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Record No. 6220

In the

Supreme Court of Appeals of Virginia

at Richmond

SHELTON HORSLEY STEVENS

v.

CHARLES E. SUMMERS, ET AL.

FROM THE CIRCUIT COURT OF NELSON COUNTY

RULE 5:12 BRIEFS

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

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 6220

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 5th day of October, 1965.

SHELTON HORSLEY STEVENS, Plaintiff in error,

against

CHARLES E. SUMMERS and
WALTER L. McCAULEY, Defendants in error.

From the Circuit Court of Nelson County
C. G. Quesenbery, Judge

Upon the petition of Shelton Horsley Stevens a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Nelson County on the 16th day of April, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Charles E. Summers and another were defendants; 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

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This matter came on to be heard on the 28th day of September, 1964, upon defendants' motion to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence and was fully argued on that date by counsel for the parties.

It appearing to the Court that that portion of the jury verdict reading, "We, the jury, find for the plaintiff, Shelton Horsley Stevens, on his claim against the defendants, award unto him the sum of $6,500 for his damages" is contrary to the law and evidence, it is accordingly ORDERED that the same is hereby set aside and the plaintiff is directed to pay his own costs in this cause.

To this, the plaintiff, by counsel, duly objected and excepted.

And it further appearing to the Court that that portion of the jury verdict reading, "We, the jury, . . . find for the plaintiff on the claim of the defendants against him" is not contrary to the law and the evidence, it is accordingly ORDERED that defendants' motion in this respect be overruled and the defendants are directed to pay their own costs in this cause.

To this, the defendants, by counsel, duly objected and excepted.

The Clerk is instructed to place the papers herein amongst the ended causes.

Enter:
Date: 4/16/65
C. G. Q., Judge

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

Notice is hereby given, pursuant to Rule 5:1, §4, of the Rules of the Supreme Court of Appeals of Virginia, that Shelton Horsley Stevens, the plaintiff above mentioned, hereby appeals to the Supreme Court of Appeals of Virginia from the final judgment entered in this action on April 16, 1965.

Pursuant to the aforesaid Rules, the aforesaid plaintiff makes this his assignment of error and alleges that the Court erred,

(1) In sustaining the motion of the defendants to set aside the jury's verdict awarding money damages to the plaintiff in the sum of $6,500.00, on the grounds that it was contrary to the law and the evidence, and holding that the plaintiff, Shelton Horsley Stevens, is not entitled to recover the sum of $6,500.00 from the defendants, for his damages.

PAUL WHITEHEAD,
Attorney at Law
412 Krise Building
Lynchburg, Virginia
Attorney for the plaintiff,
Shelton Horsley Stevens

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ASSIGNMENTS OF CROSS ERROR

Notice of Appeal and Assignments of Error, having been filed by the plaintiff, the defendants, Charles E. Summers and Walter L. McCauley, by counsel, pursuant to the rules of Court, respectfully submit this, their Assignments of Cross Error, and allege that the Court erred,

(1) In overruling the motion of defendants to strike the evidence of the plaintiff made when plaintiff rested and at the conclusion of presentation of defendants' evidence; and

(2) In overruling defendants' motion to enter judgment

for the defendants on their counter-claim against the plaintiff and to impanel a jury to assess the damages.

(3) The foregoing rulings of the Court were contrary to the law and evidence.

(4) The Court erred in overruling counsel's objection to introduction of certain evidence concerning skid marks by Shelton *Lewis* Stevens.

page 50] (5) The Court erred in overruling motion for new trial made by defendants' counsel on the basis that argument of plaintiff's counsel was not rebuttal argument but argument in chief.

Respectfully submitted,

CHARLES E. SUMMERS and
WALTER L. McCAULEY,
by Counsel

* * * * *

page 51A]

* * * * *

OBJECTIONS TO WRITTEN STATEMENT OF FACTS AND ORAL TESTIMONY SUBMITTED BY PLAINTIFF

Come now the defendants, by counsel, and say that they cannot agree to the Written-Statement of Facts, Oral Testimony and Instructions to be filed by plaintiff with the Judge of this Court pursuant to notice on June 7, 1965. The objections of defendants to said Written Statement of plaintiff are of substance and will appear more certainly from examination of Written Statement of Facts and Oral Testimony hereto attached as Exhibit "A."

Respectfully submitted,

CHARLES E. SUMMERS and
WALTER L. McCAULEY,
By Counsel

BATTLE, NEAL, HARRIS, MINOR & WILLIAMS
Court Square Building
Charlottesville, Virginia

WILLIAM A. PERKINS, JR.
Of Counsel

I certify that on the 4th day of June, 1965, I mailed a true copy of the foregoing writing to Paul Whitehead, Esq., 412 Krise Building, Lynchburg, Virginia, attorney for the plaintiff, and Robert L. Marshall, Esq., Lovingston, Virginia, attorney for the plaintiff.

WILLIAM A. PERKINS, JR.

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WRITTEN STATEMENT OF FACTS, ORAL TESTIMONY AND INSTRUCTIONS

EVIDENCE FOR THE PLAINTIFF

CLEN STEVENS

testified that he lived at Afton, Virginia, and was the nephew of the plaintiff, Shelton *Harsley* Stevens, and on the night of the accident, Christmas, December 25, 1963, at about 6:00 P.M., he was going to get something to eat at Mr. Ashley's, He arrived at Mr. Ashley's which is south of where the accident happened, at 6:15 P.M., and when he arrived at the scene of the accident the State Trooper was measuring the road, but the vehicles had not been moved. He saw the pickup, resting in an angled position entirely within the northbound lane and the tractor-trailer (0) standing almost entirely within the entrance road and side yard of Mr. Robertson. He stopped and took his flashlight and went in the vicinity of the accident and saw some debris in the northbound lane at a point south of the white line (the white line is diagon-

page 51C] ally across the road as shown in the pictures filed as exhibits). He saw no tire marks on the highway, but did see scrape marks which he attributed to the trailer. These marks he described as leading from the northbound lane over to the southbound lane. He testified he saw marks which lead to the rear of the trailer. He said the pickup's right rear wheel was about two inches from the

shoulder line, the left front wheel was about two feet from the middle line, the left rear wheel was sitting about four to five feet from the center line, and he didn't know where the right front wheel would be. He didn't make any measurements but these were estimates. He didn't notice any debris in the southbound lane. The accident happened just south of the entrance to the cannery. He made an "x" mark on Plaintiff's exhibit No. 10 where he found the debris in the northbound lane. On cross examination, he stated that the front of the Stevens' car was two feet from the white line, above referred to, which was diagonally across the road, as shown in the pictures filed as exhibits.

page 51D] EVIDENCE FOR THE PLAINTIFF

SHELTON LEWIS STEVENS

testified that he was the son of the plaintiff, was 26 years of age, and lived at Afton, Virginia. He went to the scene of the accident on the morning after the accident when it was daylight and the pickup and tractor-trailer had been moved from the scene to Saunders Ford near Colleen, Virginia. There was a culvert at the cannery, near the scene of the accident, and there was a white line diagonally across the road at the culvert (see Exhibits 2 and 11). There were three dual wheel skid marks (0) in the northbound lane, approximately one foot apart and approximately three feet in length. The closest one was three to four feet north of the white line, and the width of the marks were five to six inches, and *they* were three dual wheel skids right in a row like they had skipped. Counsel for the defendants objected to the introduction of this evidence on the basis that it was irrrelevant. Upon the assurance of counsel for the plaintiff that evidence would be submitted tying these marks into the accident, the Court overruled defendants' objection, to which exception was noted. There was oil and dirt in the northbound lane south of the culvert, but there was none in the southbound lane. The outside of the five to six inch mark was seven to eight inches from the center line over in the northbound lane. On the mark that was closest to the shoulder of the road, it was twelve inches or more from the center of the

page 51E] road. These were the only marks he saw on the road on the morning of the 26th. He also

stated that he didn't know when the marks were made or who made them and that he stayed at the scene only a few minutes.

