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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6400

In the Supreme Court of Appeals of Virginia at Richmond

ELSWORTH MONROE WILSON, ET AL.,

v.

EUGENE TUCK WHITTAKER, ADMINISTRATOR, ETC.

FROM THE CIRCUIT COURT OF GILES COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6400

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 25th day of April, 1966.

ELSWORTH MONROE WILSON AND HOWARD T. PHILLIPS, Plaintiffs in error,

against

EUGENE TUCK WHITTAKER, ADMINISTRATOR OF THE ESTATE OF ALBERT LEE WHITTAKER, DECEASED, Defendant in error.

From the Circuit Court of Giles County
Vincent L. Sexton, Jr., Judge

Upon the petition of Elsworth Monroe Wilson and Howard T. Phillips a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Giles County on the 30th day of September, 1965, in a certain motion for judgment then therein depending, wherein Eugene Tuck Whittaker, Administrator, etc., was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of forty thousand dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Circuit Court Clerk's Office the 28th day of Jan., 1965.

Teste:

O. G. CALDWELL, Clerk.

MOTION FOR JUDGMENT

To: The Honorable V. L. Sexton, Judge of said Court:

The undersigned hereby moves the Court for judgment against Elsworth Monroe Wilson and Howard T. Phillips, individually and jointly, for the sum of Forty-Nine Thousand ($49,000.00) Dollars, for the following damages and wrongs, to-wit:

1. The undersigned, Eugene Tuck Whittaker, expressly alleges that he was duly appointed Administrator of the Estate of Albert Lee Whittaker, deceased, by Order duly and properly entered in the Clerk's Office of the Circuit Court of this County.

2. That heretofore, to-wit, Elsworth Monroe Wilson, who was then and there acting as agent, servant and employee of Howard T. Phillips, and was acting within the scope and course of his employment as such, on the 21st day of September, 1964, was operating a tractor-trailer motor unit, owned by Howard T. Phillips, along and over U. S. Route No. 100 in Giles County, Virginia, near the village of Bane, and was then and there proceeding in a general southerly direction; and, at the same time and place, Albert Lee Whittaker was attempting to cross said highway after being transported to that point by a school bus operated for the benefit of school children in Giles County, Virginia, having just disembarked from said bus.

page 2 } 3. At said time and place, it was the duty of Elsworth Monroe Wilson, as agent, servant and employee of Howard T. Phillips to operate said vehicle at a reasonable and proper rate of speed, on the right hand side of said highway; to maintain said vehicle under proper control; to operate the same in good mechanical condition; and to stop

and not pass any school bus stopped on the highway for the purpose of taking on or discharging passengers; and to otherwise operate his vehicle in such a manner as not to endanger the life, limb or property of other persons.

4. As Albert Lee Whittaker was lawfully crossing said highway, the said Elsworth Monroe Wilson, then acting as agent, servant and employee of Howard T. Phillips, did negligently, wrongfully, carelessly and recklessly operate his said vehicle at an excessive rate of speed; did fail to maintain a proper lookout; did operate said vehicle in bad mechanical condition; did operate the same to the left of the centerline of the highway, without maintaining proper and reasonable control thereof; did fail to stop for a school bus which had stopped for the purpose of discharging passengers; did negligently fail to exercise that degree of care and caution required in the presence of children; and did otherwise operate said vehicle in a careless, reckless and negligent manner to pass said school bus and to the left of the centerline of said highway and did strike the said Albert Lee Whittaker with tremendous force and violence, horribly mangling him and inflicting such severe and horrible injuries as to cause his death on the aforesaid 21st day of September, 1964; for all of which the undersigned demands judgment against Elsworth Monroe Wilson and Howard T. Phillips, severally and jointly, in the sum of Thirty-Five Thousand ($35,000.00) Dollars for the wrongful death of Albert Lee Whittaker.

5. The injuries sustained by Albert Lee Whittaker, as a result of which he died, were due directly and
page 3 } proximately to the said negligence of Elsworth Monroe Wilson, who was the agent of Howard T. Phillips.

6. That in the violation of the foregoing duties, as above noted, the said Elsworth Monroe Wilson did operate said vehicle in such a gross, willful and wanton manner and in such gross and careless disregard of the rights of Albert Lee Whittaker that the results of his gross conduct were absolutely foreseeable and amounted to a willful act; that, in addition, he operated said vehicle in a poor mechanical condition with reference to brakes as to amount to a criminal violation in the operation of said vehicle over the highways of this Commonwealth; that the condition of said brakes was well known not only to Elsworth Monroe Wilson but also to Howard T. Phillips, his employer, the latter of whom insisted that the vehicle continue in operation in spite of the defective condition of brakes and in spite of the fact that both Wilson

and Phillips knew of the presence of children along said highway after school hours; that the operation of said vehicle, not only with the knowledge of Howard T. Phillips but also at his insistence, under the circumstances and with full knowledge of the dangerous and defective condition of said vehicle, was such gross and wanton negligence, and so willful as to amount to a deliberate act; that, therefore, the undersigned alleges that Albert Lee Whittaker was killed under such circumstances as to amount to a willful, wanton and deliberate act on the part of Elsworth Monroe Wilson and Howard T. Phillips sufficient to entitle the undersigned to punitive damages in the sum of Fourteen Thousand ($14,-000.00) Dollars for which he demands judgment.

7. Said Albert Lee Whittaker, at the time of his death, was eleven (11) years of age; that he died intestate; and that his surviving heirs at law, and the statutory beneficiaries in this action are as follows: a. Eugene Tuck Whittaker, his father; Susie Irene Whittaker, his mother; Carolyn June Whittaker, age nine (9), his sister; and Susie Ann Whittaker, page 4 } age fifteen (15) his sister.

UPON CONSIDERATION OF ALL OF WHICH, the said Eugene Tuck Whittaker, as Administrator of the Estate of Albert Lee Whittaker, moves the Court for judgment against Elsworth Monroe Wilson and Howard T. Phillips, individually and jointly, for the full and just sum of Thirty-Five Thousand ($35,000.00) Dollars for the wrongful death of Albert Lee Whittaker, plus Fourteen Thousand ($14,000.00) Dollars as and for punitive damages, for a total of Forty-Nine Thousand ($49,000.00) Dollars, for which this plaintiff demands judgment against both defendants, individually and jointly.

Respectfully,

EUGENE TUCK WHITTAKER
By JOHN B. SPIERS. JR.
Of Counsel.

* * * * *

page 10 }

* * * * *

Received 2/25/65, 10:00 A.M., Filed.

O. G. CALDWELL, Clerk
Circuit Court of Giles County.
W. B. PETERS, D. C.

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* * * * *

THE ANSWER OF ELSWORTH MONROE WILSON AND HOWARD T. PHILLIPS TO THE MOTION FOR JUDGMENT FILED AGAINST THEM IN YOUR HONOR'S SAID COURT.

1. Defendants neither admit or deny the allegations of paragraph one, but call for strict proof thereof.

2. Defendants each deny the allegations contained in paragraph two (2) of the motion for judgment exhibited against them herein.

3. Defendants neither admit or deny the allegations contained in paragraph three.

page 12 } 4. Defendants deny the allegations contained in paragraph four.

5. Defendants deny the allegations contained in paragraph five.

6. Defendants deny the allegations contained in paragraph six.

7. Defendants neither admit or deny the allegations contained in paragraph seven concerning the age or statutory beneficiaries of the deceased, Albert Lee Whittaker, but aver that neither of them are liable in damages for the alleged wrongful death of Albert Lee Whittaker as charged, and that they should be henceforth dismissed with their costs in this cause.

page 13 } And further defending the motion for judgment by the plaintiff herein, the defendants represent as follows, to-wit:

1. The accident, if any, and the injury and death of plaintiff's decedent, Albert Lee Whittaker, resulting therefrom, on the occasion mentioned in the plaintiff's motion for judgment, was wholly or partly caused or contributed to by the negligence or lack of care of plaintiff's decedent, Albert Lee

Whittaker, and was not the result of any negligence or want of care on the part of these defendants.

2. At the time and place of the alleged wrongful death of plaintiff's decedent, Albert Lee Whittaker, defendant. Elsworth Monroe Wilson, was suddenly confronted with and placed in a position of imminent peril. He then page 14 } and there attempted to prevent injury to himself or others by applying the brakes of his tractor-trailer as quickly and vigorously as possible, but through no fault of his, or either of the defendants, the brake mechanism failed, whereupon the defendant, Elsworth Monroe Wilson, swerved said tractor-trailer abruptly to the center-line of the highway in an attempt to pass to the left of the school bus which was then and there stopped upon said highway, which was all he could think of to do or had time to do in his confusion and excitement, in order to prevent a collision with the bus and injury to its occupants. The peril and failure of defendant, Elsworth Monroe Wilson, to avoid the collision with plaintiff's decedent, Albert Lee Whittaker, was caused solely by the negligence of Albert Lee Whittaker in page 15 } creating the emergency by dashing into the highway immediately in front of the tractor-trailer operated by defendant, Elsworth Monroe Wilson, allowing no time to defendant, Elsworth Monroe Wilson, to think or act otherwise than he did in the emergency, and the collision occurred without any negligence or lack of care on the part of the defendants.

3. At the time of the occurrence mentioned in plaintiff's motion for judgment, defendant, Elsworth Monroe Wilson, was proceding lawfully in the tractor-trailer along U. S. Route No. 100, with due caution and at a low rate of speed. Defendant, Elsworth Monroe Wilson, cautiously applied his brakes as he saw the school bus stopped upon said highway ahead of him, but the brakes, through no fault of page 16 } his, or either of these defendants, failed, and said vehicle operated by defendant, Elsworth Monroe Wilson, as aforesaid, was thereby caused to collide with plaintiff's decedent, and the accident, if any, was unavoidable as to these defendants.

