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Record No. 6730

In the Supreme Court of Appeals of Virginia at Richmond

OLIVER A. HOLBERT, III, an infant, etc.

v.

FRANKIE JEANETTE EVANS

FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON

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. 6730

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 13th day of June, 1967.

OLIVER A. HOLBERT, III, AN INFANT, WHO SUES BY HIS MOTHER AND NEXT FRIEND, CATHERINE HOLBERT, Plaintiff in error.

against

FRANKIE JEANETTE EVANS, Defendant in error.

From the Circuit Court of the City of Hampton
Nelson T. Overton, Judge

Upon the petition of Oliver A. Holbert, III, an infant, who sues by his mother and next friend, Catherine Holbert, a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Hampton on the 19th day of January, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Frankie Jeanette Evans was defendant; no bond being required.

RECORD

* * * * *

page 1 }

* * * * *

MOTION FOR JUDGMENT

* * * * *

The undersigned hereby moves the Circuit Court for the City of Hampton, Virginia, for a judgment against you in the amount of FIFTY THOUSAND DOLLARS, ($50,000.00), together with the costs incident to this proceeding and award of execution for personal injuries sustained by him in the following manner, to-wit:

1. That on Sunday, the 2nd day of May, 1965, the undersigned was playing in an open area in front of apartment houses on the south side of West Queen Street in the City of Hampton, Virginia.

2. That at the aforesaid time and place you were operating your 1961 Chevrolet sedan in a generally westerly direction on West Queen Street.

3. At the aforesaid time and place the undersigned, an infant of tender years, to-wit: four years of age, left the south curb line of West Queen Street traveling in a northerly direction across the aforesaid street and the undersigned had traversed the east bound lane of West Queen Street and had entered well into the west bound lane when you, proceeding in a westerly direction on the said roadway, struck the undersigned with your motor vehicle, causing serious bodily injuries.

page 2 }

4. That in operating your motor vehicle as aforesaid and striking the undersigned, you were negligent in all of the following particulars:

A. You failed to keep your vehicle under reasonable and proper control under the conditions then and there obtaining.

B. You failed to keep and maintain a proper lookout and to act upon what such a lookout would have disclosed.

C. You failed to keep a reasonable and proper lookout for children playing in the area in spite of the fact that you

were put on notice of the same by the large number of children in the immediate area and to keep a proper and reasonable degree of care toward said children under the circumstances then and there obtaining.

D. You failed to seasonably and timely apply your brakes when the necessity for so doing became apparent under the circumstances then and there obtaining.

E. You failed to operate your motor vehicle at a reasonable and safe speed under the circumstances then and there obtaining and on the contrary operated your motor vehicle at an excessive and unlawful speed under the conditions then and there obtaining.

5. As a direct and proximate result of your negligence, you caused a collision between your vehicle and the un-
page 3 } dersigned thereby causing this plaintiff to suffer painful and disabling injuries adversely affecting his mental and physical well-being.

6. Such injuries have made it necessary for the plaintiff to seek medical aid and hospitalization, to alleviate the pain and suffering caused by the said injuries and will further cause the undersigned to seek medical aid and assistance in minimizing and alleviating the distress caused by said injuries in the future.

7. The injuries suffered by the undersigned as a direct and proximate result of your negligence were disabling, permanent, painful and progressive, causing the undersigned to suffer head-aches, nervousness, mental anguish, emotional distress, physical pain, limitation of motion in his normal pursuits and activities and inability to engage in his normal pursuits and pastimes.

8. As a direct and proximate result of the injuries aforesaid, the undersigned suffered a permanent reduction of his earning capacity and ability as well as a diminution of his endurance and resistance to disease and injury.

9. All of the foregoing injuries and consequences were due solely to the negligence and omissions of you, Frankie Jeanette Evans, defendant, and resulted from your negligence in the operation of your motor vehicle as aforesaid.

WHEREFORE, the undersigned moves the Circuit Court for the City of Hampton, Virginia, for a judgment against you in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), together with the costs of this proceeding and award of execution.

