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Record No. 6693

In the Supreme Court of Appeals of Virginia at Richmond

IRENE BANKS JOHNSON

v.

RACHEAL WILMOTH

FROM THE CIRCUIT COURT OF BUCKINGHAM 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. 6693

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 21st day of April, 1967.

IRENE BANKS JOHNSON, Plaintiff in error,

against

RACHEAL WILMOTH, Defendant in error.

From the Circuit Court of Buckingham County
George F. Abbitt, Jr., Judge

Upon the petition of Irene Banks Johnson a writ of error is awarded her to a judgment rendered by the Circuit Court of Buckingham County on the 6th day of December, 1966, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Racheal Wilmoth and another were defendants; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 21 } INSTRUCTION D

It was the duty of the plaintiff as she walked along the highway to exercise ordinary care for her own safety and protection and to look and listen for approaching vehicles proceeding in dangerous proximity to her and to step from her course into a place of safety if it reasonably appeared that he was in danger of being struck.

And if the jury believe from the evidence that the plaintiff violated any of the foregoing duties, then she was negligent; and if you further believe from the evidence that any such violation was the sole proximate cause of his being struck, or that it proximately contributed thereto, then you *chall* return your verdict in favor of the defendant.

Given. G. A., JR.

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This case having been duly set for trial on the 2nd day of November, 1966, on that day came the parties and their attorneys and came a jury panel of thirteen free from lawful objections and each party having struck off from the said panel three members, the jury composed of L. R. Shores, R. L. Shores, W. E. Swan, Bobby Gowin, Lindberg Hardiman, and W. C. Heath were sworn and having heard the evidence of the plaintiff the defendant moved the court to strike the evidence of the plaintiff and enter up judgment for the defendant, which motion the court overruled, to which action of the court the defendant excepted and the jury having heard the evidence of the defendant the plaintiff moved the court to strike the evidence of the defendant and the defendant renewed her motion to strike the evidence of the plaintiff and enter final judgment for the defendant and the court having overruled each motion each party excepted to

WHEREUPON, the jury having retired to its jury room to consider its verdict and sometime thereafter returned into the action of the court upon the respective motions.

court and delivered its verdict, "We, the jury, on the issue joined find for the defendant."

Signed:
Wesley E. Dunkum
Foreman

THEREUPON, the plaintiff by counsel moved the court to set aside the verdict of the jury upon the ground page 29 } that it is contrary to the law and to the evidence and for errors committed in overruling motions and objections and in the granting and refusal of instructions as will appear in the transcript of the testimony and incidents of the trial. Counsel for the plaintiff having indicated to the court that he did not desire to submit further argument or legal memorandum in support of his motion the court did overrule the said motion and proceeding to enter judgment upon the verdict of the jury and doth Adjudge and Order that the plaintiff recover nothing of the defendant and that the defendant recover of the plaintiff her costs in this behalf expended, to all of which action of the court the plaintiff duly excepted.

Enter: GEORGE F. ABBITT, JR., Judge

I ask for this order:
J. SEGAR GRAVATT
Counsel for the defendant

Seen:
LOUIS ELLENSON
ELLENSON AND FOX
Counsel for the Plaintiff

Date: 3:00 P.M.—12-6-66.

The above order was entered after notice by J. Segar Gravatt by letter written and mailed on November 16, 1966 unto Louis Ellenson, attorney of record for the plaintiff that this order would be presented to me, George Abbitt, Jr., Judge, at Appomattox, Va. in the Circuit Court room of Appomattox County at 3:00 P.M. o'clock, December 6, 1966, which written notice was acknowledged by the said attorney for the plaintiff by letter to me dated November 30th, 1966, stating the said plaintiff attorney would not appear. The said

attorney for the Plaintiff having refused to endorse this order.