4. And further defendants respectfully represent and show unto Your Honor that prior to the time plaintiff filed this motion for judgment in this Court, that is to say, on or about the .. day of December, 1964, the plaintiff and defendants came to an agreement for compromise and settlement and

release of plaintiff's cause of action against defendants by reason of the facts alleged in plaintiff's motion for judgment herein for the sum of Fifteen Thousand ($15,000.00) Dollars; that in pursuance of the said agreement for compromise and settlement and release of plaintiff's claim for the page 17 } said sum of Fifteen Thousand ($15,000.00) Dollars, the plaintiff, Eugene Tuck Whittaker, Administrator of the Estate of Albert Lee Whittaker, deceased, filed a petition in this Court for Your Honor's approval of the said compromise agreement and distribution of the proceeds thereof as provided by law; that Your Honor refused to hear the said petition filed by the said Eugene Tuck Whittaker, and upon instruction of the Court a petition was filed on behalf of the defendant, Elsworth Monroe Wilson, for approval of the said compromise agreement, and a hearing upon the petition was held in this Court on the 15th day of December, 1964, at which said time and place the plaintiff, Eugene Tuck Whittaker appeared and represented to this Court that he had agreed to the settlement and compromise of said claim for the sum of Fifteen Thousand ($15,- page 18 } 000.00) Dollars, and in support thereof filed his written consent and approval of the compromise agreement with this Court; that after hearing the evidence this Court ratified, confirmed and approved a compromise of this claim for the sum of Fifteen Thousand ($15,000.00) Dollars and funeral expenses; that in pursuance of the ratification, confirmation and approval of said compromise, defendants did cause to be paid unto the Clerk of this Court, as Received, the sum of Five Thousand ($5,000.00) Dollars, as and for the distributive share of Eugene Tuck Whittaker and Susie Laing Whittaker; the sum of Ten Thousand ($10,- 000.00) Dollars as and for the distributive share of Susie Ann Whittaker and Carolyn Jean Whittaker; the sum of Seven Hundred Twenty ($720.00) Dollars as and for funeral expenses; the sum of One Hundred Fifty ($150.00) Dollars as and for counsel fees for A. L. Farrier, Esq., page 19 } Guardian *ad Litem* for Susie Ann Whittaker and Carolyn Jean Whittaker, infants, and the costs of said proceeding, all of which said sums were paid unto the Clerk of this Court, as aforesaid, on the 15th day of December, 1964; that on the .. day of December, 1964, the plaintiff, Eugene Tuck Whittaker, withdrew, with the approval of this Court, the sum of Two Hundred ($200.00) Dollars from the distributive share alloted to him and his wife, the said Susie

Laing Whittaker, from the Clerk of this Court, and no part of said sum of Two Hundred ($200.00) Dollars has been returned to your defendants; that the plaintiff's claim for damages for the wrongful death of Albert Lee Whittaker, due to the alleged negligence of your defendants, has been compromised and settled by the express agreement of this plaintiff and your defendants, as aforesaid, for the
page 20 } said sum of Fifteen Thousand $($15,000.00) Dollars, and defendants are entitled to specific performance of said compromise and settlement agreement by this plaintiff.

WHEREFORE, defendants respectfully demand that plaintiff's motion for judgment may be dismissed, and that he may be required to pay all of the costs thereof, and that the plaintiff, Eugene Tuck Whittaker, Administrator of the Estate of Albert Lee Whittaker, deceased, may be decreed specifically to perform the said compromise and settlement agreement entered into with these defendants.

Dated on this 23rd day of February, 1965.

ELSWORTH MONROE WILSON
AND HOWARD T. PHILLIPS,
Defendants
By Counsel.

* * * * *

page 25 }

* * * * *

A MOTION TO STRIKE

To: The Honorable Vincent L. Sexton, Jr., Judge of said Court:

The defendants, Elsworth Monroe Wilson and Howard T. Phillips, respectfully move that there be stricken from the motion for judgment for $49,000.00 so much of the allegations and the prayer thereof as asks for judgment for $14,000.00 punitive damages. In support of this motion to strike the defendants respectfully submit the following matters:

(1) The Administrator's cause of action against these defendants for the death by allegedly wrongful act of the decedent exists solely by reason of Code of Virginia (1957 Repl. Vol.), Sections 8-633 *et seq.*, and amendments thereto.

(2) As a matter of law the elements of damage in such an action are limited to the statutory beneficiaries' pecuniary damages, if any, their loss of the decedent's services, and a reasonable sum for their grief and sorrow.

(3) This Court has no jurisdiction to consider nor to award punitive damages against the defendants or either of them, and so much of the motion for judgment as asks for punitive damages should therefore be stricken.

Respectfully submitted this 13th day of July, 1965.

ELSWORTH MONROE WILSON
AND HOWARD T. PHILLIPS,
Defendants
By ROBERT V. IRONS
Of Counsel.

* * * * *

page 30 } INSTRUCTION NO. 1

The Court tells you in this case that both of the defendants are liable to the plaintiff as a matter of law for the wrongful death of Albert Lee Whittaker.

Given 7-19-65.

V. L. S., JR., Judge.

page 31 } INSTRUCTION NO. 2

In arriving at the amount of your verdict in favor of the plaintiff, you may award such compensatory damages as to you seems fair and just and you may ascertain such damages with reference to the following:

1. The pecuniary loss, if any, sustained by Eugene Tuck Whittaker and Susie Irene Whittaker, the parents of the deceased, and Carolyn June Whittaker and Susie Ann Whittaker, his sisters, fixing such sum with reference to the prob-

able earnings of the deceased for the duration of his life expectancy if he had not been killed and in view of his health. age and experience.

2. Compensation for the loss of Albert Lee Whittaker's attention, love and society to his mother and father, and his sisters.

3. Such further sum as you may deem fair and just by way of solace and comfort to his mother and father, and his sisters, for the sorrow, suffering and mental anguish occasioned to each of them by his death.

And you may, if you wish to do so, make such allocation of the amount of your verdict as you deem proper between his survivors, ie:

page 32 } Eugene Tuck Whittaker, his father Susie Irene Whittaker, his mother Carolyn June Whittaker, his sister Susie Ann Whittaker, his sister.

Given 7-19-65.

V. L. S., JR., Judge.

page 33 } INSTRUCTION NO. 3

The Court tells the jury that, in addition to the damages mentioned in the preceding instruction, you may award punitive damages if you believe from a preponderance of the evidence that the defendants acted wantonly, or with such recklessness or negligence as to indicate a conscious disregard of the rights of others, or with criminal indifference to civil obligations. Such punitive damages are something in addition to full compensation, not given as the plaintiff's due, but as a punishment to the defendants and as a warning and example to deter him and others from committing like wrongs.

Given 7-19-65.

V. L. S., JR., Judge.

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* * * * *

We, the jury, on the issue joined, find for the plaintiff in the sum of $35,000.00.

DAN TAYLOR, Foreman.

ORDER

page 35 }

* * * * *

This 19th day of July, 1965, came the parties to this action, in person and by counsel, the said case having been duly matured upon the pleadings heretofore filed, and issue having been joined thereon. Thereupon, the defendants, by counsel, moved the Court to strike out so much of the allegations in the prayer of the motion for judgment as asks for Fourteen Thousand ($14,000.00) Dollars punitive damages, on the grounds assigned in a written motion to strike filed July 13, 1965, and on the grounds assigned at bar, and as more fully set forth in the Court Reporter's record of the proceedings. After maturely considering said motion, the Court doth overrule the same insofar as the allegations demanding punitive damages are concerned, but does sustain the same insofar as the motion for judgment moves for judgment in excess of Thirty-Five Thousand ($35,000.00) Dollars; to which action of the Court the defendants, by counsel, excepted.

WHEREUPON, argument was heard on the plaintiff's demurrer and motion to strike certain portions of the responsive pleadings of the defendants, commencing with paragraph 4 of said responsive pleadings to the conclusion thereof; which motion and demurrer the Court doth sustain, to which no exception was stated.

Then came a jury, a panel of thirteen (13), who were found duly qualified and free of objection for the trial of this action; and each side struck three (3) from the
page 36 } panel, leaving a jury of seven (7) for the trial of this case, to-wit:

Robert H. Pratt, Lawrence J. Willard, T. Barnes Ratcliff, R. J. Miller, Harold Chaffin, Coy Ingram, Dan Taylor who were sworn to well and truly try the issues joined between the plaintiff and the defendants.

THEREUPON, after opening statements of counsel, the plaintiff produced his witnesses and evidence, and rested, after which the defendants moved to withdraw a juror and declare a mistrial on the grounds assigned at the bar of the Court and more fully set forth in the Court Reporter's record of the proceedings, which motion the Court overruled, to which action of the Court, the defendants, by counsel, duly excepted.

THEREUPON, the defendants rested without producing further evidence.

After having heard the instructions of the Court and arguments of counsel, the jury retired to consider of its verdict, and after a time returned to the bar of the Court and returned the following verdict:

"We, the jury, on the issue joined, find for the plaintiff in the sum of $35,000.00.

20%—each parent
20%—older daughter
40%—to small daughter

Eugene Whittaker	20%
Susie Irene Whittaker	20%
Carolyn June Whittaker	20%
Susie Ann Whittaker, younger sister	40%

/s/ DAN TAYLOR, Foreman".

WHEREUPON, the defendants, by counsel, moved the Court for permission to file written exceptions and motions on or before the 23rd day of July, 1965, which motion the Court doth sustain, and it is ORDERED that the defendants shall, on or before July 23, 1965, have the right and privilege to file such motions and exceptions, in writing, as they deem proper.

page 37 } And now this action is continued until July 23, 1965.

Enter.

V. L. S., JR., Judge.

Date: July 23, 1965.

* * * * *

page 85 }

* * * * *

ORDER

This action came on again this the 30th day of September, 1965, on the verdict of the jury heretofore rendered, and on the written motion of the defendants to set aside the verdict and grant a new trial on the grounds more fully set forth in the written motion filed herein, and on such other motions as are set forth therein, and was argued by counsel.