OLIVER A. HOLBERT, III, an infant,
who sues by and through his mother and
next friend, Catherine Holbert.
By F. THOMPSON WHEELER, II
Of Counsel

Filed in the Clerk's Office the 16 day of August, 1965.

Teste:

C. M. GIBSON, Clerk
J. T. TASK, D.C.

page 4 } PROOF OF SERVICE

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

LAW NO. 5358

OLIVER A. HOLBERT, III, an infant, etc.
vs
FRANKIE JEANETTE EVANS

Returns shall be made hereon, showing service of Notice issued August 16, 1965, with copy of Motion for Judgment filed August 16, 1965, attached:

Executed on the 23rd day of August, 1965, in the City of Hampton, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to Frankie Jeanette Evans in person.

A. A. ANDERSON
Sergeant, City of Hampton, Va.
BY CARROLL HURST,
Deputy City Sergeant.

Fee Paid Direct—Mullins & Wheeler, p.q.

Returned and filed the 24 day of August, 1965.

C. M. GIBSON, Clerk.
J.T. TASK, Deputy Clerk.

page 5 }

* * * * *

ANSWER AND GROUNDS OF DEFENSE

COMES NOW the defendant, Frankie Jeanette Evans, by counsel, and for her answer and grounds of defense, says:

1

That she denies all of the material allegations of the plaintiff's Motion for Judgment.

2

That she denies that she was guilty of any negligence in the premises, and denies that she was guilty of any negligence which proximately caused the injuries and damages allegedly sustained by the plaintiff.

3

That the plaintiff was guilty of contributory negligence, which negligence efficiently contributed to the injuries and damages she allegedly sustained, if any.

4

That the plaintiff assumed the risk.

5

That she denies that the plaintiff sustained the
page 6 } injuries and damages alleged in his Motion for Judgment.

6

That she denies that she is indebted to the plaintiff in any amount.

FRANKIE JEANETTE EVANS
By JOHN N. PARKER
Of Counsel

* * * * *

Filed Aug. 26, 1965, 8:29 A.M.

C. M. GIBSON, Clerk
C. ROGERS

* * * * *

page 49 } We the jury find in favor of the defendant!

Eugene K. Allen
Foreman

* * * * *

page 62 } INSTRUCTION D

The Court instructs the jury that if you believe from a preponderance of the evidence that the actions of the plaintiff were the sole proximate cause of the accident; then you should find your verdict for the defendant.

N. T. O. Exc.

page 63 } INSTRUCTION #F

The Court instructs the jury that Virginia Law recognizes that some accidents are unavoidable in that they would have occurred despite the exercise of reasonable care by the operator of the motor vehicle.

If you believe from the evidence in this case that this accident was unavoidable as to the defendant and was not caused by negligence on her part, then you should find your verdict for the defendant.

N. T. O. Exc.

* * * * *

page 69 }

* * * * *

MOTION FOR NEW TRIAL

* * * * *

Now comes the plaintiff, by counsel, and moves this Honorable Court to set aside the verdict of the jury rendered on September 14, 1966 and award to the plaintiff a new trial on the following grounds:

1. That the Court erred in permitting Officer R. B. Baker to testify that the physical facts found at the scene of the accident were compatible with the defendant's explanation of how the accident happened.

2. That the Court erred in granting, over the objection of the plaintiff, Instruction F on unavoidable accident, to which granting of said instruction the plaintiff, by counsel, excepted.

3. The Court erred in granting Instruction D for the defendant which was a proximate cause instruction page 70 } that was repetitious of Instruction C and part of Instruction B.

OLIVER A. HOLBERT, III, an infant who sues by and through his mother and next friend, Catherine Holbert.
By F. THOMPSON WHEELER, II
Counsel

* * * * *

Filed Sep. 21, 1966, 8:43 A.M.

C. M. GIBSON, Clerk
M. ASKEU

* * * * *

page 99 }

* * * * *

TAKE NOTICE that on the 16th day of December, 1966, at 9:00 A.M., or as soon thereafter as the matter may be heard, the undersigned will, pursuant to the provisions of Rule 5:1 3(f), present to the Honorable Nelson T. Overton, the Court reporter's transcript of the testimony and incidents of the trial in the above styled cause, which was heard on October 20, 1966.

