate with the danger and probability under the circumstances—that's in No. 3.

Instruction No. 7.

Mr. Spiers: I don't think there is any evidence of No. 7. I don't know—I have seen that, and a lot of them, such as, "You will fully and fairly compensate the Plaintiff"—that is one they try to keep getting in on the condemnation suit. I think that's inviting them to go up high. I think "fairly compensate the Plaintiff" is all that is required to be

used. Now, I think it ought to end after "col-
page 168 } lision." Those are the objections I have.

The Court: There is some evidence as to his future earning capacity from the loss of his depth perception, and all that.

Mr. Spiers: That is pure speculation.

The Court: And the dollar figure added to it. I think that instruction is all right.

Mr. Spiers: Except on the grounds assigned.

The Court: What about your property damage instruction?

Mr. Spiers: Couldn't we just say that if they'd bring in a verdict for the Plaintiff?

Mr. Dalton: For the amount? He's responsible for the glasses and medical expenses, future.

Mr. Spiers: There isn't any evidence of medical expenses in the future, other than glasses.

The Court: Four examinations a year?

Mr. Spiers: $12. That's pure speculation. He doesn't know—he said so.

Mr. Turk: Well, six to twelve—that was as much as he could estimate it.

Mr. Dalton: $30 to $40 for glasses.

Mr. Spiers: None of the glasses in evidence that ever cost that much. $25 is the most.

page 169 } Mr. Turk: Twenty—some of them.

Mr. Dalton: That was the testimony, though.

The Court: This instruction covers what he's entitled to.

Mr. Spiers: Let me see the instruction.

Mr. Turk: I am not sure that first sentence is right. It might be. I want to be fair about it. It might indicate to them that the Plaintiff Robert Lee Tolley isn't entitled. You might be better to say "The Court instructs the jury that should the Plaintiff Robert Lee Shelton be entitled to recover in this action."

The Court: You should have the heading on No. 7, to instruct the jury from the evidence and other instructions of the Court, "You find your verdict for the Plaintiff Robert—"

Mr. Spiers: That is Charles.

The Court: "Charles L. Shelton."

Mr. Turk: I believe it ought to. If you find one for Robert Lee Shelton, then you say he's entitled to recover. And the statute says that you have to bring separate verdicts.

The Court: "The Court instructs the jury if you believe from the evidence and the other Instructions of the Court

you find your verdict for the Plaintiff Robert Lee
page 170 } Shelton, then Charles L. Shelton is also entitled
to recover of the Defendant."

Mr. Turk: I believe that covers it, Your Honor. "The Court instructs the jury if from the evidence"—how did we say 7? "The Court instructs the jury if from the evidence and the other instructions of the Court you find your verdict for the Plaintiff Robert Lee Shelton, then the Plaintiff Charles"—"The Court instructs the jury if from the evidence and other instructions of the Court you find your verdict for the Plaintiff Robert Lee Shelton and Charles L. Shelton"—and take out "he's entitled to recover in this case," "then the Plaintiff is also entitled to recover in this case—action."

The Court: The question mark is out, or you will have to rewrite that.

Mr. Spiers: The subparagraphs are going to be confusing.

Mr. Turk: We could put that in the first two.

Mr. Spiers: You are going to have to rewrite it; in other words, B and C and half of A we can stipulate.

Mr. Turk: Right.

page 171 } Mr. Spiers: Couldn't you write it over and
say, "necesary medical bills incurred on behalf
of the infant and as a result of injury sustained and expenses incurred," by Shelton, "and loss of wages not to exceed"—

Mr. Turk: Totalling—

Mr. Spiers: $2550.

Mr. Turk: And any additional.

Mr. Spiers: Combine these with that, and that will be—

The Court: "Medical expenses that can be reasonably foreseen."

Mr. Spiers: That's the way it ought to be—two paragraphs.

Mr. Turk: Necessary medical expenses incurred on behalf —you want to put all that in?

Mr. Spiers: Necessary expenses incurred to date, amounting to so many dollars.

Mr. Turk: The expenses—other expenses incurred to date amounting to twenty-five sixteen eighty-three.

The Court: "Any additional medical expenses that can be reasonably forseen between now and the time the aforesaid infant reaches majority."

Mr. Spiers: I except to that on the ground
page 172 } I think that is asking the jury to speculate.

The Court: Paragraph A?