After hearing the arguments of counsel, as well as the written memoranda filed by the parties, and after maturely considering the same, the Court overruled the motions filed, to which action of the Court the defendants excepted.

Therefore, pursuant to the verdict of the jury, rendered on July 19, 1965, it is ADJUDGED and ORDERED that the plaintiff, Eugene Tuck Whittaker, Administrator of the Estate of Albert Lee Whittaker, shall have and recover of the defendants, Elsworth Monroe Wilson and Howard T. Phillips, the sum of Thirty-Five Thousand ($35,000.00) Dollars, together with costs in this behalf expended.

It further appearing to the Court that the jury undertook to and did allocate said award; and it further appearing from the verdict that the manifest intention of the jury was to allocate forty (40%) per cent of said verdict to the younger sister of the decedent, and that the jury in its last allocation confused the names of the two sisters of the decedent still surviving, but still manifested its intention to award forty (40%) per cent to the younger sister of the de-
page 86 } cedent, whose name is Carolyn June Whittaker rather than Susie Ann Whittaker, the Court doth ORDER that the judgment herein granted shall be allotted as follows: Eugene Tuck Whittaker shall have and recover twenty (20%) per cent of said judgment, Susie Irene Whittaken shall have and recover twenty (20%) per cent of said judgment, Susie Ann Whittaker shall have and recover twenty (20%) per cent of said judgment, and Carolyn June Whittaker shall have and recover forty (40%) per cent thereof.

Thereupon came J. Livingston Dillow and Charles B. An-

drews who have heretofore filed a petition as attorneys claiming a fee of Two Thousand Five Hundred ($2,500.00) Dollars on the grounds more fully set forth in the petition, to which reference is made, and came also the plaintiff, in person and by his attorney, and the Court heard evidence from both sides as it related to the claim of J. Livingston Dillow and Charles B. Andrews for such counsel fees and the Court doth take this matter under advisement.

page 87 } It further appearing to the Court that Carolyn June Whittaker and Susie Ann Whittaker are minors, it is ORDERED that the sums to which they are entitled and which are paid shall be paid unto the receiver of this Court, by him to be invested for the benefit of said minors, and to be paid out only on order of this Court, or at such time as said minors become of age.

The defendants having indicated an intention to apply to the Supreme Court of Appeals of Virginia for a writ of error in this action, the Court doth ORDER that the execution of this Order be, and the same hereby is, suspended for a period of four (4) months from the date hereof, and for a reasonable time thereafter until the petition for writ of error is acted upon by the Supreme Court of Appeals of Virginia, provided said petition is actually filed within the time provided by law, and provided further that the defendants, or someone on their behalf, shall within 21 days from the entry of this Order enter into bond in the Clerk's Office of this Court in the penalty of One Thousand ($1,000.00) Dollars with surety approved by the Clerk of this Court and conditioned according to law, and plaintiff objected and excepted on the ground that said bond is insufficient.

And now this action is stricken from the docket.

Enter.

V. L. S., JR., Judge.

Date: September 30, 1965.

* * * * *

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* * * * *

Received 26th Nov. 1965, filed.

O. G. CALDWELL, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To: The Honorable Vincent L. Sexton, Jr., Judge of said Court:

The defendants, Elsworth Monroe Wilson and Howard T. Phillips, by their attorneys, hereby give notice, pursuant to the provisions of the Rules of the Supreme Court of Appeals of Virginia, Rule 5:1, Section 4, of their appeal from the final judgment entered by this Court September 30, 1965, for the plaintiff and against both defendants, and of their intention to apply for a writ of error and *supersedeas* from this judgment.

Further pursuant to the said Rule the defendants assign the following errors in the actions of the trial court:

(1) The refusal to grant the defendants' motion to strike those portions of the plaintiff's motion for judgment asking for judgment for punitive damages, on the ground that the court was without jurisdiction to award punitive damages under the Virginia statute creating the right of action for death by wrongful act;

(2) The refusal to sustain the defendants' objection to the admission of the plaintiff's evidence of the facts of the accident in which the plaintiff's decedent was killed, on the ground that, the defendants having admitted liability and there being no jurisdiction to consider punitive damages, the jury was only entitled to consider evidence upon the issue of compensatory damages;

(3) The refusal to grant the defendants' motion at the conclusion of all of the evidence to declare a mistrial and to award a new trial, for the reasons set forth in Assignments (1) and (2) above;

page 91 } (4) The refusal to sustain the defendants' objection to the granting of Instruction No. 3 tendered by the plaintiff, for the reasons set forth in Assignments (1) and (2) above;

(5) The refusal to grant the defendants' motion to set aside the verdict of the jury and to award a new trial for the reasons set forth in Assignments (1) through (4) above.

Respectfully submitted this 24th day of November, 1965.

WADE H. BALLARD, III,
Attorney at Law,
First National Bank Building,
Peterstown, West Virginia,

and

ROBERT S. IRONS,
Attorney at Law,
111 Third Avenue,
Radford, Virginia,
Attorneys for Elsworth Monroe Wilson and Howard T. Phillips, Defendants,
By ROBERT S. IRONS

* * * * *

page 3 } BE IT REMEMBERED that heretofore, to wit, on Monday, July 19, 1965, on the trial of the above-styled action, before the jury had been impaneled and sworn, the following proceedings were had in the Court's chambers out of the presence and hearing of the jurors:

Mr. Ballard: If it please the Court, on the 13th July one of counsel for defendant, Mr. R. S. Irons, filed a motion before Your Honor to strike the allegations of the motion for judgment so far as the prayer of the motion asking for judgment for $14,000 punitive damages, also the motion to dismiss the action for the $2,000 claim for funeral expenses. Taking them one at the time, the motion to strike is based on the proposition that under the wrongful death statute of Virginia the plaintiff is not entitled to recover any
page 4 } damages by way of punitive damages but that the amount he is entitled to recover is set by statute and is limited to the sum of $35,000.

Mr. Spiers: Let me answer that first. If the Court please, the one only and earliest leading case on this particular point is *Matthews* v. *Warren,* administrator. It expressly held that the Virginia death by wrongful act statute, contrary to the Lord Campbell's act and the statute of many other states, the wording differs and allows the jury to find damages as they think right, fair and just. I quote, "I think it is manifest that the Legislature intended to allow the jury in such

cases to award punitive exemplary damages." I also refer the Court to 46 Virginia Law Review, page 1038, which discusses punitive damages and cites Virginia as a
page 5 } state in which punitive damages are provided. The motion is purely frivolous and, besides that, since the pleadings filed made no mention of it, it waives any objection of it at this point.

(Further discussion of the motion was off the record.)

Mr. Ballard: It is our position, as stated succinctly in the written motion to strike, that under the Virginia statute, page 663, the damages to which the plaintiff is entitled to recover in this action is limited to $35,000.

The Court: However that may be arrived at.

Mr. Ballard: However that may be arrived at, but he is not entitled to recover punitive damages in a wrongful death case in Virginia.

page 6 } Mr. Spiers: I will concede that the limit is $35,000.

The Court: We will strike the $14,000.

Mr. Spiers: But leave in the punitive aspect in this case.

The Court: I can realize where a jury might look at one case *at* say it was purely an accident and another case they will say that, due to this fellow's knowledge that his brakes were defective, he was taking a big risk, and there might be some question in it.

Mr. Spiers: The logic is that it sets an example.

The Court: I will go along with that and limit the recovery to $35,000 but I will leave in the puntive damages.

Mr. Ballard: We respectfully except to the ruling.

The Court: Now, you have another motion.

page 7 } Mr. Ballard: Yes, sir. The written motion to dismiss the separate suit on motion for judgment to recover funeral bills is based on the proposition, as stated succinctly in the written motion, that the funeral bills incurred by the plaintiff administrator of the estate of the decedent is not an element of recovery in an action for wrongful death in Virginia, therefore, there is no basis in the statute or in the law for the recovery of funeral bills in this action.

The Court: Counsel, do you have any different view?

Mr. Spiers: Yes, sir. Any case which would survive the death of a person survives with the wrongdoer whether it is a death by wrongful act or damage to property.

page 8 } This is a suit for damage to the estate and whether it should be the father as administrator, what the

father is not legally obligated to pay is not material. The point is that this is an action which would survive because it is a damage against property.

(There was further argument on the motion off the record.)

Mr. Spiers: It is not a case for death by wrongful act. It is a claim for damage to the estate; it is a property loss. One goes directly to the beneficiary which is statutory; the other is to take care of expenses. I also feel, Your Honor, that to bring that up after a case has been in court for seven months is a little late, when no objection was made in the first instance.

The Court: In other words, we have already page 9 } pled and answered?

Mr. Spiers: Yes, sir, in February.

Mr. Ballard: I believe, Your Honor, that a demurrer should have been filed with the Court for the $2,000 claim. I did not file a demurrer because I wasn't familiar with the procedure. That would probably raise the question of the right of this defendant to maintain an action of this type in this court.

The Court: This suit is by the administrator.

(Further argument on the motion was off the record.)

The Court: I will sustain the motion to strike insofar as the administrator is concerned.

Mr. Spiers: I move to amend by adding Eugene Tuck Whittaker, individually, as plaintiff and substi- page 10 } tute him.

The Court: All right; that motion is granted and that case will have to go over. We will just try the one case at this time for the $35,000.

Mr. Spiers: Starting with paragraph 4 of respondent's pleadings, counsel has pleaded in an equity proceeding for specific performance on alleged contract and I move to strike out that part of the answer.

Mr. Ballard: I believe it is entirely correct where you have a distinction between law and equity that is improper.

The Court: All right; it is so ordered.

Mr. Ballard: We want to admit liability.

The Court: You can do that in your opening statement.