GEORGE ABBITT, JR., Judge

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NOTICE OF APPEAL

TO: John C. Spencer, Clerk of the Circuit Court for the County of Buckingham, Virginia

NOTICE is given that Irene Banks Johnson, Plaintiff and Appellant in this cause, appeals in this cause and will apply for a Writ of Error and *Supersedeas*.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in submitting the issue of the Defendant's negligence to the jury since the evidence of record unequivocally demonstrated that the Defendant was guilty of negligence as a matter of law.

2. The Trial Court erred in submitting the issue of contributory negligence on the part of the Plaintiff to the jury since the evidence of record unequivocally showed that the Plaintiff, as a matter of law, was not guilty of any negligence proximately contributing to cause her injuries.

3. The Trial Court erred in granting Instruction "D" offered by the Defendant over the objection and exception of the Plaintiff since this Instruction was absolutely inapplicable to the facts and circumstances of the case at bar.

ELLENSON AND FOX
BY: ALVIN B. FOX
Counsel for the Plaintiff

Filed in Clerk's Office 10-19-66.

JOHN C. SPENCER, Clerk

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W. R. ROACH, a witness, called by the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fox:

Q. Trooper, for the record, would you state your name and your occupation?

A. W. R. Roach. I am a State Trooper.

Q. How long have you been a State Trooper?

A. Ten years.

Q. How long have you been assigned to the general area of Buckingham County?

A. Since March of 1961.

Q. Are you familiar with the area of the county over around Arvonia, State Route 652?

A. Yes, sir.

page 18 } Q. Specifically, did you as a State Trooper have the task assigned to you of investigating a collision between an automobile and a pedestrian, the automobile being driven by Racheal Wilmoth, and the pedestrian Mrs. Irene Banks Johnson, which happened on November 8, 1964 in Buckingham County?

A. Yes, sir, I did.

Q. You did investigate that?

A. Yes, sir.

Q. At the general area of the collision between the automobile and the pedestrian, can you give us some idea of the general nature of the road, the country, whether it is level, hilly, or exactly what area of the county we are dealing with. I know these gentlemen may be much more familiar with that particular spot than we are.

A. Yes, sir. It was on State Route 652, which is a paved road. The road is generally a slight curve, crooked, and the pavement is a little uneven. It is not the best road. The Wilmoth vehicle was going down a slight grade at the point of impact.

Q. Can you tell us about that general area where the grade is, the crest, where a church is, if there is a church in this area, and the general layout of the area; about how wide the road is and those factors, Trooper?

W. R. Roach

A. Well, there is a church there as you come down. That would be coming toward Arvonia on Route 652, the
page 19 } direction in which Mrs. Wilmoth was traveling in.
As you come just past the church you come downgrade. It levels off just a little bit, then you go over another slight grade.

Q. Going toward Arvonia, this collision occurred over the next grade?

A. Yes, sir.

Q. This church, going toward Arvonia, that would be on the driver's right, Mrs. Wilmoth's right?

A. Yes, sir.

Q. That is a Negro church, is it not?

A. Yes, sir.

Q. What day of the week did this collision occur?

A. It occurred on Sunday.

Q. Sunday?

A. Yes.

Q. Approximately what time?

A. 6:00 P.M.

Q. That is Eastern Standard Time?

A. Yes.

Q. Was it light or dark at the time?

A. It was dark.

Q. Was the highway lit in any manner?

A. No, sir.

Q. Is it generally an open area there?

A. Yes, sir.

page 20 } Q. Now, would you tell us approximately, from your knowledge of that particular road, about how wide it is, Trooper?

A. The road, the pavement is 16 feet wide.

Q. 16 feet wide?

A. Yes, sir.

Q. How about on the right-hand side of the road there, at the point of the general area where this collision took place, is there a shoulder?

A. There is a shoulder that is 18 inches from the edge of the pavement, 18 inches, and then it tapers off down into the ditch.

Q. It goes into the ditch after 18 inches?

A. Yes, sir.

Q. You say this crest, this hill or rise that we are talking

about, can you give us some description of how steep the angle is?

