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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6233

In the Supreme Court of Appeals of Virginia at Richmond

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

v.

JAMES HORACE BRISTOW, ET AL.

FROM THE CIRCUIT COURT OF NEW KENT 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. 6233

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 7th day of October, 1965.

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,

Plaintiff in error,

against

JAMES HORACE BRISTOW, ALPHONSO NATHANIEL COWLES, CHARLES EDWARD ZAHN, SR., AND ALLSTATE INSURANCE COMPANY,

Defendants in error.

From the Circuit Court of New Kent County
Robert T. Armistead, Judge

Upon the petition of Pennsylvania National Mutual Casualty Insurance Company a writ of error is awarded it to a judgment rendered by the Circuit Court of New Kent County on the 15th day of April, 1965, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and James Horace Bristow and others were defendants; upon the petitioner, or some one for it, 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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page 1]

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Filed in the Clerk's Office the 23 day of December, 1964.

Teste:
VIVIAN L. ANDERSON, Clerk
MARY L. GRIFFITH, D. C.

MOTION FOR DECLARATORY JUDGMENT

The plaintiff moves the court for a declaratory judgment on account of the following facts:

(1) That the plaintiff is an insurance carrier licensed to do business in the State of Virginia;

(2) That prior to March 18, 1964, the plaintiff issued to the father of the defendant Bristow a policy of automobile liability insurance containing an uninsured motorist endorsement;

(3) That prior to March 18, 1964, a policy of automobile liability insurance had been issued by the defendant Allstate Insurance Company covering the operation of a certain Studebaker automobile owned by the defendant Zahn, which policy contained an uninsured motorist endorse

page 2] ment;

(4) That on March 18, 1964, in New Kent County, Virginia, the Zahn vehicle, while stopped on Route 33, was struck from the rear by a vehicle being operated eastwardly by the defendant Cowles;

(5) That the defendant Bristow has alleged, in a suit filed in this court, that he suffered bodily injuries in the aforesaid accident as a result of the negligence of the defendant Cowles, who is alleged to be an uninsured motorist by the defendant Bristow;

(6) That the defendant Bristow in his suit against the defendant Cowles has caused service of process to be made upon this plaintiff and upon the defendant Allstate Insurance Company, making his claim against the said insurer, or insurers as the case may be, under the uninsured motorist endorsement aforesaid;

(7) That the position of the defendant Bristow at the time of the accident aforesaid was that of being upon the Zahn vehicle in connection with the examination of the motor of that vehicle, thereby qualifying him as an "insured" under the aforesaid uninsured motorist endorsement issued by the defendant Allstate Insurance Company inasmuch as he was using and occupying the Zahn vehicle within the meaning of the uninsured motorist law of Virginia and the policy endorsement aforesaid of the defendant Allstate Insurance Company.

(8) That an actual controversy over legal rights exists between this plaintiff and one or more of the de-
page 3] fendants concerning the insurance coverage available to the defendant Bristow in his claim.

Wherefore the plaintiff moves this court: to declare the respective rights of the parties; to declare that the said uninsured motorist endorsement upon the said policy of insurance issued by the defendant Allstate Insurance Company covered the defendant Bristow as an "insured" at the time of this accident and that such coverage is the primary coverage owing to the defendant Bristow; to declare that the plaintiff herein does not owe coverage to the defendant Bristow under its policy aforesaid; to continue, pending the determination of the issue here presented, the aforesaid case presently set for trial on January 8, 1965 brought by the defendant Bristow against the defendant Cowles seeking recovery for the injuries sustained in this accident and to give such further relief to the plaintiff as to the court shall seem fair and just.

PENNSYLVANIA NATIONAL MUTUAL
CASUALTY INSURANCE COMPANY

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ANSWER OF JAMES HORACE BRISTOW TO MOTION FOR DECLARATORY JUDGMENT

The answer of James Horace Bristow to the Motion for declaratory judgment filed against him and others by Pennsylvania National Mutual Casualty Insurance Company in the above styled case in the Circuit Court of New Kent County. This defendant for answer to the motion says:

1. The allegations in clauses 1, 2, 3, 4, 5 and 6 are substantially correct.

2. This defendant denies the allegations and the position taken by the plaintiff in clause 7 of the motion. It was only after the plaintiff had raised a question as to whether James Horace Bristow was within the protection of the policy issued by the plaintiff that this defendant caused notice to be served on Allstate Insurance Company which carried the insurance on the Zahn automobile for this defendant was injured by an uninsured motorist and desires to protect his rights against whatever insurance company may be liable to him.

3. This defendant respectfully avers that he is within the protection afforded by the uninsured motorist endorsement on the policy issued by the plaintiff. In taking this page 13] position this defendant does not waive whatever rights he may have against Allstate Insurance Company should the Court determine that he is not within the protection afforded by the policy issued by the plaintiff.

JAMES HORACE BRISTOW

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Jan. 11, 1965.

VIVIAN L. ANDERSON, Clerk

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page 15]

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Jan. 11, 1965.

VIVIAN L. ANDERSON, Clerk.

GROUNDS OF DEFENSE OF ALLSTATE INSURANCE COMPANY

The defendant, Allstate Insurance Company, by counsel, for its grounds of defense to a motion for declaratory judgment filed against it and others herein says as follows:

1. This defendant has no knowledge of the allegations contained in paragraph one of the motion for declaratory judgment and therefore denies same.