Mr. Ballard: I anticipate that in his opening
page 11 } statement Mr. Spiers is going to set out the theory of liability. Mr. Spiers, we wish to state in the record that the defendants, Elsworth Monroe Wilson and Howard T. Phillips, admit their liability to the plaintiff for the wrongful death of the plaintiff's decedent, and if it is necessary for us to file a written plea of admission of liability, then we ask that we be permitted to do so.

The Court: I don't think that is necessary. That is something you can do in your opening statement.

Mr. Spiers: I think his purpose, and the reason I filed the motion for punitive damages, is to prevent us from showing how the accident happened. It is my view, under punitive damages, I am permitted to show that.

page 12 } The Court: I think you can soften it by admitting it.

Mr. Ballard: The purpose of his opening statement and his evidence will be, of course, to show this liability. It will be our position that it is improper to show the evidence on liability. An unqualified admission of liability excludes that question from jury consideration.

The Court: Not necessarily. They can show how it happened.

Mr. Ballard: I am going to be opposed to the introduction of any evidence along that line and I want to save objection on all this.

Mr. Spiers: We will agree that we understand that all evidence on liability is evidence to which you object.

Mr. Ballard: Yes, sir.

page 13 } Thereupon the Court and counsel returned to the courtroom, where the proceedings were resumed, as follows:

The Court: Are the parties ready?
Mr. Spiers: Yes, sir.
Mr. Ballard: Yes, Your Honor.
The Court: All right; call the jury.

Thereupon the jury was duly impaneled and sworn, the opening statements were made by counsel for plaintiff and defendant, after which the plaintiff, to maintain the issue on his behalf, introduced the following evidence, to-wit:

Mr. Spiers: I would like to call Elsworth Monroe Wilson. I would like to call him as an adverse witness.

N. G. White.

The Court: Is Mr. Wilson present?
Mr. Ballard: No, sir, Your Honor.
Mr. Spiers: The defendant is not present?
page 14 } Mr. Ballard: No.
Mr. Spiers: Is Mr. Phillips here?
Mr. Ballard: Mr. Phillips is not here.
Mr. Spiers: All right; call Mr. N. G. White.

N. G. WHITE,
was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Spiers:
Q. You are Trooper N. G. White?
A. Yes, sir.
Q. Mr. White, on September 21, 1964, were you a state trooper, stationed at Pearisburg, Giles County?
A. Yes, sir.
Q. Did you investigate an accident which occurred on Route 100 in Giles County, which resulted in the
page 15 } death of Albert Lee Whittaker?
A. Yes, I did.
Q. Tell the jury, please, when you arrived at the scene of the accident?
A. Approximately 4:15 P. M.
Q. What did you find when you arrived?
A. I found a school bus which had been operated by Mr. Ralph Treanor setting on the highway in his righthand lane. The tractor-trailer which was being operated by Mr. Elsworth Monroe Wilson was approximately one hundred fifty (150) to two hundred (200) feet in beyond the school bus, partially off on the lefthand shoulder of the highway. Of course, the child was also still at the scene of the accident.
Q. Was the child on the hard surface of the highway?
A. Just at the lefthand shoulder.
Q. Mr. White, tell us what the weather conditions were?
A. Yes, sir. The road was dry and the weather was clear and sunshiny.
Q. What time did the accident happen, as far
page 16 } as you could determine?
A. As far as I could determine, it was approximately 3:55 P.M.

N. G. White.

Q. When you arrived at the scene, the school bus was on the hard surface of the highway?

A. Yes, sir.

Q. Was it marked as school busses are required to be marked and the color that school busses are required to be?

A. Yes, sir.

Q. Did it have the required flashing lights and red stop lights on it?

A. It did.

Q. Tell the jury whether or not they were on at the time you arrived?

A. I can't recall as to whether they were flashing at the time I arrived, but I did check them and they were working.

Q. They were operating?

A. Yes, sir.

Q. Now, do you know whether any photographs were taken at the scene of the accident?

page 17 } A. Yes, sir, there were several photographs taken?

Q. Were you present when these pictures were taken?

A. Yes, I was.

Q. Do you have them in your possession at this time?

A. I have part of them.

Q. You have part of them?

A. Yes, sir.

Q. Are these the other part?

A. Yes, sir. This photograph was taken on the day of the accident. These two were taken the next day, and this one was taken the same day. I was present when they were all taken.

Q. These three were taken on the day of the accident?

A. Yes, sir.

Q. Come up here, Mr. White, and maybe we can show them to the jury.

Mr. Ballard: I object to that.

The Court: Let me see them. What is the basis

page 18 } of your objection?

Mr. Ballard: No foundation has been laid for them to be shown to the jury.

The Court: Maybe you had better introduce somebody who saw the accident first.

N. G. White.

Mr. Spiers:

Q. When you got to the scene of the accident, Trooper White, you say the boy's body was lying on the highway?

A. Just off the *berm* on the left shoulder of the road.

Q. Was a photograph taken of him at that time?

A. Yes, sir.

Q. You have that photograph?

A. Yes, sir.

Q. Would you produce it, please. Now, who took that photograph?

A. Deputy Sheriff Harvey Amo.

Q. Were you there?

page 19 } A. I was standing beside him.

Q. Does this photograph accurately reflect what you saw when you got to the scene of the accident?

A. Yes, sir.

Q. Does it show the condition and position of the boy's body accurately, as you saw it when you arrived?

A. Of course, it was covered.

Q. Covered with a blanket?

A. Yes.

Q. You removed the blanket?

A. Yes.

Mr. Spiers: I want to introduce this in evidence and I will connect it up.

Mr. Ballard: We want to object to the introduction of that photograph in evidence and we have a right to be heard.

The Court: Let the jury stand aside and I will hear what you have to say.

page 20 } Whereupon the jury retired from the courtroom, and the following proceedings *where* had out of the presence and hearing of the jury:

Mr. Ballard: If it please the Court, they ask to introduce in evidence on behalf of plaintiff a photograph which is not marked for identification and I want to object to the introduction of that photograph into evidence before this jury, because the evidence shows the mutilated condition of the body of the boy on the highway and it serves no purpose other than to inflame the passions of the jury. The admission in evidence of that photograph would be highly prejudicial to the defendants and it would serve no purpose other than to pre-

judice the jury's mind against the defendants in this case.

page 21 } For that reason, more than any other specific reason, we object to the admission in evidence of that photograph. In addition, we submit that no proper foundation has been laid for the admissibility of that photograph in evidence, at this time, because the trooper, I believe, has testified that he took the picture but he has not—

The Court: (interrupting) He was present when it was taken.

Mr. Ballard: Or he was present when it was taken. The person who developed them did not testify.

The Court: What they have to do is to show that it clearly and properly depicts what it is supposed to show. I don't think your objection is well taken. But the question of punitive damages is here. What is your purpose in introducing this?

page 22 } Mr. Spiers: To show the boy was on the highway and also to show the very nature of the accident and the injury sustained which resulted in his death.

The Court: I believe you are going a little too far with this photograph and I shall sustain the objection to that on the ground that it is inflammatory.

Mr. Spiers: We except to the Court's ruling. Before the jury comes back, I would like to proceed with this questioning and ask Mr. White some questions.

The Court: No statement has been made as to how this boy met his death, or anything. I think, if you would put on Mrs. Strader to show that fact, the photograph would be admissible.

Mr. Spiers: We except to the Court's ruling.

page 23 } Whereupon the jury was returned to the courtroom and the proceedings were resumed before the jury, as follows:

Mr. Spiers:

Q. Mr. White, when you arrived at the scene, was Elsworth Monroe Wilson there?

A. Yes, sir.

Q. Did you talk with him and ask him about how the accident occurred?

A. Yes, I did.

Q. Tell the jury what he told you?

A. Mr. Wilson stated—

N. G. White.

Mr. Ballard: —(interrupting) I object, Your Honor, to the admission in evidence of what Mr. Wilson told him.

The Court: Overruled. Go ahead.

(Exception.)

A. Mr. Wilson stated, in the presence of the bus driver, Mr. Treanor, and myself, when we were through talking and I was preparing my accident report—and I asked him as to what had happened and he said that he had ap-
page 24 } proached the curve and came around the curve at approximately fifty (50) miles an hour; and as he came around the curve he saw the school bus setting in the road and he saw the lights all on and he immediately started applying his brakes in an effort to stop, which he said he saw that he could not stop, or he would not be able to stop, so he pulled into the left lane, which would be on his left, and started blowing his horn. He said he held his horn wide open as a warning; and he proceeded on down the lefthand lane by the school bus and struck the child.

Q. Did he tell you whether or not he used his hand brake or his foot brake or both?

Mr. Ballard: Objection; the question is leading, Your Honor.

The Court: Don't lead the witness. You can ask him how he applied his brakes.

Mr. Spiers:

Q. Did he tell you which brake he used?

A. He said he applied his brakes with every-
page 25 } thing he had but he just couldn't stop.

Q. He said he applied his brakes with everything he had?

A. Yes, sir, but whether that meant hand brake or just the foot brake, I can't say.

Q. Could you tell the jury how far it is, or was, from the point which the school bus stopped to the place this vehicle came around the curve?

A. From the place where you come around the curve, where you have clear vision down the highway to the point where the school bus was setting—back to the curve where you could see, it was eleven hundred nine (1109) feet.

Q. Was this a straight stretch of highway?

N. G. White.

A. Yes, sir.

Q. Can you tell the jury how far the truck was from the school bus, when you got there, after it came to rest?

A. From the front of the school bus to the back of the tractor-trailer it was one hundred sixty-seven (167) feet. I believe I am correct on that.

Q. One hundred sixty-seven (167) feet?

page 26 } A. One hundred sixty-seven (167).