page 51F] EVIDENCE FOR PLAINTIFF

SHELTON HORSLEY STEVENS

testified that he was born August 30, 1915, and was employed By Central Virginia Electric Coop (REA) as a lineman. Before the accident he wore glasses, was in perfect health and worked regular for 18 to 19 years and just before the accident he was making $100 gross per week. He lived at Lovingston, Virginia, north of the scene of the accident. Just before the accident he had been down to see his mother, between Colleen and Arrington about five miles south of the scene, and was headed back to his home, alone, driving north, and had made no stops between there and the scene. He was coming over the hill at Ashley's, traveling about 35-40 miles per hour, when the tractor-trailer lights popped over the hill at the school. Upon direct examination, he testified that he saw that the tractor-trailer was on his (Stevens') side of the road at a point near the cannery and further saw a man on his (Stevens') side of the road near 100-200 feet ahead and he (Stevens) figured the truck would get back and he (Stevens) kept going 35-40 miles per hour. He further testified that he did not brake his vehicle when he saw the truck in his lane and just as the tractor-trailer got to page 51G] him, it cut away to the southbound lane and hit him (Stevens) at the moment it cut away. He further testified, on direct examination, that he was never in the southbound lane, but was at all times in the northbound lane and was hit in the northbound lane. On cross examination Stevens reaffirmed these statements and stated that he saw the tractor-trailer pop over the hill when he was at a point south of a house not shown in plaintiff's exhibit No. 10 and then when he was opposite the next house, white frame, (this one shown on plaintiff's exhibit No. 10), he could see the tractor-trailer over the line at a point between the school and the cannery. The house referred to by Stevens, the school and the cannery all were identified by him on plaintiff's exhibits No. 10 and 11 introduced in evidence. The pickup was a total loss. On direct examination, Stevens stated he had plenty of room to pass and he kept going because he thought the trac-

tor-trailer would get back in his own proper lane. The last thing he remembered was when the truck hit him and the next thing he remembered was in the recovery room at the University of Virginia Hospital, Charlottesville, Virginia.

The plaintiff stated he sustained a dislocated left hip and injuries to his right leg, knee and head; he was put in bed with weights on his leg, lying on his back, and he remained in this position flat on his back for five weeks. He stated his hearing has been impaired. He stated later he could use crutches and used them up until June, and then he only used one crutch until he went back to the hospital again. His medical bills were as follow:

page 51H]

University of Virginia Hospital 12/26/63 to 1/31/64	$ 736.10
University of Virginia Hospital 6/15/64	305.30
Dr. Fitzhugh	20.00
Dept. Radiology	150.00
Dept. Neurology	130.00
Orthopaedic Dept.	200.00
Crutches	7.50
Ambulances	75.00
	$1623.90

He stated he is still having trouble with his hip and had a black strip still around his hip region and it hurts him early in the morning, the cramps are so bad that he has to have someone help him put his socks on; his head is still giving him trouble and he has a ringing in his head and can hardly hear. He stated he returned to his job on August 10, 1964, just helping with ground work, making $65 to $70 per week. During the time from the date of the accident, December 25, 1963 until August 10, 1964, he stated he was not able to do any type of work, and he begged his employers to let him come back to work so they did. He stated while on the job his doctors advised him not to climb or lift, and at the present time he is unable to walk without limping, although he does not use a crutch now.

page 51I] EVIDENCE FOR THE PLAINTIFF

DR. CHARLES J. FRANKEL

testified that he is associated with the Orthopaedic Department of the University of Virginia Hospital, and that as a result of the accident of December 25, 1963, he saw the plaintiff in consultation with Dr. Wilkerson, who has since moved from the University, and has taken over the plaintiff's treatment. The plaintiff sustained a laceration of the leg, contusions to his knee, fracture and dislocation of the left hip, which fracture was in the hip socket and the whole hip was pulled loose from the joint and dislocated as shown by the x-rays. Mr. Stevens was not put to sleep while putting the ball back in the socket in the fractured hip. Dr. Frankel assigned a 15% permanent partial disability based on the fact that the plaintiff had at the present time, good movement of the hip, but this 15% permanent partial disability does not guard against the possibility of loss of circulation. If he loses circulation he will have a much greater disability than 15%, but the fact that he has gone this long without any evidence of loss of circulation, it makes the possibility of loss of circulation less and less, but he could not be absolutely certain until he checked again in about 12-13 months. This 15% permanent partial disability of hip and leg represents 8% disability of the body.

page 51J] The plaintiff may never develop arthritis, but if he gets by without it he is going to be very *luck*. He sustained no disability from the lacerations and contusions, and as far as the head injury, Dr. Frankel testified that he was not prepared to testify on that as the plaintiff had consulted another surgeon named by the witness for that particular injury.

While Dr. Frankel was testifying, a letter from Dr. Hamilton Allen concerning the condition of the defendant, Charles E. Summers, was admitted in evidence by agreement, and Dr. Frankel explained some of the medical terms set out in Dr. Allen's letter at the request of the defendant's attorney.

THE PLAINTIFF RESTED

At the conclusion of the plaintiff's evidence, the defendants, by counsel, made a motion to strike the evidence of the plaintiff on the grounds that the plaintiff was guilty of contribu-

tory negligence as a matter of law and the Court overruled the motion, to which exception was taken.

page 51K] EVIDENCE FOR THE DEFENDANT

STATE TROOPER C. W. DEYERLE

testified that he received the radio message about the accident of December 25, 1963, when he was about six miles south of Charlottesville, Virginia, on U. S. Highway 29. When he arrived at the scene the driver, Summers, was there and the vehicles were there, but the plaintiff had been sent to the hospital. The location of the accident was .8 mile south of Route 56 which comes out on the south limits of Lovingston, Virginia. The road was dry, there were no defects in the road, it was straight with a little dip north of where the accident occurred, the traffic lanes were marked, it was dark and the weather was clear. When he arrived Mr. Summers stated to the officer that he was driving the tractor-trailer truck which was located up in a private driveway, heavily damaged, and the other truck was operated by the plaintiff and was sitting in the northbound lane. Neither vehicle had been moved when he got there and they were in the same position as when they came to rest after the impact. Trooper W. W. Kauffman, who was at the scene, informed Trooper Deyerle that the vehicles had not been moved. Officer Deyerle drew a diagram of the accident scene on a blackboard in the presence of the jury. This diagram showed the Summers' tractor-trailer as No. 1 and the Stevens' pickup as No. 2. On the diagram the tractor-trailer was shown in a half jacked-knife position into a private drive with the left rear of the tractor-trailer at a point along the margin of the highway. The diagram showed what the Trooper referred to as a skid mark in somewhat of a half-moon shape at a point three feet to the west of the center line in the southbound *land*. The south end being further from the center line than the north. The diagram also showed scuff marks along the center line of the highway commencing at this skid mark and continuing on to the point where the front of the Stevens' No. 2 vehicle was shown. The Stevens' vehicle was shown at an angle to the highway pointed generally in a north-west direction with the highway running north-south. On the diagram the Trooper indicated a distance

page 51L]

of 31 feet 6 inches between the left rear corner of the tractor-trailer and the left front corner of the pickup. The three foot skid mark was approximately equadistant between the points. On cross examination, the Trooper stated that the diagram was not drawn to scale and showed the approximate location of the two vehicles as they were related, one to the other. On direct examination, the Trooper testified concerning the position of the wheels of the pickup as follows:

Left front wheel was 9 feet from the northbound shoulder 3 feet 6 inches from the center of the road

Left rear wheel was 5 feet 1 inch from the northbound shoulder—7 feet 3 inches from the center of the road.

Right front wheel was 5 feet 2 inches from the east side shoulder—7 feet from the center of the road

There were no measurements of the right rear wheel made.

page 51M] He made no measurements of the tractor-trailer wheels, but it was all the way off the hard surface. He stated that he found a skid mark three feet in length, half-mooned shaped, which was three feet west of the center line. He further stated that this mark, being only 3 feet in length, did not continue to either of the vehicles, although there were scrape marks along the center of the highway from this skid mark to the left front wheel of the Stevens' vehicle.