Mr. Spiers: Paragraph B. "And will fully and fairly

compensate"—which increases the amount, and it asks them to in effect do so. And I again say it should not be referring to the amount in the Motion for Judgment.

Mr. Turk: Take that out, and—

Mr. Spiers: In both of them.

The Court: I will give them this way, if they ask for it this way. You rewrite that.

Instruction No. A—given as amended Instruction B.

Mr. Turk: I object to B as covered by A.

Mr. Spiers: If you will read closely, it relates only to proximate cause.

Mr. Turk: You started out there, you have to "prove by preponderance of the evidence."

Mr. Spiers: I said "not only preponderance." Read it. I eliminated it on purpose.

The Court: Eliminate it down here "proximate cause."

Mr. Spiers: I tried to.

Mr. Turk: No. A—when he takes out that, that isn't a correct statement of the law. It has to be a prox-

page 173 } imate cause.

Mr. Spiers: In the first place, if the Plaintiff does not prove that she was negligent, then you have to go forward—

Mr. Turk: This is just a means of trying to get exactly the same thing twice.

Mr. Spiers: No, sir.

The Court: Got this first statement in both instructions?

Mr. Spiers: No, sir.

The Court: Just like getting reasonable doubt in criminal instructions.

Mr. Spiers: If Your Honor please, I have in the first one, "The Court tells the jury," it cannot act on guess and conjecture, "and if Plaintiff does not prove a preponderance of the evidence that the accident"—

The Court: If you do it in here.

Mr. Spiers: It is incumbent on her to prove by a preponderance of evidence that such negligence was the proximate cause of the accident—two different facets. You can have a case where a man is guilty of negligence, and not liable—and that is what I am trying to tell the jury.

Mr. Turk: I don't believe you can. Why, in

page 174 } this case, she could be speeding—that isn't a proximate cause—at least he can argue that.

Mr. Spiers: There are two different duties—I have always felt that. I tried a case in Roanoke purely on cause—

that's the part I am talking about, you have got in there twice.

The Court: You have got Mrs. Mullins covered—to prove by a preponderance of the evidence Mrs. Mullins was negligent—that's in each of them.

Mr. Spiers: I don't follow you, Judge.

The Court: You have got it right here.

Mr. Spiers: The accident and injury?

The Court: "And if the Plaintiff does not prove by a preponderance of the evidence that the accident and resulting injury to Bobby Lee Shelton were the results of negligence on the part of Mrs. Mullins."

Mr. Spiers: Not only to prove negligence.

The Court: You are saying—

Mr. Spiers: Go further and prove proximate cause. I grant you Instruction A does cover the additional point. You also tell them that the burden is on the Plaintiff again to prove negligence. The instruction, as offered, is a correct statement of the law. I don't know how you would
page 175 } leave it out of A—how you would say it again, or get this other point in without repeating yourself.

The Court: Unless you state the Plaintiff must also prove by a preponderance of the evidence that such negligence, and cut out that first two lines and one word. I think we are quibbling. I will grant it.

Mr. Turk: We except to the granting of the instruction on the ground that it is previously covered by Instruction A; further on the ground Mrs. Mullins was guilty of negligence. There is no question here about it being a proximate cause. If she was guilty of negligence in the operation of her car—Mrs. Mullins—it was an efficient cause; does not have to be Sole Proximate Cause.

Mr. Spiers: I agree with you, if you can limit it to lookout. You got speed in there, according to you.

The Court: Speed?

Mr. Spiers: 30 miles an hour.

The Court: Lookout is the whole—

Mr. Spiers: Case, I believe. There a similar instruction was given and granted in *Gabbard* v. *Knight*, which the Court of Appeals reversed the case—and the way I phrased it, I hope and think that I have taken care of the ob-
page 176 } jection—which is 116 S.E. 2d.

Mr. Turk: She has no right to assume that a minor—the Court said that.

Mr. Spiers: Keep reading the thing. That's what the

Court of Appeals said in this case. There is a plain old instruction in a pedestrian case of an adult—you can assume nobody is going to cross. Here's what the Court of Appeals said—202—

The Court: What page?

Mr. Spiers: What the Court of Appeals said—

The Court: What page?

Mr. Spiers: 40. The headnote—of course, I don't know whether the headnotes are the same.

The Court: Not designated for printing.