Q. Did you see any marks on the roads to indicate the application of brakes?

A. No, sir, there were no skid marks.

Q. No skid marks?

A. No.

Q. You say he was partially on and partially off the hard surface?

A. Yes, sir.

Q. Could you tell, from your investigation, approximately where in the left lane the child was struck?

A. To pinpoint it, no, sir, I couldn't.

Q. Could you tell whether the truck left the hard surface, or were there any marks to indicate the truck had left the hard surface before the child was struck?

A. No, sir. It all happened on a little concrete bridge. The truck had to go through a concrete bridge, on which the school bus was setting.

Q. The school bus was what?

A. The school bus was setting. The little con-

page 27 } crete bridge was at this point (indicating) and the bus was setting there and the truck had to go down on the other side and through the bridge also.

Q. You testified that Mr. Wilson told you about the brakes. Did he tell you anything about any previous trouble with his brakes?

A. He said that he had had trouble with the brakes as he came across the West Virginia Turnpike and that he had stopped and he and his co-driver had loosened the brakes to the point where they could travel on.

Q. Did you ask Mr. Wilson for whom he was working at the time of the accident?

A. Yes, sir, I secured the name of the owner of the tractor-trailer.

Q. Who was that?

A. Mr. Howard Phillips.

Q. Howard Phillips?

N. G. White.

A. Yes, sir.
Q. Both of these people were from out of state?
A. Yes, sir, Aberdeen, Ohio.
page 28 } Q. Who was the other person on the truck at the time of the accident?
A. Mr. Stanley Gremis, Jr.
Q. Did he indicate that he was also employed by Mr. Phillips?
A. Yes, sir.
Q. Do you know whether he saw anything that happened?
A. He said he was in the sleeper and didn't see anything.
Q. He did not see anything?
A. No.
Q. Did he have any comment about the brakes in addition to that?
A. Not to me.
Q. Did Mr. Wilson indicate anything to you about whether or not his employer was aware of the condition of these brakes?
A. He stated that Mr. Phillips knew of the brake condition and that he had lining for the brakes but he would not let the truck stop long enough to have it repaired.
page 29 } Q. What was this truck carrying?
A. Hogs.
Q. Was a photograph taken of that truck at the time of the accident?
A. Of the truck itself?
Q. Yes, sir.
A. Yes, sir.
Q. Were you present when it was taken?
A. Yes, sir.
Q. Would you get that picture?
A. Yes.
Q. Do you know who took that photograph?
A. Yes, sir.
Q. Who was it?
A. A deputy sheriff, at that time, Harvey Amo.
Q. He is no longer with the sheriff's department?
A. No, sir.
Q. Does that picture accurately reflect what you saw there at the scene of the accident, as far as the truck was concerned?
page 30 } A. Yes, sir.

N. G. White.

Mr. Spiers: I would like to introduce that photograph in evidence, Your Honor.
Mr. Ballard: We object.
The Court: What is the basis of your objection?
Mr. Ballard: No proper foundation has been laid.
The Court: Well, the trooper has testified what he found when he got there. Does it accurately depict what it is supposed to there?
The witness: Yes, sir.
The Court: All right, that will be admitted as plaintiff's Exhibit No. 1.
Mr. Ballard: Exception.

Plaintiff's Exhibit No. 1.

The photograph referred to was thereupon marked as indicated above and admitted into evidence.

page 31 } Mr. Spiers:
Q. Mr. White, this picture shows a tractor-trailer on the left side of the highway. Is this where you found it when you got there?
A. When I arrived, yes, sir.
Q. Where was the picture taken?
A. Standing on the righthand side of the school bus just in front of the school bus.
Q. Right at the front of the school bus?
A. Yes, sir.

Mr. Spiers: May I pass this picture to the jury?
The Court: Yes, sir.

(The picture was passed to the jury by counsel.)

Mr. Spiers:
Q. Was the photograph taken at the scene of the accident which showed the school bus in the condition in which you found it, or the position in which you found it?
A. Yes, sir. This was taken the next day, using the same school bus.
page 32 } Q. The next day?
A. Yes, sir.
Q. Does this show the back of that school bus, as it appeared to you on the day of the accident?

N. G. White.

A. Yes, sir.

Mr. Spiers: I would like to offer this as an exhibit.
The Court: Do you object to that?
Mr. Ballard: Yes, sir, we object to it.
The Court: Same objection?
Mr. Ballard: Yes, sir.
The Court: Same ruling. That will be plaintiff's Exhibit No. 2.
Mr. Ballard: Exception.

Plaintiff's Exhibit No. 2.

The photograph referred to was thereupon marked as indicated above and admitted into evidence.

Mr. Spiers:
Q. Can you tell the jury what the speed limit was at this place for trucks?
A. Forty-five (45) miles an hour.
page 33 } Q. Forty-five (45) miles per hour?
A. Yes, sir.
Q. This man told you he was going fifty (50)?
A. Yes, sir.

Mr. Spiers: That is all at this time. We might want to put him back on.

CROSS EXAMINATION.

By Mr. Ballard:
Q. Trooper, would you describe the condition of the highway where this accident occurred, with relationship to where the bus had stopped on the highway?
A. I don't understand your question.
Q. I believe you said you got out there about 4:00 oclock?
A. About a quarter after 4:00.
Q. About a quarter after 4:00. Where was the bus?
A. It was still setting on the highway.
page 34 } Q. Do you know whether the bus had been moved or not?
A. The driver stated that it had not.

N. G. White.

Q. But you don't know, of your own knowledge, whether it had been?

A. No, sir.

Q. The tractor-trailer, did you see it there on the highway?

A. Yes, sir.

Q. It is the same tractor-trailer that is depicted in this photograph that the jury has just seen?

A. Yes, sir.

Q. Do you know whether or not it had been moved, of your own knowledge?

A. Of my own knowledge, no, I do not.

Q. With reference to where you saw the bus on the highway, when you arrived at the scene of the accident, describe the highway there at that location, the sides of the highway?

A. Well, the highway was twenty-one (21) feet. There was ten and a half feet (10½) feet for each lane. The
page 35 } righthand shoulder was—guessing, I would say, approximately six to eight feet of shoulder on the righthand side. Of course, on the lefthand side there is a rock cliff that comes down near the highway which would limit about four to five feet of shoulder between the pavement and the rock cliff. After you got on down to where the school bus was setting there was a concrete bridge with abutments built up on each side.

Q. On which side of the concrete abutment on the bridge was the bus located when you go there at the scene?

A. I believe the bus was setting just through the bridge partially.

Q. Was it partly on the bridge?

A. I believe it was, according to the photograph.

Mr. Ballard: That's all.

RE-DIRECT EXAMINATION.

By Mr. Spiers:

Q. I forgot to ask you. Did you measure the tractor-trailer?

page 36 } A. No, sir, I didn't.

Q. It was loaded at the time, I believe?

A. It was loaded with hogs, yes, sir.

Q. Did anyone weigh it?

A. Not to my knowledge.

Ralph Trenar.

Mr. Spiers: That's all.

The witness thereupon stood aside.

RALPH TRENAR,
was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Spiers:
Q. State your name.
A. Ralph Trenar.
Q. Where do you live?
A. Six miles out of Pearisburg at Bane.
Q. What is your occupation?
A. Well, I work for the School Board as a bus driver and janitor and maintenance worker.
Q. Were you the operator of the school bus on the 21st of September, 1964, when Albert Lee Whittaker was
page 37 } killed?
A. I was.
Q. How long had you been operating a school bus?
A. Well, I had been driving approximately twelve (12) years.
Q. Twelve years?
A. Yes.
Q. On the date of this accident were you taking the children home from school?
A. Yes.
Q. Was the bus pretty well full?

Mr. Ballard: Your Honor, I object.
The Court: Don't lead the witness, Mr. Spiers.

Mr. Spiers:
Q. Well, how many children did you have on the bus, do you know?
A. Yes, I would say we had somewhere between twenty (20) and thirty (30). I just don't remember how many I did have at the time.
page 38 } Q. Mr. Trenar, was your school bus equipped with lights which the law requires you to have?
A. Yes, sir.

Ralph Trenar.

Q. What condition were they in on the day of this accident?

A. They were in good shape, all of the them.

Q. All of them operate?

A. All of them operate.

Q. As you approached the scene of the accident, tell just exactly what you saw there and what you did?

A. Well, when I pulled my lights on—on the average I didn't pull my lights on—it depends on how much traffic there was behind me. At that time there was a car or two behind me. I had cleared four or five lengths of the bus before I came to a stop. I was done stopped and the kids had done got in front of the bus, all three of them, and I happened to glance back in my mirror and saw this tractor-trailer coming.

Q. When you first saw this tractor-trailer coming, which lane was it in?

page 39 } A. It was in the southbound lane.

Q. It was in the righthand lane, the same lane you were in?

A. No, it was done on the lefthand lane whenever I first seen it. I was in the righthand lane and it was in the left lane.

Q. Tell the jury approximately how far back it was?

A. Well, I don't remember just exactly, but I would say, three or four or five lengths of the trailer behind me. I can't say exactly.

Q. And, at that time, were those lights on?

A. Yes, sir.

Q. Were they blinking?

A. Yes, sir.

Q. Were you stopped when you first saw the truck?

A. Yes, I was. I was plumb stopped.

Q. Was your door open or shut?

A. You mean, when I saw it?

Q. The tractor-trailer?

A. No, the door was open at the time when I page 40 } first seen it. I never shut the door; that is plumb shut until after the kids were done across the road. Whenever I shut the door that cuts the red light.

Q. How many children did you let off?

A. Three (3).

Q. Three children?

A. Yes, sir.

Q. Where were they at the time you first saw the truck?

A. Well, they were done getting across the road and they

Ralph Trenar.

had done got to the side of my bus, I would say, right in front of it, over to the side a little. The two were right along here behind this boy and the boy had done started across the road when that trailer came down through there beside my bus. The two girls jumped back and that is what saved them.

