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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 6221

In the

Supreme Court of Appeals of Virginia

at Richmond

MARY BAILEY, ADMINISTRATRIX, ETC.,

v.

C. V. HUNTER, INC., ET AL.

FROM THE CIRCUIT COURT OF CULPEPER 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. 6221

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.

MARY BAILEY, ADMINISTRATRIX OF THE ESTATE OF GEORGE RICHARD WASHINGTON, DECEASED, Plaintiff in error,

against

C. V. HUNTER, INC., AND JAMES EDWARD FRANKLIN, Defendants in error.

From the Circuit Court of Culpeper County
C. Champion Bowles, Judge

Upon the petition of Mary Bailey, Administratrix of the estate of George Richard Washington, deceased, a writ of error is awarded her to a judgment rendered by the Circuit Court of Culpeper County on the 29th day of January, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and C. V. Hunter, Inc., and another were defendants; no bond being required.

RECORD

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In the Circuit Court of the County of Culpeper:

MARY BAILEY, Admx. of est. of George Richard Washington, deceased *against* C. V. HUNTER, INC. and JAMES EDWARD FRANKLIN

NOTICE OF MOTION FOR JUDGMENT

To: C. V. HUNTER, INC.
Route 2
Madison Heights, Virginia
and
JAMES EDWARD FRANKLIN
Thomas Road
Madison Heights, Virginia

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

Done in the name of the Commonwealth of Virginia, this 15th day of March, 1963.

(s) MARGARET B. BROWN, Clerk.

JAMES H. RABY, p.q.
The Raby Building
1000 Pendleton St.
Alexandria, Virginia
(Office Address)

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MOTION FOR JUDGMENT

To You Defendants:

Mary Bailey, administratrix of the estate of George Richard

Washington, deceased, duly appointed and qualified under the laws of the State of Virginia, plaintiff, hereby moves the Circuit Court of Culpeper County, Virginia, for a judgment and award of execution against you and each of you, jointly and severally in the sum of $30,000.00 for this to wit:

1. That heretofore, to-wit: on or about the 27th day of November, 1961, George Richard Washington, now deceased, was lawfully operating his automobile in a Southerly direction on Route No. 29 and was, after first giving the proper signals, waiting to make a left turn off of Route #29 into Route #756 in Culpeper County, Virginia.

2. That at or about the same time, to wit: about 7:45 P. M. a truck operated and controlled by the defendant, C. V. Hunter, Inc. and then and there being driven by its servant, agent and employee, James Edward Franklin, was proceeding on said U. S. Route #29 in a southerly direction; and was immediately in the rear of automobile being driven by the said deceased.

page 3] 3. That it thereupon became and was the duty of defendants then and there to keep a proper lookout, to have its motor vehicle under proper control, and to drive at a reasonable speed under the circumstances and traffic conditions existing at the time; to keep a proper lookout for motorists travelling the highway immediately in front of defendant; and especially the deceased, George Richard Washington, who was then and there attempting to make a left turn off Route #29 into Route #756; to keep its motor vehicle under proper control; to keep its said truck equipped with proper brakes; and to yield to said deceased the right of way while he was attempting to make a lawful left turn; and when defendant saw, or by the exercise of ordinary car, could have seen the deceased attempting to make said left turn from said Route #29, defendant should have put said truck under proper control and used reasonable care to avoid a collision with the automobile of deceased, and to drive said truck so as not to endanger, or likely to endanger the life of the said George Richard Washington.

4. Yet, notwithstanding their duty, as aforesaid, the said C. V. Hunter Inc. through its servant, agent and employee, James Edward Franklin then and there drove the said truck on said highway in a wilful and wanton disregard of the safety of the said George Richard Washington, deceased; the said defendants failed to keep a proper lookout for motorists who were travelling on said highway going in the same direction, especially said deceased, failed to yield right of way

to deceased who was attempting to make a lawful left turn off said highway, failed to have the said truck under proper control and drove said truck at a grossly unreasonable and and excessive rate of speed, negligently and carelessly failed to yield right of way to deceased when he was attempting to make a left turn as aforesaid; and when defendant saw, or by the exercise of ordinary care, could have seen deceased attempting to make a turn, as aforesaid, to drive *siad* truck so as to avoid running into and injuring the deceased; defendant negligently failed so to do; and

page 4] 5. As a direct and proximate result of defendant's aforesaid carelessness and negligence, defendant's truck collided with deceased's automobile, and the force of said collision was so great that the said George Richard Washington was fatally injured, suffered injury and pain to his body, and as a result died from said injury and within two years of the commencement of this action, to the total damage of the plaintiff in the sum of $30,000.00.

WHEREFORE, the plaintiff brings this action.

MARY BAILEY, Admx.
Plaintiff—By Counsel

JAMES H. RABY
Attorney for Plaintiff
The Raby Building
1000 Pendleton Street
Alexandria, Virginia

Filed in the Clerk's Office the 15 day of March, 1963.

Teste:
MARGARET B. BROWN, Clerk

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MARY BAILEY, Admx. of estate of
GEORGE RICHARD WASHINGTON, deceased
vs.
C. V. HUNTER, INC. and
JAMES EDWARD FRANKLIN

Returns shall be made hereon, showing service of Notice issued March 15, 1963, with copy of Motion for Judgment ——————filed March 15, 1963, attached:

Executed on the 20th day of March, 1963, in the County of Amherst, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to C. V. Hunter in person.

H. S. MYERS
Sheriff, County of Amherst, Va.
By J. A. CAREY, JR., Deputy Sheriff.

(Use the space below if a different form of return is necessary)

Not finding James Edward Franklin at his usual place of abode, Amherst Co., the above mentioned papers attached to each other, were executed on the 22 day of March, 1963, in the County of Amherst, Virginia, by delivering a true copy of same to Mrs. James E. Franklin (wife) whom I found at the usual place of abode, a member of his family above the age of sixteen years, and by giving information of its purport to her.

H. S. MYERS
Sheriff, County of Amherst, Va.
By J. A. CAREY, JR., Deputy Sheriff

Returned and filed the 25th day of March, 1963.

MARGARET B. BROWN, Clerk

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GROUNDS OF DEFENSE

Come now the defendants and for answer to the Motion for Judgment filed herein respectfully represent to this Court as follows:

The defendant, George V. Hunter, Inc., incorrectly named in the Motion for Judgment as C. V. Hunter, Inc., is willing that the Motion for Judgment be amended stating its correct name.

1. The defendants and each of them deny that plaintiff's decedent, George Richard Washington, on the 27th day of November, 1961, was lawfully operating his automobile in a southerly direction on Route No. 29; deny he gave any proper signals for a left turn; and deny he was waiting to make a left turn from Route No. 29 into Route No. 756 in Culpeper County, Virginia.

2. The defendants admit that an accident occurred at or about, to wit, 7:45 P.M. near the intersection of U.S. Route 29 and State Route No. 756 in Culpeper County, Virginia, and further admit that the defendant, James Edward Franklin, was the agent of and on the business of the defendant, George V. Hunter, Inc.; they admit the vehicle operated by the said James Edward Franklin was proceeding on Route No. 29 in a southerly direction, but deny that it was immediately in the rear of the automobile driven by the said decedent, George Richard Washington.

page 7] 3. These defendants admit the duties imposed upon them by law, and say that such duties were carefully observed, and that no breach of their duty was any cause of the accident.

4. The defendants deny that the automobile-truck operated by the defendant, James Edward Franklin, and owned by the defendant, George V. Hunter, Inc., was operated in a wilful and wanton disregard of the safety of the said George Richard Washington. These defendants deny that its operator failed to keep a proper lookout for motorists traveling on said highway; they deny that they did not keep a proper lookout for the decedent; deny they failed to yield the right-of-way to the decedent; deny decedent was attempting to make a lawful turn; deny they failed to have the said vehicle under control; deny the same was operated at a grossly unreasonable and excessive rate of speed; deny they negligently and carelessly failed to yield the right-of-way to the decedent when he was attempting to make a left turn; deny that they could, by the exercise of ordinary care, have seen the decedent attempting to make a left turn; deny that they failed to drive their truck properly to avoid injuring the decedent.

