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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6335

In the
Supreme Court of Appeals of Virginia
at Richmond

VIRGINIA MILES BARTLETT

v.

ROBERTS RECAPPING, INC.

FROM THE CIRCUIT COURT OF MONTGOMERY 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.

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Record No. 6335

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 19th day of January, 1966.

VIRGINIA MILES BARTLETT, Appellant,

against

ROBERTS RECAPPING, INC., Appellee.

From the Circuit Court of Montgomery County
William S. Jordan, Judge

Upon the petition of Virginia Miles Bartlett an appeal and *supersedeas* is awarded her from a decree entered by the Circuit Court of Montgomery County on the 1st day of September, 1965, in a certain chancery cause then therein depending wherein Roberts Recapping, Inc., was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of seventeen thousand, five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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page 31]

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DECREE

This cause came on to be heard upon State Farm Mutual Automobile Insurance Company's Motion to dismiss it as a party defendant, and also for a pre-trial conference on the other pleadings.

And the Court having heard arguments on the Motion to dismiss and having thoroughly considered the same, is of the opinion to, and does hereby grant said motion. It is, therefore, ADJUDGED, ORDERED and DECREED that State Farm Mutual Automobile Insurance Company be, and it hereby is, dismissed as a party defendant in this cause, at the cost of the Complainant, to which action of the Court in so doing, the Complainant by counsel objects and excepts.

This cause will continue on the docket under the style of *Roberts Recapping, Inc.* vs. *Virginia Miles Bartlett.*

This cause was also heard on the plea of the defendant Bartlett, set down for argument on Plaintiff's motion and was argued by counsel. And it appearing to the Court that the plea is sufficient in law, it is accordingly ADJUDGED and ORDERED that the plea be allowed. Whereupon,

page 32] the Plaintiff took issue upon said plea, and the defendant Bartlett, under the provisions of Section 8-213 of the Code of Virginia, 1950, as amended, requested that the issues raised by said plea be tried by a Jury, which Motion the Court doth allow.

This cause is now continued and is to be set down for a trial by Jury at a later date.

THIS DECREE SEEN BY:

ROBERT J. INGRAM
Counsel for Plaintiff

JAMES C. TURK
Counsel for Defendant Bartlett

JAMES C. TURK
Counsel for Defendant State Farm Mutual Automobile Insurance Company

ENTER THIS DECREE: as of Feb. 1, 1965

W. S. JORDAN
Judge

★ ★ ★ ★ ★

page 35] INSTRUCTION 1-A

The Court intructs the jury that this is a contribution suit brought by the plaintiff, Roberts Recapping Company, against the defendant, Virginia Miles Bartlett. Unlike the usual civil case for damages by reason of negligence, a contribution suit presupposes that the plaintiff, himself, was guilty of negligence, a contribution suit presupposes that the plaintiff, himself, was guilty of negligence which proximately caused or efficiently contributed to the happening of the accident, and the damages resulting therefrom, but it seeks to further show that the defendant was likewise guilty of concurring, or joint negligence, which also proximately caused that accident.

Accordingly, for purposes of all those instructions which are to be given, the Court tells you that the plaintiff is not barred or prevented from having a recovery against the defendant merely because the plaintiff was guilty of negligence which proximately caused or efficiently contributed to the accident in this case, and to the fatality and injuries resulting therefrom, but the Court further instructs you that, despite any such negligence on the plaintiff's part, if you also believe from the evidence in this case, and the reasonable inferences to be drawn therefrom, that the defendant, Virginia Miles Bartlett, was also guilty of concurring negligence which either proximately caused or efficiently contributed to this accident, and the fatality and injuries resulting therefrom, then your finding must be in favor of the plaintiff, Roberts Recapping Company, unless you further believe from the evidence that Turner, Webb and Hall were guilty of contributory negligence or that they were guilty of assumption of risk under all the evidence so as to have barred them from any recovery against the defendant, Mrs. Bartlett.

And the Court further tells you that the law does not seek to balance, weigh or apportion any such concurring negligence as between the plaintiff and the defendant. Therefore, if you should believe from all the evidence that one of them was more negligent than the other, but, nevertheless, you also believe that the concurring negligence on both their parts proximately caused the accident in question and the resulting fatality and injuries, then, you shall still find for the plaintiff, Roberts Recapping Company, under the circumstances of this case.

Given
WSJ

page 36] INSTRUCTION 3

The Court instructs the jury that if you believe by a preponderance of the evidence that Mrs. Bartlett, after she knew, or reasonably should have known, that her automobile was running out of gasoline, had the opportunity to remove her car from the traveled portion of the highway and ordinary prudence dictated that she do so, then her failure to leave the traveled portion of the highway constituted negligence.

Given
WSJ

page 37] INSTRUCTION 4

The Court instructs the jury that it was the duty of the defendant, Virginia Miles Bartlett, not to stop or permit her station wagon vehicle to be stopped on the highway in such a manner as to impede or render dangerous the use of that highway by others, except in the case of a mechanical breakdown which could not have been reasonably anticipated, or foreseen, or which could not have been prevented by her in the exercise of due care and caution. And even in case of a mechanical breakdown which could not have been reasonably anticipated, foreseen, or prevented, the defendant was still charged with the duty not to stop, or permit her vehicle to be stopped on the highway if she could have driven it off the highway before it stopped in the exercise of reasonable care and caution.

And if you believe from a preponderance of the evidence

that the defendant violated any one of the foregoing duties, then the Court tells you that she was negligent.

Given
WSJ

page 38] INSTRUCTION 5

The Court instructs the jury that by law Mrs. Bartlett was required to exercise reasonable care under the circumstances to remove her vehicle, or have it removed, from the roadway to the shoulder as soon as possible. If you believe by a preponderance of the evidence in this case that she failed to do this then she was guilty of negligence as a matter of law.

Given
WSJ

page 39] INSTRUCTION 6

The Court instructs the jury that it was the duty of Mrs. Bartlett to take all reasonable precautions under the circumstances to warn other persons using the highway that her car was stopped thereon.

If, from a preponderance of the evidence, you believe that Mrs. Bartlett failed to do this, then she was guilty of negligence.

Given
WSJ

page 40] INSTRUCTION 7

The Court instructs the jury that the defendant, Virginia Miles Bartlett, was required by law, at the time of the accident in question, to have properly illuminated at least two headlights at the front of and on opposite sides of her vehicle and such headlights, if they be multiple beam, shall have provided an uppermost distribution of light sufficient in intensity to reveal persons and objects at least 350 feet ahead, and at least one lower, nonglaring distribution of light of sufficient intensity to reveal persons and objects at least 100 feet ahead. She was also required to have her vehicle properly illuminated with rear lights capable of exhibiting a red light plainly visible in clear weather from a distance of 500 feet

to the rear of her vehicle.

If you believe from all of the evidence in this case that the defendant, Mrs. Bartlett, failed to comply with these requirements of the law, then, she was guilty of negligence.

Given
WSJ

page 41] INSTRUCTION 8

The Court instructs the jury that if you believe by a preponderance of the evidence that Mrs. Bartlett, through her own negligence, created a hazardous and dangerous situation upon the highway and that as a result thereof either she or other persons traveling on the highway were placed in eminent and real danger of serious injury or death and that Turner, Hall and Webb exposed themselves to this known danger and risk in order to alleviate such danger and that such action on their part was what ordinarily prudent persons would have done under the same or similar circumstances, then the Court tells you that Turner, Hall and Webb would not be guilty of contributory negligence or assumption of risk.

Given
WSJ

page 42] INSTRUCTION 9

The Court instructs the jury that after Turner, Hall and Webb volunteered to push the Bartlett vehicle out of the highway and placed themselves in a position to start pushing, Mrs. Bartlett, at that time, owed to them the duty of minimizing any risk assumed by them by every reasonable means available to her.

If, under all the evidence in this case, you believe that Mrs. Bartlett, saw, or should have seen had she been keeping a reasonable lookout under all the circumstances, the Roberts Recapping truck approaching in time to have warned Turner, Hall and Webb and that her failure to do so was a proximate or an efficient contributing cause of the resulting death and injuiries, then you shall find for the plaintiff even though you may believe that Turner, Hall and Webb were also negligent at the time they exposed themselves to the danger.

Given
WSJ

page 43] INSTRUCTION 10

The Court instructs the jury that the defendant, Virginia Miles Bartlett, in permitting the injured parties, Webb and Hall, and the deceased party, Turner, to assist in the attempted removal of her car from the hard surfaced portion of the highway, had the duty to exercise reasonable care and caution in the supervision of that attempted removal, including the duty to keep a proper lookout, to make certain that the lights on her vehicle were properly illuminated so as to comply with the visibility requirements of the law, to give reasonable and adequate warnings of what a proper lookout should have disclosed, to otherwise give reasonable warning to the approaching motorists of the presence of her disabled vehicle, all as defined under the Court's previous instructions as heretofore given, and to do all other things under the circumstances then and there existing which a reasonable and prudent person would or should have done to avoid the happening of an accident and possible injury or death to the said parties, Webb, Hall and Turner.

Accordingly, the Court further instructs you that if you believe from all the evidence in this case that the defendant violated any one or more of the foregoing duties, then she was negligent; and if you also believe from the evidence that any such negligence on her part either proximately caused or efficiently contributed to the accident in question, then, you shall find your verdict in favor of the plaintiff, Roberts Recapping Company, unless you further believe from such evidence that Webb, Hall and Turner were guilty of assumption of risk or contributory negligence which would have barred their recovery against Mrs. Bartlett.

Given
WSJ

page 43a] INSTRUCTION 11

The Court instructs the jury that if you believe by a preponderance of the evidence that Mrs. Bartlett, as well as the driver of the Roberts Recapping truck, was negligent under any one or more of the other instructions of the Court and if you further believe by a preponderance of the evidence that such negligence on her part efficiently contributed to the cause of this accident, and if you further believe under the Court's other instructions that Turner, Hall and Webb were

not guilty of contributory negligence, or assumption of risk then your verdict must be for the plaintiff.

Given
WSJ

page 44] INSTRUCTION 12

The Court instructs the jury that a verdict must not be based upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the Court.

Given
WSJ

page 45] INSTRUCTION 13

The jury are the sole judges of the weight to be given to the evidence and of the credibility of the witnesses. And in ascertaining the preponderance of the evidence and the credibility of witnesses, you may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he has testified; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, you are to determine the credibility of witnesses and the preponderance of the evidence.

Given
WSJ

page 46] INSTRUCTION NO. A

The Court instructs the jury that if you believe from the evidence that the proximate cause of the injuries suffered by Turner, Hall and Webb was solely due to the negligence of the driver of plaintiff's truck, then plaintiff cannot recover in this action and your verdict must be for the defendant, Mrs. Bartlett.

Given
WSJ

page 47] INSTRUCTION NO. B

The Court instructs the jury that the mere fact that there has been an accident and that as a result thereof Turner, Hall and Webb were injured, does not of itself entitle the plaintiff to recover from the defendant in this action. In order to recover against the defendant, Bartlett, the burden is upon the plaintiff to prove by a preponderance of the evidence that Mrs. Bartlett was negligent and that any such negligence was a proximate cause of the injuries received by Webb, Hall and Turner.

And if the jury be doubtful as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probably that Mrs. Bartlett was not guilty of any such negligence as it is that she was, then you shall return your verdict in favor of the defendant, Mrs. Bartlett.

Given
WSJ

page 48] INSTRUCTION NO. C

The Court instructs the Jury that this is a contribution proceeding and before the Plaintiff can recover in this action it must show by a preponderance of the evidence that the Defendant, Mrs. Bartlett, was guilty of negligence which was a proximate cause of the injuries to the third parties for which they could recover from Mrs. Bartlett. If the injured third parties could not recover from Mrs. Bartlett, then you must find your verdict for the Defendant, Mrs. Bartlett.

Given
WSJ

page 49] INSTRUCTION NO. D

The Court instructs the jury that the burden is upon the plaintiff, Roberts Recapping, Inc., not only to prove by a preponderance of the evidence that the defendant, Mrs. Bartlett, was negligent, but also to prove by a preponderance of the evidence that any such negligence was a proximate cause of the occurrence complained of and the injuries sustained by the third parties, Turner, Hall and Webb; that is, that their injuries were a natural and probable consequence of any

such negligence on the part of Mrs. Bartlett. A person is not charged with foreseeing that which could not reasonably be expected to happen, nor for casualties, though possible, were wholly unprobable. Therefore, even though you may believe from a preponderance of the evidence that the defendant, Mrs. Bartlett, was negligent, yet unless you further believe from a preponderence of the evidence that any such negligence was a proximate cause of the occurrence and the injuries sustained by Turner, Hall and Webb, you must find your verdict in favor of the defendant, Mrs. Bartlett.

Given
WSJ

page 50] INSTRUCTION NO. E

The Court instructs the jury that if you believe from the evidence that injuries sustained by Turner, Hall and Webb might have been due to either of two causes, one of which the defendant, Mrs. Bartlett, might have been responsible for, the other of which she was not responsible for, and if the jury are unable to determine which of the two causes occasioned the injuries to Turner, Hall and Webb, you must find your verdict in favor of the defendant, Mrs. Bartlett.

Given
WSJ

page 51] INSTRUCTION NO. F

The Court instructs the jury that in order to justify one in risking his life or serious injury in rescuing another person from serious peril, the danger threatened the latter must be eminent and real, and not merely imaginary or speculative. There must be more than a mere suspicion that an accident to some person may follow if a rescue is not performed. The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant, Mrs. Bartlett, was negligent and that as result thereof, a perilous condition was created and that danger therefrom was eminent and real; and unless the plaintiff proves the foregoing by a preponderance of the evidence, he cannot rely upon a claim of attempted rescue as a bar to contributory negligence or assumption of the risk on the part of Turner, Hall and Webb.

And even though you may believe from a preponderance of

the evidence that the defendant, Mrs. Bartlett, was guilty of negligence in creating a perilous condition and that danger therefrom was eminent and real, nevertheless if you further believe from the evidence that Turner, Hall and Webb in attempting to remove the automobile from the highway, acted rashly and with reckless disregard for their own personal safety, then the plaintiff cannot rely upon a claim of attempted rescue as a bar to contributory negligence or assumption of the risk on the part of Turner, Hall and Webb.

Given
WSJ

page 52] INSTRUCTION NO. G

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant, Mrs. Barlett, was negligent and that such negligence created a situation of potential danger, but that the driver of plaintiff's vehicle became aware, or by the exercise of ordinary care, should have been aware, of the *existance* of such situation of potential danger, and that thereafter plaintiff's driver, by an independent, intervening act of negligence, brought about the occurrence complained of, and that the defendant, Mrs. Bartlett, in the exercise of ordinary care could not reasonably have foreseen such intervening negligent act of plaintiff's driver, then the situation of danger created by the defendant's, Mrs. Bartlett, negligence, if any, became merely a circumstance of the occasion complained of, but not a proximate cause thereof, then you shall return your verdict in favor of the defendant, Mrs. Bartlett.

Given
WSJ

page 53] INSTRUCTION NO. H-1

The Court instructs the jury that one who voluntarily assumes the risk of injury from a known hazard or danger cannot recover for injuries received from such hazard or danger. And if you believe from a preponderance of the evidence that Turner, Hall and Webb fully appreciated that there was a hazard or danger involved in the venture which they undertook, and that they voluntarily exposed themselves to such hazard or danger, and that they were injured as a result of

such hazard or danger, then plaintiff, Roberts Recapping, Inc., cannot recover even though you may also believe that Mrs. Bartlett, the defendant, was negligent, unless you further believe that the third parties, Turner, Hall and Webb, were engaged in a rescue as defined in other instructions.

Given
WSJ

page 54] INSTRUCTION NO. I

The Court instructs the jury that if you believe from a preponderance of the evidence that the injured third parties, Turner, Hall and Webb, failed to exercise such care as ordinary prudent persons would reasonably be expected to exercise under similar circumstances in protecting themselves against the injuries they received, and thereby contributed to cause their said injuries, your verdict must be for the defendant, Mrs. Bartlett.

Given
WSJ

page 55] INSTRUCTION 1

The Court instructs the jury that Mrs. Bartlett was guilty of negligence as a matter of law in permitting her vehicle to stop on the highway under the circumstances of this case.

If you believe from all the evidence in this case that such negligence on her part contributed in an efficient degree to the happening of this accident and resulting death of Turner and injuries to Hall and Webb, then you must find for the plaintiff, unless you further believe by a preponderance of the evidence that Turner, Hall and Webb were guilty of contributory negligence or assumption of risk under Instruction #.....

Refused
WSJ

page 56] INSTRUCTION 2

The Court instructs the jury that if you believe from all the evidence in this case that Mrs. Bartlett was aware or reasonably should have been aware that the car which she was

driving might run out of gasoline before reaching Boyers service station and that a reasonably prudent person under all the circumstances of this case would not have proceeded onto the highway or would have stopped for gasoline at the nearest available gasoline station then Mrs. Bartlett's failure to do this constituted negligence.

Refused
WSJ

page 57] INSTRUCTION NO. H

The Court instructs the jury that one who voluntarily assumes the risk of injury from a known hazard or danger cannot recover for injuries received from such hazard or danger. And if you believe from a preponderance of the evidence that Turner, Hall and Webb fully appreciated that there was a hazard or danger involved in the venture which they undertook, and that they voluntarily exposed themselves to such hazard or danger, and that they were injured as a result of such hazard or danger, then plaintiff, Roberts Recapping, Inc., cannot recover even though you may also believe that Mrs. Bartlett, the defendant, was negligent.

