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Record No. 6689

In the Supreme Court of Appeals of Virginia at Richmond

RALPH J. WHITE, SR., ADMR., ETC.

v.

WILLIAM R. HUNT, JR.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

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. 6689

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 20th day of April, 1967.

RALPH J. WHITE, SR., ADMINISTRATOR OF THE ESTATE OF CATHERINE B. WHITE, DECEASED, Plaintiff in error,

against

WILLIAM R. HUNT, JR., Defendant in error.

From the Circuit Court of the City of Norfolk
Clyde H. Jacob, Judge

Upon the petition of Ralph J. White, Sr., Administrator of the estate of Catherine B. White, deceased, a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Norfolk on the 25th day of October, 1966, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and William R. Hunt, Jr., was defendant; no bond being required.

RECORD

* * * * *

page 1 }

* * * * *

ASSIGNMENTS OF ERROR

The plaintiff, Ralph J. White, Sr., Administrator of the Estate of Catherine B. White, deceased, hereby assigns as error to the judgment heretofore entered by this Court in favor of the defendant, the following:

page 2 } (1) The Court erred in overruling plaintiff's motion at the conclusion of the trial to strike the defendant's evidence and for the case to go to the jury only on the question of damages.

(2) The Court erred in granting defendant's instruction D-14, for it erroneously told the jury that if Ralph White, Sr., who was the Administrator of his wife's estate, was guilty of negligence which proximately contributed to cause the accident, then he would be barred from recovering even though the defendant was also guilty of negligence contributing to the accident. The Virginia Death By Wrongful Act statute creates a cause of action for the estate of a decedent and if the estate proved negligence on the part of the defendant contributing to the death of the decedent, the jury was required to award some damages to the estate and the husband, Ralph White, Sr., would be entitled to be considered as a beneficiary of the *esate,* regardless of his negligence.

(3) The Court erred in granting instruction D-10, in that said instruction improperly described the effect of a stop sign at an intersection and improperly stated the duty of the driver under the circumstances in the instant case and was a finding instruction that failed to embody all of the elements of the case.

(4) The Court erred in granting instruction D-1 in that the use of the language "circumstances of the situation" is ambiguous and confusing and the jury should have been instructed that negligence is the failure to do what a reasonably prudent person would have done under like or similar circumstances.

page 3 } (5) The Court erred in granting instruction D-2, for the reason that in the instant case the negli-

gence of the defendant as well as the negligence of the plaintiff could have concurred in causing the subject accident and the instant instruction, when considered with other instructions granted, suggested to the jury that there can be but one proximate cause.

(6) The Court erred in granting instruction D-4 in that said instruction improperly conveyed to the jury that the defendant's estate could not recover if Mr. Hunt's negligence was a contributing cause of the accident, the instruction stating that plaintiff could not recover unless he proved by a preponderance of the evidence that the defendant's negligence was *the* proximate cause of the accident.

(7) The Court erred in granting instruction D-6, in that the instruction was a finding instruction and failed to embody all of the elements of the case and the duties that were imposed upon the driver were not applicable to the evidence of the case and the instruction failed to adequately instruct the jury that there could be two acts of negligence concurring to cause the instant collision.

(8) The Court erred in granting instruction D-9, in that said instruction improperly stated the law and, as worded, confused the jury. Said instruction improperly instructed the jury that the defendant had the right-of-way over the driver of the automobile in which decedent was a passenger any time the plaintiff's vehicle was on East Princess Anne Road and the instruction was not related to the evidence page 4 } of the case and created a prejudicial impression in the minds of the jury that the driver of decedent's automobile had no right to leave the stop sign at the intersection of East Princess Anne Road and Rush Street so long as the defendant was any place on East Princess Anne Road.

(9) The Court erred in granting instruction D-11 for the reason that the evidence did not support a sudden emergency defense. The instruction failed to tell the jury that the burden of proving the defense by a preponderance of the evidence was on the defendant. The instruction was a finding instruction that did not embody all of the elements of the case. The instruction exonerated the defendant from all negligence as a matter of law in an erroneous legal context. The instruction further conveys to the jury that the Court is finding that the defendant acted as an ordinarily prudent person under the circumstances.

(10) The Court erred in giving to the jury to take into the jury room the tables of speeds and stopping distances set forth in Section 46.1-195 of the Code of Virginia, for the reason the defendant failed to establish the conditions that

are a prerequisite to the tables being considered under any circumstances, namely, the defendant failed to show that the 1964 Chevrolet involved was in good condition and, as a matter of fact, the evidence showed that the brakes were defective in that they had a disparite breaking power; and, further, in view of the fact the evidence shows that the defendant's car was moving with great force at the time of the collision, the table would tend to confuse the jury in its use during their deliberations.

page 5 } (11) The Court erred in refusing to grant instruction P-4 for the reason that the instruction constituted a proper statement of the law applicable to the evidence of the case.

(12) The Court erred in refusing to grant instruction P-9 for the reason that it constituted a proper statement of the law applicable to the case. The plaintiff was entitled for the jury to know that they did not have to compare the degree of negligence; that even though the defendant's negligence was slight, if such negligence contributed in whole or in part to cause the death of plaintiff's decedent, then her estate was entitled to recover.

(13) The Court erred in refusing, under the circumstances of this case, to permit Sergeant Sidney Cherry, who had seventeen years' experience as an accident investigator with the Norfolk Police Department and who had special educational training from Central State Police School in Richmond, Virginia, and Northwestern University in Evanston, Illinois, to give expert opinion evidence as to the speed of the defendant's automobile at the time of the accident, where Sergeant Cherry had testified in Police Court that the evidence of impact established that in his opinion the defendant was going somewhat in excess of normal speed.

RALPH J. WHITE, SR.,
Administrator of the Estate of
Catherine B. White, deceased,
By: HENRY E. HOWELL, JR.
Of Counsel

Filed Dec. 20, 1966. T. A. W. GRAY, D.C.

* * * * *

page 14 } INSTRUCTION P-II

The Court instructs you that it is the duty of the operator of a motor vehicle to exercise ordinary care

(1) To keep a proper lookout;
(2) To keep his vehicle under proper control;
(3) To operate his vehicle at a reasonable speed under the circumstances and traffic conditions then and there existing, regardless of any posted speed limit.

And if you believe from a preponderance of the evidence that the defendant, William R. Hunt, Jr., failed to exercise ordinary care in the performance of any one or more of the foregoing duties, then he was negligent, and if you further believe from such evidence that any such negligence was a proximate cause of the collision then you shall find your verdict in favor of the plaintiff.

Granted. C. H. J.

page 15 } INSTRUCTION P-III

The Court instructs the jury that under the law of Virginia, the driver of any vehicle travelling at an unlawful rate of speed forfeits any right-of-way which he may otherwise have.

Granted. C. H. J.

page 16 } INSTRUCTION P-IV

Ralph White, the driver of the car in which Mrs. Catherine White was riding, is presumed to be free of negligence and this presumption is not overcome until the defendant proves Ralph White was guilty of negligence by a preponderance of the evidence.

Granted. C. H. J.

page 17 } INSTRUCTION P-V

The Court instructs the jury that the driver of an automobile such as Mr. Ralph White, Sr., who, in obedience to a stop sign, stops before entering an intersection, thereafter has the right to proceed under such circumstances as a reasonably prudent person so situated would have concluded that it was reasonably safe so to do. Under these circumstances such a driver has a right to assume that the drivers of oncoming vehicles will themselves obey the law and keep their vehicles under proper control; and he may act under such assumption

unless and until the contrary appears or in the exercise of reasonable care should have appeared.