5. These defendants deny that as a direct and proximate result of their negligence and carelessness that the truck collided with the decedent's automobile; deny that the force of said collision was so great that the said George Richard Washington was fatally injured; deny he suffered any injury, pain, or death as a result of these defendants negligence.

These defendants say, by way of further answer, that if

plaintiff's decedent, George Richard Washington, was fatally injured and damaged as alleged that said injury and damage causing his death was due to the sole negligence of plaintiff's decedent, George Richard Washington, or contributed to by him in that the said George Richard Washington failed to keep a proper lookout; failed to keep his automobile under control; attempted to make an improper and illegal turn directly into the path of the defendants' truck; he failed to give a proper signal or warning of his intentions; and say that the cause of the decedent's death was his own negligence or contributed to by him and these defendants expect to rely upon contributory negligence of George Richard Washington as a defense.

page 8] WHEREFORE, having fully answered, the defendants ask judgment that the Motion for Judgment be dismissed with their costs allowed to them.

JAMES EDWARD FRANKLIN
By Counsel
GEORGE V. HUNTER, INC.,
By Counsel

DOUGLAS A. CLARK
Attorney for defendants
360 Cedar Lane
Merrifield, Virginia

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Filed in Culpeper County Circuit Court Clerk's Office March 27 1963.

DOROTHY A. FAULCONER, Dep. Clerk

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REQUEST FOR SUBPOENAS

The Clerk of the Court will please issue subpoenas for the following named persons to appear in this Court on April 24, 1964, at 10:00 o'clock A.M., to testify at the trial of the above cause on behalf of the defendants.

ANDREW RUSSELL LEE
118 Elm Street
Culpeper, Virginia

Virginia State Trooper
JOSEPH C. LAWSON
Virginia State Police
Culpeper, Virginia

ANGELA LEE
118 Elm Street
Culpeper, Virginia

DOUGLAS A. CLARK
Attorney for Defendants

Subpoenas issued 4-16-64

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MOTIONS OF PLAINTIFF

The Court having ruled in this cause on April 24, 1964 granting defendants' Motion to strike the evidence of Plaintiff on the ground that the death certificate of George Richard Washington, deceased, submitted by plaintiff was not sufficient to make out a *prima facie* case as proof of the cause of death of said George Richard Washington, deceased, and stated that said ruling was made after applying the facts in the *Brockman* case (*Life Ins. Co. of Virginia* v. *Brockman,* 3 S. E. 2d 480) Plaintiff does respectfully move the Honorable Court:

1. To vacate the order of the Court heretofore entered on April 24, 1964 on the following grounds:

A. That the ruling of the Court was contrary to the law and the evidence and that the law and facts in the *Brockman* case were not applicable to this case.

B. That the death certificate of George Richard Washington, as a matter of law, did make out a *prima facie* case as proof of the cause of death of said deceased.

2. To grant plaintiff a New Trial on the grounds specified in Paragraph No. 1 and for a date to argue said Motion.

JAMES H. RABY
Attorney for Plaintiff
The Raby Building
1000 Pendleton Street
Alexandria, Virginia

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Filed in Culpeper County Circuit Court Clerk's Office May 6, 1964.

MARGARET B. BROWN, Clerk

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ANSWER TO PLAINTIFF'S MOTION FOR NEW TRIAL

Come now the defendants and for answer to the plaintiff's Motion For New Trial respectfully represent to this Honorable Court as follows:

1. It is submitted that this Court was correct in ruling that the case of *Life Insurance Co. of Va.* v. *Brockman* was in point.

2. The death certificate which plaintiff attempted to introduce would have been admissible as to the fact of death, but not as to the cause thereof, since the cause was strictly predicated upon hearsay evidence given to the Medical Examiner, James A. Wilkerson, who is the Medical Examiner of Albemarle County. There was no evidence that Dr. Wilkerson ever saw the decedent at any time; certainly he did not treat him.

3. The Court's attention is respectfully called to *Dorsey* v. *Prudential Ins. Co.*, 124 W. Va. 100, 19 S.E. 2nd 152; and *Collins* v. *Equitable Life Ins. Co.*, 122 W. Va. 171, 8 S.E. 2nd 825-130, A.L.R. 287.

page 13] It is, therefore, submitted for the reasons stated and the above authorities, that plaintiff's Motion For New Trial should be overruled.

EXHIBIT: Copy of Certificate of Death.

DOUGLAS A. CLARK
Attorney for Defendants

* * * * *

page 14] COMMONWEALTH OF VIRGINIA
CERTIFICATE OF DEATH 26

Department of Health — Bureau of Vital Statistics 123-2

MEDICAL EXAMINER'S CERTIFICATE

Registration area Number 101
Certificate Number 684
State File Number
1. Full Name of Deceased George R. Washington
2. Sex male [x] female [ ]
3. Date of Death Dec. 1, 1961
4. Age of Deceased 70 years
If Under 1 Year If Under 1 Day
months days hours minutes
5. Color or Race Negro
6. Name of Hospital or Institution of Death Univ. Va. Hosp.
7. County of Death Albemarle
8. City or Town of Death Charlottesville
inside city or town limits? yes [ ] no [x]
9. Street Address or Rt. No. of Place of Death
10. State or (Foreign Country) of Deceased's Residence Virginia
11. County of Deceased's Residence Culpeper
12. City or Town of Residence Culpeper
inside city or town limits? yes [x] no [ ]
13. Street Address or Rt. No. of Residence 1105 West Street
14. Name of Father of Deceased George Washington
15. Maiden Name of Mother of Deceased Ellen Tutt
16. Citizen of What Country USA
17. Married [x] Never Married [ ] Widowed [ ] Divorced [ ]
18. If Married or Widowed, Name of Spouse Eliza Washington
19. Social Security Number
20. If Veteran, name war, or if peacetime only, so state
21. Birthplace of Deceased (state or county) Rappahannock Co.
22. Date of Birth (mo) (day) (year) Feb. 23, 1891
23. Usual or last Occupation Sexton

24. Kind of Business or Industry Church
25. Informant — or source of Information Chart
26. Cause of Death (Enter only one cause per line for (A), (B), and (C). Part 1. Death Was caused by:
Immediate cause (a) Pulmonary Thrombotic Emboli
Interval between onset and death 24 hrs.
Due to (B) Ruptured Spleen and Splenectomy 3 days
Due to (C) Automobile Accident 8161 3 days
Conditions if any, which gave rise to immediate cause (A), stating the underlying cause last.
Part II. Other Significant Conditions contributing to Death but not related to the Terminal Disease condition given in Part 1 (A)
26a. Autopsy? yes [x] no [ ]
Authorized by: Med. Examiner
26b. If Female, was there a pergnancy in past 3 months?
yes [ ] no [ ] unknown [ ]
26c. External Cause of Death was Primary [x] or
Contributing [ ]
26d. Describe how Injury Occurred. (enter nature of injury in part I and part II) Driving a car which was struck by truck
26e. Time of Injury (mo) (day) (year)
————A.M.
P.M. Nov. 26, 1961
26f. Injury Occurred while at work [] not while at work [x]
26g. Place of Injury (home, farm, factory, street, office bldg.,etc.) Street
26h. (city or town) (county) (state)
Culpeper, Culpeper, Va.
26i. I Certify that I took charge of the remains described above, viewed the body, made inquiry and in my opinion death resulted on or about 8:05 (PM) from Natural Causes [ ] Accident [x] Suicide [ ] Homicide [ ] Undetermined [ ] Pending [ ]
Actual Signature James A. Wilkerson, M. D.
Medical Examiner for Albemarle Co., Dec. 2, 1961 Date signed
27. Burial [x] Removal [ ] Cremation [ ]
28. Place of Burial, Removal, etc. (name or cemetery or crematory) Fairview Cemetery, Culpeper, Va.
29. (signature of funeral director or person acting as such)
Mortimer M. Marshall
Name of Funeral Home and Address: Marshall Funeral Home, Culpeper, Va.
30. Mary Louise Stuckler Registrar
Date Record Filed: 12/6/61

This is to certify that this is a true and correct reproduction of the original record filed with the Bureau of Vital Statistics, Virginia Department of Health, Richmond, Virginia.
RM 71973
Date Issued Jan 3 1962
DEANE HUXTABLE, State Registrar

Filed in Culpeper County Circuit Court Clerks' Office June 24, 1964

DOROTHY A. FAULCONER, Clerk

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MEMORANDUM OF LAW AND ARGUMENT IN SUPPORT OF PLAINTIFF'S MOTION FOR A NEW TRIAL.