Mr. Spiers: There is one I have corrected—read this, and the next paragraph—they have it all. This is what I have tried to cure in the last 4 lines of my instruction. She has no right to assume anything after she sees him. What I have said, she has a right to assume that until she sees him.

Mr. Turk: That's exactly what that instruction says. It says, "until the contrary appeared or should have appeared."

page 177 } Mr. Spiers: "The driver sees or in the exercise or ordinary care, or near an approaching street"—he has no right to assume the child will cross the street—that's exactly what I have said. He has got to see him first—he has a right to assume it up until then.

Mr. Turk: Until the contrary appeared—that's seeing.

Mr. Spiers: That isn't what I have said. I put "until she saw."

The Court: That's just different language. "Until she saw or in the exercise of ordinary care should have seen."

Mr. Spiers: I think I used the language of the Court to justify it—I might not have.

The Court: I am going to refuse that one.

Mr. Spiers: Except to the ruling of the Court, because of the language that you have added.

The Court: Because of the language you have added. "Until she saw or in the exercise of ordinary care should have seen," is exactly the same language as "until the contrary appeared or should have appeared."

Mr. Spiers: I except to the Court's ruling.

page 178 } The Court: Instruction C, I have added. "at which time she was no longer justified in relying upon this assumption"—to the end of it. I think that's getting close. But instead of making it—or the addition as you have it, if you would say, "If you further believe she saw or in the exercise of reasonable care should have seen, then she was no longer justified in relying"—that might correct it.

Mr. Spiers: I will offer it the way it is there, C-1.

The Court: I will refuse C-1 as offered. And if you will type that other out, as I said, I will take another look at it.

Mr. Spiers: You said to add, "and if you believe"—

The Court: "If you further believe from the evidence that she saw or by the exercise of reasonable care should have seen the child, then she was no longer justified in relying upon the assumption that the child would not attempt to cross 7th Street in front of her"—but those facts were brought home, or should have been brought home to her to assume a clear road ceased to exist. I think that's the point you want to get across to the jury.

page 179 } Mr. Spiers: And she was no longer justified in assuming that he would not cross the road?

The Court: Assuming that he was not attempting to cross the road.

Instruction D.

Mr. Turk: Your Honor. I would object to the granting of Instruction No. D on the ground that it's not supported by Mrs. Mullins' own evidence, and that Mrs. Mullins had no reasonable opportunity to avoid striking the child after seeing him—and you are taking away there the duty of her to look, if she had no reasonable opportunity to avoid striking the child after seeing him—and you are taking away that part of the Plaintiff's case that entitles him to recover—"if she should have seen him"; and you are saying down there that she had no opportunity to avoid striking him after seeing him, "then you shall return your verdict for the Defendant."

The Court: When she saw the child she was so close to him that it was impossible to do anything other than what she did—slam on the brakes hard and cut.

Mr. Spiers: That's her theory.

The Court: That's what the law is.

page 180 } Mr. Turk: And you are saying it's going to be, "After seeing or should have seen"?

Mr. Spiers: Her theory is she didn't see him until she was running too closely.

The Court: "After seeing him" added in there, or "should have seen him in the exercise of reasonable care."

Mr. Spiers: According to her, he came out of nowhere.

The Court: Her theory was she saw him?

Mr. Spiers: Come out from behind a column or tree.

The Court: You can't argue she didn't see him. I'll give it as offered.

Mr. Turk: We except to the ruling of the Court, and to

the granting of Instruction D on the grounds already pointed out to the Court.

Instruction E.

Mr. Spiers: At first blush that would look like Instruction D. It is my feeling that in a case like this, if you assume that Mrs. Mullins saw this child, she still could see, if he was standing still, and everything, as long as she exercised care to do so—she didn't have to guess he was going to run in the street.

page 181 } Mr. Turk: You don't normally see a three-year old standing on the edge of the street—that's contrary to her own theory of the case, Your Honor.

Mr. Spiers: This says, "Even though you believe she should have seen him, she still would have had a right to proceed if she exercised reasonable care to do it."

Mr. Turk: You got her repeating she's not an insurer—or had an instruction on that.

Mr. Spiers: Where is that?

The Court: Instruction D.

Mr. Spiers: You are right. Strike out "such fact."

The Court: And D has also got "at which time it was her duty to increase her diligence."

Mr. Spiers: It restates her duty, even though she saw the child, she still didn't have to stop if he appeared to be safe, and everything was reasonable.

The Court: Why don't you say that?