Q. Did you watch the truck?

A. From the time I seen it coming, I watched it until it stopped.

Q. What did you do, if anything?

page 41 } A. Well, there wasn't anything I could do. Whenever I seen it had done rode over the kid, I got out of my bus and checked on the other children. That was the only thing I could do.

Q. Where was the little boy, with reference to the hard surface, when he was struck? Was he on or off the hard surface?

A. I couldn't say exactly but I feel like he was still partly on the hard surface, from where the boy was laying, but I don't know that that is correct; I couldn't say.

Q. When you got out of your bus, did you see the other two children?

A. That's right. I got out of my bus and checked to see where they were at. I heard them screaming when I got out of the bus and they had done got back to the righthand side of the bus.

Q. Was one of them Albert Lee Whittaker's sister?

A. That's right.

Q. Did you see the truck driver at the scene, Mr. Wilson?

page 42 } A. I didn't see him until after he came back up to where the bus was at.

Q. How far did he go before he came to rest?

A. I guess, maybe three or four lengths of the tractor-trailer before he ever stopped after he passed the bus.

Q. Did he walk back to you?

A. He walked back to where the child was laying, to where I was aiming to help them.

Q. How long did it take him to get back there, do you remember?

A. Well, I can't say; it wasn't but just a little bit, maybe; I don't know.

Q. Did the truck driver say anything to you about what happened?

A. Yes, he did. He come up to me and he said, "I seen your lights but I couldn't stop."

Ralph Trenar.

Q. He couldn't stop?
A. He said he didn't have no brakes.

Mr. Ballard: He said what?

A. That he couldn't stop, that he didn't have no brakes.

page 43 } Mr. Spiers:
Q. Did he say anything more?
A. That is about all I can recall.
Q. How long had you known Albert Lee Whittaker?
A. Well, I just knowed of him when I'd see him for a year or so but this is the first time I had hauled the child on the bus; I hadn't been in that community. In fact, I hadn't ever made any stop there at the Strader gate until the little Strader girl started to school.
Q. Before the little Strader girl started to school?
A. Yes, I hadn't had any stops there before.
Q. Do you know how old the boy was?
A. Well, I don't know how old the boy was; I have heard it mentioned.
Q. Tell us.
A. Well, he seemed to me like he was an awfully bright little boy. When he got on the bus of a morning and when he got off, he always spoke and he always had a big grin. When he got off the bus that evening he told me good-
page 44 } bye. He always had a smile.
Q. When you went to his body tell the jury, was he alive or dead?
A. He was dead. His body was torn all to pieces.
Q. Now, did you move the school bus? Were either of the vehicles moved at all?
A. No.
Q. From the time of the accident until the time the trooper arrived?
A. No, sir.
Q. Did Mr. Wilson say anything to you about leaving the vehicles where they were?
A. He wanted me—he asked me to pull the bus up in front of the child's body to hide it from the rest of the children on the bus. I told him, no, the bus wasn't going nowhere and for him not to move that trailer—was the words I told him.
Q. You didn't move it?
A. I didn't move it.

Ralph Trenar.

Q. Did you cover the child up?

A. I covered the child up with a blanket.

page 45 } Q. With a blanket?

A. Yes, sir.

Q. Was the child in the same place when the trooper arrived as it was when it was knocked down by the truck?

A. That's right.

Q. It wasn't moved?

A. It wasn't moved.

Mr. Spiers: That's all.

CROSS EXAMINATION.

By Mr. Ballard:

Q. Mr. Trenar, is there a bridge or abutment in the near vicinity of where this accident occurred?

A. Yes, sir, there is a little bridge or a culvert, or whatever you call it. At that time I had just got across it at the time, as well as I remember, the culvert was behind the bus where I stopped. That's what I think; I won't say for certain that's true because I don't remember.

Q. This culvert that you are speaking about, to

page 46 } His Honor and these gentlemen of the jury, runs underneath the road where the accident happened?

A. Yes, sir.

Q. There are two concrete abutments which extend above the highway on each side of the road? Is that correct?

A. As well as I remember.

Q. Which give a bridge appearance?

A. Yes.

Q. With reference to those concrete abutments on each side of the highway, where was your bus when you stopped?

A. You mean, on which side of that culvert?

Q. Yes, sir.

A. Well, as well as I remember, it was on the far side.

Q. You say, on the far side—

A. —On the side next the Bane store.

Q. On the side next to the Bane residence, on the other side of the bridge going away from Pearisburg?

A. That's correct.

page 47 } Q. Was any part of your bus extending beyond the culvert, that is, toward Pearisburg?

Elizabeth J. Strader.

A. I don't think so.
Q. Do you know whether it was?
A. No, sir, I won't say for certain but I don't think that it did. I never have paid too much attention but I don't stop right on the culvert. I wouldn't think that any part of the bus was on any part of the culvert, no.
Q. How much width, can you estimate, is there between the two concrete abutments on each side of the highway?
A. I don't know and I never did ask any questions about how wide the road is there, or anything.
Q. That is a two-lane highway?
A. Two-lane highway, yes.

Mr. Ballard: All right; I believe that's all.

RE-DIRECT EXAMINATION.

By Mr. Spiers:
Q. Did you ever hear a horn blow?
A. No.
page 48 } Q. You did not?
A. I never heard any horn blowing. I did blow mine; I heard it blowing but I never did hear any more.

Mr. Spiers: That's all.

The witness thereupon stood aside.

ELIZABETH J. STRADER,
was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Spiers:
Q. State your name.
A. Mrs. Elizabeth J. Strader.
Q. Where do you live?
A. Well, I live about five miles from Pearisburg in a little community called Bane.
Q. On September 21, 1964, did you see an accident in which Albert Lee Whittaker was killed?
A. Yes.
Q. How did you happen to be at the scene of the accident?

Elizabeth J. Strader.

A. Well, I was waiting for the bus because our
page 49 } little girl was riding on the same bus.
Q. With the Whittaker child?
A. Yes, sir.
Q. Where were you with reference to where the bus stopped?
A. I was sitting in a car, in our car, at the entrance to my father-in-law's farm.
Q. Where did the bus stop with reference to the entrance?
A. Directly in front.
Q. Right straight across the highway?
A. Yes, sir.
Q. Would you tell us then what you saw before this accident? Did you see the school bus coming?
A. Yes, I saw it coming because that was the only way I could tell which bus was hers, when the lights came on. I saw the bus coming around the curve and the lights came on.
Q. How far away was the bus when the lights came on, do you know?
page 50 } A. Well, it was just a few feet after he came around the curve and the lights came on.
Q. Did the lights ever go off before he stopped?
A. No.
Q. They continued to blink?
A. Yes.
Q. Then tell us what else you saw? Did you see any other traffic, any other cars?
A. Well, the bus came down just a few feet and the lights were on and I saw a trailer truck and a car following it.
Q. Behind the bus?
A. Yes, sir.
Q. Go ahead and tell us just exactly what you saw?
A. Well, the bus came on down and got ready to stop. The tractor-trailer was a few feet back and he pulled out in the passing lane and he kept on coming. I thought for some reason that he would stop when he got close to the school bus.
The bus stopped and the door came open and the
page 51 } children started off and the little boy rushed away from the other two and came out in the lane. The truck kept coming. In fact, he was just there. He didn't stop or anything.
Q. The other two were yours?
A. One was the younger sister of the little boy and the other child was my six-year old girl.

Elizabeth J. Strader.

Q. Where were they at the time this truck came by the bus?

A. Well, they were just getting ready to step out in the path of the truck, too, when they just did step back.

Q. When you saw the little boy, did he look in your direction?

A. Well, he got off the bus and he looked straight across at me, then I looked back and saw the truck wasn't going to stop, he turned and I think he saw the truck, too.

Q. Where was the truck then? How close to him was it?

A. It was just a few feet away. I couldn't exactly say the measurement.

Q. What was the expression on the little boy's
page 52 } face when you saw him?

A. Well, he seemed like he was in a mighty big hurry to get home about something.

Q. What did he do when he saw the truck?

A. Well, he turned and started to outrun it. He ran straight in front of the truck, in the same path the truck was going. He didn't turn to the left or right.

Q. What part of the truck hit him?

A. I couldn't exactly say because the front end of the truck had passed me before it struck the child but I could see it.

Q. You could see it?

A. As the child came back from under the wheels.

Q. The wheels hit him, the dual wheels?

A. Yes.

Q. Where was the truck with reference to the hard surface at the time it did strike the child? Was it on or off the hard surface?

A. It was on the hard surface.

Q. The little boy, where was he in the lane?
page 53 } A. In the middle part, I would say.

Q. In the center of that lane?

A. Yes, sir.

Q. What did you do after the accident?

A. Well—

Q. —Let me ask you this. Before the truck got to this place, did you hear any horn blowing? Did you hear the truck blow any horn?

A. No.

Q. Tell us what you did afterwards?

A. Well, I jumped out of the car because his sister was screaming. My first glance was at the child lying on the ground. The truck threw him back in the lane on the shoulder.

Elizabeth J. Strader.

I didn't see any life when I jumped out of the car and ran across and tried to grab his little sister and my child. The little girl ran from me and I had to chase her to the back of the bus, then I grabbed hold of her and held her head beside me, and also my little girl, so they couldn't see the child. As we cut back across the road and I got back to the car and got her in the back seat, she started screaming. I asked page 54 } the bus driver which direction he felt I should go to call for help, the quickest, and he said he felt it would be best if I went to my house, so I did that.

Q. Where was the truck driver when all this was going on?

A. I didn't see him until I went back down about an hour later and he happened to be pointed out to me.

Q. How far down the road did he go before he stopped?

A. Well, it wasn't too far. I don't know the exact measurements but it was still a good distance, at least a truck and a half length.

Q. Then did you go to call for help?

A. Yes, I rushed to take the little girl to her mother and she passed me running down to the road with this oldest sister. I told her what happened so she ran on and I let the child off at the entrance to the tenant house. I told her to stay on the porch with her grandmother. Then I went on to our house to call for help.