OLIVER A. HOLBERT, III, an infant who sues by and through his mother and next friend, Catherine Holbert.
By G. CURTIS OVERMAN, JR.
Counsel

* * * * *

Legal and timely service of the within Notice accepted:

JOHN N. PARKER
Counsel for defendant

Filed 12/16/66. * * *

page 100 }

* * * * *

MOTION

* * * * *

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA hereby moves this Honorable Court that it enter its final judgment order in accordance with the jury verdict *nunc pro tunc*—October 21, 1966, because of the following:

(1) That on October 21, 1966, after hearing argument of counsel on plaintiff's motion to set aside the jury's verdict and grant a new trial, the Court advised it was denying plaintiff's motion and that final judgment would be entered in accordance with the jury verdict. Plaintiff's counsel then requested that he be allowed to draft the final judgment order, which request the Court granted. Plaintiff's counsel intentionally or inadvertently failed to draft final order;

(2) Plaintiff's counsel, on December 14, 1966, filed in the Clerk's office of this Court a Notice of Appeal and Assignment of Errors, serving a copy of said notice on John N. Parker, counsel for Frankie Jeanette Evans. Counsel for The Insurance Company of the State of Pennsylvania was not served with notice;

(3) Notice of presentation of transcript of record was filed on December 16, 1966, service being accepted by John N. Parker, counsel for Frankie Jeanette Evans. Counsel for The Insurance Company of the State of Pennsylvania was not served with notice and did not accept notice;

page 101 } (4) Final order has not been entered by the Court as it would have been except for the actions of plaintiff's counsel. Plaintiff has taken necessary steps for appeal as to the defendant, Frankie Jeanette Evans as though final order had been entered and has not given The Insurance Company of the State of Pennsylvania proper notice of the appeal. Final order should be entered as if it had been done in normal course;

THE COURT is, therefore, moved to enter final judgment order *nunc pro tunc*—October 21, 1966.

Respectfully submitted,
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
By E. RALPH JAMES, JR.
Of Counsel

page 102 }

* * * * *

Jan. 17, 1967, 8:34 A.M.

C. M. GIBSON, Clerk

* * * * *

page 103 }

* * * * *

This day came the plaintiff, by counsel, and moved this Honorable Court for leave to withdraw the Notice of Appeal and Assignment of Errors heretofore filed and the transcript of the evidence heretofore filed in this cause for the reason that at the time of the filing thereof, which was within sixty days of the hearing on the motion for new trial, the final order in this cause had not been entered;

And it appearing unto the Court that leave to withdraw the aforesaid pleadings and documents should be granted in view of the possibility of confusion in any ensuing appeal;

NOW, THEREFORE, be it ADJUDGED, ORDERED and DECREED that leave is herewith granted the plaintiff to withdraw the Notice of Appeal and Assignment of Errors and the transcript of testimony heretofore filed.

ENTER this 19th day of January, 1967.

NELSON T. OVERTON, Judge

Seen:
F. THOMPSON WHEELER, II, p.q.
JOHN N. PARKER, p.d.

Seen and objected to action taken:
E. RALPH JAMES, JR., pd.

page 104 } Circiut Court of the City of Hampton, Virginia on Thursday, the nineteenth day of January, in the year of our Lord one thousand nine hundred and sixty-seven.

* * * * *

This matter came on to be heard as to final disposition of a motion made on September 14th, 1966, and continued until October 14th, 1966, to set aside the verdict of the jury rendered in this matter and finally argued on October 21st, 1966, and on the additional written motion made part of this record by filing on January 17th, 1967 of the Insurance Company of the State of Pennsylvania to enter up final judgment in accordance with the jury verdict *nunc pro tunc* October 21st, 1966; and the Court having heard arguments of counsel doth deny both motions, to which ruling of the Court both counsel excepts; and the Clerk is directed to enter up judgment in accordance with the verdict of the jury.