2. This defendant has no knowledge of the allegations contained in paragraph two of the motion for declaratory judgment and therefore denies the same.

3. This defendant admits paragraph three of the motion for declaratory judgment.

4. This defendant admits paragraph four of the motion for declaratory judgment.

5. This defendant admits paragraph five of the motion for declaratory judgment.

6. This defendant admits paragraph six of the motion for declaratory judgment.

page 16] 7. This defendant denies paragraph seven of the motion for declaratory judgment.

8. This defendant admits paragraph eight of the motion for declaratory judgment.

9. This defendant says that the defendant, James Horace Bristow, qualifies as an insured under the plaintiff's policy of insurance within the meaning of the terms of such policy and Section 38.1-381 of the Code of Virginia, as amended.

10. This defendant says that the defendant, James Horace Bristow, does not qualify as an insured under this defendant's policy of insurance within the meaning of the terms of such policy and Section 38.1-381 of the Code of Virginia, as amended, and that this defendant owes the defendant, James Horace Bristow, no coverage whatever, primary or otherwise.

11. This defendant will rely upon any defense disclosed by the evidence or any incident of trial.

This defendant reserves the right to amend its grounds of defense at such time as it may be advised.

This defendant demands a jury trial.

ALLSTATE INSURANCE COMPANY

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Jan. 12, 1965.

VIVIAN L. ANDERSON, Clerk

GROUNDS OF DEFENSE
OF
CHARLES EDWARD ZAHN, SENIOR

The defendant, CHARLES EDWARD ZAHN, SENIOR, by counsel, files the following for his grounds of defense to the plaintiff's motion for declaratory judgment:

1. This defendant has no knowledge of the allegations contained in paragraphs 1. and 2. of the motion for declaratory judgment and neither admits nor denies the same, but calls for strict proof thereof.
2. This defendant admits the allegations contained in paragraphs 3. and 4. of the motion for declaratory judgment.
3. This defendant is unadvised as to the allegations contained in paragraphs 5. and 6. of the motion for declaratory judgment and neither admits nor denies the same, but calls for strict proof thereof.
4. This defendant denies that the defendant, Bristow, at the time of the accident was upon his vehicle as al-
page 21] leged in paragraph 7. of the motion for declaratory judgment and insofar as the remaining allegations contained therein he has no knowledge of the same and therefore neither admits nor denies the same, but calls for strict proof thereof.
5. This defendant is advised that the allegations of paragraph 8. of the motion for judgment are correct, but has no personal knowledge of the same.
6. This defendant will rely upon any defense disclosed by the evidence or any incident of trial.
7. This defendant reserves the right to add to or amend his grounds of defense if he may be at any time so advised.

CHARLES EDWARD ZAHN, SENIOR

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ORDER

The day came the plaintiff, Pennsylvania National Mutual Casualty Insurance Company, and the defendants, James Horace Bristow and Allstate Insurance Company; the de-

fendants Alphonso Nathaniel Cowles and Charles Edward Zahn, Senior, came not.

The Court, after hearing the evidence *andarguments* of counsel, *findsthat* the defendant Bristow was not an insured under the policy of insurance issued by the defendant Allstate Insurance Company at the time of his injury, in that *hewas* not using the vehicle of the defendant Zahn nor was he "occupying" the said *evehicle* by being "in or upon" it; and

It is therefore ORDERED that the petition for declaratory judgment be dismissed at the cost of the plaintiff, page 63] to all of which action of the Court the plaintiff, by counsel, objected and excepted.

Enter: 4/15/65
R.T.A.
Judge

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page 71]

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, June 11, 1965.

VIVIAN L. ANDERSON, Clerk

ASSIGNMENTS OF ERROR

The plaintiff assigns the following errors committed by the Court:

(1) The Court erred in finding that the defendant Bristow was not an insured under the policy of insurance issued by the defendant Allstate Insurance Company at the time of his injury;

(2) The Court erred in failing to declare that the plaintiff does not owe coverage to the defendant Bristow under its policy of insurance;

(3) The Court erred in failing to declare that the aforesaid policy of insurance issued by the defendant page 72] Allstate Insurance Company covered the defendant Bristow as an "insured" at the time of his injury and that such coverage was the primary insurance coverage owing to the defendant Bristow;

(4) The Court erred in finding that the defendant Bristow was not "using" the vehicle of the defendant Zahn at the time of the injury aforesaid;

(5) The Court erred in finding that the defendant Bristow was not "occupying" the vehicle of the defendant Zahn by being "in or upon" it at the time of the injury aforesaid; and

(6) The Court erred in its order of April 15, 1965 as the judgment of the Court was contrary to the law and the evidence and contrary to the weight of the evidence.

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PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

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The Court: Call your witnesses.

Mr. Compton: Your Honor, I would like to make a brief opening statement since I represent the plaintiff
page 16] in the case and I think the record will be developed in a more orderly fashion if we do it that way.

Of course, Your Honor knows the nature of the case, the question involved being whether or not Mr. Bristow, who has a suit pending in this court of a civil nature against an uninsured motorist, qualifies as an insured under a policy of insurance with uninsured motorist endorsement thereon, issued by Allstate Insurance Company.