A. I am a very poor hand in giving you degrees.

Q. I don't mean degrees, Trooper, because I don't think they mean much to anybody but engineers and I cannot understand them what they are talking about. But can you give us some general idea with your hands, maybe, about the general shape of it?

A. As you come down by the church, you come down something like this (indicating with hands) and it grad-
page 21 } ually levels off and then goes over again.

Q. Does it go up and then over, or what?

A. It goes up slightly, very slightly, and then it drops off down.

Q. With relation to the crest of this drop-off that you are talking about past the church, further on down toward Arvonia, did the collision occur past the crest of the hill or before you get to it, going toward Arvonia?

A. Going toward Arvonia, it would be just over the last hill crest.

Q. Trooper, was Mrs. Johnson at the scene when you arrived?

A. No, she was not.

Q. Did you determine the exact point of the impact?

A. I went back to the scene with Mr. and Mrs. Wilmoth. They showed me the place.

Q. Any information that you would have about that would be what they told you about where it occurred?

A. Yes, sir.

Q. Did you take a statement from Mrs. Wilmoth in regard to what occurred there that Sunday night?

A. Yes, I did.

Q. Was that taken right there at the scene?

A. Yes.

Q. Would you reveal then to the jury the state-
page 22 } ment that Mrs. Wilmoth gave to you?

* * * * *

page 24 } A. Mrs. Wilmoth stated that she was going about thirty-five to forty miles per hour and had passed some other pedestrians near the church and was meeting another car. So she dimmed her lights and was not sure whether the other car dimmed the lights or not. Then,

as she was at the other car, she heard and felt the bump and also her husband told her she had hit something. She stated that she stopped right after hitting her and went back to her and she was in the ditch with her husband holding her up on her feet.

By Mr. Fox: (Cont'd.)

Q. All right, sir. About how far was that point where Mrs. Wilmoth struck Mrs. Johnson from the church, Trooper?

A. From the church?

Q. From that Negro church that we are talking about.

A. That would be approximately 75 yards from the church.

Q. About 75 yards?

A. Yes.

Mr. Fox: Thank you, Trooper.

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RE-CROSS EXAMINATION

By Mr. Gravatt:

Q. Mr. Roach, you said that there are 18 inches of approximate level shoulder on the south side of this road?

page 28 } A. Yes, sir.

Q. Is that where this plaintiff was as pointed out to you by Mr. and Mrs. Wilmoth? Is it at that point that there is 18 inches of approximately level shoulder?

A. Yes, sir.

Q. You said that the shoulder then gradually tapers off to the ditch?

A. Yes, sir.

Q. How far is it from the hard surface to the ditch?

A. From the edge of the pavement to the ditch?

Q. Yes, sir.

A. It is three feet.

Q. Is there any reason why a person could not occupy the space and the place between the edge of the hard surface and the ditch?

A. (Pause)

Irene Banks Johnson

Q. There is no reason why anybody could not step out beyond the 18 inches to the ditch, is there?

A. No, there was nothing in the way. But from 18 inches, it tapers off so steep, I doubt seriously if anyone could stand up.

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page 29 }

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By Mr. Fox:

Q. Trooper, was it wet or dry on the night this occurred?

A. It was dry.

Q. And any tracks that we are talking about would not be any water tracks or anything like that?

A. You mean mud?

Q. Yes.

A. No, no mud there.

Q. Were there any skid marks that you ever determined where Mrs. Wilmoth applied her brakes?

A. No, no skid marks.

Q. No skid marks whatsoever?

A. No, sir.

Q. And Mrs. Wilmoth pointed out to you that she struck Mrs. Johnson on the shoulder of the road?

page 30 } A. (No answer)

Mr. Fox: All right, sir. No further question.