It is therefore considered by the Court that the plaintiff take nothing from his bill, but for his false clamor be in mercy etc.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS

* * * * *

The petitioner, Oliver A. Holbert, III, by his counsel, hereby gives notice of appeal and assignment of errors from a final judgment entered in this cause on the 20th day of October, 1966, and assigns the following errors:

1. That the Court erred in permitting Officer R. B. Baker to testify that the physical facts found at the scene of the accident were compatible with the defendant's explanation of how the accident happened.

2. That the Court erred in granting, over the objection of the plaintiff, Instruction F on unavoidable accident, to which granting of said instruction the plaintiff, by counsel, excepted.

3. The Court erred in granting Instruction D for the de-

fendant which was a proximate cause instruction that was repetitious of Instruction C and part of Instruction B.

All of which will more fully appear from the record.

OLIVER A. HOLBERT, III
By G. CURTIS OVERMAN, JR.
Counsel

Withdrawn per order of 1/19/67.

C. M. GIBSON, Clerk
by EARLYNE H. MILLER, D.C.

Jan. 25, 1967, 8:43 A.M.

C. M. GIBSON, Clerk

* * * * *

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* * * * *

ASSIGNMENT OF CROSS-ERROR

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA hereby makes assignment of cross-error as follows:

(1) That the Court erred in entering order on the 19th day of January, 1967, allowing the Plaintiff to withdraw Notice of Appeal and Assignment of Errors previously filed;

(2) That the Court erred in denying motion of The Insurance Company of the State of Pennsylvania to enter final judgment order *nunc pro tunc October* 21, 1966, and in entering final judgment order effective January 19, 1967.

THE INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA
By E. RALPH JAMES, JR.
Counsel

Feb. 3, 1967, 4:35 P.M.

C. M. GIBSON, Clerk

* * * * *

page 1 }

* * * * *

Stenographic report of all the testimony stated herein, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the trial of the case of Oliver A. Holbert, III, an infant who sues by and through his mother and next friend, Catherine Holbert vs Frankie Jeanette Evans, tried in the Circuit Court for the City of Hampton, Virginia, on September 14, 1966, before the Honorable Nelson T. Overton, Judge of said Court, and jury.

PRESENT:
Mr. F. Thompson Wheeler, II, Attorney for the Plaintiff.
Mr. John N. Parker, Attorney for the Defendant.

* * * * *

page 3 } MRS. FRANKIE JEANETTE EVANS, called as an adverse witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wheeler:
Q. You're Mrs. Frankie Jeanette Evans?
A. Yes.
Q. Would you speak up loud enough so these people can hear you?
A. Yes.
Q. Right now you're living in Rocky Mount, North Carolina, are you not?
A. No.
Q. You are not. You live at 1081—1018 Rutherford Street?
A. No.
Q. In Hampton.
A. No.
Q. Where do you live?
A. In Durham, North Carolina.
Q. In Durham, North Carolina. In May of last year, Mrs. Evans, you were living at 1018 Rutherford Street in Hampton, were you not?
page 4 } A. Yes.

Mrs. Frankie Jeanette Evans

Q. And that is in the apartment development known as Pleasant Manor, isn't it?

A. Yes.

Q. And it's located off of Pembroke Avenue, right down by the Food Fair Market, isn't it?

A. Yes.

Q. And at that time, Mrs. Evans, you were working at Kecoughtan Veterans Hospital, isn't that right?

A. Yes.

Q. Are you a Registered Nurse?

A. Yes.

Q. Now Mrs. Evans, where did you receive your training as a nurse?

A. Winston-Salem Teachers College, School of Nursing, Winston-Salem, North Carolina.

Q. During that training, you worked in all parts of the hospital in different services?

A. Yes.

Q. You worked on pediatrics while you were training, didn't you?

A. Yes.

Q. And you know from your experience—do you have children of your own?

A. No.

page 5 } Q. You know from experience with children in the hospital that they are very unpredictable, don't you?

A. Yes.

Q. Now, on the day that this accident happened, Mrs. Evans, this was a Sunday, was it not?

A. Yes.

Q. And you worked that day, did you not?

A. Yes.

Q. Was—what does your husband do?

A. He was working at Newport News Shipyard at that time.

Q. I see. He wasn't working that Sunday, was he?

A. No.

Q. And you went to work on the first shift, seven to three thirty, did you not?

A. Yes.

Q. Is it seven to three thirty or seven to three?

A. It was seven to three thirty at that time. It is seven to four now.

Mrs. Frankie Jeanette Evans

Q. In order to get by seven o'clock from your home and get yourself ready, what time do you have to get up in the morning?