The motion for judgment and grounds of defense and Mr. Anderson's statement just now indicate that there are certain basic points which I think there is no question about, and I would like to set those out, if I may, in orderly fashion at this time.

The Court: Let me ask you this. Do you agree to the stipulation of fact, eliminating (6)(b) and (6)(i)?

Mr. Compton: Yes, sir, and I might say for the record, Your Honor, this stipulation is based on a sworn statement taken of the defendant Bristow and of Mr. Boughton, who is a witness in this case, in my office on July 10, 1964 at which time I was present, the two men, Bristow and Bough-
page 17] ton, were present and their attorney, Mr. David Nelson Sutton of West Point, was present.

Allstate Insurance Company did not have notice of that sworn statement, nor did they have counsel present to cross examine, and His Honor indicated that is to be the purpose of this hearing today.

So with that statement and the agreement on behalf of the plaintiff to the stipulation of facts, I will not elaborate on that for the record because I feel it is clearly stated in the stipulation, and we would move the court to make the stipulation a part of the record in this case and marked it Exhibit A, because in our memorandum we have referred to the two insurance policies as Exhibits 1 and 2.

The Court: I will mark it Plaintiff's Exhibit A.

Mr. Anderson: What is that?

Mr. Compton: The stipulation of facts.

Mr. Anderson: What is Your Honor ruling about paragraph (j)?

The Court: Paragraph (j) should also be eliminated. Paragraph (6) (j) also should be eliminated.

page 18] Mr. Compton: All right.

The Court: I might say I make no ruling on this. If you agree on it, all right; otherwise you will have to prove it.

Mr. Anderson: Do I understand Mr. Compton is agreeing to eliminate paragraphs (6) (b), (6) (i) and (6) (j)?

Mr. Compton: I am agreeing to eliminate those from the stipulation because I think the position is a reasonable one. They are disputed questions of fact, to be decided by the triers of fact.

Mr. Anderson: That means he is not offering any evidence on that?

The Court: I don't understand you.

Mr. Anderson: Your Honor please, is Mr. Compton taking the position he eliminates paragraphs (6) (b), (i) and (j) and is not going to offer any evidence on those issues?

The Court: No. He expects to prove the very things which you would not agree to, Mr. Anderson.

page 19] Mr. Anderson: This puts us in a very difficult situation here, Your Honor, and we have no opportunity to have a jury trial.

The Court: You had an opportunity and I just don't see how there could possibly have been any misunderstanding on what occurred last time.

Mr. Anderson: All right, but I will have to except.

The Court: We have been over all that. Let's move along. Call your first witness.

Mr. Compton: Call James Horace Bristow.

Mr. Anderson: Your Honor please, if Mr. Compton is going to offer evidence, I don't see why it is necessary to stipulate anything, if he is going to prove everything.

The Court: I understood you had agreed to stipulate and that would shorten the evidence. Do you wish to withdraw the stipulation?

Mr. Anderson: Yes, sir, under the circumstances, we do.

page 20] The Court: All right. I will permit you to withdraw the stipulation, if that will not take you by surprise, Mr. Compton.

Mr. Compton: The facts in paragraphs 2, 3, 4 and 5 of the stipulation have been admitted in the grounds of defense of Allstate Insurance Company, so I don't see how there can be any question whatsoever about those.

The Court: You say you wish to withdraw the stipulation, Mr. Anderson?

Mr. Anderson: That is correct.

The Court: What is the reason for withdrawing the stipulation?

Mr. Anderson: I think he might as well prove everything, except what we have admitted in the grounds of defense. I don't think I should be required to make a stipulation as to what he wants.

The Court: You were not required to make any stipulation, Mr. Anderson. You came in and voluntarily stipulated these paragraphs — the facts as set out here.

page 21] Mr. Anderson: That is perfectly correct. I was perfectly willing to stipulate if that is what we were going to have this hearing on. If not, I do not feel I am obligated to stipulate one way or the other.

Mr. Compton: Paragraphs 2, 3, 4 and 5 of the stipulation of facts, which is marked Plaintiff's Exhibit A, have been admitted in the grounds of defense of Allstate Insurance Company. If there is any question that the plaintiff issued the policy to Mr. Bristow's father, counsel have exchanged copies of their respective policies. Is there any question that the policy was issued?

The Court: Mr. Anderson, do you question paragraph (1), that the policy was issued?

Mr. Compton: In their memorandum of law, Allstate Insurance Company states that as a fact.

Mr. Anderson: We will agree to that.

The Court: Are you in a position to prove the remainder by your witnesses?

Mr. Compton: Yes, sir.

page 22] JAMES HORACE BRISTOW,

a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Compton:

Q. State your name, residence and occupation, please.

A. James Horace Bristow, Woods Crossroads, Virginia; truck driver.

Q. And your age?

A. Twenty-one.

Q. When were you twenty-one?

A. July 25th.

Q. 1964?

A. Yes, sir.

Q. All right. Who do you work for?

A. E. B. Haynes, West Point.

Q. What is the nature of the work you do and what is Mr. Haynes' business?

A. We deliver drugs for Owens Minor and

page 23] Bodeker in Richmond.