Refused
WSJ

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page 59]

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DECREE

On the 8th day of February, 1965, came the parties, both plaintiff and defendant, as well as counsel for both plaintiff and defendant, and issues being joined on defendant's pleas, came a jury, a panel of thirteen (13), which were selected from the regular venire summoned for this term of Court, who were examined by the Court and found free from all legal exceptions and qualified to serve as jurors; thereupon, the plaintiff, by counsel, and the defendant, by counsel, struck three each from said panel, and the remaining seven composed the jury for the trial of the case, against whom no

objections were raised, to-wit: Clarence L. Bishop, William M. Deemer, Clyde E. East, D. L. Grubb, John D. Hardie, Walter Milton and James L. Swain, who were sworn to well and truly try the issues joined between the plaintiff, Roberts Recapping, Inc., and the defendant, Virginia Miles Bartlett, and a true verdict render according to the law and evidence.

Whereupon, the plaintiff proceeded to produce its evidence and having rested, the defendant moved the court to strike the plaintiff's evidence and enter summary judgment for the defendant on the grounds assigned at bar, which motion the Court overruled, to which action of the Court in so doing, the defendant, by counsel, duly objected and excepted.

Thereupon, the defendant announced that she had no further evidence to present and announced that she rested

page 60] and again renewed her motion to strike the evidence of plaintiff and for summary judgment in favor of the defendant on the grounds assigned previously, which motion the Court overruled and to which action of the Court in so doing, the defendant duly objected and excepted.

Thereupon, the Court was adjourned until the following morning, February 9, 1965, at 9:00 a.m.

Both sides having completed their case and the jurors having heard all the evidence, the instructions of the Court and the arguments of counsel, retired to their room to consider of their verdict, and after a time returned to the court with the following verdict, to-wit:

"We, the jury, upon the issue joined, find in favor of the plaintiff, and fix its damages at $14,850."

/s/J. D. HARDIE, Foreman

Whereupon, the jury was discharged, and thereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury and for the Court to enter up final judgment in favor of the defendant, or in lieu thereof, to grant to the defendant a new trial, and assigned as the basis for her motion the grounds that the verdict of the jury was contrary to the law and the evidence, without evidence to support it and plainly wrong, and on further grounds that the Court had admitted certain evidence objected to by the defendant, had given certain instructions over the objection of the defendant, and had failed to give certain other instructions tendered by the defendant.

Thereupon, the defendant asked leave of the Court to file written grounds in support of said motion, which leave is granted by the Court; the defendant to file her Memorandum in support of her motion to set aside the verdict of the jury on or before April 1, 1965, with leave granted to the plaintiff to file any reply thereto on or before April 30, 1965.

page 61] And the Court having taken time to consider said motion, this cause is now continued.

WE HAVE SEEN THIS DECREE:

ROBERT J. INGRAM
Counsel for Plaintiff

JOHN N. DALTON
Counsel for Defendant

ENTER THIS DECREE: 2/22/65

W. S. JORDAN
Judge

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page 114]

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DECREE

This day came the parties again, by their attorneys, and the Court having maturely considered the motion of the defendant to set aside the verdict of the jury, doth overrule the same, to which ruling of the Court, the defendant, by counsel, duly objected and excepted.

It is therefore ADJUDGED, ORDERED and DECREED by the Court that the plaintiff do have and recover of the defendant the sum of $14,850.00 in accordance with the jury verdict, with interest thereon from February 9, 1965 until paid, together with its taxable costs incurred herein.

WHEREUPON, the defendant, Vrginia Miles Bartlett, by counsel, indicated to the Court her intention to apply to the Supreme Court of Appeals of Virginia for an appeal and *supersedeas* to the action of the Court herein, and upon mo-

tion of the defendant for the suspension of the execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for an appeal, or, if an appeal be granted by the Supreme Court of Appeals of Virginia, until an opinion be rendered by the Supreme Court of Appeals of Virginia, until an opinion be rendered by that Court, it is hereby AD-

page 115] JUDGED and ORDERED that, if defendant files her petition for appeal in accordance with the rules of the Supreme Court of Appeals of Virginia within four (4) months from this date, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon said petition; and, if an appeal be granted in this case, it is ADJUDGED and ORDERED that execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia. The suspending of this judgment is conditional upon the defendant or some person or persons in her behalf, entering into bond, with corporate surety before the Clerk of this Court within twenty-one (21) days from this date in an amount of $17,500.00 conditioned according to law.

THIS DECREE SEEN BY:

ROBERT J. INGRAM
Counsel for Plaintiff

JAMES C. TURK
Counsel for Defendant

ENTER THIS DECREE: 9/1/65

W. S. JORDAN
Judge

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page 119]

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

The appellant, Virginia Miles Bartlett, by her counsel, hereby gives notice, pursuant to the provisions of Section 4,

Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia, of her appeal from that certain final decree entered in the above-styled cause on September 1, 1965, and will apply for an appeal or Writ of Error and *Supersedeas.*

The following are the errors assigned:

The Court erred in:

(1) In not striking out the evidence introduced for the plaintiff.

(2) In not setting aside the verdict of the jury as contrary to the law and the evidence, without evidence to support it, and plainly wrong, and not entering final judgment for the defendant or granting a new trial, and in entering judgment for the plaintiff.

(3) In granting Instructions Nos. 1A, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 13.

(4) In refusing to grant Instruction No. H, submitted on behalf of the defendant.

(5) In admitting evidence concerning the location of the Kayo Service Station on Page 14 of the transcript, page 120] in admitting improper evidence concerning the stopping of the Bartlett vehicle on the highway, improper evidence concerning the signaling of approaching automobiles and improper evidence concerning Mrs. Bartlett's efforts to remove the automobile from the highway.

VIRGINIA MILES BARTLETT

By: JAMES C. TURK
Of Counsel

DALTON, POFF & TURK
Attorneys at Law
Radford, Virginia
Counsel for Appellant

CERTIFICATE

I, James C. Turk of counsel for the appellant, Virginia Miles Bartlett, do hereby certify that I mailed a copy of the foregoing Notice of Appeal and Assignments of Error to Messrs. Philip Sadler and Robert J. Ingram, Law Offices, Gilmer,

Sadler, Ingram, Thomas & Sutherland, Pulaski, Virginia, Counsel of record for appellee, on October 26, 1965.

JAMES C. TURK

Filed in Clerks Office Circuit Court of Montgomery County 27 day of October 1965

ALBERT B. CORRELL, Clerk

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page 2]

APPEARANCES: Philip M. Sadler, Esq.,
Robert J. Ingram, Esq.,
of
Gilmer, Sadler, Ingram, Thomas and Sutherland
Pulaski, Virginia,
Counsel for Plaintiff; and
John N. Dalton, Esq.,
James C. Turk, Esq.,
of
Dalton, Poff & Turk
Radford, Virginia,
Counsel for Defendant.

Christiansburg, Va.
February 8, 1965
10:00 a.m.

(The reporter is sworn.)

The Court: Is the Plaintiff ready?
Mr. Sadler: Yes, sir.
The Court: Is the Defendant ready?
Mr. Turk: Yes, sir.
The Court: As I understand it we are trying the issue joined by the plea in the chancery pleading under Section 8-213 of the Code.
Mr. Sadler: Yes, sir.

Grady A. McConnell

(A Jury of seven was impaneled to try
page 3] this case.)

(The witnesses were called forward, sworn and excluded from the courtroom.)

(Mr. Sadler opened before the Jury on behalf of the Complainant.)

(Mr. Turk opened before the Jury on behalf of the Defendant.)

GRADY A. McCONNELL,
a witness called on behalf of the Complainant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ingram:

Q. Would you state your full name, please, sir?

A. Grady A. McConnell.

Q. Mr. McConnell, you are presently the Sheriff of Montgomery County, Virginia?

A. Yes, sir.

Q. Going back to the time of this accident on October 27, 1960, were you on active duty as a Virginia State Trooper in Montgomery County?

A. I was.

page 4] Q. In that capacity did you have occasion to investigate the accident which has been described here in the opening statements?

A. Yes, sir.

Q. Will you tell us how you came to learn of that accident and where you were located when you first received word of it?

A. I was patrolling on No. 11 east of Christiansburg. I was headed east and I just drove up on the accident just a few minutes after it happened.

Q. Do you know what time, or are you able to say what time the accident actually occurred?

Grady A. McConnell

A. 6:44 p.m. and I based that on the fact that a watch which was on the arm of the Turner boy who was killed was crushed and was stopped at that time.

Q. That would be David Lewis Turner, the person who was killed in the accident?

A. That's right.

Q. For the purpose of identification was he then a V.P.I. student?

A. He was.

Q. This was after dark, was it not?

page 5] A. Yes, sir, it was dark.

Q. When you arrived at the scene do you know whether or not any of the vehicles involved in the accident had been moved?

A. No, they were in the same position that they came to rest after the accident.

Q. Will you describe to the Court and the Jury just what you found at the scene in the way of vehicles and other matters that might reflect how this accident occurred?

A. The location is 1.95 miles east of the corporate limits of Christiansburg, and I believe it is 19 feet east of a driveway which led into the home of Ernest Thompson. That property has been sold since then.

Q. Do you know who owns it now?

A. I'm sorry, I do not know who owns the property at this time.

The highway at this point is a three lane road with a total width of thirty feet. It is level and straight. Just west of where the accident occurred the highway curves a little bit to the left as you travel west. The west bound lane at that time was marked with double solid lines which

page 6] prohibited passing traveling west.

Q. Let me ask you in that connection, the west bound lane which was marked for no passing by a double line, is that the lane which you were to ascertain that both the Bartlett station wagon vehicle and the Roberts Recapping truck were headed in?

A. That's right. They were in the west bound lane.

Q. All right.

A. The weather at the time was intermittent showers. The

surface was wet but as I drove up to the accident the rain had ceased and I was able to stop my windshield wipers. During the time just prior to this accident there had been intermittent raining, and I had been turning my windshield wipers on, and I would be able to cut them off for a little while and then it would rain a little more.

Q. I might ask you in that connection, you said it was dark on this particular evening, what would you describe the visibility condition as viewed from the inside of an automobile or truck as people use the roadway there?

page 7] A. Through my exeprience that type of weather makes very poor visibility as far as driving is concerned. There's not enough rain to keep the wiper running and the dampness on the windshield reflects your light rays when you meet vehicles.

Q. And the road was still wet at the scene?

A. Yes, sir, it was. And, of course, the sky was still cloudy.

Q. What vehicles did you find there at the scene, and where were they located, Sheriff?

A. There was a 1960 model Ford station wagon, which was in the west bound lane and the right wheels of this vehicle—the right front wheel was six inches from the edge of the hard surface, and the rear right was twelve inches from the hard surface.

Q. Is that what might be the Bartlett vehicle?

A. That's the Bartlett station wagon, that's right.

Q. By your measurements then are we to conclude that *vechile* was entirely altogether on the hard surface

page 8] portion, and approximately in the center of the west bound lane, or occupied that?

A. It was entirely on the hard surface, yes.

Q. And in the west bound lane marked by a double line for no passing?

A. That's true. Then I measured from the rear of this Bartlett station wagon a distance of eleven feet there was a ton and a half Chevrolet truck, a 1946 model, which was at right angles across the highway. The center lane was completely blocked by this vehicle, and measuring from the front bumper of the truck to the south edge of the highway, which would be the east bound lane, was a distance of three and a half feet. Then measuring from the rear of the truck to the north edge of the hard surface was a distance of three feet. Then east of the truck and in the west bound lane was a skid

Grady A. McConnell

mark made by dual tires which led up to the truck. That skid mark was a distance of a hundred and four and a half feet. It bore to the left as it approached the station wagon.

Q. Let me see if I can understand just exactly the position of that skid mark. Did tracing it back to the point

page 9] where it began, what lane of traffic was it in?

A. It was in the west bound lane.

Q. So the vehicle that put it down was obviously Roberts Recapping truck which was in the west bound lane headed towards Christiansburg from the top of the mountain down there when it started to put the skid mark down, was it not?

A. That's right.

Q. And does it reflect that the Roberts truck was properly in that lane at that point?

A. Yes, it did.

Q. Then what course did that skid mark take after it headed up toward the direction of the Bartlett station wagon parked there in the middle of the west bound lane on this evening?

A. It bore to the left.

Q. In other words, towards the center of the road or double line indicating the west bound lane no passing?

A. Yes, sir.

Q. As it reached the end of the skid mark some hundred and four and a half feet from its beginning, what course did the Roberts truck take?

page 10] A. It made just a sharp turn to the left.

Q. It turned to the left?

A. Yes, sir.

Q. And I believe you said it was at right angles in the road, across the road?

A. The truck was, yes, sir.

Q. Meaning that the front of it was facing across to the side of the road, would that be the southside of the road?

A. Yes, sir.

Q. And the Bartlett vehicle remained there in the middle of the west bound lane on the hard pavement?

A. Yes, sir.

Q. Was there any evidence to indicate—I believe you said there were eleven feet distance from the point where the Roberts truck had come to a stop and the rear of the Bartlett vehicle, was there anything to indicate that those two vehicles ever came any closer than that, or that they ever collided?

A. I could find no evidence at all on the truck where it

had made contact with the Bartlett vehicle.

page 11] Q. And the truck, as it came to stop at that point some eleven feet from the rear of the Bartlett vehicle, what else did you notice at the scene to indicate that an accident had taken place?

A. Well, on the right hand side of the truck were some wood stakes, and there was a frame made out of possibly an inch and a quarter pipe, which had been shaped into a rack to hold the automobile tires, which had been cargo on this truck. The wooden stakes were broken off; the metal rack had been thrown from the truck, and any number of truck and automobile tires had been thrown from the truck. Some few of them were thrown and found over on the south side of No. 11 highway. A good many were found at the rear of the Bartlett station wagon.

Q. Did you find out when you arrived there if any people were injured or any fatality resulting from this accident?

A. Yes, sir, the Turner boy was lying just behind the Bartlett station wagon. The Webb boy, I believe, and a Hall boy were there at the scene. They were injured.

page 12] Q. Could you tell where they had been prior to the injury, or was one still immobile at the scene?

A. The Turner boy was lying on the hard surface just behind the station wagon.

Q. Just behind the Bartlett station wagon?

A. That's right.

Q. And were you able to tell what caused—that was David Lewis Turner, was he killed in the accident, or did he die within a few moments after the accident?

A. I thought that he was dead when the first-aid crew came. Some of the members thought that he might be still breathing and he was loaded into the ambulance and brought to the hospital. But my opinion was that he was dead at that time.

Q. Was Mr. Marvin Hall another V.P.I. student who was injured?

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

Q. And John Walter Webb was he another person injured there at the scene?

A. Yes, he was there. I believe he was sitting on the north shoulder most of the time. He was not able to move around.

page 13] Q. He was seriously injured, was he not?

Grady A. McConnell

A. Yes, he was seriously injured.

Q. Now, from your investigation of these injuries and the fatality of the Turner boy were caused by the load of tires and the metal rack that had sheared off of the tire truck as it came to a halt there in the road some eleven feet from the rear of Mrs. Bartlett's vehicle?

A. Yes, sir, the rear of the Bartlett vehicle, the doors—I believe one door raises up on the station wagon and the other lowers. The upper door had glass in it and the glass was broken, and the frame around that right about the center was bent forward.

Q. Can you tell us, Sheriff, if you know, approximately how far did this accident take place from the Bartlett home located to the east of that point and on the south side of the road?

A. I actually didn't measure that. I'd say a quarter of a mile west of the Bartlett home.

Q. And so if Mrs. Bartlett had left her home that evening headed towards Christiansburg, as her car was
page 14] when it was parked down the road and stopped, she would have traveled approximately a quarter of a mile already?

A. That would be my estimate, yes, sir.

Q. Would she have in the course of proceeding from her home to the point where her car was stopped there in the middle of the road passed another service station?

A. She would have passed I believe its a Kayo station there.

Q. And that's located rather close to the—

Mr. Turk: I would object to that. I don't think that would have any material value on this case at all as to how many service stations and what not, and I object to that as being irrelevant and immaterial.

The Court: I overrule your objection.

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

By Mr. Ingram:

Q. She would have passed a Kayo service station just after she turned out on to No. 11?

A. I'm pretty sure that's right.

page 15] Q. As the car was stalled there in the road, how far was she from the Bowyer Esso station,

which was on up west in the direction towards Christiansburg?

A. About one-tenth of a mile.

Q. About one-tenth of a mile?

A. Yes, sir.

Q. Five hundred feet approximately?

A. Yes, sir, it's one-tenth of a mile east of secondary route 777, and that leads off of No. 11 just east of the Boyer Esso station.

Q. Just a few feet farther?

A. Yes, sir, just a few feet.

Q. Now, I haven't asked you this, Sheriff, would you tell the Court and Jury what size shoulder there was along there in the vicinity where Mrs. Bartlett's vehicle came to rest in the middle of the road?

A. The shoulder is wide enough on either side of the highway through that area for a vehicle to park completely off the hard surface.

Q. And that would be true at a point just opposite and in close proximately anywhere in there where she

page 16] came to rest in the middle of the road?

A. Yes, sir.

Q. Now when you arrived did you notice any cars on that north shoulder?

A. Yes, west of her car was one foreign car on the north shoulder there.

Q. Did you later learn that belonged to one of the injured parties?

A. Webb had parked his car there. I don't recall right off about the car Hall and Turner were in just where it was parked.

Q. Other than possibly those two there were no other cars on that shoulder any where that you noticed?

A. Well, some other cars came in there, or maybe a car or two was there when I arrived.

Q. Were they assisting at the scene?

A. Yes, sir. But I do recall the Webb car being parked west of that on the shoulder.

Q. In the course of the tires and shearing off the side of the truck and falling over in the direction of the injured people and the young man who was unfortunately killed,

page 17] did you ascertain how that occurred on the truck? Were there posts that were sheared off, or can

Grady A. McConnell

you describe how they got off the truck?