Granted. C. H. J.

page 18 } INSTRUCTION P-VI

The Court instructs the jury that under the law of Virginia, in considering the actions of the deceased in the subject suit:

(1) As a matter of law, the negligence of Ralph White, Sr., if any, cannot be imputed to the deceased, Catherine B. White; and

(2) As a matter of law, the deceased, Catherine B. White is free from contributory negligence.

The Court further instructs you that you are not to consider any negligence on the part of the deceased, Catherine B. White, during your deliberations.

Granted. C. H. J.

* * * * *

page 21 } INSTRUCTION P-9

The Court instructs the jury that under the law of Virginia, if you believe from a preponderance of the evidence that the defendant, William R. Hunt, Jr., was guilty of any negligence, no matter how slight, which caused or contributed in whole or in part to cause the death of Catherine B. White, then you shall return your verdict for the plaintiff.

Refused. C. H. J.

page 22 } INSTRUCTION P-10

The evidence is uncontradicted that there was no traffic observed by the defendant, William R. Hunt, Jr., in either of the westbound lanes of Princess Anne Road, either to the rear of him or ahead of him between him and Rush Street.

Therefore, if you believe from a preponderance of the evidence that the defendant, by exercising ordinary care in maintaining a proper look-out and keeping his vehicle under reasonable control, could have, in the exercise of reasonable care, steered his vehicle into the left hand westbound lane and by so doing could have avoided striking the vehicle operated by Ralph White, Sr., then the defendant was guilty of negli-

gence, and if you further believe that such negligence, if any, caused or contributed to cause the death of Catherine B. White, then you shall return your verdict for the plaintiff.

Refused. C. H. J.

page 23 } INSTRUCTION P-11

The Court instructs the jury that under the law of Virginia, if you believe from a preponderance of the evidence that the defendant, William R. Hunt, Jr., was guilty of any negligence which proximately caused or contributed in whole or in part to cause the death of Catherine B. White, then you shall return your verdict for the plaintiff.

Granted. C. H. J.

page 24 } INSTRUCTION P-12

The Court instructs the jury that even if you believe from the evidence that the defendant was driving at a lawful rate of speed and had the right-of-way at the intersection involved herein, nevertheless, he was not thereby relieved of the duty of keeping a reasonable lookout and otherwise exercising reasonable care to avoid a collision.

And if you believe from the evidence the defendant violated the foregoing duty and that such violation proximately contributed to cause the death of Mrs. Catherine White, then you shall return your verdict in favor of the plaintiff.

Granted. C. H. J.

page 25 } INSTRUCTION P-14

The Court instructs the jury that if you find for the plaintiff you may award such damages as to you may seem fair and just, not exceeding the sum of $35,000.00, and in ascertaining such damages you may find the same with reference to the following factors:

First, the pecuniary loss, if any, sustained by the husband, Ralph J. White, Sr., fixing such sum with reference to the probable earnings of the deceased, Catherine B. White, taking into consideration her age, intelligence and health during what would have been her probable lifetime if she had not been killed.

Second, compensation for loss of her care, attention and society to her husband, Ralph J. White, Sr., and her daughter, Alvern Graham, and her son, Ralph J. White, Jr.

Third, you may also consider such further sum as you may deem fair and just by way of solace and comfort to her husband, daughter and son, for the sorrow, suffering and mental anguish occasioned to them by her death.

And the jury may, in its discretion, if it sees fit, make such allocation of the sum awarded as it deems proper between the following survivors of the deceased:

page 26 } Ralph J. White, Sr., her husband;
Ralph J. White, Jr., her son;
Alvern Graham, her daughter.

Granted. C. H. J.

page 27 } INSTRUCTION NO. D-1

The Court instructs the Jury that "negligence" is the failure to do what a reasonably prudent person would have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances.

Granted. C. H. J.

page 28 } INSTRUCTION NO. D-2 X

The Court instructs the Jury that the "proximate cause" of an accident is an immediate or direct cause of the accident: a cause which in natural and continuous sequence unbroken by any efficient intervening causes produces the accident and without which it would not have occurred.

Granted. C. H. J.

* * * * *

page 30 } INSTRUCTION NO. D-4

The Court instructs the Jury that the fact that there has been an accident resulting in a fatality does not entitle the decedent's estate to recover from Mr. Hunt.

Mr. Hunt is presumed to have been free of negligence. The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that any such negligence was the proximate cause of the accident.

If you believe from the evidence that Mr. Hunt was not that such negligence was not a proximate cause of the accident, or if you believe from the evidence that it is just as probable that Mr. Hunt was not guilty of any such negligence as that he was, then your verdict shall be for the defendant, Mr. Hunt.

Granted. C. H. J.

* * * * *

page 32 } INSTRUCTION NO. D-6

The Court instructs the Jury that at the time and place of the accident involved herein, it was the duty of Mr. White to exercise reasonable care:

1. To keep a proper lookout so as to avoid injury to himself and others;
2. To operate his car at a reasonable speed and in a reasonable manner under the circumstances and traffic conditions existing at the time;
3. To timely and seasonably apply the brakes of his vehicle when so to do would avoid a collision;
4. To keep his car under proper control;
5. To obey all traffic signs and traffic regulations.

The Court further instructs you that each of the above is a continuing duty, and if the Jury believe from a preponderance of the evidence that Mr. White failed to exercise ordinary care to comply with any one or more of the foregoing duties, then he was negligent; and if you further believe from the evidence that such negligence was the proximate cause of the collision, then your verdict shall be for the defendant.

Granted. C. H. J.

* * * * *

page 35 } AFFIDAVIT

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

This day personally appeared before me, Douglas E. Ballard, a Notary Public in and for the City and State aforesaid, whose commission expires on August 3, 1969, Mary M. Randolph, who, after being duly sworn, states that she is Deputy

City Clerk of the City of Norfolk, Virginia, and states that Section 29-367 of the Norfolk City Code was in effect on April 17, 1966, and further states that the following Sections of the Norfolk City Code were in effect on April 17, 1966, to-wit:

Sections 29-352, 29-353, 29-346.4, 29-346-5, 29-346.6, 29-347, 29-347.1, 29-347.2, 29-348, 29-348.1, 29-348.2, 29-350.1, 29-353, 29-354, 29-355, 29-356, 29-357, 29-358, 29-359, 29-360, 29-361, 29-362, 29-363, 29-363.1, 29-364, 29-365, 29-366, 29-367, 29-368, 29-369, 29-370, 29-371, 29-371.1, 29-371.2, 29-372, 29-373, 29-374, 29-375, 29-375.1, 29-376, 29-377, 29-378, 29-379, 29-379.1, 29-380, 29-381, 29-382, 29-383, 29-384, 29-385, 29-386, 29-387, 29-287.1, 29-387.2, 29-388, 29-389 and 29-390.

The affiant further states that authority for this Affidavit was granted by the City Attorney's Office, as evidence by a member of that Department's signature hereto affixed.

MARY M. RANDOLPH

Sworn and subscribed to before me this 21st day of October, 1966, in testimony whereof I have hereunto set my hand the day, month and year aforesaid.

DOUGLAS E. BALLARD
Notary Public

My Commission Expires: August 3, 1969.

GORDON B. TAYLOR, JR.
Assistant City Attorney

Filed. C. H. J.

page 35-A } EXCERPT FROM NORFOLK CITY CODE OF 1958

* * * * *

Article XII. Arterial Streets.
DIVISION 1. GENERALLY.

Sec. 29-352. *Signs and markers.*

The city manager is hereby authorized and directed to erect and maintain, at the intersections of the streets designated in the sections of division 2 of this article, appropriate markers or signs designating such intersections as intersections at

which vehicles entering such streets shall stop, as provided in the following section. (Code 1950, § 27-49.)