Mr. Spiers: I want to put all this junk in there for their benefit.

The Court: I will have to refuse it as offered.

Mr. Spiers: I will offer it as amended, then.

page 182 } Offer it like that.

Mr. Turk: Is this just exactly like D? What have you taken out?

Mr. Spiers: Everything down to where she had no duty—"exercise of reasonable care—it appeared safe to do so."

Instruction E-1.

Mr. Turk: I would object to the granting of Instruction E-1 on the grounds there is no evidence whatever to support this instruction offered by the Defendant. Now, if she says she didn't see the child until she was right on top of him; now, then, the Defendant is offering this instruction here, that if she saw him up there, then she had no duty to stop—maybe she didn't have a duty to stop. This is contrary to her own

theory of the case, and is without evidence to support it, and I don't believe it's a correct statement of the law.

The Court: Contrary to what her evidence is. Her evidence is that she saw the child only when she was at such point it was too late to do anything about it.

Mr. Spiers: We amended this. "The Court tells you even though you may believe from the evidence
page 183 } in this case Mrs. Mullins should have seen the child near the street"—not that she saw him, but that she should have seen him—that's their theory. She still had no duty to stop.

The Court: That's right.

Mr. Spiers: Unless a reasonable person under these circumtances would have—and she had a right to go ahead.

Mr. Turk: That she had a right to proceed?

Mr. Spiers: Only in the exercise of reasonable care. The sum and substance—

Mr. Turk: She would proceed with due diligence. Nowhere she's been told she had to stop.

Mr. Spiers: I am telling the jury she doesn't. We have told them she proceeded at her own peril—which isn't the law.

The Court: What case did you get this out of?

Mr. Spiers: Nothing. It's good law. It's an amalgamation of Gabbard, Hosey.

The Court: I am going to refuse it.

Mr. Spiers: We except to the Court's ruling as to E-1. We except on the grounds that even though she should have seen the child, to proceed—and this instruction merely tells the jury she could proceed under the theory of
page 184 } reasonable care, that it was proper to do so.

Instruction F.

The Court: That's a correct statement of sudden emergency of law?

Mr. Spiers: That's the only defense she's got. She says the child was not on the bank visible, it suddenly appeared running down the bank—that is an emergency.

The Court: I will give you F.

Mr. Turk: We object to the granting of Instruction No. F on the ground that such an instruction is not applicable to the case at bar, and that the sudden emergency doctrine does not apply when infants are concerned, or an infant is concerned—and certainly not in this case, since there is no evidence to support the instruction.

Instruction G—given.

Mr. Turk: We object to the granting of Instruction No. G on the ground there is no evidence to support it, and that the Defendant by her own testimony convicts herself of negligence in failing to keep a proper lookout.

Instruction H.

The Court: I don't know about that mother waving over there.

page 185 } Mr. Spiers: That's the cause of the whole accident. He's looking at his mother, five feet away from the street.

The Court: What about No. H?

Mr. Turk: I would object strenuously to the granting of Instruction No. H. I think it's covered in practically every instruction that he's given; and here he's saying, as we have said in all these, there had to be negligence on the part of her—it's just another way he's trying to get in another instruction that implies that they shouldn't return a verdict for the Plaintiff.

Mr. Spiers: That is an instruction based on something a third party did.

Mr. Turk: You said a half dozen times there has to be negligence on the part of this lady, and attributable to her, before they can recover—that's another way of saying that.

Mr. Spiers: I think the jury should be told in this case unless they believe the mother caused it, we are hooked.

The Court: What case does this come out of?

Mr. Spiers: I don't know, Judge—*Atlantic Rural Exposition* v. *Fagan*; I have used it in dozens of cases.

page 186 } The Court: Infant cases under seven.

Mr. Spiers: No, sir. What this is, is the third party intervening. Now, the last case I used it in involved an infant—not little children—sixteen years old or something like that. You can expect anything from a three-year old child. I don't think even the law requires you to anticipate you can expect anything from a third party. I don't have to assume that third party is going to do anything; I think the child would have stayed where it was. Another thing—and I think this is in Mrs. Mullins' favor, and the jury has got a right to consider it—that the mother was making all this racket. What would you do? You'd have looked left—and as soon as she looked back—and here's what she said: She tried

to stop—and that's Mrs. Mullins evidence, that she looked as soon as she heard that, she turned and tried to stop, and the boy was there—and that's as fast as she could do it.