A. Well, the standards were broken that held the rack on the truck. There's a little strip of metal or a hole down through the edge of the bed that these standards are put in.

Q. And your investigation indicated that a sudden shift in the course of the vehicle and the shifted weight sheared that off and allowed it to spill over in the direction of these parties?

A. Yes, sir.

Q. Were there any other lights in that area on this dark night which would have illuminated the area to any degree or extent?

A. No, the Kayo station and the lights from the Boyer Esso station would actually be a little too far to put a lot of light on this area.

Q. So where this happened was at a dark point not aided or illuminated by any other sources to any appreciable extent?

A. No, sir, I wouldn't think so. In other words, you can see from where the accident happened at the Esso
page 18] station and the Kayo station, but if you were at either of the stations and looked in the direction where the accident happened you wouldn't have any appreciable amount of light shining at that distance.

Q. Do you recall what color the Bartlett station wagon was from the rear, as it would have been viewed from the rear by approaching traffic?

A. As I recall, the station wagon was red. I could be mistaken.

Q. Could it have been a dark red?

Mr. Turk: I object to that, he keeps leading the witness.

The Court: Sustained.

Mr. Ingram:

Q. Did you find any defective equipment on the Roberts truck?

A. No, I did not as far as mechanical

Q. Did you find anything at the scene other than whatever mechanical difficulties, or whatever caused the Bartlett vehicle to stop, any obstruction that would not have allowed any-

one to get to safety over on the shoulder there?

A. So far as the road condition was concerned there was nothing.

page 19] Q. Do you have any knowledge as to whether or not the reason that the Bartlett vehicle had stopped was because it was out of gas, or anything about gas being put in it subsequent to the accident and it running all right then?

A. I talked to Mrs. Bartlett and she stated that she had sent up to Bowyer's Esso station to get gas to put in it, and that Jerry Bowyer she felt would be down with it shortly.

Q. Do you know for a fact that putting gas in it did allow it to be started all right?

A. I don't know that.

Q. Realizing that it had been some four and a half years since this traffic accident took place, I have some photographs here, and I don't know that you have seen these, but I wonder if by agreement of counsel we could stipulate the admission of these photographs, but since you investigated it I wonder if you might just step forward and just describe to the Jury what those photographs indicate to you, remembering what you saw on that evening.

The Court: Before you do that let's mark them

page 20] for identification Plaintiff's Exhibits 1, 2, 3 or however many there are.

Mr. Ingram: I believe there are six-seven.

(Received and marked as Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7.)

Q. I will take then in the order that they have been marked, and take the first one, would you step up and describe to the Jury generally what the picture portrays?

A. In the first photograph you will notice the station wagon, and from the front in this direction is Christiansburg. You will notice as to the position of the right wheels of the station wagon very near the north edge of the hard surface.

Q. Would that also show the shoulder width there?

A. That's right. You see the edge of the hard surface here

and then the shoulder over in the direction towards the north side.

Q. And can you see in the background?

A. This is the Roberts Recapping truck, and as you will notice the rear and the front is practically at a right angle with the highway.

page 21] Photograph No. 2 shows the rear end of the station wagon. And you will notice on this upper door that it is damaged here.

Q. That again shows the position on the pavement. Can you see the marks there of the double line?

A. That's right. This lane here is the west bound lane, and the double line indicating a no passing as you travel west. The body of Turner was found right in this position here right behind the station wagon.

Q. And the Roberts truck in that picture would be where?

A. Well, it's right here.

This shows the rear end of the Roberts Recap with the position —

Mr. Turk: Will you mention the number of the picture?

A. No. 3, and you notice lying between the truck and the rear of the station wagon is the metal rack that I referred to, with several tires scattered around there. And the distance I measured from the rear of the station wagon to the right edge of the truck was eleven feet. You can still

page 22] see in the photograph the double solid line traveling west.

Q. This is No. 4 photograph?

A. Yes, sir. Now this is looking in a westerly direction. You will see the sign at the Bowyer Esso station, which, as I stated, is a tenth of a mile west of the scene of the collision. You notice the skids that I pointed out here made by the right hand dual wheels of the truck. They started as you notice here they were bearing to the left, as I stated, and then as they traveled east from out of this picture they were closer to the north edge of the hard surface. You can determine the width of the north shoulder here by this car, which is parked here.

Grady A. McConnell

Q. Does that get wider east as you go on?

A. Yes, the north shoulder gets wider as you travel west. That's an unidentified vehicle as far as I'm concerned. I don't know who that belonged to.

Q. Those are the double solid lines?

A. Yes, and these lanes were approximately ten feet. In other words, when this highway was constructed it was a thirty foot, three lane road.

page 23] Q. Those vehicles arrived at the scene, and was the road blocked there?

A. On the south side vehicles could get by.

Q. This photograph No. 6?

A. This is No. 5. This is a photograph of the front of the Bartlett station wagon, and, of course, that's the truck, and you see the pile of tires which were thrown from the truck. And you can see that the Bartlett vehicle is parked near the — the right hand wheels of the station wagon are close to the north edge of the hard surface.

Q. What is the next one please?

A. The next photograph is No. 6. And here you can see on the truck platform where these stakes were down in the truck platform and where they have been broken off, one, two, three and four. And, of course, the metal rack. Here you get a view of the damage to the station wagon, the rear end.

Q. All right, this is your last one, No. 7.

page 24] A. No. 7. That is a picture which is made closer to the tires as they were thrown from the truck on the road. And you notice the rack here.

Q. Those pictures as your memory serves you accurately reflect the situation as you arrived at the scene, Mr. McConnell?

A. I feel like they do, yes, sir.

Mr. Ingram: I believe that's all. Your witness.

(At 11:28 a.m. a five minute recess was declared, after which the Court, counsel, Jury and interested parties returned to the courtroom and proceedings were resumed.)

Grady A. McConnell

CROSS EXAMINATION

By Mr. Dalton:

Q. Sheriff, you have pretty well described the scene of the accident with the exception with the sight distance, what is the terrain at this point in question?

A. It's level. Oh, you can see actually past Bowyer's as far as view is concerned. Just a very slight curve in the road as you travel west and you can see actually see past Bowyer's, and the vision in an easterly direction is a good distance. As far as vision is concerned in either direction is good.

page 25] Q. Is the vision in an easterly direction as much as a half mile?

A. I believe it would be close that, a quarter of a mile any way.

Q. At least a quarter of a mile a straight open highway approaching from an easterly direction the way the truck was coming?

A. Yes, sir.

Q. Up to the point of the collision?

A. Yes, sir.

Q. I believe you testified that there were eleven and a half feet, am I correct, from the nearest corner of the truck to the rear end of the Bartlett vehicle when the truck came to rest?

A. I believe it was just eleven feet.

Q. In other words, it was eleven feet of pavement separating the two vehicles when they came to a stop, even though they hadn't collided?

A. Yes, sir. Unless the impact from the cargo thrown from the truck pushed the car forward. There was that much distance when I got there.

Q. When you got there there was eleven feet separating the two vehicles?

page 26] A. That's right.

Q. When you arrived were there or were there not lights on the station wagon?

A. Lights were burning on the station wagon.

Q. And you said you arrived just a few minutes after the collision occurred?

A. Yes, sir.

Q. You were patrolling east and were headed in that direction and just came upon the accident?

A. That's right.

Q. I believe you testified that the right front wheel was within six inches of the edge of the road and the right rear wheel twelve inches?

A. That's correct.

Q. Sheriff, did your investigation reveal the manner in which the steel rack was attached to the truck before it broke loose?

A. The rack itself, I mean, the steel rack itself was not anchored to the truck. The stakes themselves held the rack as I recall.

Q. You mean that this steel rack that fell over on this boy was not attached to the truck, it was just

page 27] setting on top there?

A. That's right, it could be just slid out of the truck as I recall.

Q. It was just laying up there on the top and you could just slide it out and it wasn't attached in any way as far as you can recall?

Mr. Ingram: That's three times he's been over that.

Mr. Dalton: Yes, I want to get it across. Your witness.

Mr. Ingram: That's all.

Witness stand aside.

page 28] VIRGINIA BARTLETT,

being called by the Plaintiff as an adverse witness, after being first duly sworn, testified as follows:

CROSS EXAMINATION

By Mr. Ingram:

Q. You are Mrs. Virginia Bartlett, the Defendant in this case?

A. Yes, I am.

Q. Mrs. Bartlett, were you the operator of the station wagon vehicle, I believe a 1960 model, that was involved in

this accident on October 27, 1960?

A. I am.

Q. Now, let me ask you, that vehicle at that time was it being used by you and your husband in a business operation?

A. Yes, it was used in business.

Q. And had you used it earlier that day for some business in Giles County?

A. Yes, we had.

Q. And had you put any gas in it at any time earlier that day?

A. No, we usually always kept it filled up at Bowyer's and bought all of our gas from Bowyer's. And page 29] we usually filled it up in the morning before going out, and then when we go out the next morning I always go up and fill it up two or three times a week at Bowyer's.

Q. Were you and your husband partners in a business operation?

A. Yes, we are.

Q. Now on this particular evening you knew your car was low on gas among other things?

A. Well, that was a new station wagon. We had bought it in '60, and ever since we had had the station wagon it would just stop all of a sudden on us, and it has stopped right in town —

Q. Well, I understood —

A. Judge, may I explain this part of it.

And we have had it back to the Ford place on two or three occasions for stopping in the road. We'd stop in town and we'd stop anywhere. Maybe we would sit awhile and we could get it started. So the last time Mr. Bartlett took it back it was the first of the week, and this accident happened on Thursday. He told him not to bring it back no more that they either had to take it in or do something about it page 30] that we could not use it any longer in our business stopping on the road like it was, and said they would either have to fix it, or make adjustments or give us another station wagon. So I don't recall how long they kept it up there, but this was the first time that we had used it since then, and we had used it that day.

Virginia Bartlett

Q. All right, Mrs. Bartlett, my question was on this night you knew that your station wagon was low on gas?

A. Yes, when we go to Giles and come back and used it all day it was low on gas.

Q. And there was a discussion about its being low on gas by you and your husband, was there not?

A. No, there was no discussion. I was starting up to the station to get coca colas, and he said, "While you're up there you just as well get the gas." Because we worked every day and he said we're probably low on gas and have them put gas in while you're getting the drinks.

Q. So to get back to my original question you had reason to suspect that the car was low on gas, and the answer to that would be "yes," would it not?

page 31] A. Yes, the car would have been low because we had used it that day.

Q. I understand one of the reasons for your going up the road was to get gas?

A. Not particularly. I went after drinks. The coca cola bottles was in there broke to show you if you will look at the picture if you took the station wagon you will find the carton of cokes that I had in there.

Q. And you left, and your husband said you were probably low on gas and you had better get some. When you got in the car, I want to ask you, Mrs. Bartlett if you checked the gas *guage* before you started out of the driveway?

A. No, I didn't because I didn't —

Mr. Turk: I object to that as being immaterial and irrelevant.

The Court: She's already answered that.

A. I said to him — he said he was low on gas, or he might be low on gas and to get some. And I said to him, "Do I have plenty of gas? I don't want to go on the road, you know how the car stops anyway." And he said, "You have plenty of gas. I just want to have gas for in the morning."

page 32] The money was in my pocket to get the gas and have it filled. I did not look at the gas because I

don't think my husband would have sent me out on the road in an empty car.

Q. All right, Mrs. Bartlett, you drove out onto highway No. 11 and turned in the direction of Christiansburg, did you not?

A. Yes, I went towards Bowyer's Esso station.

Q. And this was after dark?

A. Yes, it was.

Q. Do you remember approximately what time it was?

A. Well, the news had been on I'd say five minutes or more because I went down to the car —

Q. The 6:30 news?

A. The 6:30 news was on, and I went down to the car and noticed the keys wasn't in it. He had said the keys was in it, so I come back to the back door and told him that I wanted the keys; that they wasn't in it, and he said, "I thought I left them in it." And so he handed me the keys out the back door and I went right to the car and got in.

page 33] Q. So it was aproximately 6:30 or 6:35 when you started out, something in that neighborhood?

A. Something in that neighborhood. It might be a little more because I had to go to the garage. We had pulled the car inside the garage, and I had to go down the steps, and into the driveway and into the garage, and back up to the house and then back down.

Q. And you drove out onto the main U. S. 11 highway on this dark evening and started in the direction of Bowyer's?

A. Now let me make this clear to you. When you get to my driveway any time there's always a lot of cars. You can't just drive right out. You have to pause there.

Q. Eventually you got out onto the highway?

A. That's right.

Q. Let me ask you if in the course of going up in the direction of Bowyer's before your car stopped did you pass the Kayo gas station?

A. Yes, I passed the Kayo gas station because I wasn't going to the Kayo gas station. They don't have coca colas there.

page 34] Q. You continued on there past the Kayo gas station, did you not?

A. That's right.

Virginia Bartlett

Q. Now, how close had you gotten to Bowyer's when something happened to your car that caused it to stop?

A. Well, I don't know. You could see it real good.

Q. All right, let me ask you this, Mrs. Bartlett, if you will tell this Court and Jury what happened after you passed the Kayo station?

A. Well, nothing ever happened. I just went along and my car stalled just like it had been doing on previous times, it just konked out.

Q. What speed were you making as you went along up there?

A. I didn't pay any attention to the speed limit because I've been driving about 35 years and I never have gotten a ticket for speeding, and I was driving along at the regular rate. I don't guess I could have gotten up much speed because I don't live too far from there. I don't speed.

Q. I'm not suggesting that you were speeding, I'm just asking what speed you were going?

page 35] A. I'd say I was going rather slow because I wasn't in any hurry. I was just going to pick up some drinks and I just came out of the driveway and I wasn't going fast because it had been raining and all and I was just careful.

Q. Were you going 50 m.p.h, would that be reasonable?

A. No, I wouldn't say I was going 50. I'd say I was going about 35 or maybe 40.

Q. Thirty-five or forty?

A. Not more than that.

Q. All right, as you're going along there 35 or 40 m.p.h. on this dark evening what did you notice about your car before it stopped?

A. I didn't notice a thing until it just konked out. If you've never had a car to do that and have never driven one like that you don't understand it, it just goes out. But when it went out there was a car parked —

Q. Let me ask you this, did it give some choking noise or sputtering noise before it stopped?

A. No, it don't. The only way it does it just goes

page 36] out and the only way you can tell your car begins to slow down just like you had cut the motor off is the way it did. I don't know why it did that, but we've

Virginia Bartlett

had it four different times to do that. We had it to do that right up here on Main Street in town, when my husband would be driving. So when it did —

Q. I asked you if it gave any choking noise or any sound before it cut out?

A. No, it never did make any noise. The only way you would notice it it would stop on you.

Q. Let me ask you this, Mrs. Bartlett. Do you remember testifying in a previous matter involving this accident on November 28, 1960?

A. I remember being there because I was hurt in the accident myself.

Q. Do you remember testifying in answer to the question, "Before your car stopped on the highway did it sputter, or just go all of a sudden dead?"

And do you remember giving the answer, "Well, it just gave one choking noise like it had been doing."

A. No, I don't remember that. And my husband will tell you it never did.

page 37] Q. Do you deny making that statement?

A. You see that was recently afterwards and I was under a doctor's care because I was hurt and went into shock, and when that was I can prove by the doctors.

Q. Would your recollection be better now having heard what you said on an earlier occasion that the car gave a choking or sputtering sound?

A. I don't know what made me say that because I just might have been nervous or shaky at the time.

Q. Would your recollection have been better back at the time during that same year of the accident that I just read you?

A. About the choking sound?

Q. Yes. Would it have been better then, your recollection?

A. No, it wouldn't be any better, because I am better now. I had to stay under the doctor's care for a long time after that. I was still in shock. I am better now than I have been since. And I could have made that statement that there was a choking noise; I don't know.

page 38] Q. All right, whatever happened to cause your car to stop it did stop without question in the middle of the west bound lane on the hard surface all to-

gether, did it not?

Q. It stopped on the hard surface. And there was a car there. I couldn't get in behind it. I seen I couldn't get in behind it, and if I pulled in front of it whoever was in it was starting up. And the car was there. It would be no reason for me to lie. So when I seen I couldn't get behind the car, and I tried to get in front of it and I had to put on my brake and then the car wouldn't move any more. And I did cut, I tried to but I couldn't.

Q. Going along there at a speed of 35 to 40 miles per hour there was, under ordinary circumstances, plenty of room on the shoulder beside your car for you to get your car off the road, was there not?

A. Well, there wasn't enough room to get in back of the car. I seen if I put on my brakes I would stop.

Q. Let me ask you, if there wasn't enough shoulder there if something hadn't —

A. If there hadn't been a car there there would have been.

page 39] Q. You're saying that you might have gotten on there except for the car that happened to be right there parked in your way?

A. There was a car there and I was afraid to put on my brake and try to get in back of it, and when I did try to get in front of it and cut the car started and pulled out and then I put my signal light on. I did try to get off.

Q. And you did have time enough to —

A. No, I didn't have time enough.

Q. May I ask the question, Mrs. Bartlett. You had time enough before your car came to a final stop to consider getting off on the shoulder, to looking and thinking about putting on brakes, to looking and seeing another car parked on the shoulder, to giving a signal and continuing on finally until your car did come to a stop whatever speed it had been going 35 or 40 m.p.h.?

A. No, my car came to a stop even with this car and he pulled out when I put my signal on. I could not; I seen he was going to move, and I couldn't pull in front of him.

page 40] Q. You were afraid to put your brakes on and you were still moving enough that if you had put your brakes on you would have brought it to a

stop sooner than you did, is that right?