Q. You deliver drugs in the general area of Richmond and West Point?

A. I deliver in Richmond—that's all.

Q. All right. On March 18, 1964 were you injured in an accident on U. S. Route 33 in New Kent County, Virginia?

A. Yes, sir.

Q. Approximately what time of day or night did this accident occur?

A. Around eight o'clock.

Q. Was it in the morning or evening?

A. Evening.

Q. What was the weather like at the time of the accident?

A. Clear.

Q. How did you happen to be at the location where the accident happened?

A. We were coming home from work.

Q. You were coming from Richmond and going where?

A. To West Point.

James Horace Bristow

Q. You say "we." Who was with you?

A. Mr. Carter, Mr. Shelton and Mr. Boughton.

page 24] Q. How did you arrive at the scene of the accident from Richmond? By what means?

A. In a panel truck.

Q. Who was driving the truck?

A. Mr. Carter.

Q. With relation to West Point, Virginia, approximately where on Route 33 did the accident occur?

A. About two and a half miles.

Q. West of West Point?

A. Yes, sir.

Q. What is Route 33 like at that location, that is, as to how many lanes of travel there are and whether it is hard surfaced or not?

A. It is two lanes, one going east and one lane going west, and it is hard surfaced.

Q. Now before the vehicle you were in stopped at the scene of the accident, in which direction had you been headed in the vehicle?

A. Towards West Point — east.

Q. Who was driving the vehicle you were in?

A. Mr. Carter.

Q. What caused you to stop?

A. We saw this old man and old lady, Mr. and Mrs. Zahn, on the side of the road.

page 25] Q. As you were going east towards West Point, on which side of the road were they—the right or lefthand side?

A. Righthand.

Q. Where was the vehicle they were standing near? On which side of the road was it?

A. It was on the righthand side.

Q. Which way was it facing?

A. Headed towards West Point.

Q. What was the location of the vehicle with reference to the hard surface portion of Route 33?

Mr. Anderson: Your Honor, he is going into facts which would properly be gone into at the trial on the merits and we don't think they are properly gone into in this hearing. Whether the car was parked on the hard surface or partly off the hard surface would not have any bearing with his particular connection with that car. We are now going into

questions, we respectfully submit which properly relate to the merits of the case.

The Court: Overruled.

page 26] Q. (By Mr. Compton) What was the location of the Zahn vehicle when you first saw it, Mr. Bristow?

A. Off the road as far as it could get.

Q. What was the location of the lefthand wheels of the vehicle with reference to the hard surface portion of the highway?

A. Partially on the hard surface.

Q. Precisely where were the lefthand wheels with reference to the south edge of Route 33?

A. I don't know exactly.

Q. Where were the righthand wheels of the Zahn vehicle with reference to the ditch on the south side of the road?

A. They were in the ditch.

Q. Were there any other individuals you saw in or around the Zahn vehicle as you approached it?

A. No.

Q. What happened next?

A. We went around it and went down the road a little ways and stopped.

Q. How far did you go before you stopped?

A. About six or seven truck lengths.

page 27] Q. Approximately how far is a truck length? According to your measurement, how far would that be?

A. I don't know.

Q. Sixteen or twenty feet?

A. More than that.

Q. Twenty-five feet?

The Court: If he doesn't know —

Q. (By Mr. Compton) What happened after the truck was stopped?

A. We went back to see if we could help Mr. Zahn.

Q. What was the conversation that you had with Mr. Zahn, if any?

A. We just asked him—

James Horace Bristow

Mr. Anderson: We object to hearsay conversation at the scene of the accident.

The Court: I don't think the truth of this is in issue. I will overrule the objection.

Mr. Anderson: Exception.

page 28] The Court: If the truth of this statement should have some bearing on the outcome I will disregard it.

Mr. Compton: I withdraw the question.

Q. (By Mr. Compton) What was determined to be the cause of the Zahn vehicle being there?

A. It "cut off" in the road.

Q. What do you mean by "it cut off?"

A. The automobile just stopped.

Q. When you reached the Zahn vehicle, what was the position of the hood of the car—up or down?

A. It was down.

Q. The hood of that vehicle was hinged where with reference to the windshield of the car?

A. In front of the windshield.

Q. What happened next after you arrived at the vehicle when the hood was down?

A. One of us raised the hood—I don't know which one of us did it.

Q. Did you return to the truck between the time you arrived at the car and the time the hood was raised?

A. No, sir.

page 29] Q. Was a flashlight obtained from the truck after you first left the truck?

Mr. Anderson: I object to the leading question, which suggests the answer.

The Court: Sustained.

Q. (By Mr. Compton) State whether or not any means was used to assist you or any of the others in examining the vehicle of the Zahns?

A. What do you mean by that?

Q. (By The Court) Did you obtain any illumination?

A. Yes, we had a flashlight.

Q. (By Mr. Compton) Now, what did you do with reference

to the motor compartment and the motor of the vehicle after the hood was raised? If anything, that is.

A. I didn't have a chance to do anything.

Q. Why didn't you have a chance to do anything?

A. The car was hit.

Q. What was your position when the vehicle was hit?

A. Standing in front of it.

Q. Were your feet on the hard surface part of Route 33 or were they on the shoulder?

page 30] Mr. Anderson: I object to the question as leading.

The Court: I think the question suggests two equal answers. I will overrule the objection.