The Court: I have given this instruction, but I have never given it in the case of a child like that.

Mr. Spiers: I think that would be your only
page 187 } question here. You have got a case from a third
party that precipitated it, in my opinion—and it's hard to make the jury swallow such a thing, I know.

The Court: It's a correct statement of the law, and I will give it.

Mr. Turk: Counsel for the Plaintiff objects to the granting of Instruction No. H, in that it is not applicable to this case, and this case is based solidly on whether or not the Defendant was guilty of negligence on her part. Now, to come in here and give this instruction, and infer that this thing may have been caused by the negligence of the mother over in the field, seems to me to be improper, and not applicable to this case, but most prejudicial to the infant Plaintiff.

The Court: This is the full table?

Mr. Spiers: From 20 to 100, and applies to cars.

The Court: I will give Instruction I.

Instruction J.

Mr. Turk: I object to the granting of Instruction I, in that we have no braking distance in the case; we don't know when she applied her brakes, or anything else, because there's
no evidence of skid marks, and there's nothing
page 188 } in the case on which to—

The Court: You know where she stopped, and they can start from that point and figure backwards.

Mr. Spiers: That's the purpose of the instruction. She stopped within 43 feet.

Mr. Turk: From the time she hit him?

Mr. Spiers: Yes.

Mr. Turk: We don't know.

Mr. Spiers: According to your client, she never did.

The Court: That should be absolutely right. They can attach such weight to the evidence as they see fit.

Mr. Spiers: I believe under the cases they can disregard it. If Your Honor please, that's the other side of the coin. I think if you had a witness who testifies knowingly and falsely about anything—

The Court: That doesn't give the jury the right to dis-

regard it. I think the jury has to determine whether it's their imagination, or whether—

Mr. Spiers: You tell them in here that doesn't make it nugatory—which doesn't make it just useless—it can be useless. The jury might believe that falls on every-
page 189 } thing—she's just not telling the truth. *Zircle* v. *Commonwealth,* 55 S.E. 2d. p. 24.

The Court: That is West Virginia law. I still think it's Virginia law. It's up to the jury to believe any or all.

Mr. Spiers: Or none—that's what I mean.

The Court: That's right. Then you have a right to disregard it or give it such weight as you think it's entitled to. I guess that's all right.

Mr. Turk: Counsel or the Plaintiff objects to the granting of Instruction No. J on the ground it is not a correct statement of Virginia law; and first, there is no evidence that there has been any inconsistent statements. The things he's trying to say were inconsistent—proximate distances—she qualified as proximate; and instructions are couched in such a manner as to indicate that the Court feels like that one witness made prior inconsistent statements, and tells the jury that they have a right to disregard the whole testimony which she gave.

The Court: She was inconsistent on her speed.

Mr. Turk: Highly prejudicial to the Plaintiff and we except.

Instruction C-1A.

Mr. Turk: Counsel for the Plaintiff objects to
page 190 } the granting of Instruction C-1A on the same grounds as set forth in *Gabbard* v. *Knight.* The Court in *Gabbard* v. *Knight* said such an instruction was not applicable, and was prejudicial to the Plaintiff. The Court in that case said that the Defendant didn't have a right to assume that infants would not attempt to cross between intersections. And it is wrong for the reason that the Court set out in the case that he just mentioned. We except to the granting of the instruction.

(Court and counsel return to open court.)

(The Court instructs the jury.)

(Closing summations were made to the jury by Mr. Dalton

for the Plaintiff, by Mr. Spiers for the Defendant, and by Mr. Turk for the Plaintiff.)

(The jury retired to deliberate, and later returned a verdict in favor of the Defendant.)

Mr. Turk: Counsel for the Plaintiff, Your Honor, respectfully moves the Court to set aside the jury verdict and to grant to the Plaintiff new trial, on the grounds that the verdict of the jury is contrary to the law and the evidence, without evidence to support it, plainly wrong, and on the further ground that the Court gave certain instructions on behalf of the Defendant which were objected to by the
page 191 } Plaintiff, and failed to give certain instructions the Plaintiff felt was proper and should have been given.

The Court: I will overrule the motion and enter final judgment in favor of the Defendant in both cases.

Mr. Turk: We except to the ruling of the Court.

(End of proceedings.)

A Copy—Teste:

H. G. TURNER, Clerk.

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