A. Well, when it konked out it was just moving along, and then I seen I couldn't get behind this car, and then this car started to pull out, and I give my signal. I thought if I did give him a signal he would pull out faster and then I could get over there, and then is when I cut my front wheels towards the hard surface to try to get off, but he was a little slow and I seen I wasn't going to make it and it stopped on me.

Q. You had an interval of time to try to think about getting off on the shoulder, did you not?

A. From the time I looked and tried to get off the car was there. No, I couldn't have possibly got off with that car in my way.

Q. Why couldn't you put your brakes on and get off there behind the car if there was a car there?

A. I couldn't get off the highway because it was at about the edge of it. You see a car was setting here and I was about the edge of it and I couldn't get in behind it.

page 41] Mr. Tuck: I want to object to this line of questioning as being completely irrelevant and immaterial to the issue that's involved here today.

The Court: I overrule your objection.

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

Mr. Ingram:

Q. Did you apply your brakes and stop?

A. It stopped. I don't know whether I applied my brakes because I was watching that car and I was trying to get off, but when I got even with that car just when I cut it stopped on me, and I couldn't get no farther. I've had it to do it before.

Q. This car when you got beyond far enough to get off it started moving in the same direction you were and it had you blocked all the time?

A. Well when I realized the car was stopping, if you're riding along and all of a sudden your car goes out, well, I looked and saw two cars over there and I seen I couldn't get in back of it, and I thought if I put my signal light on he would move on out and I could go over.

Q. You did put your signal light on?

page 42] A. I put my signal light on and it was still on when the State Trooper got there. He pulled on up and I couldn't get the car to move.

Q. Did you blow your horn?

A. No, I didn't blow no horn or anything because it just konks out. I don't know what caused it to do like that.

Q. You had time to make these movements and think about getting off?

A. Yes, I tried my best to get off. I would have got off if I could have.

Q. And the reason you wanted to get off is you didn't want to stall there in the highway and create a danger to yourself and others, did you?

Mr. Turk: Your Honor, I object to that.

The Court: I overrule the objection. This is cross examination.

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

Mr. Ingram:

Q. Isn't that a fair statement, Mrs. Bartlett?

A. That I wanted to get off?

page 43] Q. Because you knew it was a bad situation stalled there in the middle of the highway?

A. Well any time you stall, I don't never want to stall on no highway. I always want to try to get off.

Q. Well you realized the possibilities that would result by being stalled there in the middle of the highway and that's why you wanted to get to the shoulder?

A. I wanted to get to the shoulder, yes.

Q. And you would have gotten to the shoulder except for some car that was on the shoulder blocking it?

A. That's right, and if the motor hadn't konked off on me. And may I make this clear to the Jury. We never did take the car away from the Ford garage. We left it there and traded it in and a colored man that —

Mr. Ingram: You're not answering my question now. No, I don't think you can state that.

Virginia Bartlett

The Court: You just answer the questions, Mrs. Bartlett and not volunteer any additional information unless you're asked about it.

Mr. Ingram:

page 44] Q. Let me ask you this, putting gas in your car got it started afterwards, didn't it?

A. Well, let me tell you this. After it would set a few minutes sometimes it would start.

Q. Your car was in fact out of gas, do you deny that, Mrs. Bartlett?

A. I don't know whether it was out of gas completely or not enough to stop it or not. I do not know that.

Q. Let's go back to this car that prevented you getting off along there on the shoulder. When you did these things about putting your brakes on and putting your signal on, you were coming along there knowing your car was coming to a stop, do you know what happened to that car, or whose car it was?

A. No, I don't because I didn't think it was important at that time, and just about that time a Mason-Dixon truck — I looked up in the mirror and a Mason-Dixon truck came by.

Q. Well can you tell us the *idenity* of this car that had you blocked all along through there from getting onto the shoulder?

A. No, I couldn't. I just know it was a black car.

Q. Do you know what color it was?

page 45] A. Black, a dark color.

Q. When you got out of the car after you stopped there did you go over to see whose car it was?

A. No, the car pulled off after I stopped and couldn't get no further.

Q. Pulled off the shoulder in front of you?

A. That's right, he pulled right on off. When I give the signal I guess he thought I was going in the driveway, there's several houses along there and I guess he thought I was going in the driveway, and he pulled right on off.

Q. He disappeared forever as far as we know?

A. As I say, about that time I looked up in the mirror and this Mason-Dixon was coming.

Q. Did you say that was a black car that was over there?

A. It was a dark car because it was night, and like I say,

I wasn't paying any attention much only I just wanted to get my car off.

Q. Did I understand you to say black a minute

page 46] ago?

A. I said black or dark.

Q. You remember, going back again to your earlier testimony, in answer to a question as to what color car it was over there, and your answer, "No, I only know there was a car there. I don't know anything about what color it was or anything." Do you remember making that statement on a previous trial?

A. Yes, but since then a lot of things has come out that I remember. Just like I say, I was in shock, I was hurt. If I had been in the car I would have been killed because the tires were thrown plumb through the back end up to the front seat; it broke all of the coca cola bottles, and there wasn't a glass in the car.

Q. But you realized it was a dangerous situation by your being there in the middle of the road, did you not, Mrs. Bartlett?

A. That's right, it was dangerous and I wanted to get off if I could.

Q. And that was brought home to you I believe when you said a Mason-Dixon truck came along there?

A. Yes, I looked up and he went on.

page 47] Q. And that's the reason you wanted to get off there when this car was moving along there?

A. I didn't pay too much attention to this because I looked up in the *mirrow* and saw this Mason-Dixon coming.

Q. Now, after you stopped there in the road did you try to start your car?

A. No, because after the Mason-Dixon I guess that's why I didn't see where this other car came. There was a man and a lady came in a car and they pulled right up beside of me and the lady rolled the window down and she says, "Can we help you any way?"

And I say, "Yes, go to Bowyer's Esso and tell Jerry that Mrs. Bartlett is down here and to bring some gas and see if he can get my car started."

Q. Didn't you actually tell them to send Jerry with some

gas because you needed gas? Isn't that right?

A. It was something to that effect, to send Jerry and tell him to bring some gas and get my car started. Because if it was gas I didn't want him to come down there and then have to go back and get gas, and if it was the other I

page 48] wanted to get it towed in.

Q. You sent for gas and not a mechanic, didn't you?

A. That's right. I sent to Bowyer's Esso because I thought it was the quickest place that would help me.

Q. Were you in your car still when this couple pulled up?

A. Yes, they had no trouble at all; they pulled right up by me and asked me, and I watched them until they went in Bowyer's Esso, and then I got out of the car.

Q. Did you try to start your car during any of that time?

A. No, I didn't. I was close right there to — I know Jerry and them, and I told her to tell them Mrs. Bartlett.

Q. So you didn't try to start the car?

A. No, I didn't do anything else. I got out of the car because I had sent for help.

Q. All right, in the meantime with your car setting there in the middle of the road, did you do anything to warn or give signal to the approaching motorists that that

page 49] car was setting there in the middle of the road on this dark night?

A. Well, it was so wide there; there was a middle lane and then there's another lane, and the other side was enough for cars to pass in case of emergency, and it was clear. There was nothing coming either way while I was standing there. And Mr. Webb was parked somewhere up above there, well, any how a man got out of a car parked up above there a good ways and came down there, and I told him I had sent for help.

Q. You say Mr. Webb, and I believe he's here to testify, and he was parked in his car a good ways ahead?

A. A good ways ahead the best I can remember.

Q. Was that off on the right shoulder of the roadway?

A. On the same side, uh huh.

Q. He was not in the car that you say blocked you from getting off the road, was he?

A. I couldn't say whether he pulled up there and stopped

and came back there to help me when he seen I didn't get out of the road when I give him the signal.

page 50] Q. His car wasn't there when he came from it any place where it could have interfered with your getting off on the shoulder, was it?

A. Not when he came back the last time, but where he was the first time because I didn't see him.

Q. There's a lot of traffic on that road, is there not, Mrs. Bartlett?

A. Yes, there was traffic on that road.

Q. And you were afraid the Mason-Dixon truck might hit you when it came down on you?

A. Well, I looked up and thought if I'm in any danger I'll put this signal light on, and I know you have a right to stop there if you're going to turn into a driveway and there wasn't nothing coming either way.

Q. Isn't it a fact that when you saw the Mason-Dixon truck coming down from the rear you said, "Good-bye, here I am."

A. Yes, I did, because I thought maybe he might hit me and I put my signal light on.

Q. You put the signal light on?

A. That's right, you never know what's going to happen to you when you're on the highway.

page 51] Q. You did that to try to help him see you better?

A. That's right.

Q. Of course, you hadn't been there but a few seconds at that time?

A. I had been there and put my signal light on and looked up in the car and that's *when* took my attention off the other car.

Q. Did you leave it on all the time you were there?

A. My signal light?

Q. Yes.

A. Yes. I think if you will ask Mr. McConnel it was on because after that I never did bother it.

Q. You left the signal light blinking all this time?

A. I believe I did. I wouldn't say for sure because it's been five years you all have been hounding me.

Q. Are you positive of that; are you saying yes you did,

or are you just not certain?

A. Mr. McConnell would know if I left it on, but
page 52] I'm pretty sure I left it on, because I figured if anybody would see me they would think I was turning in there.

Q. Did you have a flash light in the car?

A. I don't recall what was in the car except the coca cola bottles.

Q. Did you look in the glove compartment to see if you had a flash light?

A. No, I didn't.

Q. Did you not go to the rear of your car there at one point thinking that you might be able to warn approaching motorists?

A. No, I got out of the car because I figured when Jerry got there he would put the gas in and do whatever it was to get it started. And I went to the back and I didn't see no motorists coming.

Q. Now, Mrs. Bartlett, I ask you again, did you not walk to the rear of your car and stand on the edge of the west bound shoulder in hopes that your presence might warn others you were there?

A. Yes.

Q. Now you remember that?

page 53] A. I got out of the car and walked to the back and that's where I was when Webb came back.

Q. And wasn't your reason in doing that in the hopes that you might warn cars coming in the other direction, in the same direction?

A. I'd say it was. I would say they would see me because I had a bright red coat on.

Q. But you never looked to see if you had a flash light or anything in the car?

A. You see I wasn't there but a very few minutes, because the other car came up, and Webb came back, and I was talking with Webb, and Webb walked out, and then these two V.P.I. boys came in their car and they came right up beside the car and talked to Webb. And I never did talk to them.

Q. But that's the reason you went back there?

A. I went back there, yes.

Q. But at the same time you didn't look to see if you had anything in the car that might better signal that your car was parked there in the road?

page 54] A. Well, on that '60 model I had the lights on and all, and the whole back is lit up if you know a '60 station wagon that wide, all the back end is just red.

Q. If you had all that situation why did you feel it was necessary to go back there in addition and stand there in your red coat?

A. Well any time you're out and you can help, I felt it was my duty to do everything possible I could, and that's what I wanted to do. And that's what I did do too.

Q. And then came along Mr. Webb who volunteered his help and be of some assistance to you?

A. Mr. Webb walked back there and spoke to me, and about that time these two boys came up and they came to a stop and Mr. Webb went over and talked to them, but I did not talk to them.

Q. Let me ask you this, Mr. Webb you did not know?

A. I didn't know any of them.

Q. A complete stranger to you?

A. That's right.

Q. And he came from a car parked up there well

page 55] ahead of yours parked on the shoulder, and he came back and asked you if he could be of assistance?

A. Well, after five years I can't remember exactly what words he said, but any way this other car came up and he went over to talk to them.

Q. Let me ask you if you remember in substance what he said. Did he just walk back there and not say anything, or did he walk back and say, "Can I help you?"

A. He came back to see if he could help me, but about that time this other car came up, and he spoke to me, and he went over to the other car with the two boys in it.

Q. Let me ask you, before the other two boys came up there, when you were talking to Mr. Webb and he offered to help you, did you not tell him you didn't need any help?

A. I said I had sent to Bowyer's to get help.

Q. And you told him that you didn't need any help; that

you had already sent to Bowyer's for help?

A. I told him I had sent to Bowyer's for help.

page 56] Q. For gas?

A. That's right and to get my car started, and that he would be there in a few minutes.

Q. And you didn't ask them to help get your car out of the road or give warning or anything like that?

A. No, I didn't ask them.

Q. And then in a few minutes these boys came along from V.P.I.?

A. While he was talking to me the boys pulled up there.

Q. All right, did they pull on up the road off on the shoulder and come back to see if they could help you?

A. They talked to Mr. Webb. I don't know what they said to each other, but they did come back. But I didn't say a word to them.

Q. You had no discussion with them at all?

A. With those two boys I did not. I didn't go off the side of the road over to the car. Webb went over and talked with them. I did not.

page 57] Q. You remember telling them as they stood there to see if they might be able to be of some help to you, that you said, "There's no sense in trying to push it off the road.?"

A. That's right because I said he'll be here any minute.

Q. You remember now saying that to them?

A. That was after they got out of the car and come back.

Q. I mean when they came back.

A. I thought you meant while they was in the car.

Q. I'm sorry. What did you have to say to them when they came back after parking their car?

A. They said, "Get in the car and we'll push you off."

And I said, "I guess Bowyer will be here any minute, because I sent for help."

Q. And didn't you in fact tell them that there was no sense in pushing this car off the road onto the shoulder there?

A. Well, it was such a few minutes from there to Bowyer's, and I had sent for him and knew that I would have

page 58] help, and I didn't want to get the boys involved

and a crowd around the car.

Q. So you just think it would have been best to let it stay there?

A. It would have been best too if they had went on.

Q. And the shoulder was open there?

A. Everything was clear.

Q. No car was blocking you at that point, was there?

A. There was nothing there to block it. But they told me to get in and they would push me off. I didn't want to argue with them. I went around and looked up and down, I walked to the edge of the road and looked up and down and there was nothing in sight.

Q. Why did you look up and down when you walked around?

A. To get in a car in the road, of course, you're going to look to see if there's anything coming.

Q. Because you knew if something had been coming it might have been dangerous, isn't that right?

page 59] A. That's right. If there had been anything coming I wasn't going over and get in the car and let the boys push it.

Q. So you did walk around up to your driver's side of the car?

A. That's right, I walked around and opened the door.

Q. And what were these boys doing? Were they positioning themselves in the rear to push the car?

A. I don't know what the boys were doing in the rear, because just as I was aiming to get in the car to take my seat I looked up and there come Jerry out of his driveway. So I hollered at the boys the best I remember and said, "Here comes Jerry now." That's when I got back out of the car, when I said, "Here comes Jerry now." And about that time the tires started falling and flying.

Q. Let me see if I can understand the sequence. You went to your car to let the boys push you off on the shoulder. The boys were getting ready to push in the rear of your car.

A. I suppose they were because they told me to get in.

page 60] Q. And you went on around and thought the way was clear, you looked to see that there was no traffic coming?

A. That's right.

Q. So you went out and walked in the highway up to the driver's side of your car?

A. That's right.

Q. You opened and then about that time you looked up in the direction of Bowyer's and saw Jerry coming with the gas?

A. That's right.

Q. And then you turned to the rear of your car where these boys were and said, "Don't worry, Jerry is coming," or something to that effect.

A. I said Jerry is coming now, but about that time the tires were flying everywhere. The tires had done hit the car.

Q. You had turned and were facing to the rear to tell them Jerry was coming before the tires fell?

A. Just as I looked up to see Jerry it was approaching I guess and the tires were flying, because I looked straight ahead of me and I didn't look in the rear. I looked up to see and I saw Jerry and I hollered to the boys, and by that time

page 61] I started to get back out of the car, which I had just aimed to get in like you would, and had taken hold of the steering wheel and looked up, and then I started getting back out.

Q. At the time the accident happened you were standing with your back to the open door?

A. That's where the back of the car hit my head.

Q. At the time the accident happened you were actually facing in the direction that the Roberts Recapping truck was coming?

A. That's right.

Q. And while you were doing that you actually had some conversation with the boys?

A. No, I didn't. I didn't have time for no conversation. When I was looking in front of me, I said, "Here's Jerry; I see Jerry coming now." Then I looked when I got out of the car and the things was flying and falling all around. I didn't have no conversation.

Q. Mrs. Bartlett, if I may refresh your recollection, do you recall on October 2, 1962, giving a deposition in Mr. Turk's and Mr. Dalton's office?

A. In Mr. Dalton's office, yes.

page 62] Q. I ask you again if you were not facing to the rear of the car and engaged in some conversation with these boys when the accident happened?

A. I didn't say nothing, only "Here comes Jerry." Now whether I was facing it or what that was all that I said because I didn't have time.

Q. Do you remember making this statement:

"Q. You were facing the rear in the direction where the boys were?"

And your answer was:

"A. That's right, I was talking to them."

A. That was talking when I said, "Here comes Jerry now." That's what I meant.

Q. Would your answer be the same then as it was when I just stated?

A. Yes.

Q. Then you were talking with them and facing the rear?

A. Right, and I said, "Here comes Jerry now."

page 63] Q. When did you first see the Roberts truck coming up the road, when did you first take notice of that?

A. I didn't see it. By the time I got out the tires was flying everywhere and it was just knocking and hitting our station wagon, and it was just coming like rain by the time I stepped to the ground and said that.

Q. You didn't hear the truck approaching, the noise of the motor, or perhaps the noise of the brakes sliding? You don't remember hearing anything before?