Q. (By Mr. Compton) Were they on the hard surface or on the shoulder?

A. On the hard surface.

Q. At that time what was your approximate height and weight?

A. Five feet eleven — around one hundred and eighty pounds, I guess.

Q. Where were your hands when the vehicle was hit?

A. I don't know exactly. Somewhere on the car, I imagine.

Mr. Anderson: I move that be stricken. If that is what he imagines, it is evident he is not sure what he is talking about.

page 31] The Court: You may state things to the best of your recollection. You may not guess or imagine. You may estimate but not guess. I will sustain the motion and strike what he may have imagined.

Q. (By Mr. Compton) To your best recollection, where were your hands located when the vehicle was struck?

A. I don't know.

Q. You don't know?

A. No.

Q. Were you standing up straight or not, at the time the vehicle was struck?

A. I was leaning over looking into the motor.

Q. State whether or not there was any illumination at that time assisting you?

A. Yes, sir.

page 36] DOUGLAS ALLEN BOUGHTON,
a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Compton:

Q. State your name, your age and your residence?

A. Douglas Allen Boughton; age twenty-two; Woods Crossroads, Virginia.

Q. Were you a passenger in a panel truck of your employer on March 18, 1964 prior to an occurrence on Route 33 in New Kent County?

A. Yes, sir.

Q. In relation to the Zahn vehicle or the vehicle that was stopped on Route 33 that day, where did the vehicle you had been occupying, the panel truck — where did that vehicle stop?

A. We went past him and stopped in front of
page 37] Mr. Zahn.

Q. What was the approximate distance between your truck when it was stopped and the Zahn vehicle?

A. I couldn't tell you. I am a very poor judge of distance.

Q. What occurred after the truck was stopped?

A. We all got out of the truck — the four of us, Mr. Carter, Mr. Shelton, Mr. Bristow and myself — and headed back towards Mr. Zahn's car.

Q. What happened next?

A. We all got back to the car and opened the hood.

Q. Who opened the hood?

A. I am not sure. I think Mr. Bristow — but I am not sure.

Q. What happened next?

A. Mr. Carter was holding the hood open and I was standing by the right front headlight holding the flashlight, leaning under the hood.

Q. For what purpose were you holding the flashlight?

A. Getting ready to work on the car, to see what was wrong with it. But it all happened so quick we didn't have a chance to do nothing.

page 38] Q. State whether or not an attempt had been made by anyone to start the car after you got there and before the accident happened?

A. One of us told Mr. Zahn to go around to start the car and he had started around the side of the car to start it, but

he never did even try to start it.

Q. What was Mr. Bristow's location at that time?

A. Standing directly in front of the car.

Q. State whether or not he was standing straight up?

A. I couldn't possibly *tellyou.*

Q. What is your best recollection?

A. I don't know. I just don't know. I was more interested in what I was doing, besides what he was doing.

Q. At the time the collision occurred, what was the position of Mr. Bristow?

A. He was still standing in front of the car.

Q. Specifically, what was his position, as far as standing straight up?

A. I believe he was leaning over — towards the last, when the car hit us.

Q. Where was his stomach located?

page 39] A. I don't know.

Q. You say you don't know?

A. No, sir, I don't.

Q. Where were his hands?

A. I believe they were on the breather.

Q. What is the breather?

A. It fits over top of the carburetor — the air cleaner.

Q. Where was the carburetor located with reference to the front of the vehicle?

A. Right in the middle of the motor — halfway between the back and front.

Q. What was the distance it was behind the radiator — approximately?

A. About like that (indicating with hands) — six or seven inches. I don't know exactly.

Q. What, if anything, was Mr. Bristow doing with the breather of the carburetor?

A. The last thing I remember he was reaching over to that thumbscrew on top of the breather. He was reaching over to unscrew that. That's the last thing I remember.

Q. Where is the thumb screw located on the

page 40] breather?

A. Right in the middle.

Q. You have indicated with your right hand when you said he was unscrewing it. Is that the hand he was using?

A. I don't know, sir.

Q. State whether or not both of his feet were on the ground?

Douglas Allen Boughton

A. Yes, sir, they were.

Q. Now more particularly as to the ground, do you recall whether or not his feet were on the hard surface or on the shoulder — on the dirt?

A. I couldn't say specifically, sir.

Q. You say you were standing at the right front headlight?

A. Yes, sir.

Q. Would that be the right front headlight as you were looking forward at the Zahn vehicle?

A. No. Heading towards the car it would be the left.

Q. Where was Mr. Bristow standing?

A. Directly in the middle.

Q. Middle of what?

A. Of Mr. Zahn's car—between the two head-
page 41] lights.

Q. And you were standing in front of the headlight on the driver's side?

A. No, sir, on the rider's side of the Zahn vehicle — rider's side.

Q. You were standing at the front headlight on the passenger's side or the rider's side?

A. Yes, sir.

Q. Where were the other gentlemen located at that time?

A. Mr. Carter was between me and Mr. Bristow and Mr. Shelton was standing on the righthand side.

Q. That would be in front of the driver's headlight?

A. Yes, sir.

Q. What occurred to Mr. Bristow at the time of the collision?

A. I don't know, sir.

Q. Do you know what happened to you?

A. I just got knocked into the woods. I heard the explosion and then everything went blank and after a few minutes I came to in the woods.