He further testified that he talked to Stevens several days after the accident and Stevens had stated that as he came down the road he saw a pedestrian on the side and the tractor-trailer up ahead on his (Stevens) side of the road and he (Stevens) "tried to split the difference."

page 51N] EVIDENCE FOR THE DEFENDANT

STATE TROOPER WM. W. KAUFFMAN

testified that on the night of the accident he went to the scene and put out flares. The tractor-trailer was in Mr. Robertson's driveway with the rear portion out in the yard. None of the rear of this vehicle was out in the highway. He spoke to Mr. Summers at the scene during the course of his work which was to get the scene safe until the investigating officer arrived. He was there before Mr. Stevens was removed from the

scene and stayed there for a short time after Officer Deyerle arrived. He recalled that the debris was under and around the left front wheel of the pickup and that the pickup was not moved from the time he arrived until State Trooper Deyerle arrived, and according to his information, the pickup had not been moved after it came to rest.

page 510] EVIDENCE FOR THE DEFENDANT

CHARLES E. SUMMERS

testified that he had left home in Martinsburg, West Virginia, on that day and was on his way to *to* Georgia for a load of fresh chickens. As he was proceeding at a speed of 40-45, he came across the knoll in the road near the elementary school he saw the plaintiff approaching coming down over the other knoll. He continued on in his southbound lane and line. He stated he continued on, however, just before the approaching vehicle was weaving and straddling the center line. He stated he continued on, however, just before the impact he realized the other vehicle was not going to get back. He then cut sharply to his right, however, the impact did occur. His vehicle then continued on into the driveway where it came to a stop. Photographs taken by Mr. Summers were introduced showing the damage to the tractor-trailer and he indicated that the point of impact on the tractor was the left front which came into contact with the left front of the pickup. Ho did not go back to examine or look at the side of the road right after the accident. The defendant, Summers, was sore and stiff after the accident and went to see a doctor in West Virginia and later went to see Dr. Allen at the University Hospital in Charlottesville, Virginia. Exhibits were introduced concerning medical costs. He stated that he had cut the tractor-trailer just before they hit page 51P] and it went across the ditch up in the air and at first he thought he was on top of the plaintiff. He was going about 30 miles per hour. (o) He stated the vehicles, after they came to rest were not moved until after the State Troopers had arrived and that he did not see a pedestrian. Also, he stated he went to the pickup truck where the plaintiff was and he smelled liquor. He said it was 40 or 45 minutes after the accident before State Trooper Deyerle got there.

Mr. Summers further testified that he had made certain measurements in the presence of Mr. Perkins. He stated that under the driveway, which he went into, there was a culvert 18 paces long. The driveway was 7 paces in width and a telephone pole was 6 paces distant from the north edge of the driveway. The north end of the culvert he found to be about 1-2 feet south of a perpendicular line from Route 29 to the telephone pole. He further stated that from the north end of this culvert it was a distance of 53 paces to a wide shoulder area on the west of Route 250 and north of the point of impact. He further stated that it was a distance of 67 paces from the north end of the culvert to the south margin of the first entrance road located north of the accident scene. This entrance road was identified as the south entrance road to a cannery. Stevens stated that he started slowing down at a point near this entrance road as he had observed Summers, when he was at a point some distance back, straddling the line.

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page 51Q] EVIDENCE FOR THE DEFENDANT

E. B. SAUNDERS

testified that he lived at Lovingston, Virginia, and he ran the Ford place near Colleen on U. S. 29 in Nelson County, Virginia. He came upon the accident and the wrecker from his place of business was used to haul the vehicles away.

page 51R]

EVIDENCE FOR THE DEFENDANTS

WALTER L. McCAULEY

testified that the repair bill on the tractor-trailer was $4,736.16 and that the tractor-trailer lost 7½ weeks from work while being repaired and other facts in support of his counter claim.

page 51S] THE DEFENDANTS RESTED

The foregoing was all the testimony adduced at said trial. At the end of all the evidence the defendants again re-

newed their motion to strike the evidence of the plaintiff and the Court overruled the motion, to which action defendants, by counsel, objected and excepted. (0)

The following instructions were given:

NOTE: Instructions as included in plaintiff's written Statement of Facts, Oral Testimony and Instructions appear in fact to be photocopies of instructions in the Court record. Defendants objected to paragraph (f) of Instruction 2A on the ground that this statement was inapplicable to the case at hand, repetitious and contrary to the law. The defendants objected to plaintiff's Instruction No. 6 as being repetitious and Instruction No. 7 on the ground that it was contrary to the law.

The Court refused defendants' Instruction 1 after defendants' counsel noted that the instruction should have contained the phrase "for one of which you find the defendants responsible and for the other of which the defendants were not responsible" rather than the phrase "for one of which he was not responsible." Defendant's counsel objected and excepted.

After the Court so instructed the jury, Robert L. Marshall made opening argument for the plaintiff, William A. Perkins, Jr. argued on behalf of the defendants and page 51T] Paul Whitehead made closing argument for the plaintiff. At the completion of Mr. Whitehead's argument and after the jury retired, but before verdict was rendered, counsel for the defendants moved for a new trial on the ground that the closing argument of defense counsel was not rebuttal argument but argument in chief. The Court overruled this motion and defendants' counsel excepted.

Whereupon, the jury retired to consider their verdict, and upon returning to the courtroom, presented the following verdict:

"9/10/64

"We the jury, find for the plaintiff, Shelton Horsley Stevens, on his claim against the defendants, award unto him the sum of $6,500 for his *demages* and find for the plaintiff on the claim of the defendants against him.

s/"BOBBY D. HIGGINBOTHAM
Foreman"

A motion was made by the defendants to set the verdict aside on the ground that it was contrary to the law and evidence and to enter up judgment for the defendants on the plaintiff's claim and to enter up judgment for the defendants on their counterclaim against the plaintiff and to empanel a jury to assess the damages,(0)and the Court stated he would hear oral arguments on this motion at a later date. Thereafter, Sheriff Whitehead of Nelson County, in the presence of defendants' counsel and the Judge of this Court, took a photograph of the blackboard drawing by Trooper

page 51U] Deyerle and placed this photograph amongst the papers in the cause

On September 28, 1964, this matter was fully argued by counsel for all parties and the Court further took same under advisement and on April 16, 1965, the Court entered its order of that date.

Filed in the Clerk's Office the 16th day of June, 1965.

AUSTIN EMBREY, Clerk

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LAW OFFICES
PAUL WHITEHEAD ASSOCIATES
PLEASE REPLY TO
LYNCHBURG OFFICE
June 10, 1965

HONORABLE C. G. QUESENBERY,
Judge, Twenty-ninth Judicial Circuit
Waynesboro, Virginia

Re: *Stevens* v. *Summers, et al*
Circuit Court of Nelson County, Virginia

Dear Judge Quesenbery:

Enclosed herewith you will find the Objections to Written Statement of Facts and Oral Testimony Submitted by Defendants, with attached "Exhibit A" entitled Corrections to Written Statement of Facts and Oral Testimony Submit-

ted by Defendants, submitted on behalf of the plaintiff in the above matter.

Respectfully yours,
PAUL WHITEHEAD

PW:bgj
Enclosure
cc-WILLIAM A. PERKINS, JR., ESQUIRE
Attorney at Law
Battle, Neal, Harris, Minor & Williams
Court Square Building
Charlottesville, Virginia

ROBERT L. MARSHALL, ESQUIRE
Attorney at Law
Lovingston
Nelson County, Virginia

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OBJECTIONS TO WRITTEN STATEMENT OF FACTS AND ORAL TESTIMONY SUBMITTED BY DEFENDANTS

Comes now the plaintiff, by counsel, and says that he cannot agree to the Written Statement of Facts, Oral Testimony and Instructions to be filed by the defendants with the Judge of this Court. The objections of the plaintiff to parts of said written statements of the defendants are of substance and will appear more certainly from examination of corrections made, hereto attached as "Exhibit A."