On April 24, 1964, after plaintiff had offered her evidence in the above styled cause, defendants, by counsel, moved the Court to strike the evidence of plaintiff on the ground that there "is no *proff* of cause of death, and we denied specifically and do again, that this automobile accident caused this death." The Court in sustaining said motion to strike stated that the death certificate of George Richard Washington, the deceased, had been ruled *admissiable* in evidence and "is permitted to be so filed and designated," and gave as its grounds for such ruling that the death certificate was admitted in the evidence the application of Section 32.353.27 (b) of the 1950 Code of Virginia, as amended. The Court further stated that after applying the case of *Life Insurance Company* vs. *Brockman,* 173 Va. 86 to the instant case he was granting Motion of the defendants to strike the evidence of the plaintiff on the ground that "the death of the plaintiff has not been shown to have resulted from the accident, notwithstanding the fact that the death certificate is in the evidence," and concluded with, "It is with a great deal of reluctance I hold

page 16] in view of the *Brockman* case that the motion is well taken and it is sustained." (page 39 of the record)

Plaintiff contends that the facts in the *Brockman* case are not applicable to the facts in the instant case for the following reasons:

1. The suit in the *Brockman* case was for recovery on a life insurance policy where the company claimed the deceased committed suicide. Section 217, page 382 of THE LAW OF EVIDENCE discusses the difference of proof necessary on actions to recover on life insurance policies when the insurance company alleges Suicide as a defense in an action to recover under the policy, and states that in such cases there is a presumption that when death occurs from unexplained reasons that there is a presumption of accident and against suicide, but points out that it may be at least doubted whether there is any such presumption of general application in other types of actions.

The Court in reversing the ruling of the trial court in striking the evidence of the plaintiff and setting aside the verdict of the jury in *Bly* v. *Southern Ry. Co.,* 183 Va. 162 said, "In an action to recover damages for a death negligently caused, direct or positive evidence that the negligence caused the injuries is not necessary. The relevant conditions and circumstances surrounding and relating to the occurrence, unless they interdict, as a matter of law an inference or inferences necessary to the verdict, may be submitted to the jury, in the absence of direct proof, in order that the jury may determine the inferences, if any, which they create."

2. In the *Brockman* case all the physicians who had signed medical statements and certificates as to the cause of death were called at the trial as witnesses. The Court found that from their own testimony the facts relative to suicide given in their medical statements were based on information and given to them by someone else, according to their own testimony. In the instant case, the Death Certificate of the deceased was admitted into the evidence. There was no evidence put on by the defendants denying anything
page 17] on in an automobile accident, due to embolism, due to ruptured spleen.

The said Statute states: "A certified copy of a certificate or any part thereof issued in accordance with subsection (a) shall be considered for all purposes the same as the original, and shall be *prima facie* evidence of the facts therein stated . . ." Does not the said death certificate state as a fact that the deceased plaintiff died? Does not the said death certificate state as a fact that the cause of death is from embolism, due to ruptured spleen, due to automobile accident? The medical examiner was not called by the defendants to show facts weakening, or *contridicting* the statements made by him on the death certificate. It appears to plaintiff that

the Court's ruling placed on the plaintiff the duty of the defendants; that is, the burden of showing whether or not the statements made on the death certificate were facts or mere expression of opinions. It was the duty of the defendants to show by evidence that the *prima facie* case as to the cause of death as stated on the death certificate, presented by the plaintiffs was not conclusive evidence as to the cause of death. This the defendants did not do.

In the opinion of the Court in *Eisenhower, et al* v. *Vergie Jeter,* 205 Va. 159, the Court held that the age of the deceased in that case had been shown by the age listed on the death certificate. There was no testimony submitted to refute the age as shown on the death certificate in that case.

In the *Brockman* case the Court did not strike the evidence of the plaintiff, nor did the Court rule that the plaintiffs had not presented a *prima facie* case at the conclusion of plaintiff's evidence. The Court has ruled so many times that when the plaintiff puts on *prima facie* case, the burden is on the defendant to show by evidence that the evidence of the plaintiff is not conclusive that the question is now elementary. In the instant case plaintiff did *indead* put on a *prima facie* case as to the cause of death by submitting in the evidence the death certificate of the deceased, which was admitted by the Court.

page 18] In concluding this argument, plaintiff calls to the attention of the Court that expert evidence is not always necessary to prove the cause of death in an action for Death by Wrongful act, and cites as authority therefor the text book language found in MICHIE'S JURISPRUDENCE, Book No. 5 (Death by Wrongful Act) Section 11, page 620 which states: "It is not always necessary to prove the cause of death and that Court and juries may take into consideration the facts with which all mankind are familiar. Also in MICHIE'S JURISPRUDENCE, *Volumn* 7, page 543, (Evidence) Section 172 is stated: "Expert or medical testimony is not in all cases necessary to establish the cause of death." The Court held in *Northern Virginia Power Co.* v. *Bailey,* 194 Va. 464 that frequently material facts are not proven by direct evidence and that a verdict may be properly based upon reasonable inferences drawn from the facts.

Plaintiff's evidence clearly showed by witnesses that the defendant collided with plaintiff decedent automobile at a point which was over the double white line and on the left side of the road, that the decedent was injured and taken to the hospital where he died three days later.

Plaintiff therefore *ask* the Court to grant her a new trial on the ground that plaintiff did show by *prima facie* evidence the cause of the death of the decedent by the facts stated in the death certificate and the testimony of the witnesses at the trial.

Respectfully submitted

JAMES H. RABY
Attorney for Plaintiff
The Raby Building
1000 Pendleton Street
Alexandria, Virginia

Filed in Culpeper County Circuit Court Clerk's Office June 29, 1964

MARGARET B. BROWN, Clerk

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NINTH JUDICIAL CIRCUIT
C. Champion Bowles, Judge
Goochland, Virginia

January 4, 1965

IN RE: *MARY BAILEY, Administratrix of the estate of George Richard Washington, deceased*
vs.
C. V. HUNTER, et al

Mr. James H. Raby
The Raby Building
1000 Pendleton Street
Alexandria, Virginia

Mr. Douglas A. Clark
Box 188
Merrifield, Virginia

Mr. D. French Slaughter, Jr.
Culpeper, Virginia

Gentlemen:

You are advised that I have considered the motion filed for a new trial, and have reviewed the evidence in the above styled case, and I am of the opinion that the motion for a new trial must be denied.

Very truly yours,

C. CHAMPION BOWLES.

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JUDGMENT ORDER

On the 24th day of April, 1964, came the parties hereto, the plaintiff in person and by counsel, and the defendants in person and by counsel, and this case came on to be heard on the Motion for Judgment and Grounds of Defense; and thereupon came a jury of thirteen veniremen and took their seats in the Jury Box and were sworn and examined on their *voir dire* and found to be competent and qualified jurors, according to the statute. And the attorney for the plaintiff and the attorney for the defendants having alternately, beginning with the attorney for the plaintiff, each stricken from the said panel the names of three of the said veniremen, the remaining seven constituted the jury for the trial of this case, who were sworn the truth of and upon the premises to speak and who heard the opening statement of the Attorney for the plaintiff and the Attorney for the defendants and all the evidence on behalf of the plaintiff; and upon conclusion of the evidence presented on behalf of the plaintiff, the attorney for the defendants, out of the presence of the jury, made a motion to strike the evidence presented on behalf of the plaintiff, which motion the Court, after hearing argument thereon, granted; and to the action of the Court granting said motion the attorney for the plaintiff noted his exception.