Q. With reference to the radiator on the Zahn vehicle, where was that located with reference to any part of Mr. Bristow's body?

page 42] A. I would say the middle of the radiator was right in front of Mr. Bristow.

Q. Do you recall on July 10, 1964 giving a sworn statement in my office in the presence of Mr. Sutton, your lawyer?

A. Yes, sir.

Mr. Anderson: Objection. He is trying to impeach his own

witness, the witness he has put on the stand, and is referring to the affidavit again to which we have objected.

The Court: If he is taken by surprise and if the witness has made a prior inconsistent statement, I will permit him to ask the question.

Mr. Anderson: Note an exception.

Q. (By Mr. Compton) Do you remember this question was asked you: (Reading)—

"Q. And Mr. Bristow was leaning into the car like you were?

"A. Except he had the radiator right across his stomach.

page 43] "Q. The radiator was across his stomach, just below the rib cage, as you have indicated?

"A. I believe so."

Q. (By Mr. Compton, continuing) Do you recall those questions and those answers?

A. Yes, sir.

Q. Is that your present recollection of what occurred?

A. According to what the question sounded like. I didn't state he was touching the radiator. The way he was standing the radiator was in the middle approximately. Whether he was touching it I don't know.

Q. (By the Court) He was leaning over the radiator but you are not positive to what extent, if any, he was touching it. Is that right?

A. Yes, sir, he was leaning over the radiator.

The Court: Do you gentlemen have any questions?

Mr. Anderson: We have no questions, for the reason previously stated.

page 44] CROSS EXAMINATION

By Mr. Mitchell:

Q. Mr. Boughton, you made reference to a screw on the breather. Are you positive Mr. Bristow's hands were touching the screw you referred to, or was he reaching in the direction of it?

A. My recollection is he was reaching.
Q. You never saw his hand on the screw?
A. No, sir.
Q. You never saw his hand on any part of the interior of that car?
A. No, sir.

Q. (By Mr. Compton) I noticed you just indicated with a turning motion?
A. I was just explaining how the thumb nut works.

Witness stood aside.

page 45] JAMES CHESTER SHELTON, JR.,
a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Compton:
Q. State your name, please, and your age and residence.
A. James Chester Shelton, Jr., age twenty-two; Gloucester County.
Q. By whom are you employed, Mr. Shelton?
A. E. B. Haynes, West Point.
Q. Were you present on Route 33 near West Point in New Kent County on March 18, 1964 when an accident occurred involving the occupants of a vehicle you had been in, including yourself, and a vehicle owned by Mr. Zahn?
A. Yes, sir.

The Court: Confine his testimony to Mr. Bristow's position at the time of the accident.
page 46] Mr. Compton: Yes, sir.

Q. (By Mr. Compton) Mr. Shelton, what was the location of Mr. Bristow immediately before the accident occurred?
A. He was standing in front of the car.
Q. You say he was standing. What specifically was his position; that is, whether he was standing straight up or not?
A. He was kind of leaning a little bit.
Q. What was your location at that time?
A. Standing on the righthand side, in front of the fender.

James Chester Shelton, Jr.

Q. Would that be in front of the headlight on the driver's side of the Zahn vehicle?

A. Kind of beside the headlight — wasn't standing in front of it.

Q. On the driver's side?

A. Yes, sir.

Q. How close were you to Mr. Bristow?

A. Standing next to him.

Q. What was he doing immediately prior to the accident?

A. I don't remember what he had been doing.

page 47] He was kind of leaning over in there.

Q. What was his purpose in leaning over there?

A. I think he was going to check something in the car — the distributor or spark plugs.

Q. You say you think he was going to check the distributor or the spark plugs?

A. Yes, sir, but he didn't have a chance to.

Q. What leads you to the conclusion he was going to check the distributor or the spark plugs?

A. He was reaching down towards them.

Q. Where were the distributor and spark plugs located with reference to the radiator of the Zahn vehicle?

A. Behind the radiator.

Q. How far behind the radiator, approximately?

A. I don't know. I can't answer that. I don't know.

Q. State whether or not the distributor and spark plugs were on the same level as the top of the radiator or not?

A. Yes, sir, I believe it was.

Q. The top of the spark plugs were the same level as the top of the radiator?

A. Yes, sir.

page 48] Q. Now what happened to Mr. Bristow immediately after the accident?

A. Well, he was thrown in the ditch.

Q. Before he was thrown in the ditch, what was his location?

A. Still standing in front of the car.

Q. Between the time he was standing in front of the car and the time he was in the ditch, what happened to him, if anything?

A. I don't understand you.

Q. There was a period of time after the impact and before

he ended up in the ditch. What was his position at that time — Mr. Bristow's position?

A. He was standing in front of the car before the other car hit and after the car hit, he was thrown over in the ditch.

Q. Immediately prior to the impact or within a minute or so before the impact happened, where were Mr. Bristow's hands located?

A. I couldn't tell you. I don't know.

Q. Where was his stomach located?

A. He was leaning over, kind of towards the front of the car.

Q. Could you be more specific than that?

page 49] A. Well, before he got to the radiator — I don't know whether he was leaning on the radiator or not, but he was leaning that way.

Q. With reference to any part of the Zahn vehicle, where was Mr. Bristow's head immediately before the impact or within a minute before the impact?