* * * * *

IRENE BANKS JOHNSON, the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellenson:

Q. You are Irene Johnson, the lady that was hit by Mrs. Wilmoth's car?

A. Yes, sir, I am.

Q. Now, will you tell the jury where you were when Mrs. Wilmoth's car hit you?

Irene Banks Johnson

A. I was on the shoulder of the dirt road, facing traffic.

Q. Now, you were facing traffic; you were on the dirt shoulder?

A. Yes, sir.

Q. Why didn't you get out of the way of that automobile when it came there to hit you?

page 31 } A. There wasn't anywhere for me to go unless I jumped in the ditch.

Q. Did you have time to jump in the ditch?

A. No, sir.

Q. What happened to you? Do you remember anything after the accident?

A. No, sir, I don't.

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page 33 } Q. When you were on that shoulder of the road facing Mrs. Wilmoth's car and walking, where were you going?

A. To the church.

Q. You were going to the church?

A. Yes, sir.

Q. What time of night did this happen?

A. Around 6:00.

Q. Around 6:00 o'clock?

A. Yes.

CROSS EXAMINATION

By Mr. Gravatt:

* * * * *

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Q. All right. But you say you remember that you were on the dirt part of the shoulder?

A. Yes, sir, I remember where I was walking.

Racheal Wilmoth

Q. Well, the Trooper says there is 18 inches of space over there. Do you remember seeing these lights approaching you from the west, Mrs. Wilmoth's car?
A. I remember the lights.
Q. You remember seeing them?
A. Yes, sir, I remember the lights.
Q. Well, you had 18 inches of space on that shoulder. Why didn't you step over in that space and get out of the way?
A. Where was I to step unless I stepped in the ditch; jumped in the ditch.

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page 37 }

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Q. How close were you walking, if you remember, on the dirt shoulder of the road? How close were you walking to the edge of the hard surface?
A. I had got as far as I could get there. There was a ditch there. I couldn't get over in the ditch.
Q. You could not?
A. It was a deep ditch.

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page 40 }

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RACHEAL WILMOTH, the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Gravatt:

* * * * *

page 41 } Q. Mrs. Wilmoth, were you driving a motor vehicle on Route 652 on November 8, 1964, about dark?
A. Yes, sir.

Racheal Wilmoth

Q. Whose car were you driving?
A. My husband's.
Q. Who was in the car with you?
A. My husband and my little boy.
Q. Did you have a collision in which your car struck this plaintiff here, Irene Johnson, on that evening?
A. Yes, sir.
Q. As you approached the church, before you got to the church—that is on the hill above the place of this occurrence—at what speed approximately were you driving your car?
A. Thirty-five to forty.
Q. Now, as you approached this church, or as you passed the church, did you see anything?
A. Yes. Before the accident, there were pedestrians walking on the side of the road.
Q. On the shoulder of the road?
A. That is right.
Q. What did you do when you saw these people walking on the side of the road?
A. I applied my brakes.
Q. Did you reduce the speed of your car?
page 42 } A. I reduced the speed.

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By The Court:

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Q. Describe fully what you saw.
A. There was an approaching car.

By Mr. Gravatt: (Cont'd.)
page 43 } Q. Did you see this automobile?
A. I saw the lights.
Q. What effect did these lights have upon your vision?
A. They blinded me.
Q. From the time that you first saw the lights on this car until the time that you passed this car, did the driver of the automobile ever lower the beam of the lights?
A. No, sir.
Q. Did they continue to shine brightly in your eyes?
A. Yes, sir.

Racheal Wilmoth

Q. On what part of the road were you driving your car as you approached this motor vehicle?

A. On the right-hand side.

Q. Will you state to the jury what you know about your motor vehicle striking the plaintiff, Irene Johnson?

A. Well, of course, I dimmed my lights, and just as I passed this other car, I felt a slight bump or heard it or something, and I did not realize I had hit somebody until my husband said, you hit somebody.