Whereupon the attorney for the defendants moved the Court that Summary Judgment be entered in favor of the defendants, which said Motion the Court granted, and to which said Motion the attorney for the plaintiff duly noted his exception.

Whereupon the Jury was recalled and discharged.

page 21] Thereupon the plaintiff, by counsel, timely filed a Motion to Set Aside the Judgment of the Court

for the defendants and to grant plaintiff a new trial. Whereupon Answer to said motion was duly filed by the defendants, by counsel, and the same was considered by the Court. The written grounds in support of said Motion are hereby made a part of the record in this case, and the Court is of the opinion that said Motion ought to be, and the same is hereby overruled. To all of which plaintiff, by counsel, objects and excepts.

It is, therefore, ADJUDGED and ORDERED that the plaintiff take nothing of the defendants in this case, and that the defendants do recover of and from the plaintiff their costs of defense and have judgment therefor; to all of which the plaintiff, by counsel, objects and excepts.

AND this ORDER is final.

Enter:

C. CHAMPION BOWLES
Judge
1/29/65

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NOTICE OF TENDERING OF TRANSCRIPT TO JUDGE

To: Douglas A. Clark, Esquire and
D. French Slaughter, Jr., Esquire
Attorney for Defendants

You are hereby notified that on the 15th day of February, 1965, at ten o'clock A. M., or as soon thereafter as counsel may be heard, in the Circuit Court Room for the County of Culpeper, Virginia, the undersigned will tender to the Honorable C. Champion Bowles, Judge of the Circuit Court for Culpeper County, Virginia, the original transcript of the evidence, reduced to writing in the above styled cause, including all exhibits, stipulations and exceptions, and respectfully ask the Honorable C. Champion Bowles to certify the same as the true copy of the evidence presented in the above styled cause.

MARY BAILEY, Admx.
Counsel for Plaintiff

* * * * *

Filed in Culpeper County Circuit Court Clerk's Office, Feb. 4, 1965.

MARGARET B. BROWN, Clerk

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To The Clerk of the Circuit Court of Culpeper County:

Counsel for Mary Bailey, Administratrix of the Estate of George Richard Washington, hereby gives notice of appeal from the final judgment order entered by the Court herein and sets forth the following assignments of error:

1. The Court erred in granting defendants' Motion for Summary Judgment.
2. The Court erred in refusing to set aside its ruling and grant a new trial to the plaintiff on the grounds that the judgment of the Court was contrary to the law and the evidence and without evidence to support it.

page 24]

JAMES H. RABY
Attorney for Plaintiff
The Raby Building
1000 Pendleton Street
Alexandria, Virginia

Dated 3-19-65

* * * * *

Filed in Culpeper County Circuit Court Clerk's Office March 22, 1965

MARGARET B. BROWN, Clerk

* * * * *

Filed in Culpeper County Circuit Court Clerk's Office May 27, 1964

MARGARET B. BROWN, Clerk

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Culpeper, Virginia,
April 24, 1964.

The above-entitled cause came on for trial before The Honorable C. Champion Bowles, Judge, and a jury, commencing at 10:00 o'clock a.m. on Friday, April 24,1964.

APPEARANCES:

JAMES H. RABY, Esq.,
1000 Pendleton Street,
Alexandria, Virginia,
In behalf of Plaintiff

DOUGLAS A. CLARK, Esq.,
and
D. FRENCH SLAUGHTER, Esq.,
In behalf of Defendants.

page 2] PROCEEDINGS

Thereupon,

ANGELA WRIGHT LEE

was called as a witness by counsel for Plaintiff and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Raby:

Q. What is your name?
A. Angela Wright Lee.
Q. How old are you?
A. Fourteen.
Q. And do you go to school?
A. Yes.
Q. What school do you go to?
A. George Washington, Junior High School.

Angela Wright Lee

Q. What grade are you in?
A. Ninth.
Q. Do you know the purpose of taking an oath?
A. Yes.
Q. What is the purpose?
A. To solemnly swear to tell the truth and nothing but the truth.
Q. Now, Angela, on or about the 27th day of November, were you in a car with Mr. George Washington?
A. Yes.
Q. Talk up so we can here you, and His Honor
page 3] the Judge, and the jurors up here.
A. Yes, I was.
Q. All right. Now, Angela, tell me what happened that you know?
A. Well, we were on our way to the hospital to see Mrs. Liza Washington, who was in the hospital.
Q. Take your time. Don't talk so fast. Take your time. Slow.
A. So as we got near the hospital Mr. Washington put on his signal, and as we got near the entrance of the hospital he had to turn in. Mr. Washington missed the entrance a little bit and backed back. And as we were turning the truck came up and hit us.
Q. Now, you said that — did at any time Mr. Washington go off on the shoulder to back?
A. No, he didn't.
Q. Can you tell by this board, give us a description of what happened there?
A. Yes.
Q. Well, will you come down by this board, please?
A. (Witness complies)
Q. Now, this is going south (indicating); this is the entrance here. Now, tell the jury just where and how it happened.
A. Well, over here is the hospital (indicating)
page 4] and as he neared the hospital, this is where Mr. Washington put on his signal, and the entrance here, he missed the entrance a little bit and he backed back there (indicating) and when he got to there (indicating), this truck, it came and hit him here (indicating).
Q. Right there (indicating)?
A. Yes, right there.
Q. Did you see Mr. Washington put on his blinker?
A. Yes.

Q. How do you know he had on his blinker?
A. Because you could hear it when he had his blinker on. And it was blinking.
Q. And about how far away was Mr. Washington from that intersection before he started giving the signal?
A. I would say about 100 feet away.
Q. That is when he was giving the signal?
A. Yes.
Q. And that is the way you say this accident happened?
A. Yes.
Q. Now, did you hear anybody blow a horn — the other car driver?
A. No, I didn't.
Q. If had blown his horn you would have heard him?
A. Yes.

page 5] Mr. Raby: That is all. Your witness. Get back on the stand, Angela. Oh, just let me ask some more questions, Your Honor.

By Mr. Raby:
Q. What happened after the accident?
A. The rescue squad came and took Andrew out of the car and Mr. Washington, he got out of the car and he all went to the hospital in the ambulance.
Q. Where was this hospital? Was it Culpeper County?
A. Yes, it was the Culpeper Memorial Hospital.
Q. Now, this accident happened on — do you know what route number it was, do you remember that road?
A. No, I don't.
Q. But it was in Culpeper County?
A. Yes.
Q. And you were turning to go into the hospital?
A. Yes.
Q. As a result of this accident, did Mr. Washington die?
A. Yes, he did.
Q. Do you know approximately when he died?
A. No, I don't know when he died.

Mr. Raby: All right. Your witness.

CROSS EXAMINATION

By Mr. Clark:
Q. What time did you get in this car of George Washing-

ton's that night.

page 6] A. I don't remember the time we got in the car before.

Q. Do you remember the time this accident happened?

A. No.

Q. You don't know what time of day it was?

A. It was at night.

Q. It was at night; what time of the night?

A. I don't remember.

Q. Well, was it as late as ten or eleven o'clock?

A. I don't think so.

Q. What time was it?

A. I don't remember.

Q. Where were you seated in the car?

A. I was seated up in the front seat.

Q. In the front seat?

A. Yes.

Q. Who else was in the front seat.

A. My sister.

Q. And what is her name?

A. Cecelia Bridget Lee.

Q. And how old is she?

A. She is eleven years old now.

Q. Eleven years old now. Now, were you going north or south on Highway 29?

A. I think we were — we were going toward Culpeper Memorial Hospital.

page 7] Q. From which way? From Culpeper?

A. Yes.

Q. In other words, you had come through Culpeper?

A. Oh, we live right — we live — we don't live in the town of Culpeper, we live right over the — by the Case machines in Culpeper, up over the hill.

Q. But you were going away from Culpeper towards the hospital?

A. Yes.

Q. And you said that Washington passed the turn?

A. Yes, he missed the entrance a little bit, when he got there.

Q. When you say he missed the entrance a little bit, how much did he miss the entrance?

A. A few feet, I think.

Q. Well, now, what do you mean by a few feet? Will you show us something in the courtroom that will indicate to you

a few feet, or would you have to go outside — do you see anything that indicates the distance to you that you passed the intersection?