Sec. 29-353. *Duty of driver crossing or entering designated streets.*

The driver of every vehicle crossing or entering any of the streets designated in the sections of division 2 page 35-C } of this article, between the designated points shall immediately, before crossing or entering the same, bring such vehicle to a full stop and, upon crossing or entering the same, shall yield the right of way to vehicles approaching on such streets, except at intersections where automatic signals are installed. (Code 1950, § 27-47.)

* * * * *

page 35-D }

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DIVISION 2. DESIGNATION.

* * * * *

page 35-E }

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Sec. 29-367. *East Princess Anne Road,* between the eastern line of Park Avenue and the city limits. (Code 1950, § 27-47.)

* * * * *

page 35-F }

* * * * *

TRUE COPY
TESTE:

MARY M. RANDOLPH, Deputy City Clerk

* * * * *

page 38 } INSTRUCTION NO. 9

The Court instructs the jury that if you believe from the evidence that Mr. Hunt was in the exercise of ordinary care operating his vehicle upon East Princess Anne Road at the time of this accident then he had the right of way and if under such circumstances he had the right to assume that Mr. White would yield the right of way to him unless and until the contrary appeared or should have appeared to him.

Granted. C. H. J.

page 39 } INSTRUCTION NO. D-10

The Court instructs the Jury that a stop sign is notice that danger lies ahead and it is the duty of the driver of an automobile faced with a stop sign to stop at a point which in the exercise of reasonable care he can see traffic moving on the street he proposes to enter. This duty to look requires not only the physical act of looking, but reasonably prudent action to avoid the danger which an effective lookout would disclose.

If you believe from the evidence that the plaintiff violated any of the foregoing duties and that such violation was the proximate cause of the accident, then your verdict shall be for the defendant.

Granted. C. H. J.

page 40 } INSTRUCTION NO. D-11

The Court instructs the Jury that where the operator of a motor vehicle by a sudden emergency, not due to his own negligence, is placed in a position of imminent danger and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as required under ordinary circumstances, and if he takes a course of action to avoid an accident such as a person of ordinary prudence placed in a like position might do, he is not guilty of negligence even though he did not adopt the wisest choice.

If you believe from the evidence that the defendant was faced with a sudden emergency, not due to his negligence, and that he thereafter acted as an ordinarily prudent person might have acted under the same circumstances, then he is not negligent, even though the action he took to avoid the accident

was not the wisest choice or course of conduct, and your verdict shall be for the defendant.

Granted. C. H. J.

* * * * *

page 43 } INSTRUCTION NO. 14

The Court instructs the Jury that if you believe from a preponderance of the evidence that Mr. White was guilty of negligence which proximately contributed to cause the accident, then, as a beneficiary of his wife's estate, he is not entitled to recover any sum from the defendant.

Granted. C. H. J.

* * * * *

page 45 } VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 25th day of October, in the year 1966.

This day came again the parties, by counsel, and thereupon came the jury sworn herein on yesterday, and having fully heard the argument of counsel returned its verdict in the following words, to-wit: "Jury finds in favor of defendant—Mr. Hunt." And thereupon said plaintiff, by counsel, moved the Court to set aside the verdict of the jury and grant him a new trial on the grounds that the same is contrary to the law and the evidence, which motion having been fully heard and maturely considered by the Court is overruled. Whereupon it is considered by the Court that said plaintiff take nothing by his suit herein and that said defendant go hence without day and recover against said plaintiff his costs about his defense in this behalf expended, to all of which said plaintiff, by counsel, duly excepted.

* * * * *

page 5 }

* * * * *

GOERGE C. CULLER, called as a witness on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Howell:

* * * * *

page 7 }

* * * * *

Q. I now show you a photograph that has been offered in evidence as Exhibit 1 and ask you what that photograph as marked by the Judge reflects?

A. This shows the point of rest after collision at Rush and Princess Anne of the Chevrolet.

* * * * *

Q. Take a look at Plaintiff's Exhibit 3. Which automobile does that reflect?

A. This shows the point of rest after impact of the Buick. It shows looking south on Rush Street.

* * * * *

page 8 }

* * * * *

Q. All right, Plaintiff's Exhibit Number 4. Will you tell us what that picture was taken to reflect?

A. This picture shows the path of the Chevrolet headed west on Princess Anne in the right lane showing skid marks prior to impact.

Q. I am going to ask you to put the Numbers 1 and 2 after the skid marks that reflect the wheels of the Chevrolet since

there are three skid marks in that photograph. Will you show me the skid marks of the right wheel of the Chevrolet and put the Number 1 on it? You have to just bear down real hard. Just put a numeral 1 just as hard as you can bear with that pen. That is it.

And put the numeral 2 by the skid marks left by the left wheels of the Chevrolet.

* * * * *

page 10 }

* * * * *

CROSS EXAMINATION

By Mr. Fears:

Q. Officer Culler, you had to use a flash to take these photographs, didn't you?

A. Yes, sir.

Q. It was pretty dark out there, wasn't it?

A. Yes, sir.

* * * * *

Q. Officer, on Plaintiff's Exhibit Number 4, this
page 11 } is looking westwardly, isn't it?

A. Yes, sir.

Q. And over here in the right corner of the photograph is the Buick that had been operated by Mr. White?

A. Yes, sir.

Q. Would you be kind enough to put a numeral 3 there?

A. Number 3?

Q. Yes. By that car.

A. Okay.

* * * * *

DAVID W. CLAYPOOLE, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

David W. Claypoole

DIRECT EXAMINATION

By Mr. Howell:

* * * * *

page 12 }

* * * * *

Q. Were you the owner of the 1964 Impala involved in this accident?
A. Yes.
Q. How did Mr. Hunt get your car?
A. We went down to the Beach and we had two vehicles down there. I had to have both of them back so I had him drive the Chevrolet back.

* * * * *

Q. Will you tell us the approximate weight of your 1964 Impala which was involved in this accident?
A. Thirty-five hundred pounds.
Q. What is the size of the regular motor that comes in this style Impala?
A. Three hundred twenty-seven cubic inches. Either 250 or 300 horsepower.
Q. What is standard horsepower?
A. If you just order the car it comes in 250.
Q. What horsepower did the engine that you ordered for this Impala have?
A. Three hundred.

* * * * *

page 13 }

* * * * *

Q. Where is the gear shift located in this Impala?
A. In the floor.
Q. How many shifts does it have?
A. It's four speed.

* * * * *

page 16 }

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Q. And who, if anyone, was with him?
A. Nobody.

* * * * *

WILLIAM RUSSELL HUNT, JR., the Defendant, called as an adverse witness, was examined and testified as follows:

DIRECT EXAMINATION (Adverse)

By Mr. Howell:

* * * * *

Q. How old were you on the date of this accident, April 17, 1966?
A. Twenty-one.
Q. How tall are you, Mr. Hunt?
page 17 } A. Six-one.
Q. How much do you weigh?
A. Two-eighty.
Q. Did you *weight* approximately 280 pounds on the date of this accident?
A. Yes, sir.
Q. What kind of car do you, yourself, own, Mr. Hunt?
A. 'Sixty-one Volkswagen.
Q. Had you driven the Claypoole Impala involved in this accident many times before the accident that is involved in this case?
A. I had driven the car before, yes.
Q Had you driven it often?
A. Not often, no.

* * * * *

page 18 }

* * * * *

Q. And he stated that he left you in his car and you departed from Sandbridge about what time? What time did you depart, approximately?