Q. Did you stop your car?

A. Yes, sir.

Q. Did you go back to the scene?

A. Yes, sir.

page 44 } Q. Did you see Irene Johnson?

A. Yes, sir.

Q. Where was she?

A. She was standing beside her husband.

* * * * *

Q. Do you know where Irene Johnson was at the time that you struck her?

A. No, because I did not see her.

Q. Did you ever feel your automobile leave the hard surface?

A. No. My automobile never left the hard top.

By The Court:

Q. In relation to the shoulder and the hard surface, where was your car?

A. It was on the right-hand side of the hard top.

page 45 } CROSS EXAMINATION

By Mr. Fox:

Q. Mrs. Wilmoth, this was a Sunday night and you were conscious of people going to church?

A. Yes, sir.

Q. I mean, I think you were probably born in Buckingham, weren't you? You know the county; you know that road?

A. Yes, sir.

Q. And you knew there was a Negro church there?

A. Yes, sir.

Q. And you saw a bunch of Negro people going to the church?

Racheal Wilmoth

A. Yes, sir.

Q. And that is why you say you slowed your automobile down to thirty-five or forty at that time, is that correct?

A. I did not slow it down to thirty-five or forty. That was the pace I was going before I applied the brakes.

Q. What speed were you going then when you hit Mrs. Johnson?

A. I don't know.

Q. Did you tell the State Trooper, Mrs. Wilmoth, that you were going between thirty-five and forty at the time that you struck Mrs. Johnson?

page 46 } A. No, not at the time I struck her. That was the pace I was going before.

Q. You recall the State Trooper asking you how fast you were going, do you not, ma'am?

A. That is right.

Q. And do you know what you told him?

A. Yes, sir.

Q. What did you tell him?

A. I told him I was going thirty-five to forty.

Q. You told him you were going thirty-five to forty?

A. That is right.

Q. You did not tell him you were going anything underneath thirty-five or forty?

A. I told him I had applied my brakes.

Q. But you told him you were going thirty-five to forty?

A. Yes, sir.

Q. When you applied your brakes, how far before striking Mrs. Johnson did you apply your brakes?

A. I don't know in feet.

Q. Approximately. I know you did not measure it.

A. Well, these other pedestrians were just about at the church, and that is when I applied my brakes.

Q. And that was supposedly about 75 yards up

page 47 } the road where you supposedly slowed down?

A. Yes, sir.

Q. But when the Trooper asked you how fast you were going, you told him between thirty-five and forty miles per hour?

A. Yes, sir.

Q. And you realized that he was questioning you as to how fast you were going in relation to the time you struck Mrs. Johnson?

A. No, I did not realize that.

Racheal Wilmoth

Q. You did not realize that?
A. No, I did not.
Q. But you said nothing about slowing down below thirty-five or forty?
A. I did not mention any other speed, no, sir.
Q. I understand. The car that you say blinded you by its lights, were the lights on high beam?
A. The other car?
Q. Yes, ma'am.
A. In my opinion, yes.
Q. Your statement to the Officer who investigated this, was that you were not sure whether it was on high beam or not, is that correct?
A. That is what I told him, yes.

page 48 } Q. The statement that you gave the Police Officer did not indicate anything about being blinded by lights. Did you tell Trooper Roach that you were blinded by oncoming lights and that is why you did not see anything?
A. Yes, sir.
Q. You made the statement then—please correct me if I am wrong, because I don't want to misquote you at all. You then say under oath, that you told Trooper Roach sitting over there, on the night when he investigated this accident, the night that it happened, that you were blinded by oncoming lights?
A. I don't know if I used these exact words or not, but I told him I could not see. But I did not use, lights, I was blinded by lights. I did not use it that way. I told him I could not see.
Q. You told him the fact that you did not see Mrs. Johnson?
A. That is right. I was blinded by the lights and I could not see.
Q. Did you tell him that you were blinded by the lights and could not see, or did you tell him that you just did not see the pedestrian?
A. No, I told him that the lights blinded me.
Q. You specifically recall now, telling him that you were blinded by the lights?

page 49 } A. Yes, sir.
Q. You do?
A. Yes.