Q. When you got back down to the scene, did page 55 } you then see the truck driver?

A. Yes.

Q. Did you hear him say anything?

A. I didn't talk to him and I couldn't tell. He was talking to some other people but I didn't hear what he said.

Q. Did you know little Albert Lee Whittaker?

A. I knew of him but I didn't actually know him at all until they moved into our tenant house, just a few weeks before, until their house was fixed back. I met him through having to fill out papers for school admission.

Q. What type of little boy did he seem to be?

A. Well, he was a very bright little boy and very alert and very eager for school. In fact, that morning he had a book on Virginia history and he was talking about Pocahontas and he seemed so excited.

Q. What grade was he in?

A. I believe, the fourth.

Q. Did he seem like he was a happy child?

A. Yes, sir.

Elizabeth J. Strader.

Q. How about the family? Did they seem to get
page 56 } along and be a close family?
A. As far as I could tell.
Q. Do you know how old the boy was?
A. Eleven, I believe.
Q. Eleven years old?
A. Yes, sir.

Mr. Spiers: That's all.

CROSS EXAMINATION.

By Mr. Ballard:
Q. As I understand, Mrs. Strader, you were parked by the side of the road which entered Route 100, near where the accident occurred, and that was the reason you happened to see it?
A. Well, I was waiting for my little girl.
Q. How far away from the bus were you when you saw the bus stop?
A. Just a few feet across the lane. In fact, it was directly across from where I was sitting.
Q. Is there a concrete abutment there?
A. Yes.
Q. With reference to where the bus stopped, where is the concrete abutment?
page 57 } A. Oh, I guess, about six feet from the one on the right.
Q. Six feet?
A. Yes; well, it is actually on both sides of the road. There is a little bridge that cuts under the road and there is a concrete abutment on each side.
Q. On each side of the road?
A. It is not very big.
Q. On which side of the concrete abutment was the bus?
A. It was on both sides of the road—I mean, there is a concrete abutment on both sides.
Q. Yes.
A. The bus, I guess, was just a few feet in front of it. The middle and back of the bus was directly in front of that abutment on that side of the road.
Q. So that, at the time, the bus was stopped between the two concrete abutments? Is that correct?
A. Well, it is not straight across. It is slanted but the

front of the bus was ahead of it, because the children had a clear way to get by.

page 58 } Q. Did you see the bus driver?

A. Yes.

Q. Where was he when the accident happened?

A. On the bus.

Q. Did he get out of the bus before the accident occurred?

A. No.

Q. When the children got off the bus, did he get off the bus?

A. No.

Q. The children get off the bus themselves?

A. Yes, sir, that was the general procedure.

Q. Did I understand you to say that you heard no horn of any kind whatsoever?

A. I didn't hear any horn from the truck coming down that lane at all, no, sir.

Q. Did you hear any horn?

A. No, sir. In fact, I think if I had, I would have jumped out of the car as he was coming down the road.

Q. How far were you away from that bus?

A. Just a few feet across the passing lane.

page 59 } Mr. Ballard: That's all.

RE-DIRECT EXAMINATION

By Mr. Spiers:

Q. This concrete abutment Mr. Ballard is talking about, Mrs. Strader, how high are those?

A. Not very high. There is a white sign that goes into our entrance.

Q. A low concrete abutment?

A. Yes, it's low, about two or three feet.

Mr. Spiers: That's all.

The witness thereupon stood aside.

DONALD ORFIELD,

was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Donald Orfield.

DIRECT EXAMINATION.

By Mr. Spiers:

Q. State your name, please.

A. Donald Orfield.

Q. On September 21, 1964, Mr. Orfield, were you on duty in Giles County as a state trooper?

page 60 } A. Yes, I was.

Q. Did you investigate an accident which occurred on Route 100, which resulted in the death of Albert Lee Whittaker?

A. I assisted in that investigation.

Q. With Mr. White?

A. Well, I arrived after Mr. White did and I assisted him with the investigation.

Q. Were the vehicles and the people still there at the scene when you arrived?

A. The tractor-trailer was still there and the school bus had been moved.

Q. Did you check the brakes and so forth on this truck?

A. Yes, I did.

Q. The tractor-trailer?

A. Yes, sir.

Q. Tell the Court and jury the nature of your inspection and what you found?

A. The tractor-trailer had not been moved, to my knowledge, when I arrived. In checking the brakes of the vehicle, the left drive axle, with the brakes fully applied,

page 61 } the drive axle on the tractor, I could run my index finger between the brake shoe and the drum. The brakes on the trailer, the push rod or the linkage that goes into the brakes had two inches of play in them. The maximum safe range of play would be one-half inch and it should be in the neighborhood of one-quarter inch.

Q. What would that indicate to you with reference to the safety of the brakes?

A. That would indicate that the brakes were either improperly adjusted or defective.

Q. Did you talk with the driver?

A. No, sir, I talked with him after the statement was taken by Trooper White.

Q. Did this truck have a hand brake on it?

Donald Orfield.

A. Yes, it did have, however, I didn't inspect that particular brake, because I was checking on the emergency brake.

Q. Yes, sir.

A. And, of course, the tractor-trailer had a hand valve that all tractor-trailers have. It is an emergency brake and parking brake.

page 62 } Q. The hand valve?

A. That would be the one that operated the trailer brake, the hand valve. Of course, that would be defective, with two-inch play.

Q. In other words, the hand valve would be defective and the brakes wouldn't work when he pulled with it?

A. That's right.

Q. Did you measure the truck that was involved?

A. Yes, sir, Sheriff Harmon and I measured it. It was fifty feet long.

Q. Fifty feet?

A. Yes, sir.

Q. Was it loaded?

A. It was loaded. I don't know the total weight but he was loaded with livestock, hogs.

Q. Did the trailer have dual wheels?

A. No, he had tandem wheels.

Q. Do you know whether or not the brakes were checked by any professional people in Pearisburg?

A. Yes, the tractor-trailer was moved by a page 63 } wrecker from the Croy Motor Sales and it was inspected at that establishment.

Q. Mr. Orfield, did you do any investigating in connection with the marks on the highway, skid marks or any indication of where it occurred?

A. There were no marks visible, either on the hard top or on the gravel where it came to a stop. I found no skid marks at all.

Q. There was testimony here about visibility and that the distance from the school bus was over eleven hundred feet. How much farther beyond the bus did the truck go?

A. It travelled one hundred sixty-seven (167) feet. Sheriff Harmon assisted me with this measurement. I had marked where the bus had stopped and I assisted him with the measurement there to the back of the tractor-trailer.

Q. Was it on or off the hard surface?

A. The tractor-trailer was partially on and partially off

Donald Orfield.

the hard surface. It had gone to the left of the road. The left wheels would have been off the hard surface.

page 64 } Q. The rear wheels were on the hard surface?

A. Yes.

Q. Was there any indication that it had hit anything or struck anything to stop?

A. No, it had come to a stop anyway.

Q. It did not hit anything to stop?

A. No, it didn't hit anything.

Mr. Spiers: That's all.

CROSS EXAMINATION.

By Mr. Ballard:

Q. Were you with Trooper White?

A. I arrived at the scene after Trooper White did.

Q. How long after?

A. I received a call or received the information at approximately 4:10 P. M., or a few minutes after, while I was in Narrows. I drove immediately—when they informed me that there was a fatality, I drove immediately to the scene.

Q. About what time would you say you got there?

A. Well, it would have been 4:20 or 4:25 but

page 65 } that is an estimated time. I didn't note the time.

Q. Were you alone?

A. Yes.

Q. When you got out to where this accident happened you saw this tractor-trailer there on the highway, you said?

A. Yes, sir.

Q. You don't know whether or not, before you got there, it had been moved? You don't know that, of your own knowledge?

A. No, sir. From all I know, it had not been moved. I can't tell you that it had not been, no, sir, but I was told it had not been moved.

Q. Did you see the school bus?

A. No, sir, the school bus had been moved.

Q. The school bus had been moved?

A. Yes, sir.

Mr. Ballard: That's all.

Marshall Peters, Jr.

RE-DIRECT EXAMINATION.

By Mr. Spiers:

Q. I believe you said this truck was moved to the Croy Garage by the wrecker?

page 66 } A. Yes, sir.

Q. Did you follow it in?

A. Yes, I did.

Q. Was anything done to it at all between the time you got to the scene of the accident and the time these people started the inspection of it?

A. Not to my knowledge.

Q. And nothing done to tamper with the brakes or anything?

A. No, not to my knowledge.

Mr. Spiers: That's all.

RE-CROSS EXAMINATION.

By Mr. Ballard:

Q. If anyone had tampered with the brakes on the tractor-trailer before you got there, you wouldn't know about that?

A. No, sir, I wouldn't; to my knowledge, no one did.

Q. But it is not something you know, is it?

A. That's right.

Mr. Ballard: That's all.

The witness thereupon stood aside.

page 67 } MARSHALL PETERS, JR.

was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Spiers:

Q. State your name.

A. Marshall Peters, Jr.

Q. Where do you live?

A. Ripplemeade, Virginia.

Q. Where do you work?

A. Croy Motor Sales.

Q. Were you employed at Croy Motor Sales on September 21, 1964, when Albert Lee Whittaker was killed?

A. Yes, sir.

Q. In what capacity were you employed?

A. Mechanic and shop foreman.

Q. Mechanic and shop foreman?

A. Yes, sir.

Q. How long have you been a mechanic?

A. I have been doing mechanic work about
page 68 } thirteen years.

Q. Have you done work on tractor-trailer units and are you familiar with their braking systems?

A. I have done quite a bit of work on them.

Q. On the day of this accident did you go to the scene of the accident to get this truck?

A. I was with the wrecker, yes, sir.

Q. You went with the wrecker to get the truck driven by Mr. Wilson?

A. I didn't know who it was drove it at the time.

Q. You have since found out who was involved in this accident? Is that correct?

A. Yes.

Q. Did you stay with the tractor-trailer all the way back into the shop?

A. Yes, sir.

Q. From the time you picked it up until you got it to the shop, were the brakes used in any way?

A. Not until I got to the garage, but going down the steep hill into the garage, we did use the brakes.

page 69 } Q. You did use them?