A. Approximately 6:30.

Q. Six-thirty p.m. And where were you going to take his automobile, Mr. Hunt?

A. To my house.

Q. And you live on what street?

A. Wyoming Avenue.

Q. On Wyoming?

A. Wyoming, yes, sir.

Q. That is just off of East Princess Anne Road?

A. Yes.

Q. It intersects with East Princess Anne Road?

A. Yes.

Q. How many blocks west of Rush Street is Wyoming?

A. Approximately five blocks.

* * * * *

page 19 }

* * * * *

Q. So you use Princess Anne Road at the area of this intersection an average of twice a day except for Sundays?

A. Yes.

* * * * *

page 20 }

* * * * *

Q. And sometimes you use Rush Street?

A. Yes.

Q. That is one of the more traveled streets carrying traffic from Virginia Beach Boulevard across Princess Anne Road and on into Norfolk, isn't it?

William Russell Hunt, Jr.

A. Yes, it's used. I use it myself and I have seen other people use it.

Q. All right, sir. Now, at the time of this accident the road was dry?

A. Dry, yes.

Q. You had your lights on?

A. Yes, sir.

Q. It was a clear night?

A. Clear.

Q. There is a street light on Rush Street and East Princess Anne Road, is there not?

A. Yes, sir. It's on the north side of Rush Street.

* * * * *

page 21 }

* * * * *

Q. There are a number of houses on the north side of Princess Anne Road between a little church that is east of Rush Street and on down to Wyoming?

A. Yes, sir.

Q. Aren't the houses right much next to each other all along there?

A. Yes, sir.

Q. Do you remember as a landmark this little white church that is up there about three blocks east of Rush Street?

A. I have seen the church before, yes, sir.

Q. And below that church there is a garden?

A. Further down the road.

Q. Further down the road there is a garden?

A. Yes.

Q. And when you first saw Mr. White's automobile where was his car?

A. His car was—the front end was on the median strip and—

Q. And he was going 10 to 15 miles an hour?

Mr. Harris: Let him finish his answer. I am not sure he did.

page 22 } By Mr. Howell:

Q. I certainly want to give you all the time,

William Russell Hunt, Jr.

Mr. Hunt. If you haven't finished, I apologize to you. Had you finished?

A. Yes, sir.

Q. I thought you had.

Now, at that time about how fast was Mr. White's car going?

A. I couldn't tell. I knew it was traveling 15 or 20 miles an hour, 10 or 15.

Q. Well, haven't you heretofore estimated it 10 to 15 miles an hour?

A. Yes. But I wasn't in the car. I couldn't tell.

Q. I understand, but it wasn't going fast, was it?

A. No. It wasn't going—I didn't think that he could stop in *thy* median.

Q. You thought he was going across the median strip?

A. Yes, sir.

Q. And he was going about 10 or 15 miles an hour?

A. That is correct.

Q. Now, when you first saw him you were east page 23 } of the garden?

A. West. West of the garden.

Q. West?

A. West of the garden, yes.

Q. Mr. Hunt—on Page 35, Mr. Harris—I want to refresh your recollection by reading testimony that you gave under oath in this case on September 10, 1966. You were asked: "When you left, how did you arrive at that 80 feet? Have you gone out there and measured it?

"ANSWER: I noticed there was a small garden down there and a telephone pole. It was right there. He was down from the telephone pole.

"QUESTION: You were about opposite the garden; is that the idea?

"ANSWER: Yes, sir, a little up from it.

"QUESTION: East of the garden?

"ANSWER: Yes, sir."

Now, when you say "up," you mean up above the garden?

A. Yes, sir.

Q. And so you were east, as you recall it now? You were east of the garden when you first saw Mr. White in the median —was the front part of his car in the median?

William Russell Hunt, Jr.

A. I was talking about westerly of the garden. Being up from the garden in a westerly direction.

page 24 }

* * * * *

Q. And so, were you east of the garden as you stated here on September 10th or not?

A. I was west of the garden. I couldn't actually see the garden that well at night. It was dark and I was watching the road.

Q. Well, of course, I never knew there was a garden there until you brought it up. Can you tell this Jury now? First you said on September 10th you were east of the garden. Can you tell us where you were with respect to the garden so we can have the benefit of your testimony today?

A. I was just west of the garden. The garden is approximately three houses down from the intersection.

Q. How far west of it were you?

A. Well, the telephone pole I mentioned there, you know, as being with the garden—

Q. Yes.

A. I was right in that particular area.

Q. There are a lot of telephone poles. There
page 25 } is one just at the end of the garden. There is one just east of the garden.

A. It is the one just at the west part of the garden at the end of the garden.

Q. Did you see the garden at about the time you saw Mr. White?

A. Sir? Did I see the garden?

Q. Did you see the garden at or about the time you saw Mr. White?

A. Approximately the same time. I had saw Mr. White and then I saw the garden.

Q. You saw him at approximately the same time?

A. Approximately.

Q. So at that time you were going 40 miles an hour, weren't you?

A. Yes, sir.

Q. Going at 40 miles an hour and seeing Mr. White at or about the same time you saw the garden, do you know whether you saw the garden—it made an impression on you before you

saw Mr. White or you saw Mr. White before you saw the garden?

A. I saw the garden and then Mr. White.

Q. All right, you saw the garden and you saw Mr. White and was that almost a simultaneous observation or was there an interval of time?

page 26 } A. There was no interval of time.

Q. There being no interval of time, is it a fair statement to say you were about opposite the garden when you saw Mr. White?

A. Yes, sir.

Q. All right, sir. Now, at this time there were no cars behind you that had made an impression on you?

A. No, sir.

Q. None in the left lane nor in the right lane behind you?

A. No, sir.

Q. And up ahead of you there were no automobiles other than Mr. White in either the right or the left lane between you and Rush Street?

A. Not at that time. I mean, some cars had just traveled past the intersection going easterly.

Q. I understand, but I am asking you at the time you first saw Mr. White there was not a single, solitary car in either the left lane or the right lane heading in a westerly direction in front of you between your automobile and Rush Street? Is that a fair statement?

A. Yes, sir.

Q. There was absolutely no reason whatsoever that you could not have traveled in the center lane of traffic if you so desired?

page 27 } A. I didn't have time.

Q. I know you didn't have time going 40 miles an hour, but I am asking you if you had wanted to pull over in the left lane and you had time to pull over in the left lane, there was nothing to keep you from doing so?

* * * * *

Q. Now, there was nothing to prevent you from pulling—

A. If I had plenty of time, you said, could I have pulled over in the left lane?

Q. Yes.

A. If I had time, yes, I could have.

Q. Did this Impala have power steering?

page 28 } A. No, sir.

Q. Going 40 miles an hour, you don't have any trouble moving the wheel, do you? I mean, you weigh 280 pounds, I think you said.

A. Yes, sir.

Q. Going 40 miles an hour all you have to do is just barely touch your hand on the steering wheel and the car will go to the left, wouldn't it?

A. Yes.

Q. Sir?

A. Yes.

Q. And you mean to say that in a distance of 80 feet or more that you can't turn your car, this Impala, to the left, going 40 miles an hour?

A. I didn't think Mr. White was going to stop and I immediately applied my brakes. I went for the brakes.

Q. All right. If you didn't think he was going to stop, you knew he was going into Rush Street, didn't you?

A. Yes, I knew he was going—

Q. So you would want to pass to the rear of him, wouldn't you?

A. I didn't have time. All I had time to do was go for the brakes.

Q. Will you testify and state to us, Mr. Hunt, why—you had 80 feet or more between you and Mr. White,
page 29 } didn't you, when you first saw him?

A. Yes.

Q. Depending on how far the garden is from Rush Street. You had from the garden to Rush Street to make a turn?

A. Approximately 80 feet, yes, sir.

* * * * *

page 30 }

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Q. Now, Mr. Hunt, when you struck Mr. White's automobile the front part of Mr. White's car was in Rush Street, wasn't it?