Racheal Wilmoth

Q. Even though he has not anything in his statement to that effect?

A. Yes.

* * * * *

Q. Now, with relation to the point that you felt something, which you take to be the point that you hit Mrs. Johnson, how far back up the road were you when you were first blinded by the lights of the oncoming car, approximately?

A. It was just after I had passed the other pedestrians.

Q. About how far? These other pedestrians were in the area of the church then, is that correct?

A. They were near the church, yes.

Q. Was it at least then, would you say, 50 yards up the road that you were blinded by the lights?

A. I don't know, because I couldn't say.

page 50 } Q. Well, Mrs. Wilmoth, can you give us some approximation with landmarks at all? Was it before you reached the crest of the hill?

A. It was just as I came over the crest.

Q. Just as you were coming over the crest, these car lights—

A. That is right.

Q. Approximately how far was that from where you struck Mrs. Johnson? If it would help you any, point it out in the window, or landmark.

A. Just after I passed the car, I struck her.

Q. Just after you passed it, but you were blinded by the lights of the car long before you passed the car, were you not, ma'am?

A. It was not that long.

Q. It was some distance, was it not?

A. It was some distance.

Q. After you passed the automobile, you were no longer blinded by the lights, were you?

A. Not after I passed it, no.

Q. And it was after you passed the automobile that you struck Mrs. Johnson, is that correct?

A. Not exactly after. It was just as you pass.

Q. Then you would say it was just about the same time, you would pass the car and struck Mrs. Johnson?

A. That is right.

page 51 } Q. What I am trying to establish from you,

Racheal Wilmoth

ma'am—you were the only eyewitness to this fact. Can you tell us approximately how long it was between the time that you were first blinded by the lights of the oncoming car and the time you passed the oncoming car, which is the same time that you struck Mrs. Johnson?

A. I don't know. It was not very long.

Q. That is what we are trying to establish, ma'am.

A. I don't know. I just don't know.

Q. I know you did not time it—

A. No, I did not.

Q. —and no one in the world would expect you to. But can you give us an approximation of the distance by picking out a landmark or picking out the number of lengths of this courtroom, or something to this effect?

A. No, sir, I cannot.

Q. You cannot?

A. No, sir.

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page 53 }

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Q. Are you familiar with that road, Mrs. Wilmoth?

A. Yes, sir.

Q. How many times have you been over that road?

A. I could not tell you how many times. I was born in that area?

Q. You were born in that area?

A. That is right.

Q. This road, then, is quite familiar to you?

A. That is right.

Q. I mean, you have gone over it, would you say hundreds or maybe even thousands of times?

A. Yes, sir.

Q. You know that it is a narrow road?

A. Yes, sir.

Q. You know that it is bumpy?

A. Yes, sir.

Q. You know that it has hills?

A. Yes, sir.

Q. You know that it has curves?

page 54 } A. Yes, sir.

Racheal Wilmoth

Q. You knew it was Sunday night?
A. Yes.
Q. Dark?
A. Yes, sir.
Q. You knew there were Negro people going to church, you said there were pedestrians?
A. Yes, sir.

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page 55 }

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Q. You say that you were blinded by the lights. Did you stop your car?
A. When I was blinded?
Q. Did you pull off the road?
A. Not off the road, no.
Q. Did you put on your brakes and stop?
A. I applied my brakes.
Q. You applied your brakes when you were blinded now?
A. Yes.
Q. How hard did you apply your brakes?
A. Gradually.
Q. When you gradually applied your brakes, you realized that you were blinded and could not see, did you not?
A. That is right.
Q. But you did not apply your brakes so as to
page 56 } stop your automobile, or to stop it as quick as you possibly could?
A. I had it so I could stop if I had to.
Q. What do you mean if you had to, Mrs. Wilmoth?
A. Well—
Q. Tell me what you mean, if you had to?
A. Well, like I did. I had to stop and I stopped after the incident with Mrs. Johnson.
Q. Did you have it so that you could see?
A. No, I could not see.
Q. You could not?
A. The lights were blinding me.
Q. All right. Then, Mrs. Wilmoth, then you were driving your automobile down that road absolutely in all effect then blind to what was happening?