A. I believe he was kind of leaning over under the hood. His head was kind of under the hood.

Q. With reference to any part of the motor of the Zahn vehicle, at what part of the motor would Mr. Bristow's head have been?

A. Towards the middle.

Q. Towards the middle of the motor?

A. Yes, sir, in the middle.

Mr. Compton: No further questions.

Mr. Anderson: We have no questions, for the reasons stated.

Mr. Sutton: No questions.

Witness stood aside.

page 50] JAMES EMMETT CARTER, JR.,

a witness called by and on behalf of the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Compton:

Q. State your name and your age and your occupation.

A. James Emmett Carter, Jr., forty-four years old. I work for E. B. Haynes as a truck driver.

James Emmett Carter, Jr.

Q. Mr. Carter, were you the driver of the E. B. Haynes truck when it stopped near the Zahn vehicle on the night in question?

A. Yes, sir.

Q. What was your position with reference to the Zahn vehicle immediately before the accident happened?

A. We were coming down the road —

Q. No — I mean immediately before the collision occurred. What were you doing immediately before it happened?

page 51]

A. I was holding the hood up in front of the car.

Q. Where were you standing?

A. In the front.

Q. Where was Mr. Bristow standing?

A. I couldn't tell you which side he was standing on. I don't know.

Q. Was he on the side of the automobile or on the front of the Zahn automobile?

A. I couldn't tell you.

Q. You don't know?

A. I don't know which is which. I don't know.

Q. What was his position with reference to the Zahn vehicle, regardless of the side of the Zahn vehicle he was on?

A. They were looking underneath the hood at the motor.

Q. Who was "they?"

A. The rest of them was.

Q. Do you mean the other three boys — including yourself as a boy?

A. Yes, sir.

Q. For what purpose was Mr. Bristow looking under the hood?

page 52]

A. They were trying to get the car started.

Q. What had they done to attempt to get the car started?

A. I don't know.

Q. You don't recall?

A. No, I don't.

Q. State whether or not anyone had gotten behind the steering wheel of the Zahn vehicle and attempted to start the car before it happened?

A. No, sir.

Q. Where were Mr. Bristow's hands immediately before the accident happened?

A. I don't know.
Q. You don't know?
A. No, sir.
Q. Between the time the collision occurred, what is the next thing you remember after the impact?
A. After the impact?
Q. Yes, sir.
A. I was lying in the edge of the woods.
Q. Do you recall anything between that time and the time of the impact?
page 53] A. No, sir.
Q. You don't recall anything from the time of the impact until you found yourself lying in the edge of woods?
A. No.

Mr. Anderson: No questions, for the same reason.
Mr. Sutton: No questions.

Witness stood aside.

page 54] Mr. Compton: Plaintiff would like to recall Mr. Bristow.
Mr. Anderson: Your Honor, we made a motion to exclude the witnesses and he has been sitting in the courtroom.
Mr. Compton: He is a party to the suit.
The Court: I will permit him to testify again.
Mr. Anderson: Note our exception.

JAMES HORACE BRISTOW,
recalled to the stand, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

By Mr. Compton:
Q. Mr. Bristow, let me direct your attention to July 10, 1964 at which time you were present with Mr. Sutton in my law office in connection with this accident and gave a sworn statement at that time. Do you recall that day?
page 55] A. Yes, sir.
Q. Do you recall that you were asked this question at that time —

Mr. Anderson: I object to this attempt to impeach this witness on an affidavit taken out of the *present* of other counsel without notice.

The Court: The statement would be admissible itself if it is an admission and not a self-serving declaration. I will allow it.

Mr. Anderson: Note my exception.

Q. (By Mr. Compton) Mr. Bristow, do you recall these questions being asked and these answers being given by you on that occasion — (Reading)—

"Q. As you were standing there inspecting the engine of the automobile, what part of the motor were you inspecting just before the accident happened? That is, were you near the front of the automobile, or were you reaching back farther towards the rear of the automobile, in the engine of it?

"A. I was getting ready to reach in the back.

page 56] "Q. Getting ready to reach into the back?

"A. Yes, sir.

"Q. In connection with doing that, was it necessary for you to stretch and lean over into the motor of the automobile, such that maybe your stomach was resting on the radiator while you were doing that?

"A. I wasn't stretching too far, but part of my stomach could have been resting on the motor.

"Q. Resting on the motor, or radiator?

"A. Radiator, not the motor; the radiator."

Q. (By Mr. Compton, continuing) Do you recall those questions and answers given by you?

Note: The witness nodded his head in the affirmative.

Q. (By Mr. Compton) You are nodding your head to indicate "yes?"

A. Yes.

page 57] The Court: That is the same thing he has testified today.

Mr. Compton: That may be, sir.

The Court: Anything else?

Q. (By Mr. Compton) Mr. Bristow, further on that day,

James Horace Bristow

on page 20, you were asked these questions and gave these answers: (Reading) —

"Q. Do you remember the actual impact itself?
"A. Yes, sir.
"Q. What do you remember about it?
"A. I remember trying to keep from going forward with the car, but it wasn't any use.
"Q. You say 'going forward,' you mean east toward West Point?
"A. The car was carrying me right on with it.
"Q. So at that time, your feet were up off of the ground and you were draped over the engine; would that be about correct?
"A. Yes, sir."

page 58] Q. (By Mr. Compton, continuing) Do you recall those questions and those answers?
A. Yes, sir.
Q. Is that your present recollection of what occurred on that day?
A. Yes, sir.
Q. Did you say "yes?"
A. Yes, sir — yes.