A. It was in the threshold of Rush Street.

Q. And the rear was completely out of the left lane of traffic?

A. I wouldn't say that.

Q. You don't know?

A. He was right directly across in my lane. It could possibly have been some in the left lane, also.

Q. Looking at Plaintiff's Exhibit 4, can you identify the tracks marked by the numerals 1 and 2 as being your skid marks?

A. Yes, sir.

Q. And they go in a straight line right down the middle of the right lane of the two lanes heading west, do they not, sir?

page 31 } A. Yes, sir.

Q. You never got over in the left lane, did you?

A. No.

Q. And when you struck the White car, you said the front part of that car was in Rush Street on the north side of Rush Street?

The Court: He so testified.

The Witness: It was right at the threshold here.

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page 33 }

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GENE C. MANLEY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Howell:

* * * * *

page 34 }

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Q. Would you tell us the width of the two lanes—I would like to know first the width of Rush Street.

A. Thirty feet three inches.

Q. All right, sir. Now, in Plaintiff's Exhibit 10 I see a stop

sign. Would you tell us if at my request you made
page 35 } a measurement to see how far it was from the stop
sign to the threshold of Rush and East Princess Anne Road?

A. Yes, sir.

Q. And how far was it from the stop sign to the threshold of East Princess Anne?

A. Seven feet one inch.

Q. All right, sir, and what was the width of the two eastbound lanes of Princess Anne Road?

A. Eastbound was 23 feet 1 inch.

Q. And then there was a median strip there?

A. Yes, sir.

Q. And what was the width of the median strip?

A. Twenty feet six inches.

Q. Were there any signs of any sort on the median strip or any place after you left the stop sign shown in this photograph, any other signs of any sort?

As you proceeded in a northerly direction across Rush, were there any signs on the median strip of any sort?

A. No, sir, I don't recall any.

Q. All right, sir, and what was the width of the two westbound lanes of Princess Anne Road?

A. Westbound was 22 feet 10 inches.

Q. All right, sir, now, Mr. Manley, did you measure the
distance from the north side of Rush Street in an
page 36 } easterly direction to a white church that was
located on East Princess Anne Road east of Rush Street?

A. Yes, sir.

Q. How many feet was it from Rush Street to that church?

A. From the east side of the east boundary of Rush to the sign post on the corner of the church, which would be Kennon Avenue, it's 711 feet and 3 inches.

The Court: How many feet?

The Witness: Seven hundred eleven feet and three inches.

The Court: Seven hundred?

The Witness: Yes, sir.

* * * * *

Q. Now, would you tell us how many streets there are be-

tween Rush Street and Kennon Street, the corner where the church is located?

A. Yes, sir, there are two more.

Q. Give us the names. Going east from Rush, what is the first street east of Rush?

A. It's Rush and then Fairbanks Avenue, then Palmyra and then Kennon Avenue.

Q. All right, sir. Now, at my request did you measure the distance from Rush Street to the easternmost edge

page 37 } of a garden located east of Rush Street?

A. Yes, sir.

Q. How many feet was it?

A. That was 136 feet.

Q. And *di?* you take—I will refer to this photograph as Plaintiff's Exhibit 11 and ask you what that photograph reflects with respect to the garden that you measured?

A. This photograph covers from Rush Street to Fairbanks Avenue and it's almost directly across from the garden.

Mr. Howell: We offer in evidence that photograph as Plaintiff's Exhibit 11.

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page 41 }

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SIDNEY EARL CHERRY, called as a witness on behalf of the plaintiff, having been first duly sworn, was

page 42 } examined and testified as follows:

DIRECT EXAMINATION

By Mr. Howell:

Q. Sergeant Cherry, state your full name, sir.

A. I am Sergeant Sidney Earl Cherry, a member of the Norfolk Police Division.

Q. How many years have you belonged to the Norfolk Police Division?

A. Twenty and a half years.

Q. To what department are you assigned, Sergeant?

A. I am assigned to the Accident Investigation Bureau.

Q. How many years have you worked in Accident Investigation?

Sidney Earl Cherry

A. Approximately 17 years.

Q. Would you tell us what particular training aside from your on-the-scene experience over 17 years—what particular training have you received?

A. I have attended the Central State Police School in Richmond, Virginia; the Northwestern University in Evanston, Illinois in accident investigation.

Q. All right, sir. Tell us the general nature of your responsibility and your duties with respect to automobile

page 43 } accidents.

A. I am the Accident Investigation Sergeant on my shift, whatever shift that is, and I have three accident investigators. On all serious accidents I follow up and assist them and see that the investigations are carried out.

Q. Were you the principal officer in charge of the investigation of the accident involving the death of Mrs. Cathryn White, an accident between a car driven by Ralph J. White, Sr., and one being driven by William Hunt, Junior?

A. I was.

* * * * *

page 45 }

* * * * *

Q. Now, did you find any skid marks left by the Hunt vehicle?

A. I did.

Q. Did you measure those skid marks?

A. I did.

Q. Will you relate to us what your measurements and investigation disclosed?

A. My investigation showed that the Hunt vehicle left skid marks in the right westbound lane, which would be actually the north lane. He left 58 feet with his

page 46 } right front wheel, 58 feet with his left front wheel, 36 feet with his right rear and 50 feet with his left rear before impact. After impact we had 36 foot of tire burn in an arch to the rear wheel where the vehicle came to final rest.

Q. All right, sir. Prior to the 36 feet of skid marks in an arc, what was the average skid of the first set of skid marks?

Sidney Earl Cherry

A. The average would be—it would average out 51 feet a tire.

Q. And just for the record, how do you determine the average skid marks in accident cases?

A. We measure all four wheels, add them up and divide it by four.

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page 55 }

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Mr. Howell: This is the statement when he investigated the accident. What my client said with reference to the stop sign.

The Court: Self-serving. Objection sustained.

Mr. Howell: All right, we note an exception,
page 56 } if your Honor please.

By Mr. Howell:

Q. Sergeant Cherry, based upon your 17 years experience in investigation of accidents and based upon the skid marks that you observed, the damage done to the automobiles, their position in the highway, what is your opinion regarding the speed of the Hunt automobile at the time of the accident?

Mr. Fears: Objection, your Honor, please. For goodness' sake.

The Court: Objection sustained.

Mr. Fears: He knows that is not proper.

Mr. Howell: If your Honor please—

The Court: Repeat the question that you have asked.

Mr. Howell: Based upon 17 years experience in investigating accidents and based upon the skid marks of the automobile, the damage done to the two cars and the position of the cars in the highway, what his opinion was of the speed of the Hunt automobile.

The Court: Objection sustained.

Mr. Howell: We note our exception.

I believe that is all the questions we have.

page 57 }

* * * * *

Q. What was the condition of the road, Sergeant Cherry, on the north side of East Princess Anne Road, the two westbound lanes? What was the road made out of?

A. You have asphalt, blacktop surface on the westbound lanes.

Q. All right, sir. And what was the condition of the road with regard to debris or gravel or that sort of thing?

A. The street was clear of any debris and it was dry.

* * * * *

CROSS EXAMINATION

By Mr. Fears:

Q. Officer Cherry, I believe the speed limit there

page 58 } is 40 miles an hour?