A. No, because it happened so fast that I don't remember hearing anything.

Q. And you don't remember seeing the Roberts truck at all?

A. No, all I remember seeing is the tires.

Q. You never saw or heard its approach from the rear, see its lights, or hear the noise of the motor, or anything?

A. No, because all the time I had was the time I walked from the back and walked to the door and started to sit down and got back up it had done happened, but he wasn't in

sight.

page 64] Q. How long did it take you to walk around the car as the boys got in position at the rear to push, to get to the driver's seat and open the door as you said?

A. Well I wouldn't know how long that would take.

Q. It was just a few seconds?

A. That's right.

Q. And you can see down that road, I believe the sheriff testified approximately ¼ to ½ of a mile?

A. That's right. But I hadn't gotten into position to look in the mirror because the three boys were in the back. I had just got in the car and aimed to sit down and took hold of the wheel and I looked up and I said "Here comes Jerry." That's the last word I ever said and all of it.

Q. But you looked out in the road to get in the side of the car and you saw nothing coming. That's your *testimoney*?

A. When I went to get in the car the boys didn't see anything either I don't think.

Q. Well you don't know that. They were getting ready to push were they not. Looking forward?

page 65] A. No, they was all bunched up as well as I can remember. They was just at the back of the car. I don't know what they did.

Q. Just at the back of the car?

A. I don't know what position. They were talking to each other. They wasn't talking to me.

Q. Are you telling us that you actually got in the car and took a seat under the wheel?

A. I aimed to sit down, but you know how you well get in and take a hold of the steering wheel.

Q. But you had never gotten seated?

A. Well, that I don't remember whether I had gotten seated, anyway the minute I got in the vision part and could see Bowyer's Esso. I saw Jerry coming out of the driveway.

Q. Let me ask you this Mrs. Bartlett. As you went around that car and got to the driver's side to open the door to get in, did you look down the road to see if anything was coming?

A. Now that I don't remember.

Q. You don't remember?

A. I don't remember if I did. But I do know I didn't see anything coming.

page 66] Q. Before you started driving you looked and didn't see anything coming?

A. I know I didn't see anything. If I had I wouldn't have got in.

Q. All right. So you got in and you were looking up in the direction of Bowyer's and you saw Jerry, and you turned and had the conversation or had some remarks with the boys about Jerry coming?

A. No the minute I saw him as I was getting in I just said, "Here comes Jerry.", and that's the last word I remember. Because the tires starting hitting and flying.

Q. But when you said here comes Jerry you were facing the rear. The same direction in which the Robert's truck came were you not?

A. *Thats* right. Because that's the way the station wagon was.

Q. But you never saw the truck?

A. I didn't. I never did see the truck. The tires started flying everywhere and hitting, and hitting on top of the car and going by me. They glanced by me.

page 67] Q. Did you say anything to the boys about watch out or here comes a truck or here comes tires or, did you give them any warning at all?

A. I didn't have time.

Mr. Turk: I object to that,

A. I just didn't have time.

Mr. Ingram:

Q. Now it was your intention for them to push you off the highway those few inches over onto the shoulder, was it not?

A. No. It wasn't my intentions to. The boys was nice and they asked me to. I just didn't want to have no argument with them or say anything to them. I just went along with them. That's the whole story.

Q. So you did. And it was your intentions to let them

push you off and they were trying to help you and assist you. Were they not?

A. They were real nice. They sure were. But I didn't ask them to.

Q. Now isn't it true that in earlier testimony you did say *youdid* see the truck coming sideways before the tires came off?

A. I don't know remember whether I did or not. After five years I can't remember *whetherI* saw it coming. I can't remember every detail. The only fact that

page 68] I can remember are the main things that stand out. The most important things that stand out.

Q. All right, let me see if I can refresh your recollection by referring to the depositions that you gave on October 2, 1962, in Mr. Turk's office. I read these out.

"Did you tell the boys at the time."

Your answer. "I turned around and said, "There's no use pushing here comes Jerry now. And well just about that time I seen the truck coming up the road sideways. But we didn't think it was going to affect us because it was in the other two lanes."

So you did have time enough to see that much, did you not Mrs. Bartlett?

A. I might have had time to glance but not to talk.

Q. And would it be accurate that you didn't think the truck was any danger, because you thought he was in the other two lanes and could get by, even though it was coming sideways?

A. Well it wasn't. It come to rest 11 feet from us and at that time I didn't think so. It was coming up the road fast.

page 69] Q. So you didn't think it would be any danger at that point?

A. At the time I didn't know what I was thinking. I can't say what I thought or what I didn't think at that time.

Q. All right, now you recall you did see the truck coming sideways, and you didn't think that anything might happen.

Mr. Turk: She hasn't said that. I object to that.

A. I hadn't had time. The tires started hitting. I hadn't

had time to move away from the door beat my head till I pulled pieces of skin and all out of it for months afterwards. I never did even get away from the door where I got out. The doctors will tell you that the back of my head looked like that.

Mr. Ingram:

Q. What I am asking you now Mrs. Bartlett for the purpose of this case and for the *benifit* of these gentlemen on the jury and the Court. You have said I believe that you didn't see anything but tires. You never saw the truck. Now I read in your testimony that you had given under oath at an earlier time, and ask you if it would help you recall a

page 70] little bit better about the details.

"And do you deny that you saw the truck coming or said you saw it coming sideways and didn't think it would be any danger?"

A. Well, I could have saw the truck I don't know. But anyway it happened so fast that I had no time for warning.

Q. Do you deny the statement that I just read to you? Do you deny that?

A. No I don't, because after five years I can't remember ever word I said. It's like I say I know exactly what happened and most of the things I said. Because I was under the doctor's care and was even over at Dr. *Kings* for shock even went up there for awhile. And I was hurt.

Q. All right, you do not deny making the statement is that right?

A. I don't deny anything that you have got down there. No, sir.

Q. Now, let me ask you this. Whenever you saw the truck, or what ever you told them whether it would be dangerous or not, you did not warn these boys pushing your car from behind did you?

Mr. Turk: Your Honor, I object to that.

page 71] The Court: Overrule the objection.

Mr. Turk: Exception.

A. I didn't have time. I just said, "Here comes Jerry," and

that was enough — They had as much time as I did. I didn't have any time either.

Mr. Ingram:

Q. What ever time you had, whether you had time to see it sliding sideways and not thinking it was going to be any danger, you did not warn them despite that?

A. No I didn't have time. Because I was still right at the door where I got out. If I'd had time I'd moved. This door was still hitting me, and I was still clutching to the door.

Q. That's after that?

A. What?

Q. That the door hit you. That's after the tires came and spilled over. What I am talking about is before the tires came.

A. Well, see, I didn't have time to move, from the time I got out, that's where I stood when all the tires were rolling.

Q. Facing the rear. Looking in the direction that this truck was coming?

A. That's right, I was hit in the head.

page 72] Q. And the boys were at the rear of your station wagon with the idea of pushing you off the road?

A. No. I don't know where the boys was. They were back there.

Q. But that was the whole intention of the thing was to have them push you off the road? Was it not?

A. That was the whole intention. But now at the time that the accident. I don't know what they were doing.

Q. How long were you on the highway Mrs. Bartlett, in that stalled stationary position on this dark night?

A. Just very few *minuets*. It wasn't long at all.

Q. Five *minuets*, 10 *minuets*, something in that neighborhood?

A. I couldn't judge it like that in time.

Q. Would that be close?

A. Well I wouldn't say, but it was just a short time.

Q. May I ask you. When the first car came by

page 73] and you sent them up to get gas, why it didn't occur to you to ask them to push you off? Perhaps with their car at that time.

Mr. Turk: I object to that question as irrelevant and immaterial to the question before.

The Court: Overruled.

Mr. Turk: We except to the ruling of the Court, Your Honor.

Mr. Ingram:

Q. They offered to give help to you did they not?

A. Yes.

Q. And after that you didn't ask them if they would be kind enough to push you off the road —

A. They didn't say anything about pushing me, they just asked me if they could help me. And I said, yes, because the first thing I thought was getting assistance from the filling station. Because a lot of people don't like to push you off the road. And I figured I was just in such a short distance there, that Mr. Bowyer or Jerry one should get down there just before they could probably get up and turn around. They would have had to went up the road and turn and come back.

page 74] Q. But you had already had what you would consider a close shave with a Mason-Dixon truck, had you not?

A. Well no, the Mason-Dixon truck went on by, it didn't have any trouble. It just went on.

Q. It scared you because you knew what could happen?

A. *Thats* right I knew it could happen.

Mr. Ingram: Your witness.

Mr. Turk: We'll put her on again as a defense witness.

Witness stands aside.

page 75] JERRY ALLEN BOWYER

a witness called on behalf of the Plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ingram:

Q. Would you please state your full name Mr. Bowyer?

Jerry Allen Bowyer

A. Jerry Allen Bowyer.

Q. And where do you live Mr. Bowyer?

A. I live at Kingston Court here in Christiansburg.

Q. Let me direct your attention back to October 27, 1960, and ask you if you recall an accident down in the vicinity of Bowyer's Esso station on No. 11.

A. Yes I do.

Q. Incidentally, is that station owned and operated by your father?

A. Yes sir, that's right.

Q. Were you working there on that evening?

A. Yes sir, I was.

Q. Would you tell us if you saw Mrs. Bartlett's
page 76] station wagon there on that particular evening?

A. Well, not until after the accident I didn't see it.

Q. I mean after the accident?

A. Yes sir.

Q. All right, now, tell us what you were doing a few minutes, 5, 10, or 15 minutes that transpired before this accident happened?

A. Well, I was just working there at the station.

Q. Were you working the gas pumps?

A. Yes, sir.

Q. All right.

A. And this lady came in on the driveway and said that Mrs. Bartlett was sitting down the road out of gas, and would like for me to take some gas to her. So I started to get the gasoline and put it in the truck and started to take it to her.

Q. Now that was the information there, that she was sitting down the road out of gas and needed gas to put in the car?

A. Yes, sir.

Q. All right now, so what did you do?

page 77] A. Well I got gas in the can and put it in the truck, and started to take it to her.

Q. And that took you a couple or three minutes to do that?

A. Yes, sir. A couple or three minutes.

Q. Did you know where she was down the road? How far?

A. No, sir, I didn't.

Jerry Allen Bowyer

Q. So you filled the gas can up and put it in the truck?

A. Yes, sir.

Q. You were going to drive down there weren't you?

A. Yes, sir, that's right.

Q. All right now, tell us what you did after that?

A. Well I started to drive down but as I started to pull off the end of the driveway I looked to see if the road was clear.

Q. Now look in what direction?

A. Both directions. But when I looked to my left I saw a vehicle coming down the road. I'd say about a quarter of a mile or something like that. And all of a sudden it just swerved. At one time the headlights were coming

page 78] right at me and the next time they were headed towards the field. That is as far as the headlights was concerned.

Q. Now is that the headlights that you found out later to be that of the Roberts Recapping Truck?

A. Yes, sir.

Q. Now let me ask you this, as you saw and observed these things you stopped right at the edge of No. 11 and the intersection of your gas station driveway in the truck getting ready to head in that direction yourself?

A. Yes, sir.

Q. Now when you first looked, did you look more than once?

A. Yes, sir. When I first looked I was trying to locate the vehicle.

Q. Mrs. Bartlett's vehicle?

A. Mrs. Bartlett's vehicle. But I didn't see it so I started to proceed on down the road and then that's when I saw the vehicle — truck swerve.

Q. Now, you never saw on either *ocassion* when you looked down that road, Mrs. Bartlett's vehicle or any headlights that would indicate that a vehicle was parked down the road?

page 79] A. No, sir.

Q. But you could see far enough down the road that you could tell the Roberts Recapping truck *light's* swerve to the left?

A. Well I could just see lights swerve to the left.

Jerry Allen Bowyer

Q. Do you know of any reason why you wouldn't have seen the Bartlett vehicle, where you later found out it was located?

A. Well the only reason, I guess was, the lights were not on. It wasn't that far a distance that you couldn't see.

Q. And it was clear. Nothing to obstruct your view between your station and down where she was parked.

A. No, sir.

Q. And you never saw any lights on her vehicle at all?

A. No, sir. There wasn't even any moving traffic.

Q. This was before the accident?

A. Yes, sir.

page 80] Q. Did you hear the commotion, perhaps it created when this truck swerved to the left and the tires came off of it?

A. No, sir, I didn't.

Q. Did you stop and run down, or what did you do after that?

A. Well, I told the boy that was with me, Harold Shealor, I told him something happened. I'm going to park the truck and I'm going to go down and see. And then when I got there, of course, I saw what had happened.

Q. Was that the first time that you had seen Mrs. Bartlett's station wagon?

A. Yes, sir.

Q. And did you see Mrs. Bartlett there in the vicinity of the station wagon?

A. Yes, sir. She ask me if I would please go call an ambulance that someone was hurt.

Q. Now, did you follow her request and go back and call an ambulance?

A. Yes, sir, I did.

Q. Now, at this point where these things happened, that is, her station wagon where you *finaly* saw it was located and the truck, was that close enough to your father's

page 81] filling station so that the lights in the station would illuminate it.

A. No, the lights wouldn't illuminate that far.

Q. Was it a dark area otherwise?

A. Yes, sir.

Jerry Allen Bowyer

Q. Was the road also wet on this evening?

A. Yes, sir, it had been raining.

Q. Now, after the accident do you know what was done to Mrs. Bartlett's station wagon after it was stalled there in the middle of the road?

A. Well, a wrecker came and got the station wagon, and then brought it on up to my father's station, and we put gas in it. Then they drove it on up to the Ford Motor Co.

Q. All right, after the accident they put gas in Mrs. Bartlett's station wagon at your service station?

A. Yes, sir.

Q. The wrecker had to get it up there?

A. Yes, sir.

Q. Pull it?

A. Yes, sir.

page 82] Q. And did that allow it to be started and operate under its own power?

A. Yes, sir.

Q. Did you put the gas in it?

A. Yes, sir, I did.

Mr. Ingram: I believe that's all. Your witness.

CROSS EXAMINATION

By Mr. Turk:

Q. Jerry, you remember this lady, you didn't *reconize* her, that came there and ask you to take some gas, and run in your truck down to where Mrs. Bartlett was?

A. No, sir.

Q. You didn't know her?

A. No, sir.

Q. She came up there and you weren't busy with anything else at the time, were you?

A. No, sir.

Q. So when she told you, you got a can and got some gas in it. A boy named Harold *Shelor,* wasn't it, started with you?

A. Yes, sir.

Jerry Allen Bowyer

page 83] Q. Ok and the two of you hopped in. And what were you in a pick-up truck, or something like that?

A. Yes, sir.

Q. A little pick-up truck. All right, and you pulled up there to the *highwayand* you looked and you don't remember seeing anything, do you?

A. No, sir.

Q. When you looked either way? All right then you looked up towards your right?

A. Looked up towards my right.

Q. All right, then you looked back towards your left. Now don't you remember saying something to this effect, "Look at that idiot coming up the road *sidways*?"

A. Yes, sir.

Q. All right, now that was the first time that you had noticed anything either way, wasn't it?

A. Yes sir, it was.

Q. A vehicle coming up the road sideways. And you said to the boy sitting there, "Look at that idiot coming up the road sideways."

A. Yes, sir.

page 84] Q. And then you saw the tires flying off and what not, and you ran on down there?

A. I did not see any tires.

Q. You did not see the tires come off?

A. No, sir. In fact I couldn't even tell it was a truck. Well I could see that it was a truck but as far as a name on it or anything like that, I could not see it.

Q. You went right on down there?

A. Yes, sir, I parked the truck and went down there on foot.

Q. Running down there?

A. Yes sir.

Mr. Turk: I believe that's all.

RE-DIRECT EXAMINATION

By Mr. Ingram:

Q. Just this one question. Let me show you a photograph,

Plaintiff's exhibit NO. 5, and ask you if after you arrived at the scene, if that accurately depicts the situation as you found there?

A. Yes, sir.

page 85] Q. And is the truck there with the tires spilling out of it, the Robert's truck that obviously you had seen swerve?

A. Part of it, yes.

Q. And that's Mrs. Bartlett's station wagon in the position it was in when you arrived?

A. Yes sir.

Q. And these lights, if they had been on, would have been pointing right up in your direction would they not?

A. That is correct.

Q. You never saw any lights on that vehicle?

A. No, sir.

Mr. Ingram: That's all.

Witness stands aside.

page 86] MARVIN EUGENE HALL, JR.

a witness called on behalf of the Plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sadler:

Q. State your full name please, Mr. Hall?

A. Marvin Eugene Hall, Jr.

Q. Where do you now live?

A. Charlotte, North Carolina.

Q. Back in October, 1960, were you a student at V. P. I.?

A. Yes, sir, I was.

Q. Were you involved in the accident that took place out here near Bowyer's service station, on the night of October 27?

A. Yes, sir.

Q. Who were you with?

A. David Lewis Turner.

Q. He was the boy that was killed, was he not?

A. Yes, sir, he was.

Q. Were you all in a car?

A. Yes, sir.

page 87] Q. Whose car were you in?

A. The car was mine.

Q. Who was driving the car?

A. The Turner boy was driving it.

Q. When did you first observe the Bartlett vehicle, the Ford station wagon on the hard surface, and in what direction were you going?

A. We were on the way back to Blacksburg coming into Christiansburg.

Q. And you observed this car there that you saw sitting on the highway?

A. Yes sir, sitting on the highway.

Q. Did you see Mrs. Bartlett there?

A. No, sir, I did not at that time.

Q. Who did you see there at this car?

A. Mr. Webb.

Q. A man that you later determined was Mr. Webb?

A. Yes, sir.

Q. What did you all do when you saw the car?

A. Well as near as I can remember, we pulled up to the side of the car, I think it was the side of the car,

page 88] because I think Webb was standing on the driver's side of the car at the front door. We rolled down the window and asked him if he needed any help, and he said he was trying to get the car off of the shoulder, off the road and parked our car on the shoulder and came back down on foot.