Billy Wilmoth

A. While I was approaching this car, yes.

Q. And you have told the Trooper then that you struck this woman while she was on the shoulder of the road, did you not?

A. I don't know where she was.

Q. You don't know where she was?

A. No.

Q. Did you point out to the Trooper where she was?

A. I pointed out to the Trooper where the accident happened. That is all.

page 57 } Q. Do you know, when you struck her, how close your right wheels were to the edge of the road, or do you have any idea, since you were blind at that time?

A. No, I don't know how close I was to the edge of the road, but it was on the right-hand side of the road. I had not left the hard top.

Q. Do you know with relation to the right-hand side of the road, anywhere that you were on that right-hand side of the road, because you were blinded?

A. Where can you be except on the right-hand side.

Q. Well, Mrs. Wilmoth, with your counsel's permission, there is a right-hand side of the road and your wheels can be anywhere on that right-hand side of the road from right up against the shoulder all the way over. Now, do you know where you were?

A. I just had not left the hard top.

Q. That is all you know?

A. That is right.

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page 58 } BILLY WILMOTH, a witness, called by the defendant, first being duly sworn, testified as follows:

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Q. That is what I want to know. Now, just one thing I am trying to find out. How far would you say is the crest of the hill where you became blinded to where Irene Johnson was

when she was struck by the automobile, was it one foot, 18 inches, or 2 feet from the crest of the hill, or was it a hundred yards?

A. It would be somewhere right around 100 yards.

Q. 100 yards. Thank you very much.

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page 64 } W. R. ROACH, a witness, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Gravatt:

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page 65 }

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A. You want the approximate distance from the hill crest to where the place was pointed out to me that Mrs. Johnson was struck?

Q. That is exactly correct.

A. I did not measure that. The distance would be approximately 20 or 25 yards.

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page 72-A } JURY OUT

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Mr. Ellenson: I want the Court to rule also on my motion that there was no contributory negligence on the part of Irene Johnson; that there has been no evidence produced here that she was guilty of any contributory negligence.

Now, the Court will have to review the evidence here, and there is nothing, not one scintilla of evidence that could go to the jury on the question of contributory negligence on the part of this woman.

The Court: Unless the jury could say when she saw the car coming with the lights that she should have stepped into the ditch.

Mr. Ellenson: The law does not require that, Judge.

The Court: That is a jury question.

page 73 } Mr. Ellenson: No, sir, that is not what the law requires a person to do, to jump into the ditch.

The Court: What would you do?

Mr. Ellenson: Remember this, Judge, she said—and you have to use the evidence most favorable to the plaintiff. She said she did not have time and the only place she could have possibly gone was in the ditch. She did not have time. So, based on that, I ask the Court to rule now that she was as a matter of law not guilty of any contributory negligence.

The Court: I think that is a jury question.

Mr. Ellenson: Put on the record that I note my exception, please.

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page 87 } IN CHAMBERS

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The Court: Do you all object to Number D?

Mr. Fox: Yes, sir.

The Court: You think she owed no duty?

Mr. Fox: No, sir, you ruled on that and I think the first sentence is all right. That it was the duty of the plaintiff as she walked along the highway to exercise ordinary care for her own safety under the circumstances.

But this is just like what Mr. Gravatt was objecting to, giving an instruction about keeping a proper lookout and then specifying proper lookout in having her look to the side. So, you are telling the jury as she walks along the highway she has to exercise ordinary care for her own safety.