A. Yes, it is.

A. On East Princess Anne Road?

A. That is correct.

Q. That is the name of it, isn't it, East Princess Anne Road?

A. East Princess Anne Road.

Q. That is in the City of Norfolk?

A. It is.

Q. And I believe that—well, you know where Park Avenue is?

A. I do.

Q. It crosses East Princess Anne Road?

A. It ties into Princess Anne Road. It's a "T" intersection.

Q. And Rush Street lies between the easternmost line of Park Avenue and the city limits, doesn't it?

A. It does.

* * * * *

page 59 }

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Q. Sergeant Cherry, there was only one street light there

at the intersection, wasn't there, and that was on what would be the northwest corner?

A. That is correct, sir.

Q. Well, how would you describe the brightness of that light? How well did it illuminate the intersection?

A. I can only say that there is a street light there. It is not of the newest type that we have in the City. It's one of the older type lights. I know it's there because I travel it so much. I can't say about it.

The Court: Sergeant, what is the speed limit at the place where the accident occurred?

The Witness: Forty miles an hour on East Princess Anne Road and 25 miles an hour on Rush Street.

* * * * *

page 60 } Q. And both drivers were sober, weren't they?
A. As far as I could tell.

Q. And the stop sign on Rush Street, there are stop signs on each side of Princess Anne Road?

A. Controlling the north and southbound traffic.

Q. On each side of Rush Street, isn't there?

A. Yes.

Q. Now, I believe you did measure the median strip there as being 20 feet wide, didn't you?

A. Yes, sir.

Q. The Buick automobile driven by Mr. White, that wasn't over 20 feet long, was it?

A. I can't say.

Q. But that median strip was wide enough for a car to stop there in between?

* * * * *

page 61 } RALPH JOSEPH WHITE, the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Howell:

* * * * *

Ralph Joseph White

Q. How old are you at the present time, Mr. White?
A. Sixty-six.
Q. How old was your wife, Mrs. White, Cathryn?
A. Sixty-five.

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Q. How long had you been operating this station?
A. A little over two years.
Q. Where were you and Mrs. White living?
A. Henrico Street.
Q. What route would you take going down to your place of business at Oak Grove?
A. Well, usually come up and go down through Overbrook into Rush Street and Rush Street on through the Industrial Park and into Virginia Beach Boulevard and on out 13 and 13 to 168.
Q. All right, sir. Now, this accident happened on Sunday, April 17th. About what time did you leave your store?
A. Well, I say right a little after 6:00 o'clock. I couldn't say exact.
Q. What type of car were you driving at that time?
A. 'Fifty-seven Buick.
Q. What was the state of mechanical repair of that car?
A. First class.

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Q. Before this accident was your physical condition in any way impaired?
A. No.
Q. Now, when you reached the intersection of Rush and East Princess Anne Road, what did you do, Mr. White?
A. Well, there is a stop sign there. I stopped at that and then I pulled out a little further to the edge of Princess Anne Road on account of there are shrubs over there to see up and down the highway.

Ralph Joseph White

Q. What side are those shrubs on?

A. On the left-hand side. So I pulled out there and—

Q. When you say you pulled out there—

A. I stopped there again at Princess Anne Road.

Q. All right, sir. Now, if you will, wait just a minute. I am showing you Plaintiff's Exhibit 1, a picture, Mr. White, and will you—

A. In other words, there is some shrubs over here you can't see there. You can't see them in there.

Q. All right, on which side of the picture?

A. This is your stop sign here. I was back here and I stopped here and then pulled on out there.

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page 67 }

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Q. All right, sir. Now, what did you do then?

A. Then I waited for about two or three cars to pass and then I proceeded across the highway and I got—I slowed up in the median strip and started on across. A car was up there at that little church you see in the picture there that was coming down. Of course, at nighttime, of course, you can't tell just the speed.

Q. Let me stop you just a minute, Mr. White. When did you look? When you got to the median strip? You said you slowed down?

A. Yes, I looked.

Q. What direction did you look?

A. I looked to my right.

Q. All right. When you looked to your right what could you see to your right?

A. I could see this car coming down up there about three blocks or better. It looked like an ample time for anybody to cross the highway. So I started on across and as I got my front wheels into Rush Street my wife hollered, page 68 } "It's going to hit us." And that was it.

Q. All right, sir. How many times had you crossed Princess Anne Road going into Rush Street in the two years preceding this accident?

A. I have been crossing it for over two years.

Ralph Joseph White

* * * * *

Q. Mr. White, is there any landmark east of Rush Street that you could relate where this automobile was with respect to?

A. Yes, a little church up the road there.

* * * * *

page 69 } Q. About how fast were you going after you say you slowed down at the median strip? How fast were you going?

A. Well, I wasn't running over 15 miles an hour.

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page 71 }

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CROSS EXAMINATION

By Mr. Fears:

Q. Mr. White, you were on Rush Street, weren't you?

A. How was that?

Q. You were on Rush Street before you attempted to cross Princess Anne Road?

A. Yes.

Q. And I understand you to say that you stopped at the stop sign and then you pulled up to the edge of the roadway?

A. Pulled up right at Princess Anne Road because there is a bunch of shrubs over there on the left. I don't know whether they cut them down or not. You have to come up there to see any oncoming traffic and I waited for two or three cars to go by.

Q. There was traffic coming from your left?

A. Yes.

page 72 } Q. Is that right, Mr. White?

A. Then I proceeded on out and I looked up to my right up there.

* * * * *

Q. You did. All right. And, of course, you looked to your

left because you knew if you didn't look, you might get hit when you pulled out there, wouldn't you?

A. Well—

Q. And so, Mr. White, when you saw these cars coming from your left, as soon as they got by then you pulled out to go to the median strip, didn't you?

A. That is right.

Q. And it was at the median strip, I understood you to say, that you were going 10 to 15 miles per hour?

A. I said I slowed in the median strip.

Q. Slowed to what? Ten to 15?

A. No. No. Below that.

page 73 } Q. Below that? All right, sir. And it was at that point, I understood you to say, you looked to your right?

A. That is it.

Q. And you saw a car down by the church?

A. That is right.

Q. Well, is that the church that Mr. Manley testified to was 711 feet away? Is that the church you are speaking of?

A. That is the church.

Q. Now, you didn't stop there in the median strip, did you?

A. No.

Q. You could have, of course?

A. What?

Q. You could have?

A. I never stopped in that median strip. It's not wide enough for my car. The front end would be out and my back end would be out.

Q. But you just slowed down, as I understand it?

A. That is right.

Q. And then you looked directly ahead and then you accelerated to go across—

A. That is right.

Q. —those two westbound lanes and you never

page 74 } did look to your right again, did you?

A. Well, I didn't see no need to look to my right again after I got in there. I was three lanes across.

Q. But from the time that you looked in the median strip, you never looked to your right again?

A. Oh, yes, I looked there, certainly?

Q. As you pulled across the strip?

A. I always look.

Q. But you looked when you were in the median strip?

Ralph Joseph White

A. That is right.

Q. And then you pulled on across and up until the time you were hit you never looked to your right again, did you?

A. There was no need to.

Q. Now, I understood you to say that you heard your wife exclaim, "Look out, he is going to hit us."

A. That is right.

Q. And when you heard that you accelerated, didn't you?

A. That is right.

Q. And after you had accelerated that is when the impact occurred?

A. The impact occurred before I even got a chance to get my foot down on the floor.

page 75 } Q. Well, Mr. White, of course, you recall when you gave your deposition at my office with Mr. Howell in attendance?

A. Yes.

* * * * *

Q. I asked you these questions and you gave this reply:

"QUESTION: When you heard her exclaim that, is that when you accelerated?

"ANSWER: That is right.

"QUESTION: After you had accelerated, the impact occurred?

"ANSWER: Yes."

That is true, isn't it?

A. That is true.

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page 77 }

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Q. But, in any event, from the time you were in the median strip and you looked to your right and you saw this car down the roadway, you never did look to your right again as you proceeded across Princess Anne Road, did you?