Q. Did you have any trouble getting your car off the highway onto the shoulder?

A. No, sir.

Q. You pulled on ahead of the Bartlett's car off the highway?

A. Yes, sir.

Q. You say that Mr. Webb asked you all to help push it off?

A. I don't recall if he asked to help or not. I just remember him saying he was trying to push it off of the road.

Q. And did you help?

A. Yes, sir, so we came down and helped him.

Q. Just go ahead. Did you see Mrs. Bartlett then?

A. I don't remember seeing her.

Q. Do you know where she was?

page 89] A. No, sir. I don't remember seeing her. The only time I remember seeing her is when we went back to the back to push.

Q. Did you have any conversation with Webb when you walked up there?

A. Not that I can recollect.

Q. Who walked behind the car to push?

A. The Turner boy and I walked back behind to push. I *don's* know if Mr. Webb came along which side. He was back there.

Q. Webb was back there before you all walked back there?

A. I don't remember. I remember all three of us were back there. I don't remember if he got there before we did, or how it was.

Q. Do you remember where you stationed yourself and where Webb was and where —

A. I was on the right hand side of the car, Webb was on the left hand side and the Turner boy was in the middle.

Q. By agreement this photograph was introduced as evidence marked as Plaintiff's exhibit 8. I want to show you this Plaintiff's exhibit 8 and ask you if you *reconize*

page 90] this as being the Bartlett automobile or one similar to it?

A. It looks like it. A '60 station wagon.

Q. A '60 station wagon. I will tell you this is the Bartlett station wagon, after the accident happened. You wouldn't have any reason to *disbelive* that would you?

A. No, sir.

Q. Now in placing yourself on the right hand side, which would have been on this side.

A. Yes, sir.

Q. Now you were going to push from this side, and Mr. Webb was on this side and the Turner boy was in the middle?

A. Yes, sir.

Marvin Eugene Hall, Jr.

Q. Do you remember what part of the automobile you put your hands on to push?

A. No, sir, I don't.

Q. Do you remember what part Webb put his hands on?

A. No, sir.

Q. Well standing as you were to the right hand side, what would be the normal part you would push or exert pressure on?

A. More than likely right in here.

page 91] Q. That would be what we call a *finn* sticking out over the tail light?

A. Yes, sir.

Q. In *otherwords*, the best surface you could get to push on?

A. Yes, sir.

Q. Did you have both hands on the automobile?

A. Yes, sir.

Q. As far as you know did the others have?

A. I don't know.

Q. Had you started to push any or exert any pressure?

A. No, sir.

Q. Did you lean against it? Did you have both hands —

A. We were leaning against it. We hadn't started to push, we were getting ready to start.

Q. Looking forward?

A. Yes, sir, looking forward.

page 92] Q. Do you remember the last time that you looked to the rear or did you ever?

A. Well, the last time I looked to the rear was when we came back around I looked down the road and then I came back around and put my hands on the car.

Q. Did you stand there and continue to look forward and exert pressure?

A. Yes, sir.

Q. And all three of you were abreast that is side by side?

A. Yes, sir.

Q. Across the back end?

A. As near as I can remember, *Yes*, sir.

Q. When you came back behind the car, did Mrs. Bartlett then get in the car?

A. As near as I can remember, she was either in the car or getting into the car. I can't remember.

Q. Did she ever say anything to you all after you got in the position to push?

A. Not that I can remember.

Q. What kind of clothes were you wearing and what kind was the Turner boy wearing?

A. I had a cadet uniform on.

page 93] Q. That's a grey or a blue?

A. Yes, sir. And I had a rain coat on over it the raincoat was black. The Turner boy he had on a reversable nylon jacket, now whether he was wearing it on the red side or the black side I don't know.

Q. It was either red or black?

A. It was either red or black.

Q. Do you know what kind of trousers he had on?

A. No, sir, I don't.

Q. And you were leaning against the back of this car?

A. Yes, sir.

Q. You say that Mrs. Bartlett never said anything to you all?

A. Not that I can remember. She might have. I don't know.

Q. Did you hear the truck approaching from the rear? Tires crying —

A. No, sir I didn't. No, sir.

Q. You say you hadn't actually started to move the car?

A. We hadn't moved the car, *No*, sir.

page 94] Q. But you were in position to exert pressure weren't you?

A. Yes, sir.

Q. Your intentions were to push where, to Bowyer's Esso or off on the shoulder?

A. Well no, sir, I think somebody said something about somebody went after gas or something. We were all trying — All we were doing was trying to get it off the road.

Q. The shoulder at that point was clear so that you could push it off?

A. Yes, sir.

Q. I believe you said that you saw Mrs. Bartlett after you walked to the rear of the vehicle?

A. You mean before we started to push?
Q. Yes.
A. I might have, I don't remember.
Q. But you saw her go up to the driver's seat immediately after you took position?
A. Yes, sir.
Q. Did you have any conversation with her?
A. Not that I recollect.

Mr. Sadler: Your witness.

page 95] CROSS EXAMINATION

By Mr. Dalton:
Q. Mr. Hall, you say that the first person you said anything to there was Mr. Webb?
A. Yes, sir.
Q. And then you went on back to the rear of the Bartlett vehicle?
A. Yes, sir.
Q. I understand you to say you did not have a conversation with Mrs. Barlett?
A. Not that I remember.
Q. You do not recall any conversation with her?
A. No, sir.
Q. She didn't ask you to go back there and push her car did she?
A. I don't think so, no, sir.
Q. You *voleentarily* assumed this risk of standing back there to the rear in the highway?
A. Yes, sir.
Q. She didn't ask you to go back there?
A. No, sir.
Q. When you came on the scene of the accident there, her lights were on weren't they?
page 96] A. Yes, sir they were.
Q. Her lights were burning and as far as you know they continued to burn through the entire time, up until the accident happened?
A. Yes, sir.

Q. You had no trouble, when you came up, seeing this car sitting there in the highway did you?

A. When we were passing?

Q. When you were passing?

A. No, sir.

Q. You could see it very plain, with its lights on sitting there in the highway?

A. No, I didn't have any trouble.

RE-DIRECT EXAMINATION

By Mr. Sadler:

Q. How old were you at that time this happened?

A. At the time it happened, eighteen.

Q. How old was the Turner boy?

A. Nineteen, I believe.

Mr. Sadler: That's all.

Witness stands aside.

page 97] JOHN WALTER WEBB

a witness called on behalf of the Plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sadler:

Q. State your full name, please sir, for the record.

A. John Walter Webb.

Q. Webb where do you live?

A. 209 Cliff St., Pulaski, Va.

Q. Pulaski. Have you lived there for a number of years?

A. About 5 years.

Q. Were you living there in October, 1960?

A. Yes, sir.

Q. Do you remember this accident that occured out here at Bowyer's Esso on the night of October 27, 1960?

A. Yes, sir.

Q. I believe you were injured in this accident?

A. That is correct.

John Walter Webb

Q. What injuries did you sustain?

page 98] A. I had a fractured jaw, teeth broken and a wrist laceration, a fractured pelvis.

Q. Where were you standing when you were hit? I believe you were hit by some tires. Is that right?

A. Yes, sir.

Q. Where were you standing when you were struck?

A. In back of the car.

Q. What part of the back?

A. Well I don't know what part of the back.

Q. To the rear of the car?

A. Yes, sir.

Q. Were you pushing the car at the time?

A. We had our hands on it.

Q. How many of you were there pushing it?

A. Three.

Q. Were all three of you to the rear pushing?

A. To the best of *myknowledge.*

page 99] Q. Do you remember — I show you Plaintiff's exhibit No. 8. Do you remember what portion of the car you had your hands on? That is the car is it not?

A. That's right, it looks like it. But I wouldn't say for sure.

Q. But you did have your hand on a portion of the car where you could push with force. Is that right?

A. Yes, sir.

Q. Do you remember who was next to you in the center?

A. No, sir.

Q. But were all three of you then lined up across the rear of the car?

A. Yes, sir, all of us.

Q. Had you actually started pushing?

A. On the car? It had never started rolling.

Q. Never had started rolling. Were you facing forward towards the rear of the station wagon, towards the front of the station wagon?

A. Yes, sir.

Q. Tell me here how you happened to be there

page 100] and attempting to push this car off the highway, Mr. Webb?

John Walter Webb

A. Well I was stopped up the road there, and noticed that there was a car stalled in the road so I walked back there and asked to help get it out of the road.

Q. Now you say you were stopped up the road. Would you tell the jury where you were stopped up the road? And how far from the car were you?

A. I was about 75 to 100 feet.

Q. 75 to 100 feet. Up ahead of the car?

A. Yes, sir.

Q. Where were you sitting?

A. In my car.

Q. In your car. Where was your car parked?

A. Off to the right.

Q. Were you on the shoulder?

A. Yes, sir.

Q. How long had you been there, Mr. Webb?

A. I don't remember, a few minutes or so.

Q. But you were there before Mrs. Bartlett's car stopped, were you not?

A. To the best of my knowledge.

page 101] Q. Were you sitting still off the highway?

A. Yes, sir.

Q. In this one spot?

A. Yes, sir.

Q. How did you happen to notice the Bartlett car?

A. I looked in the rear view mirror and saw it.

Q. I believe you said before that you had some account or something, you were doing a little paper work there off the highway is that right?

A. I was planning on calling on a man there across the street. I was looking for some information.

Q. You were looking for this man you were going to call on.

A. Yes, sir.

Q. You say you happened to look in your rear view mirror?

A. Yes, sir.

Q. Did you have any reason to that you know of?

A. No, sir.

page 102] Q. And you saw this car. Where was the car sitting when you first saw it?

John Walter Webb

A. In the road.

Q. Could you see the driver of the car at the time in the rear view mirror?

A. I don't remember now.

Q. As soon as you saw it did you go back?

A. I waited just a little while.

Q. What kind of lights did you see on the car when you first looked at it?

A. I don't remember.

Q. Did you see a turn signal blinking on the front of it when you looked back?

A. I don't remember.

Q. When you walked back to it do you remember seeing one?

A. No, sir.

Q. Do you remember the head lights, were they on or off?

A. I don't remember.

Q. Was the shoulder behind you, that is, between you and the car stalled on the highway, was there any-
page 103] thing on that shoulder in between the two cars?

A. I don't think so.

Q. Did you ever see a car back there parked back of you?

A. No, sir, I didn't.

Q. Did you see any car leave or pull out between you and the Bartlett car?

A. No, sir.

Q. And you hadn't moved from that shoulder from the time she stopped and you went back there?

A. No, sir.

Q. When you walked back there, do you know why you walked back there?

A. I noticed someone stopped in the middle of the road. I went back there and said, "Can I help you?"

Q. Who did you find there at the car, when you got there?

A. Mrs. Bartlett.

Q. Did she ask you to help or did you offer to help?

A. I just offered to help.

Q. What did you offer to do?

page 104] A. She said that the car had stalled and she had sent up to the service station for some gaso-

line or something like that.

Q. How long did you stay there talking to her before the V. P. I. boys came along? Have you any idea?

A. It was a short while.

Q. Three *of* four *minuets*?

A. I guess it was something like that.

Q. Did any other cars pass from the time you got back there until the V. P. I. boys came along?

A. I don't remember whether there was any or not.

Q. Was Mrs. Bartlett standing there with you all the time?

A. I don't remember whether she was there all the time.

Q. Where were you all standing in relation to the front of the car or the rear of the car?

A. I don't remember that.

Q. Now when the V. P. I. boys came along what happened?

page 105] A. They stopped and asked us what was wrong. Of course, they had seen that the car was in the road there. Somebody suggested that we push it out of the road.

Q. Who suggested that, do you know?

A. No, sir. Anyway we attempted to.

Q. You attempted to push it out of the road?

A. Yes, sir.

Q. Was Mrs. Bartlett in on this conversation, when you were talking about pushing it out of the road? Where was she?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. Did she get in the car or was she getting out of the car?

A. I believe she attempted to start it.

Q. That was your suggestion or whose suggestion that she guide the car off?

A. I don't remember.

Q. But anyway, all three of you stationed yourselves and, your idea was to push it off the hard surface?

A. Yes, sir.

page 106] Q. Were you going to push it onto the shoulder?

A. Yes, sir.

John Walter Webb

Q. Did Mrs. Bartlett, at the time you had stationed yourself behind the car, did she say anything? Did you hear any conversation?

A. I don't remember

Q. You don't remember hearing her say anything, or anybody saying anything?

A. No, sir.

Q. Did you hear this truck coming or see it coming?

A. I heard a noise, and then there was the crash.

Q. How long had you been sitting there on the shoulder of the highway when Mrs. Bartlett's car stopped?

A. Well, just a few *minuets.*

Q. And you tell the jury that no one pulled off there behind you on that same shoulder at anytime?

A. I didn't see them.

Q. No one had pulled out from that shoulder?

page 107] A. I didn't see them if they did.

Q. If they had you would have seen them wouldn't you, Mr. Webb?

A. I probably would have. Of course, I was looking at some business there.

Q. It was after dark wasn't it?

A. It was right near dark.

Q. When you first pulled off?

A. Yes, sir.

Q. You were within 75 to 100 feet of her car where your car was parked?

A. Yes, sir.

Q. And when you were going to push the car on the shoulder, you had room to push it onto the shoulder didn't you between her car and yours?

A. Yes, sir.

Q. Did Mrs. Bartlett try to start the car at anytime while you were there?

A. I don't remember whether she did or not.

Q. Do you know where Mrs. Bartlett was at the time you heard this crash or accident happen? Was she in the car or out of the car?

A. No, sir, I don't.

John Walter Webb

page 108] Mr. Sadler: Your witness.

CROSS EXAMINATION

By Mr. Turk:

Q. Mr. Webb, as I understand it you were parked in your automobile off on the shoulder, headed toward *Christinsburg,* weren't you?

A. Yes, sir.

Q. And had been there for a few minutes?

A. Yes, sir.

Q. And you were doing some kind of paper work sitting there?

A. Yes, sir.

Q. I guess that there was traffic moving in both directions there on Route 11. You *wern't* paying attention to it though were you?

A. I wasn't paying particular attention to the traffic.

Q. But assume there was traffic going east and west along there wasn't it, while you were sitting there?

A. Probably.

Q. But you *payed* no particular attention to it?

page 109] A. No, sir.

Q. Did I understand you, that the first time you knew that her automobile was in the highway, you looked in your rear view mirror and saw it there?

A. Yes, sir.

Q. You didn't see it while it was stopping or anything did you?

A. It was there when I looked.

Q. It was there when you saw it. Now Mr. Webb do you remember another car coming along there and stopping beside of the Bartlett car? Do you know anything about that?

A. No, sir.

Q. You didn't see the car in which this woman was riding in there and stopped in the center lane right there beside Mrs. Bartlett, did you?

A. Pardon me.

Q. You didn't see this car that came along right after she stalled, stop there in the center lane there with the window rolled down and talk to Mrs. Bartlett, you didn't

see that car did you? Or don't remember it now.

A. No, sir.

page 110] Q. You didn't see that car pull out and go on up to the service station, and go in there, did you?

A. No, sir.

Q. And Mrs. Bartlett, never at anytime, *askedyou* to push her out of the road or anything, did she?

A. No, sir, not that I know of.

Q. She told you that she had already sent up to Bowyer's Esso to get somebody didn't she?

A. Yes, sir. She said that she had sent for somebody.

Q. And these two V. P. I. boys came along and you and them just talked about pushing her off the road, didn't you?

A. Yes, sir.

Q. And at no time did you ask her to stand out there and warn you of anything, had you?

A. I don't remember.

Q. If you had you would have remembered it wouldn't you?

A. I don't know, it's been a long time.

Q. You don't remember any conversation with Mrs. Bartlett at the time do you?

page 111] A. No sir, not now I don't.

Mr. Turk: I *beleive* that's all.

Witness stands aside.

(Adjourned at 1:00 P. M. until 2:00 P. M. for lunch)

(Proceedings resumed at 2:00 P. M. with the Court, Jury and counsel and interested parties present.)

JAMES EDGAR WALTERS

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

DIRECT EXAMINATION

By Mr. Ingram:

Q. Would you state your full name please, sir?

James Edgar Walters

A. James Edgar Walters.

Q. Mr. Walters, on this evening of October 27, 1960, when this tragic *acciednt* happened just east of Christiansburg here, were you the operator of the truck belonging to Robert's Recapping Company?

page 112] A. Yes, sir, I was.

Q. Would you tell us in what direction you were headed on that evening?

A. I was headed west.

Q. Towards Christiansburg?

A. Yes, sir, on Route 11.

Q. Where had you come from and where was *you* destination?

A. I was coming from Roanoke and headed to Pulaski.

Q. Were you hauling something to take back to Pulaski?

A. Yes, sir.

Q. Would you go forward and tell the Court what that was?

A. It was recapped tires that we kept on the truck and what we did pick up to recap for our customers to take back the following trip.

Q. *Alright* now, I am going to ask you if you would just speak up just a little more so the gentlemen on the Jury can hear what you say.

Could you tell us what the weather was on this evening, and visibility conditions were as you neared the scene of this accident?

page 113] A. Well it had been raining off and on, and at that time I think I had cut my windshields back off for just a little while. But you couldn't see so awful far ahead, you had to be careful.

Q. Had you been driving this truck on numerous other trips prior to this evening?

A. Oh, yes, this trip and all over West Virginia as far as Beckley.

Q. Was it loaded in the customary standard manner?

A. Maybe a little light. I didn't have so much pick up that day. When you have bad weather you don't usually pick up quite as much.