A. I would say from the end of that desk, the end of this desk, to the middle of this (indicating).

Q. You mean from this gate here to the end that the Sheriff is touching?

A. Yes.

page 8] Q. Is that the only distance that he passed?

A. Yes, that is the only distance that he passed it.

Q. Now —

The Court: For the record, do you all want to estimate the distance she indicated?

Mr. Clark: About ten feet?

Mr. Raby: I would say about ten feet. Now, about five. Five feet.

Mr. Clark: Closer to ten, I think.

(Distance referred to was measured by State Trooper)

Mr. Raby: I counted eight feet and a fraction. Did you say to the middle there (indicating)?

The Witness: Yes.

Mr. Raby: Nine feet and a fraction.

Mr. Clark: Closer to ten.

Mr. Raby: We'll settle for ten feet.

Mr. Clark: Thank you.

By Mr. Clark:

Q. Now, did he bring the car to a complete stop? On the highway?

A. No, he didn't. He just missed the entrance, then he backed back.

Q. Well, he had to stop before he backed back?

A. Oh, yes.

Q. And did he back back on the hard surface of

page 9] the highway or did he back back on the shoulder of the road?

A. He back back on the hard surface.

Q. You know what is meant by the shoulder of the road, do you not?

A. Yes.

Angela Wright Lee

Q. Did you tell the Officer that he was on the shoulder of the road after this accident?

A. I don't remember that.

Q. Well, you don't know whether you told him he was on the shoulder or not, is that correct?

A. Yes, that's correct.

Q. You mean, you don't remember what you told him?

A. I don't remember.

Q. But if you told him that he stopped and pulled off on the shoulder of the road and back up, would you say that is incorrect?

A. I would say so, I would be incorrect.

Mr. Raby. Incorrect, she said. I understood he said — did you understand what he said?

The Witness: What did you say? Would you repeat this, sir?

By Mr. Clark:

Q. I said, if you said, told the Officer that he backed up on the shoulder of the road, would you have been incorrect?

A. Yes, I would have been incorrect.

page 10] Q. Now, did he stop anytime before he started to make his turn?

A. No, he didn't.

Q. Did you see him look back behind him?

A. Yes.

Q. He did look back behind him?

A. Yes.

Q. And did you look back?

A. Yes, I looked back.

Q. At the same time that he looked back?

A. Yes, he looked back.

Q. And did you see the truck coming?

A. Yes.

Q. And where was the truck?

A. The truck was on top of a hill over there, it looked like, it was right — it was a long distance away from me.

Q. When you say a long distance away from you, how far do you mean, what do you call a long distance?

A. Oh, about 500 feet, something like that.

Q. About 500 feet. Now, would you point something out outside the courtroom that to you is 500 feet?

A. I would say from here all the way down to, I guess, the train station, something like that.

Q. It was that far away, is that correct?

A. Yes.

page 11] Q. Now, how far up the road could you see?

A. Well, we could see all the way back to where the truck was.

Q. Did you say anything to Mr. Washington about having seen the truck?

A. Would you repeat it, sir?

Q. Did you say anything to Mr. Washington about having seen the truck?

A. Yes, I told Mr. Washington when we looked back that there was a truck on top of the hill over there.

Q. And what did he say?

A. He didn't say anything, just continued to make the turn to the hospital.

Q. Now, you had not gotten out of your lane of traffic when the truck struck you, had you?

A. No. Wait a minute. Who do you mean by that?

Q. Well, I mean you were in the right-hand lane going south.

A. We were turning into the hospital right there.

Q. Turning into the hospital. You were still in that lane of the road at the time the car was struck, were you not?

A. No, we were making our turn to the hospital.

Q. How far had you gotten across the road?

A. I would say we was just making our turn to the hospital. I don't know how far that could have been.

page 12] Q. And where did the truck and the car come together, what part of the vehicles?

A. I think on the left-hand side.

Q. Left-hand side of your vehicle?

A. Yes.

Q. And the front of the truck?

A. Yes.

Q. The front of your vehicle was not struck, was it?

A. No, the left side of the vehicle was struck.

Q. Now, how do you happen to recall that the signal light was burning on the car?

A. I could hear it blinking.

Q. You could hear it blinking?

A. Yes.

Q. And had you made any other turns that night before

you got to the hospital?

A. He had turned the corner to leave my house to go to the hospital.

Q. And did you hear the signal light blinking there?

A. Yes.

Mr. Clark: That is all, if the Court please.

(Witness excused.)

Mr. *Ravy*: Andrew, come up here, please.

Thereupon,

ANDREW RUSSELL LEE

page 13] was called as a witness by counsel for Plaintiff and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Raby:

Q. *Atate* your name.

A. Andrew Russell Lee.

Q. How old are you?

A. I am 15 now.

Q. How old were you when the accident happened?

A. I was 13.

Q. Were you in the car with Mr. Washington on the date of the accident?

A. Yes, sir. I was on the left-hand side of the car.

Q. And were you injured?

A. Yes, sir, I had a broken arm.

Q. Can you tell how this accident happened?

A. Yes, sir.

Q. Tell us what you know about it. Tell us so that the Judge and the jury can hear you, please.

A. Well, we were on our way to the hospital to see Mrs. Liza Washington, who was Mr. Washington's wife. And as he was going to the hospital, Mr. Washington was to make a turn into the hospital, and Mr. Washington missed the hospital by about two feet, and he back back on the hard pavement of the road and as he was in there to

page 14] turn in the hospital lane, the entrance, this truck hit him on the side, it was the left-hand side.

Q. Had Mr. Washington made his turn?
A. Yes, sir.
Q. And can you show which way, where the truck ended up, where it struck Mr. Washington's car, on this board?
A. Yes, sir. I think so.
Q. Show it to the jury, please.
A. (Indicating on blackboard) As we were going down the road to the hospital, there, and Mr. Washington, he missed the entrance here to the hospital, he backed up on the hard surface of the road and as he turned up into the lane of the hospital the truck hit him.
Q. Did the truck go over these double lines (indicating)?
A. It did.
Q. And it hit you, and the truck was there (indicating) and according to what you saw it was over the *while* line, the center line?
A. Yes.
Q. All right. Now, you said you were injured.
A. Yes, sir.
Q. Did they take you to the hospital?
A. Yes, sir, they did.
Q. What hospital did they take you to?
A. They took me to Charlesfield, with Mr. Washington. They took us both to Charlesfield in the ambulance, to the emergency room.

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Mr. Raby: That is all. Your witness.

CROSS EXAMINATION

By Mr. Clark:
Q. Did you see the lights of the vehicle that struck you before the accident occurred?
A. I did.
Q. And how did it happen you saw that?
A. I looked back.
Q. Where was the vehicle at that time?
A. It was on top of the hill that is up there.
Q. Well, now, the top of the hill was how far from where the turn is?
A. Well, I would say about 100 or to 110 feet.
Q. 100 to 110 feet.
A. Yes, sir.

Andrew Russell Lee

Q. And was your car at a dead stop before you made the turn?

A. No, it wasn't. You mean after we missed the turn and backed up?

Q. Yes.

A. No, it wasn't.

Q. You missed *theturn,* and you had to stop to back back, didn't you?

page 16] A. Yes. But we paused. I mean, that we didn't stop, we just paused and he had to turn into the entrance.

Q. Yes. Now, did Mr. Washington look —

A. Yes, he did. We both did.

Q. You saw him look?

A. Yes. We both did.

Q. And you could see the truck coming?

A. Yes.

Q. About 100 feet away from you?

A. Yes.

Q. And you proceeded on to make the turn?

A. Yes, sir.

Q. Isn't that correct?

A. Yes.

Q. And then before you got to the center of the road this truck struck you sideways?

A. The side I was sitting on.

Q. The side you were sitting on. And the collision occurred about the center of the road?

A. Yes, sir.

Q. Now, do you know how wide the lane of the road was you were traveling on?

A. No, I don't.

Q. It was just a normal lane, was it not?

A. Yes, sir.

page 17] Q. And the car had not gotten out of the southbound lane when it was struck, had it?