Respectfully submitted,
SHELTON HORSLEY STEVENS
By PAUL WHITEHEAD,
His Attorney

PAUL WHITEHEAD
412 Krise Building
Lynchburg, Virginia
Of counsel

page 54] I certify that on the 10th day of June, 1965, I mailed a true copy of the foregoing Objections to Written Statement of Facts and Oral Testimony Submitted by Defendants, with attached "Exhibit A," entitled Corrections to Written Statement of Facts and Oral Testimony Submitted by Defendants, to William A. Perkins, Jr., Attorney at Law, Battle, Neal, Harris, Minor & Williams, Court Square Building, Charlottesville, Virginia, counsel of record for the defendants, and to Robert L. Marshall, Esquire, Attorney at Law, Lovingston, Nelson County, Virginia, counsel of record for the plaintiff on the counterclaim.

PAUL WHITEHEAD
Attorney for the Plaintiff,
SHELTON HORSLEY STEVENS

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page 55] EXHIBIT "A"

CORRECTIONS TO WRITTEN STATEMENT OF FACTS AND ORAL TESTIMONY SUBMITTED BY DEFENDANTS

In response to the defendants' changes in the Written Statement of Facts, Oral Testimony and Instructions submitted by the plaintiff, the plaintiff, by counsel, wishes to note the following corrections to the written statement of facts and oral testimony submitted by the defendants:

On page 2 of the defendants' written statement, the following is stated:

"*** the left rear wheel was sitting about four to five feet from the center line, ***."

That should be the left rear wheel was sitting about four to five feet from the east shoulder line, because there is no controversy but that all of the Stevens' pickup
page 56] truck was in the northbound lane and the witness Clen Stevens approximated the nearest part of the truck to the center line was the left front wheel, which was approximately two feet from the center line, and further,

State Trooper Deyerle stated that he measured the distance, and the left front wheel was three feet six inches from the center line. By this, when you sit down and take the measurements, as the right rear wheel was about two inches from the shoulder line, there would be no way in the world for the left rear wheel to be four to five feet from the center line as the road was twenty-four feet wide and each lane was twelve feet wide.

On page 2 of the defendants' written statement, the following is also stated:

"He saw no tire marks on the highway, but did see scrape marks which he attributed to the trailer. These marks he described as leading from the northbound lane over to the southbound lane. He testified he saw marks which lead to the rear of the trailer."

The witness, Clen Stevens, testified that he saw no scrape marks, and no tire marks, and the tractor-trailer mark (he didn't say whether it was a scrape mark or not) went across the line from south to north, and there were no marks leading over into the southbound lane made by the pickup. He didn't say anything about the marks leading to the rear of of the trailer.

page 57] On page 3 of the defendants' written statement, the following is stated:

"There were three dual wheel skid marks in the northbound lane, approximately one foot apart and approximately three feet in length. The closest one was three to four feet north of the white line, ***."

The defendants failed to note that the three dual wheel skid marks were *south of the culvert* in the northbound lane, as the plaintiff has previously stated, and the witness, Shelton Lewis Stevens, testified that the closest one was three to four feet *south of the white line,* not north of the white line as the defendants have stated.

On page 11 of the defendants' written statement, with reference to a diagram, the following is stated:

"On cross examination, the Trooper stated that the dia-

gram was not drawn to scale and showed the approximate location of the two vehicles as they were related, one to the other. ***"

The Trooper did state that the diagram he made was not drawn to scale, but he also testified that *it was not correct,* that he had the front of the pickup truck up on the center line but that was not correct, that the nearest part of the pickup truck to the center line was the left front wheel which was three feet six inches from the center line of the road and the pickup truck was all in the northbound lane.

page 58] On page 15 of the defendants' written statement the following is stated:

"This entrance road was identified as the south entrance road to a cannery. Stevens stated that he started slowing down at a point near this entrance road as he had observed Summers, when he was at a point some distance back, straddling the line."

Obviously this is not correct. The south entrance road to the cannery is north of the scene of the accident, in other words, the cannery is between the scene of the accident and the elementary school building. It is obvious that "Summers" should be written where "Stevens" is written, and "Stevens" should be written where "Summers" is written.

My notes show that Summers testified as follows to questions asked him:

"Q. You tell us as you came across the knoll this side the elementary school you saw Mr. Stevens approaching?
"A. Coming down over the other knoll.
"* * *
"Q. As you approached this vehicle you saw him?
"A. After he got down over the hill."

page 59] On page 19 of the defendants' written statement, the following is stated:

"Thereafter, Sheriff Whitehead of Nelson County, in the presence of defendants' counsel and the Judge of this Court, took a photograph of the blackboard drawing by Trooper

Deyerle and placed this photograph amongst the papers in the cause."

It is respectfully submitted, first, that counsel for the defendants never offered this diagram in evidence as an exhibit; second, counsel for the defendants never asked the Court to initial same; third, he states that a picture was made of same, but not in the presence of the attorneys for the plaintiff, and this is certainly correct for the first time the attorneys for the plaintiff knew of any picture being taken of the diagram was when the matter was argued before the Court in September, 1964; and furthermore, counsel for the defendants having failed to offer the diagram in evidence and there being no identification of same and no initials of the Judge on same, certainly it does not become a part of the record and cannot now be considered, for as stated in the Rules of the Court, Rule 5:1, § 3(d):

"Each exhibit, when offered in evidence in court, whether admitted or rejected, shall be marked for identi-
page 60] fication, and shall be initialed by the judge. It becomes part of the record when so initialed."

Respectfully submitted,

SHELTON HORSLEY STEVENS

By PAUL WHITEHEAD,
His Attorney

PAUL WHITEHEAD
412 Krise Building
Lynchburg, Virginia
Of Counsel for the plaintiff

CERTIFICATE

I, Paul Whitehead, hereby certify that on June 8, 1965, I received a copy of a letter dated June 7, 1965, addressed to the Honorable C. G. Quesenbery, from William A. Perkins, Jr., in this cause, and attached to that letter was a copy of a one page statement entitled "Objections to Written Statement of Facts and Oral Testimony Submitted by Plaintiff,"

stating that a true copy of the writing was mailed on June 4, 1965, and also enclosed was a Written Statement of Facts, Oral Testimony and Instructions submitted by the defendants' counsel. On the copy mailed to me, there
page 61] was nothing underlined showing substantive additions to the record submitted by the plaintiff and there was nothing to indicate what omissions were made in the plaintiff's record.

PAUL WHITEHEAD,
Attorney for the Plaintiff
SHELTON HORSLEY STEVENS

Filed in the Clerk's Office the 16th day of June, 1965.

AUSTIN EMBREY, Clerk

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page 66]

TWENTY-NINTH JUDICIAL CIRCUIT
County of Amherst—County of Nelson—City of Waynesboro
WAYNESBORO, VIRGINIA
June 17, 1965

MR. WILLIAM. A. PERKINS, JR.,
Attorney at Law
Court Square Building
Charlottesville, Virginia 22902

Re: *Stevens* v. *Summers, et al*

Dear Bill:

I have signed the record in the case of *Stevens* v. *Summers,* and will leave it at the Clerk's Office in passing this week.

Due to the time which has elapsed since the trial of the case and the fact that we had no reporter, has made it extremely difficult for me to complete the record. I had certain notes which I took for my own information, mainly for the purpose of ruling on motions during the trial, these notes have gone stale and I am unable to recall certain details, I refer *principlely* to the measurement.

The question of the photograph of the blackboard is one

that is not clear to me, however the diagram was seen by the Jury, was referred to a number of times by Counsel on both sides and was considered by the Jury as evidence. Under these circumstances I would think that the photograph of the diagram would be considered an exhibit. It was impossible to put the large size blackboard in the record and I see no harm that could come from proceeding as we did, although I know of no affirmative authority for this sort of thing.

page 67]

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I trust that the record does not confuse both you and Paul and that some good will come of it.

Very cordially yours,

C. G. QUESENBERY

CGQ/mq
cc: Mr. Paul Whitehead, Attorney
412 Krise Building
Lynchburg, Virginia
and
Mr. Robert L. Marshall
Attorney at Law
Lovingston, Virginia

Filed in the Clerk's Office the 22 day of June, 1965.