Q. Are you saying that you had less tires on this evening

James Edgar Walters

than you would have on other evenings?

A. Maybe five or six hundred pounds or more.

Q. Now you said as you came up the mountain there it rained, and you had cut your windshield wipers off a few minutes before you neared this point. Now would you just go forward and tell what things you saw and occured as you approached the scene where the accident occured?

page 114] Q. When I first came up, all I seen was a man's back with a dark jacket, I hit my brakes, the first thing I thought it was a man in the road. But as I got nearer it looked like a light on top of a thing. It looked like it was more, more than one man. So when I hit my brakes I just kept them locked until I seen I was getting nearer to this thing. There I cut the thing sideways, thought maybe it would stop the thing quicker or else miss it. I locked all four wheels and I slide it sideways.

Q. But sliding sideways did actually bring it to a stop before you struck.

A. Yes, when it started sliding sideways it makes it a pressure on it, but you have a little up and down movement which it shifted this load to that side.

Q. And what happened in the course of that?

A. Well it sheared, this is a factory made bed and it had four standards, about 2 inch standards, and it sheared those standards off letting tires and the side of the paneling go off too and it just scattered tires everywhere.

Q. Now can you tell us approximately what

page 115] speed you were traveling as you neared that scene?

A. Well, not over 40 miles at the most.

Q. When you were back down the road approaching this what later turned out to be a vehicle there in the middle of the road, was it light or dark?

A. It was getting dark.

Q. Do I understand you to say that you noticed what appeared to be a man standing in the road?

A. Yes that's the first thing I saw and I kept my eyes on that. I think what it really turned out to be was the middle guy bent over pushing.

Q. And by the other evidence that has been testified here,

that would have been Mr. Turner? The youth who was killed.

A. That's right.

Q. When you saw that man is that when you put your brakes on?

A. Just as soon as I saw him.

Q. And you continued to slide there before you cut it to the left?

A. That's right, *Itried,* you know, to slow it

page 116] down.

Q. As you were sliding did it occur to you that you saw what might be other people?

A. Oh, yes, it did after I started sliding.

Q. The top of some object later turned out to be the car?

A. Yes, sir.

Q. Now at anytime as you approached this scene, and having told this Court and Jury what you saw, did you ever see any red tail lights or the reflection of head lamps on this what turned out to be Mrs. Bartlett's station wagon?

A. None what so ever.

Q. Never saw any lights at all?

A. No lights at all.

Q. No one on the road side giving a signal of warning or any other signal lights to indicate a car was stalled there blocking the west bound lane as you approached the scene?

A. No, sir, I don't even remember seeing a car on the road.

Q. Likewise did I understand you to say if she had her head lamps on in the direction of Bowyer's Esso station, you didn't notice light coming from those directions as you approached?

page 117] A. No I couldn't tell at all where there was any light at all ahead of her or anything. I just seen this object.

Q. I have a couple of photographs here, Mr. Walters, which might shed *futher* light on the make of your truck and so forth. I will let Counsel see them first.

"Hands photographs to opposing Counsel."

Mr. Ingram: I will ask the Court Reporter to mark these

exhibits 9, 10, and 11 and they are introduced by stipulation of counsel, may it please the Court.

(Received and marked as Plaintiff's Exhibits Nos. 9, 10, and 11.)

Q. Now Mr. Walters, I hand you these three photographs which were reportedly taken of the truck that you were operating on this evening, perhaps the next day after the accident. And ask you if, come up in front of the Jury here so that you might better show. Would you just describe to these gentlemen what that picture shows of that particular night?

A. This picture shows the side of the panel of a
page 118] truck, which has nothing to do with the unfortunate wreck.

Q. Would that be to the left side of the truck?

A. This would be, yes sir.

Q. That was the side of the truck that was not shorn off by the shifting of this load is that right?

A. That's right.

Q. So the other side that was shorn off would look just like that before it was shorn off?

A. Yes, sir. This is a regular bed stake body truck.

Q. And that's a factory built truck?

A. Factory built post and everything.

Q. Now I hand you exhibit No. 10 and ask you if you will tell what that portrays?

A. This *refelcts* the side that broke off *Here* are my standards, the four standards that broke off.

Q. That is the side that the tires fell from?

A. Yes sir, the tires fell from the right side.
page 119] Q. Is that also a picture of the metal rack that came off

A. This is a welded rack itself.

Q. Does this Plaintiff's Exhibit No. 11 also show generally the same side of the truck?

A. Yes it does with the post broken.

Q. It shows the part of the broken post still left in the angle slots?

A. That is right.

James Edgar Walters

Mr. Ingram: I think that is all.
Your witness

page 120] CROSS EXAMINATION

By Mr. Turk:

Q. You say that you were the driver of the truck on the night in question?

A. Yes, sir.

Q. Are you an officer or anything in the Corporation?

A. No, sir, I wasn't

Q. You were just a driver?

A. Just a driver.

Q. And you were driving for the Corporation?

A. Yes, sir.

Q. And did I understand you to say it was getting dark?

A. Yes it was getting dark. It was 6:45 in the winter time. I was driving with my lights on.

Q. When did you cut your lights on or do you remember?

A. I can't remember back when I did cut them on, but I would say just roughly maybe about Elliston.

Q. About Elliston? Did I understand you to say
page 121] that there wasn't any other cars or anything involved. You didn't see any other cars in front of you. You said you didn't see any meeting you, didn't you?

A. I seen some lights up the road but it was a good piece off that would have been meeting me later.

Q. They were over in *there* right hand lane?

A. I imagine it was, but they wasn't near me.

Q. Wasn't near you?

A. No.

Q. The first thing you saw was a person with a dark jacket or something in the highway?

A. Yes that was the only thing I could *reconize* was a dark jacket of some kind, I wouldn't say what color it was.

Q. You don't know why you didn't go on out in the center lane and just keep on going do you?

A. Yes I do because that's solid lines there and I'm afraid of meeting a person. They had the passing right and I could have been hit headon.

Q. But there wasn't any cars coming were
page 122] there?

A. I seen some lights up the road.

Q. But you said that was way back up the road?

A. I didn't say so far, but I don't believe you can see so far up the road in that weather condition.

Q. You thought, I'll just stay over in this road and apply my brakes?

A. The first thing I thought, my idea was to try to stop it.

Q. Instead of just going on around?

A. That's right.

Mr. Turk: That's all

RE-DIRECT EXAMINATION

By Mr. Ingram:

Q. I might ask you this, Mr. Walters, are you connected with Roberts Recapping Co. at the present?

A. No, sir I'm not. You mean now? No.

Q. Where do you presently reside and what is your occupation?

A. I have an interest in *Montogomery* Tire Service, Christiansburg, Virginia.

Q. You live here in Christiansburg?
page 123] A. I live here in Christiansburg.

Mr. Ingram: That's all.

Witness stands aside.

GRADY A. McCONNELL

recalled for further examination by the Plaintiff, testifies as follows.

DIRECT *EXAMINATIONS*

By Mr. Ingram:

Q. You are Sheriff McConnell who previously testified under oath as a witness?

A. Yes, sir.

Grady A. McConnell

Q. Sheriff, when you arrived at the scene and observed the Bartlett vehicle there as you previously testified, would you tell us whether the right blinking signal was going or flashing?

A. No, as I recall the head lights were burning and the tail lights were burning.

Q. But no flashing or blinking?

A. No flashing, no.

Mr. Ingram: That's all

page 123-a] CROSS EXAMINATION

By Mr. Turk:

Q. But the head lights and the tail lights were still on when you got there, weren't they?

A. Yes, sir. Well, they were on and burning when I got there.

RE-DIRECT EXAMINATION

By Mr. Ingram:

Q. You don't know how long they had been on?

A. No, sir.

Mr. Ingram: That's all.

Witness stands aside.

page 124] Mr. Ingram: That's the evidence on behalf of the Plaintiff. Plaintiff rests.

Mr. Turk: We would like to see the Court in Chambers.

IN CHAMBERS

The Court: All right, sir.

Mr. Turk: Your Honor, at this proceeding in the trial of this case when the Plaintiff has announced it rests, counsel for Defendant respectfully moves the Court to strike the evidence for the Plaintiff and enter up summary judgment for the Defendant, and this motion is based on the following:

This is a proceeding by way of contribution. Before the Plaintiff could maintain this action it would have to show that the injured third parties could have recovered from Mrs. Bartlett. They stand in the shoes of the injured third parties. If the injured third parties could not recover then the Plaintiff is not entitled to recover. The injured third parties could not have successfully maintained an action against Mrs Bartlett. Even if guilty of some negligence in letting her automobile stay on the highway the injured third parties were fully aware of the situation in so
page 125] far as Mrs. Bartlett was concerned in removing her automobile from the highway. Mrs. Bartlett didn't flag any of them down or asked their help. In the question of risk where you have a helpless person in danger of peril, Mrs. Bartlett was certainly in no position of peril; she could walk off the highway. I think they have clearly failed to show any negligence on the part of Mrs. Bartlett, but even if they have as a matter of law that could not have been the proximate cause of the collision in question.

Had the injured third parties sued Mrs. Bartlett they would have assumed the risk. I could find no Virginia case similar to this. There is a Norfolk case where a bunch of sailors got out of a car and was pushing it and a car ran into them and killed some of them. The *decendantsof* their estates sued the automobile that ran into them, and the Court said it was a question of contributory negligence.

You have a Plaintiff who admitted it was guilty of negligence in this accident, and I respectfully submit there's no *evidnce* of any negligence on the part of Mrs. Bartlett. She would have had to owe a duty to the injured third parties before a recovery against her and say that she
page 126] was negligent in stalling there. I respectfully submit that the injured third parties could not have successfully recovered anything and the Plaintiff in this action could not and this is one of the cases in which the Court should strike the evidence and enter up summary judgment.

On this stopping in the highway, I would like to call the Court's attention to the case of *Crew* v. *Nelson,* 188 Virginia, p. 108. That case deals with the question of stopping on the highway and says there was not any negligence on the part

of the vehicle that stopped, and I don't see how there is any negligence on the part of Mrs. Bartlett. I strongly maintain that it could not as a matter of law be a proximate cause of the unfortunate injuries received by the third parties.

Mr. Sadler: I think it is absolutely clear that this is a jury case. There are several things I think that she was bound to do that she didn't do. First, stopping on the highway to impede traffic. As the result of a mechanical breakdown is the only exception. If she does stop she must be removed to the shoulder as soon as possible. It is up to her to explain why she was there; why she stopped, and what she did.

page 127] The burden shifts to her in leaving her car there that long and not taking further steps to warn persons traveling on that highway.

We cite the case of *Andrew* vs. *Appalachian,* 92 Virginia, p. 150, which has established the doctrine in Virginia. We think the circumstances under this case certainly makes it a jury question as to whether or not these young men were rash in their actions. I don't think Mrs. Bartlett had to ask them to help, or be in imminent peril.

This case was where an electric power line fell in the street and a fellow picked it up and was getting shocked and another fellow rushed in and grabbed the wire and he was instantly killed. The Supreme Court said it came under the rescue doctrine, in rescuing somebody from danger. We think this was a dangerous situation created by Mrs. Bartlett. We think they were trying to eleviate a situation where someone might have been killed and we think it is a jury question as to whether they acted reasonably.

Mr. Turk: In reply to the *Anderson* vs. *Appalachian.* This was a suit against the Appalachian Power Company for alleged negligence in not having its wires prop-

page 128] erly installed or insulation on it. A third party came along and this fellow went over and took hold of the wires in a effort to get them off the street and out of a dangerous situation, and the insulation around the wires came off and this fellow Anderson seeing this fellow in peril ran over to take the wires away from the person holding them and he was killed. The Supreme Court said if the Appalachian had been guilty of negligence the question was whether or not the decedent was justified in running in and

trying to save this other man. They quoted American Jurisprudence on rescue, but goes on to say that this doctrine does not apply when this party is negligent in putting himself there.

In one Michigan case this Plaintiff had negligently gotten himself in the highway there but he flagged this person down and asked him to help him out, and it turned on that point. There's no case in the United States where they allowed recovery in a situation as this.

Mr. Sadler: Mr. Turk puts Mrs. Bartlett and the fellow grabbing the wire in the same position. Mrs. Bartlett through her negligence created the situation. The only question is whether or not after such dangerous situation

page 129] was created that *that* these boys acted as reasonable persons to save somebody's life or serious injury. Mrs. Bartlett herself made the dangerous situation. She knew it was dangerous. We think it is a jury question whether they acted rashly or reckless.

We also cite the case in 204 Virginia, page 703, which was a hospital case in which the nurse attempted to rescue her patient. She rushed in and was injured and they again reaffirmed the doctrine in this case.

The Court: Was any of Mrs. Bartlett's acts negligent, and if negligent was it a contributing cause of the injuries of the two V.P.I. students and the death of the other man? Isn't that what the question is?

Mr. Turk: I don't think so if they come up and run into her car.

Mr. Sadler: They were there in a position to push. She could be guilty of negligence in not warning them to keep a better lookout.

Mr. Turk: I doubht if there is any recovery against anybody there, but they paid and they are admitting that they were at fault.

page 130] The Court: It appears to me that the Jury will have to determine under the whole evidence whether any acts constituted negligence and if that act contributed to the injuries of the two boys and the death of the other, and if so, to the extent of Mrs. Bartlett, and if the Jury determines that such acts were negligence but didn't contribute to the injuries of the two boys then there would have to be a verdict in favor of the Defendant in this case.

For that reason I overrule the motion.

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

Mr. Ingram: We failed to make mention that counsel had agreed with Mr. Turk and Mr. Dalton that the amount paid in this settlement that amount would be taken as admitted.

Mr. Turk: We didn't say you were justified in paying it, but admitted you paid it.

Mr. Ingram: You made some mention in your opening statement that after several years we brought this suit. Actually it should be known that we gave written notice to Mrs. Bartlett asking her to contribute.

Mr. Turk: The death case was filed and set for trial and you settled it.

page 131] Mr. Ingram: We put her on notice.

Mr. Turk: You certainly did.

Mr. Ingram: And several days later she came in crying about it. We have a copy of the letter we sent her, April 10, 1961, that she was notified.

Mr. Turk: That is when you settled then?

Mr. Sadler: Two at that point, but not the death case.

Mr. Ingram: April 5, 1961, we settled the Hall case, and before we agreed on a settlement of the other one we asked them to come in and contribute.

Mr. Turk: Your Honor, in view of the fact that the Plaintiff has put on all the witnesses summoned both by the Plaintiff and the Defendant, counsel for Defendant has no additional evidence and we rest.

And counsel for the Defendant respectfully renews the motion for the Court to strike the evidence and to enter up summary judgment in her favor for the reasons previously assigned.

The Court: I overrule your motion on the same basis originally ruled on.

page 132] Mr. Turk: We except to the ruling of the Court.

page 133] INSTRUCTIONS

INSTRUCTION No. 1 was offered by counsel for the Plaintiff.

Mr. Turk: I think No. 1 is wrong. The first objection would be that there is no evidence to support this instruction in that

there is no showing of negligence on the part of Mrs. Bartlett who could have been the proximate cause of the injuries to these third parties. And this instruction fails to take into consideration the assumption of risk on the part of the third parties in the third paragraph.

The only instruction that they would be entitled to is if these third parties would be entitled to recover from Mrs. Bartlett, and then the Plaintiff would be entitled to recover in this action.

Mrs. Bartlett may have been guilty of negligence but it was not the proximate cause of the injuries to these parties.

Mr. Ingram: We feel that this is a fair statement of the law. The jury needs to have this as an introductory instruction to tell what her responsibility was as between the Plaintiff and Defendant, and the other instructions will set up specific duties.

page 134] The Court: I will refuse No. 1 on the grounds the Court feels that the question for the jury to determine is whether or not she was guilty of negligence in permitting her vehicle to stop on the highway, and if such negligence proximately caused or contributed to the injuries and death of the three men.

Mr. Ingram: We except to the ruling of the Court in refusing Plaintiff's Instruction No. 1.

INSTRUCTION No. 1-A was offered by counsel on behalf of the Plaintiff.

Mr. Turk: Counsel for the Defendant respectfully objects to the granting of Instruction No. 1-A on the following grounds:

The first paragraph implies that the Plaintiff's driver may have been negligent, whereas the Plaintiff admits negligence on the part of Plaintiff's driver.

Paragraph two also implies that Plaintiff may have been negligent, whereas the instruction should tell the jury that the Plaintiff has admitted that its driver was negligent. Also, the jury must believe from a preponderance of the evidence that the Defendant was negligent.

page 135] The last paragraph implies that the Court feels that the Defendant was guilty of negligence because it speaks of concurring negligence as if it had already

been established. The last sentence makes the instruction a finding instruction and leaves out the defense of contributory negligence and/or assumption of risk on the part of the injured parties. As I understand the law, this jury would have to decide that the three injured parties could have recovered from Mrs. Bartlett, and if the three injured parties could not have recovered against Mrs. Bartlett then Plaintiff cannot recover, and this instruction overlooks this fact.

The Court granted instruction 1-A, to which granting of said instruction the Defendant, by counsel, excepted.

INSTRUCTION No. 2 was offered by counsel on behalf of the Plaintiff.

Mr. Turk: We object to the granting of Instruction No. 2 on the grounds that it is an incorrect statement of law and no evidence to support it. Mrs. Bartlett said that Mr. Bartlett told her to fill up the car for the next day. There was ample gas in it.

page 136] The Court: She had the duty when her engine was sputtering and still had momentum to get off the highway. I don't think this is right the way it is worded. You are going to have to state in there when her car started doing something unusual, and then she had the responsibility to get off the road. I will refuse this No. 2 as offered.