A. It got out the lane, yes, sir.

Q. You mean all the way into the lane?

A. Not all of it, no, sir.

Q. Well, the car then had not gotten out of the southbound lane, the total automobile, is that right?

A. Yes.

Q. In other words, it was struck, like you say, at about —

with about a fourth of the car still in the southbound lane, isn't that right?

A. The back part of the automobile, yes.

Q. And that is all the distance that you had traveled, is from a dead stop and swung around when you were hit by the truck? Is that right?

A. Yes, sir.

Q. And the truck, when you saw it, was about a hundred feet away from you?

A. Yes, sir.

Q. Did you see or do you recall seeing any signals given by Mr. Washington?

A. Mr. Washington had, yes, he had, his blinker on the left-hand side of his steering wheel.

Q. Well, was his blinker blinking? To have it is one thing, but was it blinking?

page 18] A. Yes.

Q. You saw it blinking?

A. Yes.

Q. Did you ever tell anybody you didn't know whether he had the blinker on or not?

A. I didn't tell anybody nothing.

Q. Did you talk to the police officer about this?

A. I never saw him.

Q. You never saw him. That is all.

Mr. Raby: No more questions.

(Witness excused.)

Thereupon,

MARY BAILEY

was called as a witness by counsel for Plaintiff and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Raby:

Q. What is your name, please?

A. Mary Bailey.

Q. And where do you live?

A. Marshall.

Q. Marshall, Virginia?

Mary Bailey

A. That is right.
Q. Did you know George Washington?
A. Yes.
page 19] Q. Was he related to you?
A. My brother.
Q. Did you qualify in this court as administratrix of his estate?
A. Yes.
Q. Did your brother have any brothers or sisters?
A. Yes, he did.
Q. Can you name them?
A. Yes, sir. Emma Sims.
Q. How old is Emma Sims?
A. She's 49.
Q. Next one?
A. Charles Washington. He is 48.
Q. All right. Next one?
A. Laura Sims. She's 45. Charlotte Hill, she's 42. And myself, Mary Bailey. And Gertrude Grant, his oldest sister, Gertrude Grant, lives in Washington, she's about his age, around 70-some, I am not sure exactly.
Q. Do you know how old he was when he died?
A. Approximately around 70.
Q. Now, did you go and see him at the hospital?
A. Yes, I did.
Q. And do you know approximately the date of the accident?
A. It was the 27th of November.
page 20] Q. And when did he die?
A. First of December.
Q. And where did he die?
A. In Charlesville hospital.
Q. Now, I show you this, and ask you, is this a death certificate?
A. Yes. It is.

Mr. Raby: I offer this as an exhibit into evidence, Your Honor.
Mr. Clark: I object, if the Court please. That is not proper evidence to prove the cause of death.
The Court: Objection sustained, if that is the purpose of the exhibit.
Mr. Raby: Your Honor, isn't it correct that he died? I mean, this is a certificated — a death certificate from the

coroner, and this is the first time I know of, Your Honor, that the Court sustained it, an objection. This is a death certificate from a coroner that a person died, and I think —

The Court: You just want to show that he died?

Mr. Raby: Yes.

Mr. Clark: Wait a minute. He died, but it doesn't show it was a result of this accident.

The Court: It is conceded that he died.

Mr. Raby: Your Honor —

The Court: If you want to prove cause of
page 21] death, you couldn't rely on this certificate.

Mr. Raby: This is the first time, as I said, this is the first time I ever ran up against this. This is a death certificate. You never have doctors there to prove when a doctor's certificate is authenticated by the State. Now, of course, as I say, the Court —

The Court: It is admissible in evidence to show the fact that he is dead, but that is stipulated, anyway.

By Mr. Raby:

Q. Now, he did die in the hospital?

A. Yes, he did.

Q. Now, did he ever tell you anything about the accident?

A. When I went to see him, he told me that —

Mr. Clark: I object to what he told her.

The Court: I don't think that helps us out — hearsay.

Mr. Raby: All right.

By Mr. Raby:

Q. When did you see him?

A. On Tuesday. He was hit on Monday. The accident was on Monday night and I saw him on Tuesday.

Q. Saw him on Tuesday?

A. Next day, yes.

Q. Was he in pain or suffering?

A. Well, he said he wasn't in pain. But I could *tellhe* was.

He just didn't want me to know it. I could see
page 22] him jumping with it.

Q. And that was on Tuesday?

A. Yes.

Q. He died when — he died two days after that?

A. Yes.

Q. And —

Mr. Raby: (After pause) Your Honor, I still think that this (exhibiting document) — you still sustain the objection, Your Honor?

By Mr. Raby:
Q. I asked you if he talked to you. Did he talk about the accident?
A. Yes, he did.
Q. Did he tell you how the accident happened?
A. Yes.
Q. What did he tell you?

Mr. Clark: I object, if the Court please.
The Court: Objection sustained.
Mr. Raby: That is all. I'm going to put this in evidence for what it's worth, Your Honor.
The Court: There is no need to put it in evidence. It is stipulated that the man is dead. It doesn't serve any purpose.
Mr. Raby: Your Honor, I am taking exception to that.
The Court: All right.
page 23] Mr. Clark: No questions.

(Witness excused.)

The Court: Let me see that certificate.

(Document was handed the Court.)

Mr. Raby: I want to call Mr. Franklin as a witness, I will call him as an adverse witness.

Thereupon,

JAMES E. FRANKLIN
was called as a witness by counsel for Plaintiff and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Raby:
Q. State your name, please.
A. James E. Franklin.
Q. And where do you live?
A. Thomas Road, Madison Heights, Virginia.

Q. On or about the 27th day of November 1961, were you driving a truck?
A. Yes, sir.
Q. Who owned that truck?
A. C. V. Hunter, Incorporated.
Q. C. V. Hunter, Incorporated — were you working for him?

Mr. Clark: We admit agency, if the Court please. We did that in the pleadings.
page 24] The Court: Agency has been admitted?
Mr. Clark: Yes.
The Court: In the pleadings.
Mr. Clark: Yes.
Mr. Raby: All right.

By Mr. Raby:
Q. Where had you been on this particular day?
A. Winchester, Virginia.
Q. What time did you leave Winchester?
A. Approximately three-thirty in the evening.
Q. About three-thirty in the evening. And did you stop before you got up to this place in Culpeper County?
A. I don't remember. I could have.
Q. You could have. So you don't know whether you stopped or whether you continued to go. Did you see this — strike that. How fast — strike that. Did you have a collision with an automobile?
A. Yes, sir.
Q. Did you see the car before you had the collision?
A. Yes, sir.
Q. How far were you away from him?
A. I would say 125, 150 feet.
Q. You were 125 to 150 feet away. How fast were you going?
A. Between 35 and 40.
Q. Between 35 and 40. How do you arrive at
page 25] between 35 and 40 miles an hour? Did you look — when was the last time you looked at your speedometer?
A. When I went at the bottom of the little hill.
Q. When you were at the bottom of the little hill?
A. Before the entrance of the hospital.
Q. How fast were you going then?

A. Between 35 and 40.

Q. You continued the speed of between 35 and 40 until the impact, is that right?

A. Yes, sir.

Q. Do you know the exact spot that the accident happened, on 29?

A. Yes, sir.

Q. About where was it?

A. It was at the entrance going into the hospital.

Q. How often did you go down that, travel that route?

A. At that particular time it was the first time I had been up here for quite a while.

Q. But you had been up there before, hadn't you?

A. Yes.

Q. I mean, I am asking you how many times — you were familiar with the road, were you not?

A. Yes.

Q. And you knew there was a hospital there?

A. I saw a sign there that said hospital entrance, yes.

page 26] Q. (After pause) I think you stated a few minutes ago that you were going between 35 and 40 miles an hour.

A. That's right.

Q. And you maintained that speed until the time of the impact, is that right?

A. That's right.

Mr. Raby: That is all.

Mr. Clark: No questions.

(Witness excused.)