A. Just a little.

Q. What did you find when you tried to use them?

Mr. Ballard: We object.

The Court: Overruled.

Mr. Ballard: Exception.

Mr. Spiers: Go ahead. You may answer.

A. I was riding the tractor and I applied the brakes going down that steep hill going into the garage and didn't any of the wheels lock right. You could tell they held some but not sufficient to hold it, though.

Q. They held some but not sufficient?

Marshall Peters, Jr.

A. No.
Q. All right. Did you do anything else to find out what was wrong with the brakes?
A. Well, not then but just to look at them.
Q. You did tear them down and look at them?
A. Later, not at the time. A few days later we
page 70 } tore into them.
Q. Where was the truck in the intervening few days?
A. It was parked behind the place.
Q. Behind Croy Motor Sales?
A. Yes, sir.
Q. Tell the Court just what you found?

Mr. Ballard: We object, Your Honor.
The Court: Overruled.
Mr. Ballard: Exception.

A. Well, I inspected the brake drums and brake lining and found the drums and lining on the rear of the tractor worn extremely—maybe a quarter inch wear on the drums on the rear of the tractor. The lining was wore down to the rivet heads.
Q. What does the lining do, as far as the brakes are concerned? When it is worn down that much, what is the condition of the brakes?
A. Well, the thinner it gets the harder it gets and the less it will grip the drum when it is applied to the drum.
Q. Did you take any of the wheels off?
page 71 } A. Yes, we took some of the drums off so we could see the lining.
Q. How about the trailer? Did you check it?
A. Yes, we took some of the wheels off the trailer and inspected them.
Q. What did you find?
A. Well, it wasn't as bad as the tractor but some of the lining on the trailer was wore down to the rivets and some of the drums was wore quite a bit.

Mr. Spiers: I think that's all.
Mr. Ballard: No questions.

The witness thereupon stood aside.

N. G. White.

Mr. Spiers: Could we have a five-minute recess?
The Court: All right.

(A short recess was taken.)

N. G. WHITE,
was thereupon recalled as a witness on behalf of the plaintiff, and having been previously duly sworn, testi-
page 72 } fied further as follows:

DIRECT EXAMINATION.

By Mr. Spiers:
Q: Mr. White, I believe you previously testified that while you were at the scene of the accident, certain pictures were made. I want you to take one that shows the back of the school bus and I will ask you if that accurately shows the scene, as you saw it during your investigation?
A. Yes, it does.
Q. Will you step down here in front of the jury and show them where the truck is in this. This is the back of the school bus and at this point in the lefthand lane you can see the truck in the distance (indicating)?
A. Yes.
Q. Was the body still at the scene?
A. Yes, sir, it was covered with a blanket.
Q. The two vehicles shown there on the road, they bore no relation?
A. No, sir, this was a car and this is the ambulance.

page 73 } Mr. Spiers: We offer that as Exhibit 3.
The Court: All right; plaintiff's Exhibit 3.

Plaintiff's Exhibit No. 3.

The picture referred to was thereupon marked as indicated above and admitted into evidence.

Mr. Spiers:
Q. The photograph you hold in your hand, Mr. White, what does that show?
A. It shows an overall view of the location at a point as far as you could see down the highway where the school bus was setting from the curve.

N. G. White.

Q. That was where the truck driver could have seen the school bus around the curve?
A. Yes, sir. This photograph was taken with that idea in mind.
Q. How far back from the bus was it?
A. Eleven hundred nine (1109) feet.

Mr. Spiers: We offer this as Exhibit 4.
page 74 } The Court: All right, plaintiff's Exhibit No. 4.

Plaintiff's Exhibit No. 4.

The photograph referred to was thereupon marked as indicated above and admitted into evidence.

Mr. Spiers:
Q. Tell the jury, Mr. White, what this picture shows?
A. That shows the tractor-trailer with relation to where it was setting on the highway when I arrived at the scene.

Mr. Spiers: We offer this as plaintiff's Exhibit No. 5.
The Court: All right.

Plaintiff's Exhibit No. 5.

The photograph referred to was thereupon marked as indicated above and admitted into evidence.

Mr. Spiers:
Q. Now, Trooper White, what does this picture show?
A. This picture shows the front of the tractor-trailer in relation to the highway.
page 75 } Q. That was taken when you got to the scene of the accident?
A. Yes, sir, taken on the day of the accident?

Mr. Spiers: We offer this as plaintiff's No. 6.
The Court: All right, plaintiff's No. 6.

Plaintiff's Exhibit No. 6.

The picture referred to was thereupon marked as indicated above and admitted into evidence.

Eugene Tuck Whittaker.

Mr. Spiers:
Q. From the time you arrived at the scene of the accident until Croy's wrecker got there, did anybody fool with or tamper with the truck in any way, that you know of?
A. Not to my knowledge.
Q. You were there at the scene all the time?
A. Yes, sir.

Mr. Spiers: That's all.
Mr. Ballard: No questions.

The witness thereupon stood aside.

page 76 } EUGENE TUCK WHITTAKER,
was thereupon called as a witness and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Spiers:
Q. Your name is Eugene Tuck Whittaker?
A. Yes.
Q. You have now been sworn as a witness?
A. Yes.
Q. You are the father of Albert Lee Whittaker?
A. Yes, sir.
Q. How many children did you have at that time?
A. We had three.
Q. Three, two girls and one boy?
A. Yes, sir.
Q. How old was Albert Lee Whittaker?
A. Eleven years old.
Q. What grade in school was he in?
A. Fourth grade.
Q. How was he getting along in school?
page 77 } A. He was getting along good in school.
Q. Did he like school?
A. Yes, he did.
Q. What kind of personality did this little boy have?
A. Well, he had a good personality. He was always bright and he was always willing to help me and do anything.
Q. Was he a happy child?
A. Yes, he was all the time a happy child.
Q. Did he and his sisters get along well?

Eugene Tuck Whittaker.

A. Yes, sir.
Q. How old are the other two girls?
A. Carolyn Jane is ten and Suzanne is sixteen.
Q. These are the only two children you and your wife have?
A. That's right.

Mr. Spiers: That's all.

CROSS EXAMINATION.

By Mr. Ballard:
Q. What is your business, profession or occu-
page 78 } pation?
A. I am supposed to be a farmer.
Q. Where do you work?
A. I don't work anywhere. I don't have no job.
Q. On September 21, 1964, was your son employed?
A. Sir?
Q. Was your son working anywhere?
A. No, sir.
Q. Did he have any earnings of any kind?
A. No, sir.

Mr. Ballard: That's all.

The witness thereupon stood aside.

Mr. Spiers: If the Court please, Mr. Ballard and I have agreed to stipulate that, according to the 1958 edition of the Standard Table of Mortality, Albert Lee Whittaker had a
life expectancy of fifty-eight and 65/100 (58.65)
page 79 } years.
The Court: All right.
Mr. Spiers: Plaintiff rests.
Mr. Ballard: Defendant rests.
The Court: The defendant rests?
Mr. Ballard: Yes, sir, and I have a motion.
The Court: All right, we will let the jury go.

Thereupon the jury retired from the courtroom and the following proceedings were had out of the presence and hearing of the jury:

Mr. Ballard: If it please the Court, the defendant respectfully moves the Court to withdraw a juror and to declare a mistrial and assigns in support of that motion the following grounds: At the outset of the trial the defendants, by their attorney, admitted liability and over objection of counsel the jury has been allowed to hear the testimony upon the liability of defendants, and we feel this is prejudicial to defendants and not germane to the issue before the jury, the sole consideration being the quantum of damages and not liability, the liability having been admitted.

page 80 }

The Court: Does counsel have an answer to that?

Mr. Spiers: I think the Court has already ruled that punitive damages were proper; it is proper testimony.

The Court: Was that your only motion?

Mr. Ballard: Yes, sir.

The Court: Overruled.

Mr. Ballard: Exception.

And this was all the evidence introduced in this case on behalf of both the Plaintiff and the Defendant.

Thereupon at 12:30 P. M. a recess was taken until 2:00 o'clock of the same day.

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AFTERNOON SESSION

The trial was resumed at 2:00 o'clock P. M. pursuant to the noon recess, there being present the same parties as heretofore noted.

And thereupon the Court and counsel retired into chambers, out of the presence and hearing of the jury, where the following proceedings were had:

Whereupon, counsel for plaintiff tendered and requested the Court to give plaintiff's written instructions, with objections by counsel for defendant and ruling by the Court as follows:

Mr. Ballard: I, of course, object to the giving of instruction No. 3 by the Court and assign as grounds for that objection that the plaintiff is not entitled to recover punitive damages on an action for wrongful death.

The Court: Is that the only objection you have?

Mr. Ballard: Yes, sir.

page 82 } The Court: In line with my theory, of course, I am giving it. The total verdict, however, shall not exceed thirty-five thousand dollars ($35,000).

And thereupon the Court and counsel returned into the courtroom, in the presence and hearing of the jury, and the Court read to the jury plaintiff's written instructions and the case was argued to the jury by counsel, after which argument the jury retired to their jury room to consider and after a time returned into court with their verdict, which verdict was accepted by the Court and the jury discharged. Following the discharge of the jury a motion was made by counsel for defendant as follows:

Mr. Ballard: May it please the Court, we want to move to set aside the verdict and award the defendants a new trial and I would like to assign written grounds. I would like the privilege of assigning written grounds in support

page 83 } of that motion within the next two or three days.

The Court: All right.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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