A. Oh, I usually got up about a quarter of six.

page 6 } Q. A quarter of six?

A. Yes.

Q. So you got up about a quarter to six and you went down the hospital to work?

A. Not then, not at a quarter to six.

A. No, at seven o'clock?

A. Yes, to work.

Q. And were you on a regular nursing ward in the hospital itself?

A. I worked on rehabilitation.

Q. On the rehabilitation. It's right hard job being a nurse, isn't it, Mrs. Evans?

A. Well, I enjoy it.

Q. But it's still hard work, isn't it?

A. I don't know. It depends if you like your work, sometimes you don't consider it hard.

Q. I see. You change linens and take care of patients and give medication and feed and work with the patients?

A. Yes.

Q. You have to move them and turn them and all that sort thing, don't you?

A. Yes.

Q. And down at Kecoughtan Hospital, you all don't have enough nurses to adequately cover the place, do you?

page 7 } A. Well, our ward was usually adequately stocked.

Q. Adequately stocked with patients or with people to take care of them?

A. We're talking about nurses.

Q. It was adequately stocked?

A. Usually.

Q. Did you have a full staff?

A. Did we have a full staff?

Q. Yes.

A. There were so many nurses allotted for each ward.

Q. And did you have your complement full, is what I am driving at or did you have one or two empty spaces?

A. Of nurses?

Q. Of nurses that you could have.

A. Nurses would always come and go and so at one time

you could have your full staff and the next time you might not have any.

Q. You don't particularly remember whether you were short at this particular time?

A. Well, on the weekends you always had your—you had enough nurses to cover the patients.

Q. I see. And—well, do you remember particularly that day, whether or not you worked hard or not very
page 8 } hard?

A. Weekends were very easy, were usually easy, much easier than during the week.

Q. You were on your feet most of the time, aren't you?

A. A lot of the time.

Q. Now, are there—any of your duties as a nurse that I didn't cover, Mrs. Evans?

A. I think you well covered it.

Q. All right. When you work on a Sunday, you anticipate getting home and seeing your husband again and spending the part of the day with him when he's off, don't you?

A. I anticipate seeing him every day, not only Sunday.

Q. I see. Well, does he work the same time of the day you do or was he then?

A. He wasn't then.

Q. What was he working then?

A. Four to twelve.

Q. Four to twelve?

A. Yes.

Q. Now Mrs. Evans, when you left Kecoughtan Hospital, how did you come out on to the road?

A. Through the gate.

page 9 } Q. Through the gate. Which one is that, which gate?

A. That's the one—not going out—that's the one coming out to Queen Street by Hampton Institute.

Q. You came out then on to Queen Street down by Hampton Institute?

A. Yes.

Q. And you have been driving I believe about ten years, have you not?

A. Yes.

Q. When you came on to West Queen Street down there, the first stop light you hit was at either Eaton Street or Wine Street. Do you remember whether or not you stopped at that?

Mrs. Frankie Jeanette Evans

A. If the light was red, I stopped.

Q. You don't remember whether it was red or green, do you?

A. No, I don't recall if the light was red or green at that time.

Q. Do you recall whether you had to stop at any lights before the accident occurred?

A. No, I don't recall if I stopped at any lights before the accident occurred.

Q. Well, let's see. There are a number of them. There's Wine Street and then King and Queen and then
page 10 } Armistead and Queen. You came all the way down to Queen Street, did you not, right straight?

A. Yes.

Q. Now Mrs. Evans, you've had occasions during the ten years you have been driving an automobile to have children run into the street in front of you, have you not?

A. Yes.

Q. And you've always been able to avoid striking the children, haven't you?

A. Yes.

Q. And because of your experience with children in the hospital and in driving an automobile, you know that they can be expected to do the unexpected, don't you?