Ralph Joseph White

A. When you start across a highway like that, you look where you are going and you go ahead. You certainly don't have vision to look around to your side and then look ahead.

* * * * *

page 99 } (IN CHAMBERS)

Mr. Fears: If the Court please, on behalf of the defendant, Mr. Hunt, we move the Court to strike the evidence of the plaintiff and enter up judgment for the defendant because, number one, the plaintiff hasn't shown any evidence of negligence whatever on the part of Mr. Hunt. He has called Mr. Hunt first as an adverse witness and Mr. Hunt has testified that he was proceeding along there at 40 miles per hour and at a distance he judged to be about 80 feet. Mr. White from behind oncoming traffic pulled out in front of him. He applied his brakes and skidded forward in a straight line.

Insofar as the administrator, Mr. White, is concerned, he has testified at some incredible fact. He said when he stopped in the median strip he could see this car down by the white church which, by the plaintiff's own evidence, is 711 feet away and then he proceeded forward and never looked to his right again and the impact occurred.

If the Court please, he hasn't shown any excessive speed. He hasn't shown under any testimony any improper lookout.

page 100 } He hasn't shown any evidence of negligence whatsoever. If the Court were going to say that the defendant was, in fact, 711 feet away when the man had to go 22 feet to go across in front of him, I would say, Judge, that is incredible on its face.

Secondly, insofar as Mr. White as a beneficiary is concerned, should the Court not strike the evidence I would ask the Court to rule that he, himself, is negligent as a matter of law and cannot recover as a beneficiary because he didn't keep a proper lookout as a matter of law under the circumstances.

I don't recall any evidence in this case of negligence that they have shown on the defendant.

Mr. Harris: The Jury would have to speculate in this case, Judge, as to any negligence upon the part of the defendant. There is none.

Mr. Fears: They are bound by the adverse witness's testimony.

Mr. Harris: There is none whatsoever shown.

Mr. Howell: If your Honor please, the evidence is that Mr. White came to a stop sign and stopped and looked and waited until traffic was clear on his left, and once having stopped he had a right to move forward and—

The Court: Not in the face of oncoming traffic
page 101 } dangerously near.

Mr. Howell: Not dangerously near, sir, but the testimony is, your Honor, please, when he got to the median strip he slowed and this car was three blocks to his right down the road. The witness, Hunt, has said that when he first saw Mr. White that he was about opposite a garden there and that garden is a hundred and some feet from the accident. Now, the negligence, if any, on the part of Mr. White would not bar him as a beneficiary. It wouldn't bar the estate from recovering. And the testimony is that this boy says he was going 40 miles an hour. But speed the Supreme Court has said—

The Court: Excuse me just a minute. Going back to the other, barring Mr. White from recovering, that is for the Jury to say, whether the surviving husband should take all or how much or nothing in a class of people mentioned in the Statute. And that wouldn't bar the others from recovering or wouldn't bar him from recovering, I don't think, because of his relationship as husband giving him the right.

Mr. Howell: Judge, regardless of the posted speed limit—

The Court: I think that it's a case where the parties could differ as to whatever a reasonable, prudent per-
page 102 } son would have done under like or similar circumstances, whether having stopped did he have a right to go forward when he didn't see anything else coming, although what was coming was dangerously near. I think it's a Jury question.

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The Court: They can take into consideration to determine his speed the result of the operation. That is, the
page 103 } pictures showing that—the Jury might say that a man couldn't do the damage to a car unless he was going, say, 60 to 80 miles an hour.

* * * * *

Mr. Howell: If your Honor please, I think I ought to emphasize one thing and that is assuming he doesn't change his testimony, I am going to move to strike the defendant's case

and let it go to the Jury on the question of damages on the theory that we have proved negligence as a matter of law on the part of the defendant. This defendant admittedly saw this car under his testimony 80 feet from the
page 104 } intersection and, Judge, he admits that there were no cars behind him and no cars in front of him between him and Rush Street and yet he doesn't make any effort to pull over in the left lane and says he didn't have time to do so and just went straight down the road, leaving an average of 50 feet of rubber on the road and then he skidded around 36 more feet in an arc. I submit that making no effort and giving no reasonable explanation except that he didn't have time—all he had to do was pull over in the left lane because our man had already gotten the front of his car in Rush Street.

* * * * *

The uncontradicted testimony was our man had the front part of his car in Rush Street. You can see that his tracks in those pictures go right down the northernmost lane or the outermost lane and they don't veer one inch. He went right into the side of our car while the front part was in Rush Street.

The Court: You want to answer him now?

Mr. Fears: I would just like to say with ref-
page 105 } erence to that argument, your Honor, please, as the Court knows, the duty is on the defendant to keep to the right and, furthermore, under the laws of this State not to change lanes until he can do so in safety. What Mr. Howell is saying that the Court should rule is that he is guilty of negligence as a matter of law because in this emergency situation he didn't make a split second decision.

The Court: He had a right long time to make a decision.

Mr. Fears: In 80 feet?

Mr. Harris: Eighty feet when he saw him going across.

Mr. Fears: It would take him 30 feet to get his foot on the brake.

Mr. Howell: All we want him to do is change his wheel. Take him a half a second to turn his wheel.

Mr. Fears: But under the Code it says that you keep to the right and you will not change lanes except when you can do so in safety.

Mr. Howell: He could do so in safety.

Mr. Fears: That is a question for the Jury.

The Court: It is a question for the Jury.

Mr. Howell: All right, sir.

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Mr. Howell: Note our exception to the Judge's not ruling to sustain our motion to strike the defendant's evidence.

Mr. Fears: Judge, we want to put into evidence the Norfolk City Code we have had duly certified with reference to this intersection. I offer it with reference to the signs and markers and particularly with reference—

The Court: Didn't the police officer, the Sergeant, testify about that? I asked about the speed myself.

Mr. Fears: This is with reference to East Princess Anne Road between the eastern line of Park Avenue and the city limits, as the police officer testified that Rush Street was between the eastern line of Park Avenue and the

page 107 } city limits on Princess Anne Road.

Mr. Howell: No, he didn't.

Mr. Fears: Yes, he did.

The Court: And bring a witness here,—

The Witness: They are certified.

Mr. Fears: They are all certified, Judge.

Mr. Howell: What does this say? What is this?

Mr. Harris: That East Princess Anne Road is an arterial highway.

Mr. Howell: I don't know what you are offering it for. We have admitted there is a stop sign.

Mr. Fears: But it says the driver of every vehicle crossing or entering any of the streets designated between the designated points shall immediately before crossing or entering same bring their vehicle to a full stop and upon the same yield the right-of-way to vehicles approaching on such street except at an intersection where automatic signals are installed. It goes on and points out in here, if your Honor please, the penalties and, of course, the designation of the arterial streets, one of which is East Princess Anne Road where this accident occurred.

Mr. Howell: I object to the relevancy of this, your Honor, please. It's in evidence that there was a stop sign

page 108 } on our side. We stopped. Now, we have got a divided highway. We don't have to stop again. After we get into the median strip we are not required by law to stop in the median strip.

Mr. Harris: That is not what we are saying.

Mr. Howell: If that is what you are saying, that is admitted and I don't think to put in a whole bunch—

Mr. Fears: This doesn't go to the Jury. I am just offering it because the Court does not take—

The Court: He wants it for some instruction, I reckon.

Mr. Howell: If it doesn't go before the Jury, I don't want it in evidence. You can argue.

Mr. Harris: This just adopts the State Code and makes it a violation in the City to do these things.

Mr. Fears: Judge, this is a Municipal Ordinance. I realize the Court doesn't take—

The Court: You can prove it.