Mr. Ingram: We except to the Court's ruling.

INSTRUCTION NO. 3 was offered by counsel on behalf of the Plaintiff.

Mr. Turk: Counsel for the Defendant objects to the granting of Instruction No. 3 on the grounds that it is not a correct statement of the law. Neither is there any evidence on which this instruction could be based. Mrs. Bartlett testified that the automobile suddenly stopped. She did not say that it ran out of gas. At most this is a jury question, and under this instruction the Court is telling the jury that she actually did run out of gas.

The law as I understand it is that Mrs. Bartlett had the duty to exercise reasonable care so as not to stop her motor

vehicle on the road, in such *as* manner as to im-
page 137] pede or render dangerous the use of the highway
by others, and there is an exception to this in the case of an emergency as the result of an accident or mechanical breakdown. Mrs. Bartlett testified that she had a mechanical breakdown. There is no evidence that Mrs. Bartlett passed up any opportunity to remove her car from the traveled portion of the highway. This instruction omits the standard of reasonable or ordinary care. Also this alleged act of negligence would be remote as a matter or law as to the claim of the three injured parties.

The Court granted Instruction No. 3, to which ruling of the Court the Defendant, by counsel, excepted.

INSTRUCTION No. 4 was offered by counsel on behalf of the Plaintiff.

Mr. Turk: Instruction No. 4 imposes a greater duty on the Defendant than does the Statute. It is repetitious of No. 3. The Statute says that she shall not stop her station wagon on the highway in a manner that would impede or render dangerous the use of the highway by others, except in the case of an emergency as the result of an accident or mechanical breakdown. In such instances she is charged with
the duty of removing the vehicle, or having it
page 138] moved to the shoulder as soon as possible. This
instruction goes much further than this. This instruction also omits the standard of reasonable care and tends to make Mrs. Bartlett an insurer. There is only one duty here, and the Court in the last sentence speaks of violating any one or more of the foregoing duties. This alleged negligence also would be remote as a matter of law as to the three injured parties.

The Court: I will give this instruction.

Mr. Turk: We except to the Court's ruling in granting this instruction.

INSTRUCTION No. 5 offered by counsel on behalf of Plaintiff and was given by the Court.

Mr. Turk: Counsel for Defendant objects and excepts to the granting of Instruction No. 5 on the ground that it is

not supported by the evidence. It actually should be a part of the instruction dealing with not stopping so as to impede or render dangerous the use of the highway by others. Mrs. Bartlett sought assistance from the first vehicle that stopped and help was on the way when the mishap occurred. The evidence shows that the station wagon was in the process of being removed when the parties were injured. page 139] Also this alleged negligence would be remote as a matter of law as to the three injured parties.

INSTRUCTION No. 6 was offered by counsel on behalf of Plaintiff.

Mr. Turk: Instruction No. 6 is also improper. It is vague, misleading, indefinite, and highly prejudicial to the Defendant. Instructions 3, 4, 5 and 6 when read together would impose on Mrs. Bartlett the duty of being some super human being. She could not possibly have been removing her vehicle and effectively warning traffic at the same time. Her failure to warn could not have been a proximate cause of their injuries. The injured parties saw the automobile and stopped. They asked her to get in so that they could push it off the highway. The Court must remember that the interested parties would not have been entitled to an instruction such as this. At most she had the duty to use reasonable care to warn approaching traffic of the fact that her automobile was in the road. There is no evidence that she had flares or other warning devices. There must have been a violation of a duty owed to the injured parties. They knew her automobile was stalled in the road, and at their insistence was page 140] helping in the removal of the same from the highway. There is no statutory duty requiring her to give warning signs. She was under a duty to report the stalled automobile to the nearest police officer and remove the same from the highway as soon as possible.

The Court granted Plaintiff's Instruction No. 6, to which granting of Instruction No. 6 the Defendant, by counsel, excepted.

INSTRUCTION No. 7 was offered by counsel on behalf of the Plaintiff.

Mr. Turk: Instruction No. 7 is not supported by the evidence in this case. There is no evidence that there was anything faulty with Mrs. Bartlett's lights on her station wagon. One of the injured parties has testified that the lights were on. All of the injured parties stopped and if the lights had not been burning it would have been incumbent upon them to see that the Defendant turned on the lights. There is no evidence that Mrs. Bartlett's lights failed to come up to these standards. An instruction not based on the evidence is improper. The purpose of the headlights is to project a beam of light ahead so as to make discernable
page 141] objects ahead. The Plaintiff introduced no evidence to show whether the lights were on bright or dim. Once the injured parties stopped and offered to help at their request then the duties of the lights and warning were as much theirs as it was Mrs. Bartlett's.

The Court granted instruction No. 7, to which ruling of the Court the Defendant, by counsel, excepted.

INSTRUCTION NO. 8, was offered by counsel on behalf of the Plaintiff.

Mr. Turk: Proposed Instruction No. 8 is based on the doctrine of attempted rescue or the good Samaritan doctrine. This is the type of instruction that the three injured parties might have used to show that they were not guilty of contributory negligence or assumption of risk in an action against the Plaintiff. Mrs. *Bartlet* was not in eminent danger. She was out of her automobile. The students came along and voluntarily stopped and offered assistance. There was no such hazard or dangerous situation as a matter of law to invoke the attempted rescue doctrine. Mrs. Bartlett did not need to be rescued. This instruction is not proper because the Plaintiff in making payment
page 142] and admitting liability has admitted that insofar as it is concerned the injured parties were not guilty of contributory negligence. This instruction here has the wrong application, is misleading, is not based on the evidence, and is most prejudicial and harmful to the Defendant.

The Court granted Instruction No. 8, to which ruling of the Court, the Defendant, by counsel, excepted.

INSTRUCTION No. 9 was offered by counsel on behalf of the Plaintiff.

Mr. Turk: Instruction No. 9 imposes too great a duty on the Defendant. This instruction is a finding instruction and tells the jury that even though the three injured parties were negligent in exposing themselves to danger, it was the duty of Mrs. Bartlett to keep a lookout for them and see that they were not injured. Unless they told Mrs. Bartlett to look out for them, it seems that she would have had a right to assume that they would look out for themselves. She could not possibly be out warning approaching traffic, looking out for the students, guiding the automobile off the highway, and everything else at the same time. page 143] There is absolutely no evidence to support this instruction. There is nothing to indicate that she saw or could have seen the approaching truck before they did. They had requested that she get in the automobile and steer while they pushed. It must be remembered that the three students were young men in full possession of their faculties, and there was no duty on her to be continually on the lookout for their safety. This instruction in effect takes away the defense of contributory negligence and/or assumption of the risk. This is a last clear chance instruction in effect and there is no evidence that Mrs. Bartlett had any more knowledge of the approaching vehicle than did the three students.

The Court: I think she had a duty when she started to get in that car and have somebody push her to have and keep a reasonable lookout. I will give this instruction.

To which action of the Court in granting Instruction No. 9 the Defendant, by counsel, excepted.

INSTRUCTION No. 10, offered by counsel on behalf of the Plaintiff.

Mr. Turk: Counsel for the Defendant would page 144] respectfully object to Instruction No. 10. This is a finding instruction and is not complete. Also, it imposes too great a burden on the Defendant. There was no way she could have kept the students from helping remove the automobile from the highway. This instruction

implies that the students had no duties to look out for their own safety, but places the burden of looking out for the students, signaling approaching traffic, looking out about the lights, and removing the automobile all at the same time on the Defendant. The students had a continuing duty to look out for their own safety. All of these supposed duties have also been covered in the past instructions. This is nothing more than a repeat of several instructions to which the Defendant has already objected, but which were given over her objection and to which she has excepted. This instruction is also too vague in that it says she was to do all other things under the circumstances without spelling out these things. It must be remembered that we are concerned with duties Mrs. Bartlett owed to the three students. One of the students has testified that the lights were on. Yet we are charging Mrs. Bartlett with a duty then page 145] that clearly one of the injured parties said that she had performed. Also, I would call the Court's attention to the fact that she was called as an adverse witness and the Plaintiff is bound by all of her testimony that they had not contradicted. This instruction is a duplication of other instructions, is not a correct statement of the law, is not supported by the evidence and is prejudicial to the Defendant. It makes the Defendant an insurer of their safety.

The Court granted instruction No. 10 for the Plaintiff, to which action of the Court the Defendant, by counsel, excepted.

INSTRUCTION No. 11 offered by counsel on behalf of the Plaintiff.

Mr. Turk: Instruction No. 11 is wrong in that it hedges on whether or not Plaintiff's driver was negligent. This was admitted in the pleadings and it is unfair to the Defendant for the instructions to imply that Plaintiff's driver may not have been negligent. This instruction is repetitious and implies that she was negligent. It should say, such negligence, if any —, and is prejudicial to the Defendant.

The Court granted Instruction No. 11, to which action of the Court in granting Instruction No. page 146] 11, the Defendant, by counsel, excepted.

INSTRUCTION No. 12, offered by counsel on behalf of the Plaintiff, was given by the Court without *object* on the part of the Defendant.

INSTRUCTION No. 13, offered by counsel on behalf of the Plaintiff.

Mr. Turk: There is no evidence of any prior inconsistent statements.

The Court granted Instruction No. 13, to which action of the Court in granting Plaintiff's Instruction No. 13, the Defendant, by counsel, excepted.

INSTRUCTION No. A, offered by counsel on behalf of the Defendant was granted by the Court without objection.

INSTRUCTION No. B, offered by counsel on behalf of the Defendant.

Mr. Ingram: We object to it. It doesn't really go far enough. It doesn't speak of concurring negligence. We feel she was guilty of concurring negligence.

Mr. Turk: She had to be guilty of negligence which was one of the proximate causes of the accident.

page 147] The Court amended said instruction by inserting "one of" instead of "a," and granted Instruction B, to which action of the Court in amending said instruction the Defendant, by counsel, excepted.

INSTRUCTION No. C, offered by counsel on behalf of the Defendant.

Mr. Ingram: We object to that on the grounds that it does not go far enough and it is confusing. It is already covered and it is misleading.

The Court granted Instruction C on behalf of the Defendant, to which ruling of the Court the Plaintiff, by counsel, excepted.

INSTRUCTION No. D, offered by counsel on behalf of the Defendant.

Mr. Sadler: I think her negligence, if she were negligent, continues right down to the time of the accident.

The Court refused Instruction D, to which action of the Court, the Defendant, by counsel, excepted.

INSTRUCTION No. E, offered by counsel on behalf of the Defendant.

page 148] Mr. Sadler: It's wrong. This says one who "voluntarily assumes risk" etc. They are assuming the risk from the traveling public. They were not injured by the act of Mrs. Bartlett, but by the dangerous situation which she set up. If they were rash or reckless in assuming the risk.

The Court: Don't these three boys stand in the same position as Mrs. Bartlett to the truck?

Mr. Turk: No, sir. That's the whole situation. That's carrying this doctrine to the extent that anybody who stops to offer you assistance may be liable in damages to them by stopping.

Mr. Sadler: That's right, if you're in a position of peril and danger, the one who created it trying to get the dangerous situation out of the highway so won't anybody be killed.

Instruction No. E was refused by the Court as offered, to which action of the Court the Defendant, by counsel, excepted.

page 149]

Christiansburg, Va.
February 9, 1965
9:00 o'clock a.m.

(The Court and counsel are present in chambers.)

Instruction No. E, which was refused by the Court on February 8, 1965, was withdrawn by counsel for the Defendant, and a new Instruction No. E was offered by counsel on behalf of the Defendant, and the Court granted this new Instruction No. E without objection.

INSTRUCTION No. F, offered by counsel on behalf of the Defendant, was granted by the Court without objection.

INSTRUCTION No. G, offered by counsel on behalf of the Defendant, was granted by the Court without objection.

INSTRUCTION No. H, offered by counsel on behalf of the Defendant.

Mr. Sadler: It is a direct conflict to the rescue doctrine. I think this is a direct conflict to Instruction No. F and don't think it can be applied to this case. In two instructions you tell the jury that if these boys acted reasonably they could expose themselves to danger, and now you're
page 150] telling them if they voluntarily did it they are out of Court.

The Court: I think that is what the law is. If they exposed themselves knowing the danger and went ahead any how they are not entitled to recover from anybody. The jury can disregard the theory of rescue. Instruction H is refused.

To which action of the Court the Defendant, by counsel, excepted.

INSTRUCTION No. H-1, offered by the Defendant, was granted by the Court without objection.

INSTRUCTION No. I, offered by counsel on behalf of the Defendant, was granted by the Court without objection.

(The Court, Jury, counsel and interested parties return to the courtroom where the following proceedings took place.)

The Court: Gentlemen, there are certain facts which have been stipulated by counsel for both sides, and I will tell you at this time what those stipulations are.

It has been stipulated that the Plaintiff, Roberts Recapping, Incorporated, paid in settlement of all three claims, that is, the personal injuries
page 151] and the death claim, a total of $29,700.00.

It is further stipulated that this suit for contribution is for one-half that amount or for $14,850.00, and that if the Plaintiff is entitled to recover anything it will be entitled to recover $14,850.00.

It has been further stipulated that by the letter dated

April 5, 1961, the Plaintiff, Roberts Recapping, Incorporated, notified Mrs. Bartlett that they were attempting to negotiate settlements in all cases and demanding that she come into the negotiations and contribute one-half of any settlement reached.

It is further stipulated that thereafter the two cases for personal injuries were in fact settled.

It is further stipulated that on August 28, 1961, a suit by the Administrator of Turner for his death was filed against both Roberts Recapping, Incorporated, and Mrs. Bartlett.

It is further stipulated that again on October 17, 1961, that Roberts Recapping advised Mrs. Bartlett that they had effected a settlement of the suit against Mrs. Bartlett and Roberts Recapping for the death of Turner, and page 152] demanding that she contribute one-half.

You can take those stipulations as being evidence had the witnesses been put on the witness stand to testify to those facts.

The Court instructed the jury as to the law in this case.

(Mr. Ingram opened in a summary before the Jury on behalf of the Plaintiff.)

(Mr. Dalton opened and Mr. Turk closed in their summary before the Jury on behalf of the Defendant.

(Mr. Sadler closed the summary before the Jury on *behahalf* of the Plaintiff.)

(The Jury retired to their room to consider of their verdict at 10:51 a.m., and returned to the courtroom at 11:31 a.m. and rendered the following verdict:

"We, the Jury, upon the issued joined find in favor of the Plaintiff and fix its damages at $14,850.00."

Mr. Turk: Your Honor, I would ask that the Jury be polled.

(The Court polled the Jury and each juror answered in the affirmative that it was their verdict.)

page 153] (The Jury was dismissed from further consideration of this case.)

Mr. Turk: Counsel for the Defendant, Mrs. Bartlett, respectfully moves the Court to set aside the jury verdict and to enter up final judgment in favor of the Defendant, or in lieu thereof to grant to the Defendant a new trial, and in support of said motion we would set forth the following grounds:

(1) There is no evidence to support the jury verdict, and we feel that the Court erred in failing to strike the evidence and enter up summary judgment in favor of the Defendant;
(2) We feel that the Court erred in granting certain instructions for the Plaintiff over the objections of the Defendant;
(3) The Court erred in refusing to grant certain instructions offered on behalf of the Defendant,

And we would request the Court to set a date for hearings on motions.

The Court: Gentlemen, I am going to take your motion *underadvisement* and ask counsel to furnish me with a brief from each side within a reasonable time.

page 154] Mr. Turk: A fourth ground for our motion is that the Court further erred in allowing certain evidence over the objection of the Defendant.

(Court adjourned at 12:00 noon.)

page 155] CERTIFICATE

I, W. Southall Jordan, Judge of the Circuit Court of Montgomery County, Virginia, do hereby certify that the foregoing is a true and correct stenographic copy and report of the evidence and other incidents of the trial therein, all questions raised and all rulings thereon and exceptions noted in the case of *Roberts Recapping, Inc., A Virginia Corporation of Pulaski, Virginia, Plaintiff,* vs. *Virginia Miles Bartlett, Christiansburg, Virginia, Defendant,* in said Court at Christiansburg, Virginia, on February 8 and 9, 1965, and

it appears in writing that the Plaintiff had reasonable notice when this report of the testimony and other incidents of the trial would be presented for certification, and which was presented to me within sixty days after final judgment and signed by me within seventy days.

I also certify that the Court Reporter reporting said case was sworn to take down and transcribe said testimony and other incidents faithfully and accurately to the best of her ability.

Given under my hand this

Oct. 29, 1965

W. S. JORDAN
Judge

page 156] I, A. B. Correll, Clerk of the Circuit Court of Montgomery County, Virginia, do hereby certify that the foregoing stenographic copy of report of the testimony and other incidents of the trial in the case of *Roberts Recapping, Inc., a Virginia Corporation of Pulaski, Virginia, Plaintiff,* vs. *Virginia Miles Bartlett, Christiansburg, Virginia, Defendant,* was filed with me as Clerk of said Court on the 29th day of October 1965.

A. B. CORRELL
Clerk of the Circuit Court of
Montgomery County, Virginia

★ ★ ★ ★ ★

A Copy — Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	page
Appeal and *Supersedeas* Awarded	1
Record	2
Decree — February 1, 1965	2
Instructions	3, 85
Decree — February 22, 1965	13
Final Decree — September 1, 1965	15
Notice of Appeal and Assignments of Error	16
Proceedings	18, 81, 94
Witnesses:	
Grady A. McConnell	19, 80
Virginia Bartlett	31
Jerry Allen Bowyer	55
Marvin Eugene Hall, Jr.	61
John Walter Webb	67
James Edgar Walters	74
Verdict of Jury	96
Certificates	97