CROSS EXAMINATION

By Mr. Sutton:
Q. Mr. Bristow, it was after you had been hit you were draped over the car and thrown forward?
A. After the car hit me, it carried me over.
Q. After the car hit you?
A. Yes.

Witness stood aside.

page 59] Mr. Compton: That is the evidence on behalf of the plaintiff—of course, in addition to the other facts which have been stipulated or admitted in the pleadings.
The Court: All right. I see your memorandum in here, Mr. Anderson, but I don't see your memorandum, Mr. Compton.
Mr. Compton: It wasn't finished until this morning, Your Honor.
Mr. Anderson: It was delivered to us this morning, I would

like the record to show, without any opportunity for us to make any study of it.

Mr. Compton: Would you like for me to state I got your memorandum at the time of the last hearing?

Mr. Anderson: I would be glad for you to so state on the record, and also state how many weeks it was.

Mr. Compton: I think it was about three months ago and I promised to give you my memorandum a month
page 60] ago.

The Court: Let me see it.

Mr. Compton: Your Honor, if I might interrupt a minute, the insurance policies involved, copy of them have been filed with the court papers, and I move they be made part of the record, Exhibit A being the plaintiff's insurance policy and Exhibit B that of the Allstate Insurance Company, one of the defendants.

The Court: Didn't the grounds of defense — didn't each of you actually file your own policy?

Mr. Compton: Yes, sir, and they are with the court papers and I would like to make them a part of the record, if such is necessary. I would like to be sure they are with the record.

The Court: I see Mr. Nathan Smith wrote asking that it be filed as an exhibit.

Mr. Anderson: We have no objection to the two policies being made a part of the record.

The Court: They are both here. Mr. Compton
page 61] filed one February 8 and Mr. Smith filed one January 19. I will mark them, if you think it is necessary. They are both attached to letters which the Clerk has already marked filed.

Mr. Compton: If you would mark the plaintiff's policy as Exhibit 1 and the Allstate policy as Exhibit 2?

The Court: All right — Plaintiff's Exhibit No. 1. You want the other one Plaintiff's Exhibit No. 2?

Mr. Compton: That would be the Allstate policy.

The Court: I shall so mark them.

Note: Marked Plaintiff's Exhibits No. 1 and No. 2, and filed.

The Court: Let me ask you this. I see you cite a number of cases in here. Isn't it true in all or most of these cases it was a situation in which a person had been in the car and had been driving it or using it in some manner and they had
page 62] stepped out to change a tire or something of that nature?

Mr. Compton: I think that is correct.

The Court: Is there any further argument you wanted to make about the matter?

Mr. Compton: Not in addition to what we have cited there. There are several cases cited in the annotation we referred to where there was no actual physical contact between the person and the vehicle, but they nevertheless held the person was in or upon the car. However, in those cases the person had been in the vehicle and had gotten out of the vehicle which they had been previously occupying.

The Court: That is my feeling. If the car had been entrusted to a mechanic and he was working on it and had driven the car down the road and stopped it and gotten out and raised the hood, he would still be using the car. But that would be the contrary situation to this case.

In this case we have people who were merely passers-by and who came back for the purpose of helping the man
page 63] and in the course of doing so may have touched the car — but that is stretching the meaning of "use" a long ways. Had the man already been in the car and had been driving it and then gotten out in an effort to start it or repair it, he would still be using it; but in this case since he had never gotten in the car, whether some part of his body actually touched it would be an incidental point and not a determining factor. I don't think he would be using the car under these circumstances.

Mr. Compton: The word "use" is the word found in the statute. Our point is that the policy of the defendant Allstate defines the word "insured" as one occupying the car, and "occupying" is defined as being in or upon the vehicle. The meaning of the term "use" is not the restrictive language in this case because here the policy of the insurance company is broader than the statute and therefore a decision on this point should be based on the policy, if the policy is broader than the statute.

page 64] We think, in defining the word "use" there is certainly a question that Bristow was using the vehicle. However, the fact he was in or upon the vehicle is clearly shown by the evidence.

The Court: I notice you state "while occupying." The word "occupying" means in or upon or entering into or alighting from.

I do not consider he was entering into or alighting from. and while possibly he might have been in or on to some minimal extent, I do not think it came within the meaning of the policy. because if he was in or on it, it was to such a minor degree I

would not consider him as occupying the automobile.

Of course, he was on it more emphatically after the accident. As a matter of fact, he was actually carried along as a passenger for a brief period, perhaps involuntarily — but I would not consider that as being in or on the automobile. Anyone struck by an automobile comes in contact with it. That is always true.

page 65]

That, gentlemen, would be my ruling in this case.

Mr. Compton: Do I understand Your Honor will deny the motion and will not declare the defendant Bristow is an insured under the policy issued by the defendant, Allstate Insurance Company?

The Court: That is correct.

Mr. Compton: Plaintiff respectfully excepts to the ruling of the Court.

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A Copy—Teste:

H. G. TURNER, Clerk.

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