Mr. Harris: It's certified.

The Court: He won't get any instruction on it unless it applicable.

Mr. Fears: It is applicable, Judge.

page 109 } Mr. Howell: We will argue that when instructions come. I will agree that if Mrs. Hudgins came up here that she would say that is the Code Section.

Mr. Harris: All right.

Mr. Howell: But I am not admitting the relevancy of it.

Mr. Fears: All right, sir.

Mr. Harris: That is all that is necessary.

* * * * *

WILLIAM RUSSELL HUNT, JR., the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fears:

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* * * * *

Q. Approximately what time did the accident occur?

A. Seven-thirty p.m.

Q. What street were you on?

A. Princess Anne Road.

Q. Which direction were you going?

A. West.

William Russell Hunt, Jr.

Q. Which lane were you in?
A. Right far lane.
Q. What was the condition of traffic as you approached Rush Street going west toward the Beach?
A. You mean going east?
Q. Pardon me, east toward the Beach.
A. Well, there was traffic on the other two lanes on the other side of Princess Anne Road going east.
Q. Headed toward the Beach?

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Q. Well, Mr. Hunt, is there anything there that you were able to identify as being approximately the vicinity of where you were?
A. The garden and the telephone pole.
Q. Well, did you make any measurement as to where the telephone pole was with reference to this intersection?
A. Yes, sir. It's 80 feet.

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Q. Mr. Hunt, where were you with reference to that garden, then, when you first saw Mr. White?
A. I was on the western end of the garden.
Q. And where is the telephone pole, then, with reference to that?
A. It's on the western end of the garden, also.
Q. Let me show you a photograph here and see if you can identify it for the Jury. This is Plaintiff's Exhibit Number 11. Can you point out to the Jury where this telephone pole is that you are speaking of?
A. It's right here. (Indicating.)
Q. Well, Mr. Hunt, when you saw Mr. White's automobile and you were in that position, what did you do?
A. I immediately tried to apply my brakes.

William Russell Hunt, Jr.

Q. Well, what did you do? When you applied your brakes what did your car do?
A. Skidded down the road.
Q. Did it go straight, right, left?
A. It went straight.
Q. Well, why didn't you turn to the left?
page 114 } A. I didn't have time to. I didn't have time.
Q. Well, now, when your car came in contact with his car, what happened to your car and to his car, if you know?
A. We both turned circles and I think Mr. White's back bumper and his momentum going across the road pulled me around also.
Q. He was going—
A. North.
Q. To your right?
A. Yes.
Q. On Plaintiff's Exhibit Number 7, is this the bumper you are referring to on the rear of the car?
A. Yes, sir.

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Q. You have done that, too, haven't you, and so you have had plenty of experience in steering an automobile?
A. Yes.
Q. And with your size, some 280 pounds, you have no trouble at all turning an automobile when you want to turn it?
A. No.
Q. Then on this particular occasion, according to your testimony, even though you saw this gentleman slow at the median strip, as you say, you knew he was going across when you first saw him?
A. Yes.

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By Mr. Howell:
Q. You had no control whatsoever over your car when you

were 80 feet from the point of collision except to press on the brake and hold the steering wheel steady, is that right, sir?

A. What else could I do?

Q. You were going so fast—

A. No, I was not going so fast I didn't have control over the car.

Q. Well, why didn't you make any effort whatsoever to veer just a little bit to the left?

A. There wasn't time.

page 119 } Q. You didn't have time? You mean that 80 feet in the City of Norfolk does not allow you sufficient time under the conditions that you were driving on this night to make any turn whatsoever to the left?

A. I did all I had time for.

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Q. Why in the world did you state under oath, "Yes, sir," when you were asked if you were not east of the garden when you said up from it?

A. I guess I was confused because I was west of the garden.

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Q. Now, you had not come to a stop at the time of the collision, had you?

A. No.

page 124 } Q. You have no idea how fast you were going at the moment you struck the White automobile?

A. I didn't see the speedometer or anything.

Q. And you do, however, know that the front part of the White car was into Rush Street?

A. It was on the threshold of Rush Street, yes, sir.

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(IN CHAMBERS)

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Mr. Howell: I renew my motion to strike the defendant's evidence for the reason previously stated and have the case go to the Jury only on the question of damages.

The Court: Both motions are overruled by the Court, to which action of the Court counsel for the defendant and plaintiff duly except.

I expect you want to except to all the instructions on both sides since you made the motion.

* * * * *

page 128 } EXCEPTIONS

Mr. Howell: The plaintiff excepts to the refusal of the Court to grant Instruction P-4 for the reason that the instruction properly stated the law and the evidence related to the principle of law involved and its denial was prejudicial to the plaintiff's proper presentation of the law and evidence to the Jury.

The plaintiff excepts to the failure to give Instruction P-7 for the identical reason stated for Instruction P-4.

Plaintiff excepts to the failure to give Instruction P-9 as submitted for the reason it properly stated the law and the words, "No matter how slight," should not have been denied by the Court.

The plaintiff excepted to the granting of Instruction D-1 with respect to the language, "What a reasonable, prudent person would have done under the circumstances of the situation," these words being confusing, and it should have read, "Under the same or similar conditions."

The plaintiff excepted to Instruction D-2 for the reason that it tended to create in the minds of a Jury that there could be but one cause for the occurrence of the
page 129 } decedent's death where in this case there could be several proximate causes.

The plaintiff excepts to the granting of Instruction 5, it being an amendment of Instruction 4 which was rejected, for the reason the amendments do not cure the errors present therein and the instruction constituted an inaccurate statement of the principle of law involved.

The plaintiff excepts to the granting of Instruction 7, it being an amendment of Instruction 6 which was rejected, for the reason that it constitutes error to charge the plaintiff under the circumstances of this case to timely and seasonably apply the brakes of his vehicle when so to do would avoid a collision. This statement of law was taken out of context, does not relate to the evidence of the case and must be related to the right of the plaintiff to proceed if in the exercise of reasonable care he would have been entitled to believe that he could safely cross the road.

The plaintiff objects to the granting of Instruction Number 9 for it improperly states the law as related to the evidence of the instant case.

The plaintiff excepts to the granting of Instruction Number 10 for it improperly states the duty of a driver
page 130 } with respect to a stop sign, in particular where it states that a stop sign is a notice that danger lies ahead.

Plaintiff excepts to the granting of Instruction D-11 for under the evidence of the instant case the defendant was not entitled to the granting of a sudden emergency instruction.

The plaintiff excepts to the granting of Instruction D-14 for the reason that the Virginia Death Statute creates a cause of action for the wrongful death of a decedent and once negligence has been proven as causing the death, the *benificiaries* are entitled to recover as a matter of statutory right and the statute in no way provides for the preexemption of a *benificiary's* right by reason of a finding of contributory negligence.

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"We, the Jury, find for the defendant."

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Mr. Howell: Your Honor, please, we would like to move the Court to set aside the Jury's verdict and grant a new trial. We would also on that score like an opportunity to prepare a brief memorandum on the instructions that were granted and those that were denied and then we also renew our motion that insofar as the recovery of Mr. White and Mrs. Graham that we proved negligence as to the defendant and that the only question would have been the contributory negligence of Mr. White and his not being a proper *beneficiary*.

We seriously contend that there were errors in the granting of instructions. We would ask for a reasonable time in which to prepare a memorandum and argue with supporting cases the errors we assign.

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The Court: I think the final determination of the case is what you want and you want it as quickly as you can get it under the law. I am going to overrule your motion, both motions, and note your exceptions.

Mr. Howell: Exception is noted.

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A Copy—Teste:

Howard G. Turner, Clerk.

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