AUSTIN EMBREY, Clerk

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LAW OFFICES
Battle, Neal, Harris, Minor & Williams
Court Square Building
Charlottesville, Virginia 22902
Telephone: 295-5158
June 25, 1965

The Honorable C. G. Quesenbery
Judge, Twenty-Ninth Judicial Circuit
Waynesboro, Virginia

Re: *Stevens* v. *Summers et al*

Dear Judge Quesenbery:

Mr. Embrey was kind enough to send me a photocopy of Statements of Facts as certified by you. I note that this statement takes into consideration some of the objections made by me as counsel for the defendants and filed.

Through an abundance of caution, and perhaps unnecessarily, I am writing this letter to you to respectfully except to your failure to adopt the "Objections to Written Statement of Facts and Oral Testimony submitted by plaintiff" as filed by counsel for the defendants.

Very truly yours,

WILLIAM A. PERKINS, JR.

WAPjr/swo
cc: Hon. Austin Embrey
Robert L. Marshall, Esquire
Paul Whitehead, Esquire

Filed in the Clerk's Office the 26th day of June, 1965.
AUSTIN EMBREY, Clerk

page 69]

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LAW OFFICES
PAUL WHITEHEAD ASSOCIATES
LYNCHBURG, VIRGINIA
412 Krise Building
June 30, 1965

Honorable C. G. Quesenbery
Judge, Twenty-Ninth Judicial Circuit
Waynesboro, Virginia

Re: *Stevens* v. *Summers, et al*

Dear Judge Quesenbery:

This will acknowledge receipt of a copy of your letter of

June 17, 1965, addressed to William A. Perkins, Jr., Esquire, and will also acknowledge receipt of a copy of a letter dated June 25, 1965, from Mr. Perkins to you, in the above matter.

I realize that by not having a Court Reporter for the first day of the trial and the Court Reporter destroying the tape of the second day of the trial, this left both Court and counsel in quite a dilemma in this case.

Through an abundance of caution I feel that I must write this letter so that there will be no misunderstanding concerning what has been marked as Defendants' Exhibit AA, being a photograph of a blackboard drawing. Of course, my objections to marking this as an exhibit briefly are as follows:

(1) Originally it was a diagram on a blackboard which was not to scale and Trooper Deyerle testified that it was not to scale and that although he showed in the diagram that the front of the Stevens' pickup truck was on the white center line, he admitted this was not correct and he admitted that the pickup truck was entirely in the north-
page 70] bound lane (the direction in which Stevens was traveling) and the nearest point of the pickup truck to the white line was three feet six inches, that being the left front wheel, and the rest of the pickup truck, of course, would be further east of the center white line, all entirely in the northbound lane.

(2) The blackboard drawing was never introduced in evidence, was never marked by the Court and I know no picture was ever taken of the blackboard during the trial of the case in my presence, but I have been advised that after the trial was over and after the jury had been discharged, that later a picture was taken of the blackboard and I know a picture of the blackboard was used by counsel for the defendants when we argued the motion at some later date, but no mention was ever made then with reference to it being an exhibit, and at that time it was never asked to be treated as an exhibit and, of course, it should never have been treated as an exhibit because it would be misleading as the Trooper testified that where he placed the pickup truck on the diagram was not correct and the left front wheel was the nearest point to the white center line and that was three feet six inches away from, or east of, the center white line, in the northbound lane. Therefore, under the Rules of the Court, before any exhibit can be considered as part of the evidence it must conform to

Rule 5:1, § 3(d) which states as follows:

"Each exhibit, when offered in evidence in court, whether admitted or rejected, shall be marked for identification, and shall be initialed by the judge. It becomes part of the record when so initialed."

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In examining Defendants' Exhibit AA, no initials of the Judge can be seen and no other marks of identification can be seen *in the photograph* taken of the blackboard, although it has been marked and initialed as such on the margin of the photograph, and on the margin of the photograph there is now the date of 9-9-64, which was the date of the first day of the trial, and it has been initialed by the Court. Of course, this could not be correct.

I am mailing a copy of this letter to the Clerk and to the other attorneys in this case so that all parties may be advised and I am requesting the Clerk to please file this letter as a part of the Record as was done in the case of your letter of June 17, 1965 and Mr. Perkins' letter of June 25, 1965.

Thanking you, and with my kind personal regards, I am

Respectfully yours,

PAUL WHITEHEAD

PW:bgj
cc:-AUSTIN EMBREY, Esquire
Clerk, Circuit Court of Nelson County
Lovingston, Virginia

WILLIAM A. PERKINS, JR., Esquire
Attorney at Law
Battle, Neal, Harris, Minor & Williams
Court Square Building
Charlottesville, Virginia

ROBERT L. MARSHALL, Esquire
Attorney at Law
Lovingston
Nelson County, Virginia

Filed in the Clerk's Office the 1st day of July, 1965.
AUSTIN EMBREY, Clerk

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WRITTEN STATEMENT OF FACTS, ORAL TESTIMONY AND INSTRUCTIONS

BE IT REMEMBERED and the Court does hereby certify that at the trial of this case the following evidence was introduced on behalf of the plaintiff and the defendants:

EVIDENCE FOR THE PLAINTIFF

CLEN STEVENS

testified that he lived at Afton, Virginia, and was the nephew of the plaintiff, Shelton Horsley Stevens, and on the night of the accident, Christmas, December 25, 1963, at about 6:00 p.m., he was going to get something to eat at Mr. Ashley's. He arrived at Mr. Ashley's which is south of where the accident happened, at 6:15 p.m., and when he arrived at

page 2] the scene of the accident the State Trooper was measuring the road, but the vehicles had not been moved. He saw the pickup, which was going north, was entirely within its northbound lane, and the tractor-trailer, which was going south, was sitting up in Mr. Robertson's yard, west of the hard surface. He stopped and took his flashlight and went in the vicinity of the accident and found debris in the northbound lane, south of the white line (the white line is diagonally across the road as shown in the pictures filed as exhibits). There were no scrape marks, and no tire marks leading over into the southbound lane made by the pickup and he saw scrape marks which he attributed to the tractor-trailer mark went across the line from the south lane to the north lane. He said the pickup's right rear wheel was about two inches from the shoulder line, the left front wheel was about two feet from the middle line, the left rear wheel

was sitting about four to five feet from the center line, and he didn't know where the right front wheel would be. He didn't make any measurements but these were estimates. He didn't notice any debris in the southbound lane. The accident happened just south of the entrance to the cannery. He made an "x" mark on an exhibit where he found the debris in the northbound lane.

page 3] EVIDENCE FOR THE PLAINTIFF

SHELTON LEWIS STEVENS

testified that he was the son of the plaintiff, was 26 years of age, and lived at Afton, Virginia. He went to the scene of the accident on the morning after the accident when it was daylight and the pickup and tractor-trailer had been moved from the scene to Saunders Ford near Colleen, Virginia. There was a culvert at the cannery, near the scene of the accident, and there was a white line diagonally across the road at the culvert (see Exhibits 2 and 11). There were three dual wheel skid marks south of the culvert, in the northbound lane, approximately one foot apart and approximately three feet in length. The closest one was three to four feet north of the white line, and the width of the marks were five to six inches, and they were three dual wheel skids right in a row like they had skipped. This evidence was admitted over the objection of counsel for the Defendant on the assurance that it would be connected up in later evidence. There was oil and dirt in the northbound lane south of the culvert, but there were none in the southbound lane. The outside of the five to six inch mark was seven to eight inches from the center line over in the northbound lane. On the mark that was closest to the shoulder of the road, it was twelve inches or more from the center of the road. These were the only marks on the road on the morning of the 26th. He also stated that he didn't know when the marks were made or who made them. He was at the scene of the accident only a short while.

page 4] EVIDENCE FOR THE PLAINTIFF

SHELTON HORSLEY STEVENS

testified that he was born August 30, 1915, and was employed by Central Virginia Electric Coop (REA) as a lineman.