Mr. Raby: I will recall Mary Bailey, Your Honor.

Thereupon,

MARY BAILEY

was recalled as a witness by counsel for Plaintiff and having been previously duly sworn, was further examined and testified as follows:

FURTHER DIRECT EXAMINATION

By Mr. Raby:

Q. Did your brother work?

A. Yes.
Q. Where did he work?
A. Well, he worked at two or three different places. He worked mostly with this church he was presbyterian of, I can't think of the name of the church.
Q. Well, you know *whether* this church is located?
A. It was on the southeast — I still can't name
page 27] the church.
Q. But you know he was able to work?
A. Yes.
Q. He worked all the time?
A. Yes, every day.
Q. Did he get a salary?
A. Every day, yes.
Q. Do you know approximately the salary he got?
A. No, I don't.

Mr. Raby: That is all.

(Witness excused.)

Mr. Raby: That is Plaintiff's case, Your Honor.
Mr. Clark: We would like to make a motion, if the Court please.
The Court: All right. Gentlemen of the jury, you may remain seated, or if you want to retire you may do so, just so you stay on the premises. I will hear the motion in chambers.

(Thereupon, Court and counsel retired to chambers, wherein the following proceedings were had out of the presence and hearing of the jury:)

The Court: Before you make your motion, Mr. Clark, I anticipate you are making motion to strike, which is the usual motion at this stage: I'm not too happy about this death certificate. I have denied it in evidence because upon
page 28] examination I find that it has certain statements here. One is the immediate cause, it is stated as pulmonary traumatic embola, whatever that means. And then: Due to ruptured spleen and splenic trauma due to automobile accident.
Ordinarily a certificate of a medical examiner is admissible, I think, under the statute. I could be in error — I don't think

so — on that. But this certificate does give certain facts which I have enumerated. It appears that the signature is by James O. Wilkinson, M.D. Now, Mr. Slaughter, you can tell me, is he a local man?

Mr. Slaughter: No, sir.

The Court: He's not a local man. If there is any point going to be made here in this motion as to what caused the — the cause of death hasn't been proven, I am going to reserve further ruling on this — but I'll hear what your motion is.

Mr. Clark: Well, I made my motion, if the Court please, that there is no proof of cause of death and we denied specifically and do again that this automobile accident caused this death. And to come in with the statement by some doctor that we can't cross-examine and find out on what basis he arrived at this conclusion, in my opinion, *wouldcertainly* be entirely reversible error.

Now, this man is available and hasn't been subpoenaed. He was at the University of Virginia, apparently,
page 29] at the time this man supposedly died. But we had a purpose in denying the fact that this man's death was caused by this accident, and that's why we didn't, *wenever* admitted that fact. We didn't admit it the last time and this case was non-suited because of that fact.

And the same thing arises again, they come in with a death certificate which is hearsay to begin with and state some doctor's conclusion as to what he believes occurred, but I don't have any opportunity to cross-examine as to upon what facts he *basis* that conclusion. And that is the motion at this time.

I think possibly it is enough if the jury would believe the — it would be absolutely fair if the jury would believe what these two children said — I think it would be incredible, but — that this truck could be a hundred to a hundred and fifty feet back and before this automobile could travel a distance of about ten feet it struck — but, nevertheless, I think that is something not for the Court to consider but for the jury to consider.

But as far as proof that this accident caused this death, there is nothing here.

The Court: Well, except the circumstantial evidence. You got the fact that he was struck.

Mr. Clark: Well, if Your Honor please, we don't have the fact that he was healthy. This man could have had a heart attack and died on the first of December after
page 30] this accident occurred on the 27th of November. A pulmonary embolus is a blood clot in the lung that could be caused from many other causes besides

any *traume*. So we have nothing. Many people die from embolism without any trauma being involved at all.

You can have an embolism as part of a heart attack from a blood vessel clot that goes in an artery or valve of the heart, that's an embolism, and a person dies from it, without any accident or anything else. And with an accident he could have a heart *attck,* he could have cerebral hemorrhage.

But if we accept that it was a pulmonary embolism that killed him, it is a blood clot in the lung and could have been caused from many other causes in addition to an accident he might have been involved in. And we certainly have the right to inquire as to the other causes.

This man's age, he was 70 years of age — it certainly puts a burden on us to say because of a death certificate that refers back to an automobile accident, that that's proof that this accident caused this death.

The Court: What does the statute say, Virginia statute? What makes this admissible under the statute, what is that?

Mr. Clark: I really don't know, Your Honor.

(Discussion off the record.)

Mr. Clark: Here's what it says but I don't know
page 31] what it means, Your Honor, It says:

"A certified copy of a certificate or any part thereof issued in accordance with subsection (a)" — which I assume is the vital statistics — "shall be considered for all purposes the same as the original and shall be *prima facie* evidence of the facts therein stated, provided that the evidentiary value of a certificate or record filed more than one year after the event or record which has been admitted shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence."

Now, that is the only thing I see with reference —

The Court: Well, it does say apparently it is admissible as *prima facie* evidence.

Mr. Clark: A copy is admissible of the original, is what it is talking about there. It doesn't say anything about that an original is admissible to prove the cause of death.

Mr. Raby: Well, you know, you can't have the original because it is filed. But you don't need the original. An authenticated copy is sufficient for evidence. You can never get the original.

(Pause while the Court refers to book.)

The Court: Well, if a copy of the original is *prima facie* evidence of the facts therein stated, which is what the statute says, then it would be admissible.

Mr. Slaughter: It says something about the
page 32] evidentiary value —

The Court: Where it has been more than one year, though: "Provided that the evidentiary value of a certificate or record filed more than one year after the event." I don't know when this was filed. That is not applicable here. No.

Mr. Slaughter: Your Honor, I don't believe that is admissible at all.

The Court: This was recorded on the 6th of December 1961. So the part of the statute about the twelve months does not apply; and it does make it *prima facie* evidence of the facts therein stated.

Mr. Clark: The fact that it was on the original, not the fact that — as I read it, it says it is *prima faci* evidence that that's what the original shows, but not *prima facie* evidence of the truth of the facts in the original.

The Court: "A certified copy of a certificate or any part thereof issued in accordance with subsection (a)" —

Mr. Clark: It says, a certified copy.

The Court: ". . . shall be considered for all purposes the same as the original, and shall be *prima facie* evidence of the facts therein stated." It doesn't say that — it says "shall be *prima facie* evidence of the facts therein stated." So I'm going to have that sustained.

Mr. Slaughter: Your Honor, I don't believe that certificate is admissible to prove the cause of death.

page 33] The Court: It says, "*prima facie* evidence of the facts therein stated," and the cause of death is from, is stated, "Due to automobile accident."

Mr. Slaughter: It states the cause of death is from embolism and then it goes on to state, due to ruptured spleen, then, due to automobile accident. Certainly "due to ruptured spleen" could be a matter of opinion, same as the "automobile accident."

The Court: This section which we are dealing with ought to be in the record. It is Section 32-353.27 of paragraph (b). I'm going to let you enter that. On the basis of that statute I believe I'll have to let it in.

Mr. Slaughter: Your Honor, can you give us a few minutes to see if we can find a case on this?

The Court: Oh, yes. And if that, of course, is the basis, which you say it is, of your motion, then the motion would

have to be — well, I don't know whether you would make a motion after that is in, but if you did, it's declined.

(Pause in the proceedings.)

Mr. Clark: I have one case, Your Honor, in Virginia, of *Life Insurance Company* vs. *Brockman,* in 173 Virginia 87 in which the defendant is trying to place in evidence a death certificate of the plaintiff which stated among other things, the coroner—certified by the city registrar, in which it appears that the *corner* has stated that death was due
page 34] to asphyxiation from illuminating gas, self-administered, and that the assured had committed suicide. Now, that's what the certificate pointed out. It held that:

There was no virtue to defendant's contention since the statute provides that the certified copy of the record of death shall be admissible as *prima facie* evidence of the facts therein, but does not provide that a mere statement shall be *prima facie* proof of the facts to be determined.