But when you start specifying what she has to do, you tell them, then, if she does not do that precise thing, she is guilty of contributory negligence. You are telling her what she has to do.

Her general duty is to exercise ordinary care

page 88 } and whether she does not exercise ordinary care is dependent upon the circumstances.

The Court: You think the first paragraph is all right?

Mr. Fox: The first sentence. It is the duty of the plaintiff as she walked along the highway to exercise ordinary care for her own safety and protection, and it was her duty to look and to listen for approaching vehicles proceeding in a dangerous proximity to her.

Then, when you start telling her exactly what she has to do after that—

Mr. Gravatt: That is taken from 202 Va. 472.

The Court: 202 Virginia?

Mr. Gravatt: 472.

Mr. Fox: This has to meet the circumstances of the case we have before us. Our contention is, here you don't have these things.

Mr. Ellenson: You have to have the facts to that part of the law.

The Court: Had she stepped 6 inches to her left, the accident would not have happened.

Mr. Ellenson: No, sir, she could have broken her leg jumping in that ditch, too.

page 89 } Mr. Gravatt: Judge, I have two cases here, if you worry about this. There are two cases that held where a man is blinded and somebody is struck that this is the thing that has to be done. Where they don't do it, where they are quietly standing, facing traffic and looking at an automobile, it is contributory negligence.

Mr. Fox: It all depends on the circumstances, whether they can do it without injuring themselves or some other man.

Mr. Gravatt: This is an instruction. It is for the jury to determine whether this woman should have done it or should not have done it.

Mr. Ellenson: Well, we note our objection to it and let the Court pass on it.

Mr. Gravatt: I think all of this simply goes to the question what in the exercise of reasonable care she was required to do. When you go beyond that and try to define it, you are taking something away from the jury that they have to pass on.

Mr. Fox: I couldn't agree with you more. That is why you cannot tell her to step into a place of safety.

Mr. Ellenson: There was no place for her to go to.

The Court: I will give it.

page 90 } Mr. Ellenson: The exception is that it is contrary to the law and evidence in this case.

Mr. Fox: Specifically in that the instruction does not require the jury to find that there is a place of safety for this woman to step into.

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page 102 }

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JURY OUT

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Mr. Fox: Your Honor, I would like at this time to put into the record specifically the granting of Instruction D over the objection and exception of the plaintiff in this page 103 } case, which told the jury that it was the duty of the plaintiff as he or she walked along the highway to exercise ordinary care for her own safety and protection and to look and listen for approaching vehicles proceeding in dangerous proximity to her and to step from her course into a place of safety if it reasonably appeared that she was in danger of being struck.

The error in the instruction is that over the asking that the instruction be amended—the plaintiff asked that it be amended that the jury were to find from the evidence that there was a place of safety that this woman could step to; that this instruction is absolutely erroneous and prejudicial, and undoubtedly influenced the jury in its decision.

Mr. Ellenson: And also, Your Honor, I would like to renew to the Court all statements made as to the negligence *per se* of the defendant in this case, Racheal Wilmoth. That has to be part of this record and is part of the exception.

The Court: It will come in.

Mr. Ellenson: Yes, sir. I don't want the Supreme Court to say that I did not timely claim or that I did not protest, that there was negligence *per se* and I have asked page 104 } the Court again to set it aside because of the fact that it was negligence *per se* upon the part of Racheal Wilmoth and there was no negligence on the plaintiff in this matter from the evidence.

The Court: The Court gave the instruction to that effect but directed or instructed the jury that if there were contributory negligence, then that negligence *per se* would not support a plaintiff's verdict.

But anyhow, you can pursue that as you like. If you don't wish to argue and present formal argument, I will overrule the motion now.

Mr. Ellenson: We except for the reasons stated.

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A Copy—Teste:

Howard G. Turner, Clerk.

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