Before the accident he wore glasses, was in perfect health and worked regular for 18 to 19 years and just before the accident he was making $100 gross per week. He lived at Lovingston, Virginia, north of the scene of the accident. Just before the accident he had been down to see his mother, between Colleen and Arrington about five miles south of the scene, and was headed back to his home, alone, driving north, and had made no stops between there and the scene. He was coming over the hill at Ashley's, traveling about 35-40 miles per hour, when the tractor-trailer lights popped over the hill at the school, and was on his side of the road at the cannery, and he thought the truck would get back to his side. Someone was walking on his side of the road about 100 to 200 feet ahead down towards Ashley's, right on the side of the hard surface on the shoulder near the hard surface, and the plaintiff got over as far as he could to keep from hitting the man, and as they got closer the tractor-trailer weaved over into the northbound lane and kept coming towards the plaintiff. The plaintiff was slowing down, although he did not apply his brakes and just as the tractor-trailer got to him it cut away to the southbound lane and hit him at the moment it cut away. The plaintiff was never in the south-
page 5] bound lane, but was at all times in the north-
bound lane and was hit in the northbound lane. The pickup was a total loss. The plaintiff had plenty of room to pass and he kept going because he thought the tractor-trailer would get back in his own proper lane. On cross examination his testimony was the same. When he saw the truck he was at the white house shown on Exhibit #10 and the truck was near the Cannery. The last thing he remembered was when the truck hit him and the next thing he remembered was in the recovery room at the University of Virginia Hospital, Charlottesville, Virginia.

The plaintiff sustained a dislocated left hip and injuries to his right leg, knee and head. He was put in bed with weights on his leg, lying on his back, and he remained in this position flat on his back for five weeks. His hearing has been impaired. Later he could use crutches and used them up until June, and then he only used one crutch until he went back to the hospital again. His medical bills were as follows:

University of Virginia Hospital 12/26/63 to 1/31/64	$ 736.10
University of Virginia Hospital 6/15/64	305.30

Dr. Fitzhugh	20.00
Dept. Radiology	150.00
Dept. Neurology	130.00
Orthopaedic Dept.	200.00
Crutches	7.50
Ambulances	75.00
	$1623.90

page 6] He is still having trouble with his hip and had a black strip still around his hip region and it hurts him early in the morning, the cramps are so bad that he has to have someone help him put his socks on. His head is still giving him trouble and he has a ringing in his head and can hardly hear. He returned to his job on August 10, 1964, just helping with ground work, making $65 to $70 per week. During the time from the date of the accident, December 25, 1963 until August 10, 1964, he was not able to do any type of work, and he begged his employers to let him come back to work so they did. While on the job his doctor advised him not to climb or lift, and at the present time he is unable to walk without limping, although he does not use a crutch now.

page 7] EVIDENCE FOR THE PLAINTIFF

DR. CHARLES J. FRANKEL

testified that he is associated with the Orthopaedic Department of the University of Virginia Hospital, and that as a result of the accident of December 25, 1963, he saw the plaintiff in consultation with Dr. Wilkerson, who has since moved from the University, and has taken over the plaintiff's treatment. The plaintiff sustained a laceration of the leg, contusions or blow to his knee, fracture and dislocation of left hip, which fracture was in the hip socket and the whole hip was pulled loose from the joint and dislocated as shown by the x-rays. Mr. Stevens was not put to sleep while putting the ball back in the socket in the fractured hip. Dr. Frankel assigned a 15% permanent partial disability based on the fact that the plaintiff had at the present time, good movement of the hip, but this 15% permanent partial disability does not guard against the possibility of loss of circulation. If he loses circulation he will have a much greater disability than 15%, but the fact that he has gone this long without any evi-

dence of loss of circulation, it makes the possibility of loss of circulation less and less, but he could not be absolutely certain until he checked again in about 12-13 months. This 15% permanent partial disability of hip and leg represents 8% disa-
ability of the body. The plaintiff may never
page 8] develop arthritis, but if he gets by without it he
he is going to be very lucky. He sustained no disability from the lacerations and contusions, and as far as the head injury, Dr. Frankel testified that he was not prepared to testify on that as the plaintiff had consulted another surgeon for that particular injury.

While Dr. Frankel was testifying, a letter from Dr. Hamilton Allen concerning the condition of the defendant, Charles E. Summers, was admitted in evidence by agreement, and Dr. Frankel explained some of the medical terms set out in Dr. Allen's letter at the request of the defendant's attorney.

THE PLAINTIFF RESTED

At the conclusion of the Plaintiff's evidence, the defend ants, by counsel, made a motion to strike the evidence of the plaintiff on the grounds that the plaintiff was guilty of negligence as a matter of law and the Court overruled the motion. To this action by the Court, exception was noted.

page 9] EVIDENCE FOR THE DEFENDANT

STATE TROOPER C. W. DEYERLE

testified that he received the radio message about the accident of December 25, 1963, when he was about six miles south of Charlottesville, Virginia, on U. S. Highway 29. When he arrived at the scene the driver, Summers, was there and the vehicles were there, but the plaintiff had been sent to the hospital. The location of the accident was .8 mile south of Route 56 which comes out on the south limits of Lovingston, Virginia. The road was dry, there were no defects in the road, it was straight with a little dip where the accident occurred, the traffic lanes were marked, it was dark and the weather was clear. When he arrived Mr. Summers stated to the officer that he was driving the tractor-trailer truck which was located up in a private driveway, heavily damaged, and the other truck was operated by the plaintiff and was sitting in the northbound lane. Neither vehicle had been moved

when he got there and they were in the same position as when they came to rest after the impact. Trooper W. W. Kauffman, who was at the scene, informed Trooper Deyerle that the vehicles had not been moved. Officer Deyerle then drew a diagram of the scene of the accident, which was never introduced in the evidence and which he stated that it was incorrect insofar as the position of the pickup

page 10] truck was concerned, as the Stevens pickup truck was entirely in the northbound lane and the nearest point to the center line of the road would be the left front wheel which was 3 feet 6 inches from the center line of the road. His testimony revealed the position of the pickup truck wheels to be as follows:

Left front wheel was 9 feet from the northbound shoulder 3 feet 6 inches from the center of the road

Left rear wheel was 5 feet 1 inch from the northbound shoulder—7 feet 3 inches from the center of the road

Right front wheel was 5 feet 2 inchs from the east side shoulder—7 feet from the center of the road

There were no measurements of the right rear wheel made.

He made no measurements of the tractor-trailer wheels, but it was all the way off the hard surface. He stated that he found a skid mark three feet in length, which was three feet west of the center line, but he could not follow it up to one of the vehicles. The mark was equidistant between the vehicles. Stevens later told the Trooper that he saw a pedestrian and the tractor-Trailer ahead of him and tried to split the difference.

CSQ

page 11] EVIDENCE FOR THE DEFENDANT

STATE TROOPER WM. W. KAUFFMAN

testified that on the night of the accident he went to the scene and put out flares. The tractor-trailer was in Mr. Robertson's yard with the rear portion out in the driveway. None of the rear of this vehicle was out in the highway. He spoke to Mr. Summers at the scene during the course of his work which was to get the scene safe until the investigating officer arrived. He was there before Mr. Stevens was removed from the scene and stayed there for a short time after Officer Deyerle arrived. He recalled that the debris was under the left front wheel of

the pickup and that the pickup was not moved from the time he arrived until State Trooper Deyerle arrived, and according to his information, the pickup had not been moved after it came to rest.

page 12] EVIDENCE FOR THE DEFENDANT

CHARLES E. SUMMERS

testified that he had left home on that day and was on his way to Georgia for a load of fresh chickens. As he came across the knoll in the road near the elementary school he saw the plaintiff approaching coming down over the other knoll. He continued on in his southbound lane, he took his foot off the throttle, when he saw the pickup on his side and was cutting to the right when the accident occurred. He said the plaintiff kept over to his (defendant's) side and he cut sharply to the right just before they hit. Photographs introduced by Summers showed the point of impact to be the left side of the pickup the left front of the tractor. He did not go back to examine or look at the side of the road right after the accident. The defendant, Summers, was sore and stiff after the accident and went to see a doctor in West Virginia and later went to see Dr. Allen at the University of Virginia Hospital in Charlottesville, Virginia. He had the tractor-trailer cut just as soon as they hit and it went across the ditch up in the air and at first he thought he was on top of the plaintiff. He was going about 30 miles per hour. He did not try to brake before the accident, just let up on the throttle. The vehicles after they came to rest were not moved until after the State Troopers had arrived. He did not see a pedestrian. He went to the pickup truck where the plaintiff was and he smelled liquor. He said it was 40 to 45 minutes after the accident before State Trooper Deyerle got there.