Now, the facts to be determined here is whether the automobile accident was the cause of this man's death, and the conclusion stated by the doctor in the death certificate is not sufficient to prove it from the certificate. In other words, the statute means, I think, Your Honor —

The Court: Let me read it just a minute.

Mr. Clark: I'm sorry.

(Pause in the proceedings.)

(Discussion off the record.)

The Court: Mr. Raby, you go through this case.

Mr. Raby: (After perusing document) Well, Your Honor, this was the defendant's case that he was denying there, and it must have been on the point, as I see it, the defendant contended that a medical certificate that either the physician or the coroner issued, according to the provision of the Code, and so forth and so on, is admissible, and the Court in this case denied that medical certificate or
page 35] statement from the doctor, and therefore the Court relied primarily upon the death certificate.

As I see it, the medical certificate, death certificate of the physician is directed to setting forth certain facts, not pertaining to the question of denial under consideration, and

the section concludes as follows: "The records of this case" — in this case here, the defendant was the one contending for the death certificate but the plaintiff was claiming that the man didn't die according to what the death certificate said and therefore the doctor — it would include the doctor's testimony, so I think it is on another point.

The Court: According to this case you have before you there, that was a question in which an insurance company was denying coverage on a life insurance because they claimed that it was suicide.

Mr. Raby: Yes.

The Court: And they wanted to introduce the certificate to show it was suicide. Which is an opinion, of course.

(Discussion off the record.)

Mr. Raby: There is another phase in this case. It dealt with the doctor that signed the death certificate did not attend the man. He was told or advised, and he signed the death certificate.

The Court: This says James O. Wilkinson, M.D., medical examiner for Albemarle County.

page 36] He wasn't the attending physician?

Mr. Raby: He was there, in the hospital there. There is no evidence that he didn't attend him. I think this is a question for the jury.

(Discussion off the record.)

Mr. Raby: I think, in reading that case, the doctor that signed that certificate came in and said that his was only speculation. In that case, even though there was a *prima facie* certificate, he denied it because of the fact he didn't know it was the truth. In this case there is a *prima facie* case and there hasn't been any denial that it wasn't like that.

Now, the burden on me is to present a *prima facie* case. Until something is done to destroy that, which is just what happened to that case. That doctor who signed that certificate was brought in and on cross examination it showed that he did not examine the man, he was going on speculation. And that was contrary to the other evidence they had on what he died from. And here we have no other evidence here that the man died of anything other than as the result of the automobile accident. So I think it is certainly sufficient to go to the jury. Judge, may I read this section here:

"The trial court admitted a certificate of death but declined to admit the medical certificate signed by the coroner and the defendant contended" — the defendant contended —

page 37] "that this constituted error under section 1557 of the Code 1936 which required an attending physician to state cause of death and section 1580 provides that state registrar shall furnish certified copies of the record of death which shall be *prima facie* evidence when properly certified by the state registrar. The coroner had no personal knowledge as to whether death was accidental or otherwise but his professional opinion was that it was due to asphyxiation. His opinion that it was suicide was based on statements of bystanders which was based on hearsay" — and therefore that is the crux of that case.

The Court: Mr. Slaughter, would you run that down to see if there is any other case?

(Discussion off the record.)

The Court: There appear to be no other cases.

Mr. Raby: Your Honor, they admitted the death certificate, the only thing they didn't admit was the doctor's—

The Court: The conclusion or the opinion of the doctor.

Mr. Raby: Yes.

The Court: Well, suppose they admitted it but not the conclusion or opinion of the doctor, what good does it do you?

Mr. Raby: I am going to say it was on what he said, they had the doctor there, and the reason they didn't admit the doctor's conclusion was because he said, "I didn't visit the

page 38] man." Sure, I would admit that, but he was only going by what somebody told him, that was exactly the basis of it.

But you don't have that in the case.

Also, in that case between the coroner and the doctor there was conflict in their statements as to just what it was. But in this case you have the certificate.

(Discussion off the record.)

The Court: All right, I am ready to rule. I am sorry that we were not all familiar with the rule of law which has arisen on the motion to strike in this case.

The statute, applicable statute as heretofore referred to is Section 32-353.27 (b) which provides that:

"A certified copy of a certificate or any part thereof issued in accordance with subsection (a) shall be considered for all purposes the same as the original, and shall be *prima* evidence of the fact therein stated, etc."

The Court of Appeals in 173 Virginia page 86 had occasion to interpret the meaning of this statute and in this case they had this to say:

"The statute provides that the certified copy of a record shall be admissible and treated as *prima facie* evidence of the facts stated therein. It does not provide that a mere opinion shall be *prima facie* proof of the facts to be determined."

Applying this case, which is *Life Insurance Company* versus *Brockman,* to the instant case under consideration
page 39] the Court first was of the opinion that the death certificate was not admissible in evidence; but upon its attention being called to the aforementioned section the Court is of the opinion that the certificate is admissible in evidence and it is permitted to be so filed and designated. This being the case, the counsel for the defendant moved to strike the evidence of the plaintiff on the ground that the death of the plaintiff has not been shown to have resulted from the accident notwithstanding the fact that the death certificate is in evidence.

The reason for their motion is that that portion of the death certificate signed by the medical examiner for Albemarle County only expresses an opinion. This contention seems to be supported by the *Brockman* case in that the certificate does not prove a mere opinion and as the Court said in the *Brockman caseit* does not provide a mere opinion shall be *prima facie* proof of the facts to be determined.

The fact to be determined in this case, of course, is the cause of death, and it follows that the death certificate which is the only evidence of cause of death is not sufficient to determine a *prima facie* case, is not sufficient to make out a *prima facie* case of proof of the cause of death in this case.

It is with a great deal of reluctance I hold in view of the *Brockman* case that the motion is well taken and it is sustained.

page 40] Mr. Raby: Let the record show that I am taking exception to the ruling of the Court. In the *Brockman* case the facts are not the same as they are in this case. In the *Brockman* case there was a coroner's report and a doctor who signed the death certificate stated that his opinion

was based on some bystanders, in other words, hearsay.

In this case there isn't any such evidence that the doctor signed the statement based on hearsay. Therefore, I feel that the *Brockman* case does not control the statute which gives it *prima facie* evidence which has not been overcome by the defendant. There has not been any denial of the doctor who signed the death certificate, therefore, I say that I feel that it is error of the Court to grant the motion.

It should have gone to the jury. It is a jury question. There is evidence that the man died three days —four days after the accident and I think it is sufficient for the jury to determine according to the death certificate.

The Court did admit the death certificate but ruled that it wasn't sufficient in the *Brockman* case, which I deny is the same here, according to the facts. I take exception to the Court's ruling and ask the Court to withhold execution for a time of 60 days.

The Court: There is no execution to be withheld.

Mr. Raby: Your Honor, I make a motion for a new trial — I can do that within 15 days.

page 41] Mr. Slaughter: Your Honor, before we consider that, I think it would be proper for us to state that the defendant also relies upon the best-evidence rule.

The Court: Well, of course, motion for new trial would properly come in chronological order after the jury has been discharged; but considering that has been done and motion is made, I would have to overrule that.

Mr. Raby: I take exception to that.

The Court: Now, off the record.

(Discussion off the record.)

Thereupon, Court and counsel returned to open court and the following proceedings were had in open court in the presence of and in the hearing of the jury:)

The Court: Gentlemen of the jury, I reckon jurors sometimes think that the Court and lawyers can take up a lot of time and the jury could do better, and I expect they could. But we have certain things that we have to do, and what we have been doing all this time is considering a motion involving a matter of law and not of fact, because you decide the facts, and it required some time to hear the argument and make decision on the question that was raised, the question of law raised.

But anyway, that has now been resolved and the Court has sustained the motion made by the defendant that the plaintiff's evidence be stricken on the ground that *itwas* insufficient in law to warrant a finding or go to the jury. So page 42] that motion having been sustained, there is no evidence before you, and so the Court at this time discharges you from further consideration of the case.

(Thereupon, at 12:15 o'clock p.m., trial in the above-entitled cause was concluded.)

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A Copy—Teste:

H. G. TURNER, Clerk.

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