He testified to certain distances: it was 67 paces from the north end of the culvert to the first entrance road south of the cannery, (Other measurements do not appear in detail in my notes)

page 13] EVIDENCE FOR THE DEFENDANT

E. B. SAUNDERS

testified that he lived at Lovingston, Virginia, and he ran the Ford place near Colleen on U. S. 29 in Nelson County, Vir-

ginia. He came upon the accident and the wrecker from his place of business was used to haul the vehicles away.

page 14] EVIDENCE FOR THE DEFENDANTS

WALTER L. McCAULEY

testified that the repair bill on the tractor-trailer was $4,736.16 and that the tractor-trailer lost 7-½ weeks from work while being repaired.

THE DEFENDANTS RESTED

The foregoing was all the testimony adduced at said trial.

At the end of all the evidence the defendants again renewed their motion to strike the evidence of the plaintiff and the Court remarked that it was a jury question and overruled the motion. To which action Counsel for the defendants, objected and excepted.

The following instructions were given and the defendants, by counsel, made the general objection to the giving of any and all instructions offered by the plaintiff on the ground that the plaintiff was guilty of negligence as a matter of law and was not entitled to any instructions on the theory of his case and was not entitled to any instruction on damages.

page 15] PLAINTIFF'S INSTRUCTION

1.

The Court instructs you that if you find for the plaintiff, Shelton Horsley Stevens, it is your function to determine the amount of damages that should be awarded him, and in determining same, you must be guided solely by the evidence in the case and should fix the amount at such sum as to you seems a fair and just compensation for the injuries and damages proximately caused him by the alleged collision, but not in excess of the amount sued for; and in arriving at the amount of damages to be awarded, should you find for the plaintiff, you may take into consideration any of the following items or elements of damage that a preponderance of the evidence may show to have been sustained by the plaintiff as a proximate result of the accident and collision sued for:

(a) Any bodily injury or disability, the character and duration thereof;

(b) Any physical pain, suffering and mental anguish he has already been caused to endure or that he will likely and probably, with reasonable certainty, be hereafter caused to suffer;

(c) Any expense for surgical, medical and hospital treatment, including necessary traveling expenses, he has already incurred or will likely and probably, with reasonable certainty, hereafter incur in a proper effort to be cured of

page 16] his injuries or to alleviate the effects thereof;

(d) Any inconvenience and discomfort he has already sustained or will likely and probably, with reasonable certainty, hereafter sustain;

(f) Any loss he has already sustained, or will likely and probably, with reasonable certainty, hereafter sustain by reason of his inability to earn wages or by reason of a reduction or lessening of his earning power.

page 17] PLAINTIFF'S INSTRUCTION

2a.

The Court instructs you that at the time and place this accident occurred, it was the duty of the defendant, Walter L. McCauley acting by and through his agent and servant, Charles E. Summers, and the duty of the defendant, Charles E. Summers, to use reasonable care to perform or comply with each and all of the following duties:

(a) To drive the tractor trailer under proper control;

(c) To drive the tractor trailer at a speed not greater than was reasonable and proper, having regard to all the conditions then and there existing;

(d) To keep a proper lookout;

(f) Whenever any highway has been divided into clearly marked lanes for traffic, a vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver of such vehicle, in the exercise of ordinary care, ascertains that such movement can be made with safety;

That these were continuing duties to be exercised when they would be reasonably effective, and if the de-

page 18] fendant, Walter L. McCauley, acting by and through his agent and servant, Charles E. Summers, and the defendant, Charles E. Summers, failed to perform any one or more of said duties as above set forth and that such failure was a proximate contributing cause of the

accident, then you shall find for the plaintiff, Shelton Horsley Stevens, against the defendants, Walter L. McCauley and Charles E. Summers, unless you further believe from a preponderance of the evidence that the plaintiff himself was guilty of negligence which proximately contributed to the accident and injuries.

page 19] PLAINTIFF'S INSTRUCTION

4.

The Court instructs you that *the* each party is entitled to the legal presumption that he is free of negligence and this presumption will prevail in his favor unless his negligence appears from his own evidence or from that produced by the other party.

page 20] PLAINTIFF'S INSTRUCTION

5.

The Court instructs you that the burden rests on the defendants to prove by a preponderance of the evidence that the plaintiff, Shelton Horsley Stevens, was guilty of contributory negligence, unless it is disclosed by the plaintiff's own evidence or may be fairly inferred from all the facts and circumstances of the case.

page 21] PLAINTIFF'S INSTRUCTION

6.

The Court instructs you that although you may believe from the evidence that the plaintiff, Shelton Horsley Stevens, was guilty of negligence, yet in order for such negligence to bar plaintiff's recovery, it must be a proximate contributing cause of the accident.

Defendant objected to this instruction as being repetitious.

page 22] PLAINTIFF'S INSTRUCTION

7.

The Court instructs you that a person seeing the driver of a

vehicle approaching him on the wrong side of the road, is justified in assuming, in the exercise of ordinary care, that he will comply with the law and return to his proper side of the highway. This presumption continues until in the exercise of ordinary care the contrary should have appeared.

Defendant objected to this instruction on the ground that it is contrary to law.

page 23] The defendants, by counsel, objected and excepted to the giving of Instructions 1, 2a, 4, 5, 6, and 7, for the plaintiff, on the grounds that there was no evidence on which to base the instructions and further, that the plaintiff was guilty of contributory negligence as a matter of law

page 24] PLAINTIFF'S INSTRUCTION

8.

The Court instructs you that if you believe from the evidence that the defendant, Walter L. McCauley, acting by and through his agent and servant, Charles E. Summers, and the defendant, Charles E. Summers, were negligent and that such negligence was a proximate cause of the collision, and if you further believe from the evidence that the plaintiff, Shelton Horsley Stevens, was also negligent and that such negligence proximately contributed to the cause of the collision, you cannot return a verdict in favor of the defendants, Charles E. Summers, and/or Walter L. McCauley, against the plaintiff, Shelton Horsley Stevens, or in favor of the plaintiff, Shelton Horsley Stevens, against the defendants, Charles E. Summers and Walter L. McCauley, since in such a case the law will not undertake to compare negligence, and this is true even though the negligence of one might have been greater than the negligence of the other.

page 25] PLAINTIFF'S INSTRUCTION

9.

The Court instructs you that Shelton Horsley Stevens is only liable for negligence which proximately caused the collision and if you believe from the evidence that he operated his motor vehicle in a lawful manner and used that degree of care that a

reasonable and prudent person would have used under the same or similar circumstances, then he was not guilty of negligence and you should find in his favor on the cross-claims' of Charles E. Summers and Walter L. McCauley.

page 26] PLAINTIFF'S INSTRUCTION

10.

The Court instructs you that if you believe from the evidence that it is equally as probable that the collision was proximately caused by either one of two causes, for one of which Shelton Horsley Stevens is responsible and the other he is not, then Charles E. Summers and Walter L. McCauley have failed to carry the burden of proof and cannot recover on their cross-claims against Stevens.

page 27] PLAINTIFF'S INSTRUCTION

11.

The Court instructs you that the mere happening of an accident places no responsibility on any one and raises no presumption of negligence. The basis of this action is negligence, which the jury cannot infer from *ther* mere fact that the motor vehicle collided. You should not return a verdict against Shelton Horsley Stevens which is based on conjecture, surmise or speculation as to what you think may have happened to cause the collision, and if Charles E. Summers and Walter L. McCauley fail to prove by a preponderance of the evidence that Stevens was guilty of negligence, or if it appears from the evidence that it is as probable that Stevens was not guilty of negligence as that he was, or that it is as probable that such negligence did not proximately cause the collision as that it did, then you should return a verdict in favor of Stevens on the cross-claims of Summers and McCauley.

page 28] The defendants, by counsel, objected and excepted to the giving of Instructions 8, 9, 10 and 11 for the plaintiff, on the grounds that there was no evidence on which to base the instructions and further, that the plaintiff was guilty of contributory negligence as a matter of law.

page 29] DEFENDANTS' INSTRUCTION

INSTRUCTION A

The term "proponderance of the evidence" does not neces-

sarily mean the greater number of witnesses, but means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the jury. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

The jury are the sole judges of the weight of the evidence and the credibility of the witnesses, and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept when considered in connection with the whole evidence in the case, but the jury has no right arbitrarily to discard the credible testimony of a witness.

In ascertaining the preponderance of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent fairness or candor; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; the reasonableness or unreasonableness of their testimony; the physical facts as revealed by the evidence; and from all these and taking into consideration all of the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

page 30] DEFENDANTS' INSTRUCTION

INSTRUCTION B

The expressions "negligence," "ordinary care" and "proximate cause" as used in these instructions as defined as follows:

"Negligence" is a failure to exercise "ordinary care," that is, a failure to do what a reasonable and prudent person would ordinarily have done under the existing circumstances, or doing what a reasonable and prudent person would not have ordinarily done under the existing circumstances

The "proximate cause" of an event is a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred. It is an act or omission which immediately causes or fails to prevent the event; an act or commission occurring or concurring with another act, without which the event would not have occurred; provided such event could reasonably have been anticipated by a prudent man in the light of attendant circumstances.

page 31] DEFENDANTS' INSTRUCTION

INSTRUCTION C

A verdict must not be based in whole or in part upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the Court.

page 32] DEFENDANTS' INSTRUCTION

INSTRUCTION D

The Court instructs the jury that the law of the Commonwealth of Virginia imposes upon the operator of a motor vehicle in passing a motor vehicle proceeding in the opposite direction the following duties:

(1) To keep a proper lookout;
(2) To keep his vehicle under proper control;
(3) To operate his vehicle at a reasonable speed under the circumstances and traffic conditions then and there existing, regardless of any posted speed limit.
(4) To give to the other vehicle, as nearly as possible, one-half of the main travelled portion of the roadway.

If you believe from a preponderance of the evidence that Stevens failed to exercise ordinary care in the performance of any one or more of the foregoing duties, then he was negligent; and if you further believe from such evidence that any such negligence was a proximate cause of the collision, then, unless Summers was guilty of negligence which proximately contributed to cause the collision, you shall find your verdict in favor of the defendants and award unto the defendants, Summers and McCauley, such damages as you may ascertain to be proper.

page 33] DEFENDANTS' INSTRUCTION

INSTRUCTION E

The Court instructs the jury that if you believe that from the evidence that Stevens was negligent and that such negligence was a proximate cause of the collision, you cannot return a verdict in favor of Stevens and this is true although you may further believe from the evidence that Summers was also neg-

ligent and that such negligence was also a proximate cause of the collision.

The law does not undertake to apportion or balance the negligence of the parties where both are at fault in order to ascertain which one is most at fault, but the plaintiff, Stevens, is barred from recovery if he was guilty of any negligence which proximately contributed to cause the collision.

page 34] DEFENDANTS' INSTRUCTION

INSTRUCTION F

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

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

page 35] DEFENDANTS' INSTRUCTION

INSTRUCTION G

The Court instructs the jury that where a plaintiff relies upon contributory negligence of the defendant as a defense, such contributory negligence is not presumed, but the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of such negligence, and that any such negligence proximately contributed to cause the collision; and unless the plaintiff thus proves the existence of such negligence or unless any such negligence appears from the defendant's own evidence or can be fairly inferred from all the circumstances of the case, then you cannot find the defendant guilty of contributory negligence.

page 36] DEFENDANTS' INSTRUCTION

INSTRUCTION H

The unexplained failure of a party to produce a material

witness with reference to his injury raises a presumption that the testimony of such witness would have been adverse to the party thus failing to produce him. The presumption may be rebutted by the party explaining the absence of the witness and showing that he has been unsuccessful in procuring his presence despite diligent efforts made in good faith to produce the witness.

page 37] DEFENDANTS' INSTRUCTION

INSTRUCTION J

The Court instructs the jury that if from the evidence and the other instructions of the Court you find your verdict in favor of the defendant, Summers, then in assessing the damages to which he is entitled you may take into consideration any of the following which you believe from the evidence to have resulted from the collision:

1. Any bodily injuries sustained and the extent and duration thereof;
2. Any physical pain and mental anguish suffered by him in the past, and any which may be reasonably expected to be suffered by him in the future;
3. Any inconvenience and discomfort caused in the past and any which will probably be caused in the future;
4. Any doctors, hospital, nursing and medical expenses incurred in the past;
5. Any loss of earnings in the past by reason of being unable to work at his calling;

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

page 38] DEFENDANTS'' INSTRUCTION

INSTRUCTION K

The Court instructs the jury that if from the evidence and the other instructions of the Court you find your verdict in favor of the defendant, McCauley, then in assessing the damages to which he is entitled you may take into consideration any

of the following which you believe from the evidence to have resulted from the collision:

1. Damages to the truck and any other property of the defendant, McCauley, damaged or lost as a result of the collision;

2. Any loss of earnings sustained by virtue of the loss of use of said truck;

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

page 39] DEFENDANTS' INSTRUCTION

INSTRUCTION L

The Court instructs the jury that your verdict shall be in one of the following forms:

(1) We, the jury find both drivers were negligent and therefore, find for the defendants on the plaintiff's claim against them and for the plaintiff on the claims of the defendants against him.

(2) We, the jury find for the plaintiff, Shelton Horsley Stevens, on his claim against the defendants, award unto him the sum of $———— for his damages and find for the plaintiff on the claim of the defendants against him.

(3) We, the jury, find for the defendant, Charles E. Summers, on his claim against the plaintiff and award unto him the sum of $———— and further find for the defendant, Walter L. McCauley, on his claim against the plaintiff and award unto him the sum of $———— for his damages and further find for the defendants on the claim of the plaintiff against them.

page 40] The following instruction was offered by the defendants but was refused by the Court, to which action of the Court in refusing to give the said instruction the defendants, by counsel, duly excepted.

page 41] DEFENDANTS' INSTRUCTION

INSTRUCTION I

If the jury believe from the evidence that the injury of which the plaintiff complains might have been due to either of two causes, for one of which he was not responsible, and if the jury are unable to determine which of the two causes occasioned the injury complained of, then the jury shall find their verdict in favor of the defendant.

Defendant duly objected and accepted.

Refused 9-10-64

page 42] Whereupon, after closing argument by counsel, the jury retired to consider their verdict, and upon returning to the courtroom, presented the following verdict:

"9/10/64

"We the jury, find for the plaintiff, Shelton Horsley Stevens, on his claim against the defendants, award unto him the sum of $6,500 for his damages and find for the plaintiff on the claim of the defendants against him.

s/"BOBBY D. HIGGINBOTHAM
Foreman"

A motion was made by the defendants to set the verdict aside on the ground that it was contrary to the law and evidence and to enter up judgment for the defendants on the plaintiff's claim and to enter up judgment for the defendants on their counterclaim against the plaintiff and to empanel a jury to assess the damages, and the Court took said motion under advisement, the Diagram drawn by the trooper was on a blackboard and repeatedly referred to by all counsel and was seen and considered by the jury and was photographed by Sheriff Whitehead and on September 28, 1964, this matter was fully argued by counsel for all parties and the Court further took same under advisement and on April 16, 1965, the Court entered an order setting aside the verdict for the plaintiff on his claim against the defendants in the sum of $6,500.00 for his damages and entered up judgment for the defendant on the plaintiff's claim, to which the plaintiff, by counsel, duly objected and excepted,

page 43] and entered up judgment for the plaintiff on the verdict of the jury for the plaintiff on the counterclaim of the defendants against him, to which action of the Court, the defendants, by counsel, duly objected and excepted.

★ ★ ★ ★ ★

A Copy — Teste:

H. G. TURNER, Clerk

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