A. Yes.

Q. And whenever you see children around in an area or you know that children are around in an area, you're very careful to watch out for them and to be careful not to hurt them, aren't you?

A. Yes.

Q. And as you came down Queen Street on this particular day, have you driven that area often?

A. I drove it every day that I worked and I worked 40 hours a week.

Q. I see, and how many weeks?

A. How many weeks?

page 11 } Q. How long did you work at Kecoughtan?

A. Oh, I worked there over a year.

Q. Over a year. So every day for—every day of the week for over a year you drove down that way?

A. Not every day. About five days.

Q. Five days out of the week?

A. Yes.

Q. And you know, don't you Mrs. Evans, that there are a

number of children that live along West Queen Street, especially after you pass the stop light at Back River Road and West Queen?

A. Yes.

Q. And you've seen the children out there playing in the yards and on the side of the street, haven't you?

A. Yes.

Q. And whenever you see them, you're very careful as you pass them so that you wouldn't hurt any of them, isn't that right?

A. Yes.

Q. Now, West Queen Street is from Back River Road to—all the way down to LaSalle Avenue is just—straight as it can be, isn't it? Can you picture that in your mind as you have gone down there. There's no curves in that road, are there?

A. No.

page 12 } Q. And on this particular Sunday afternoon when your husband works four to twelve shift, what time does he leave home to get there at four?

A. Oh, he usually leave home about 3:25, 3:22, something like that.

Q. And is there any possibility of your seeing him before he goes in?

A. I didn't get off until 3:30 on Sunday. Sometimes we got off early but—ordinarily he didn't usually work the weekend. That was on a Sunday.

Q. I see. So you expected him to be home then?

A. Well—

Q. Well, let's go on to something else. As you came down West Queen Street, Mrs. Evans, I believe you were going about—you told the Officer about 20 to 25 miles an hour, isn't that right?

A. Well, when I approached the area I was going about 20, I guess between 23 and 20 miles an hour but when I saw those kids playing, I reduced my speed.

Q. I see. You saw the children playing on the south side of West Queen Street there in front of the apartments there?

A. Well, I saw them playing on my left.

Q. On your left?

page 13 } A. Yes.

Q. That would be on the south side?

A. I saw a group of kids playing there.

Mrs. Frankie Jeanette Evans

Q. And you were still—a distance away from where they were at that time when you saw them?

A. When you approached the area. There's two bushes and when I passed those two bushes on my left, I then saw the children playing and then I reduced my speed.

Q. Then you reduced your speed?

A. I was going about 23 miles an hour I guess before then.

Q. I see. Did you see Bubba Holbert at that time, this little boy over here?

A. I saw some children playing.

Q. You don't know whether you actually saw this little boy, the one that you struck?

A. I couldn't say that he was in the group. I saw some children playing.

Q. When did you first see this little boy?

A. Well, I was going down the street. I had reduced my speed. After I first saw the kids, after I passed these bushes. Then I saw this—blur and there was a group of people on my right and—when I—as soon as I saw this blur, it was a little boy, I immediately slammed on brakes and swirled to my right.

page 14 } Q. Well, where were you then?

A. Where was I?

Q. You were back—about where the bushes are, were you not?

A. No. I passed the bushes?

Q. Passing the bushes.

A. Past the bushes.

Q. How far past the bushes?

A. When I hit the little boy, I was—I was—I had gotten about midways of the apartments so I couldn't say how many feet that was.

Q. But you were past the bushes then and somewhere before you hit, is that right?

A. Yes.

Q. All right. Then you struck him, is that right?

A. Yes.

Mr. Wheeler: Thank you, Mrs. Evans, I have no further questions.

Mr. Parker: I'll reserve the right to question her. Step down.

Court: Step down.

Mr. Wheeler: Call Mr. Robert Baker.

Robert Bernard Baker, Jr.

ROBERT BERNARD BAKER, JR., called as a
page 15 } witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wheeler:

Q. State your name for the Court and jury please, sir.
A. Robert Bernard Baker, Jr.
Q. How old are you, Mr. Baker?
A. 24 years old.
Q. And where do you now live?
A. 2605 South Sherolton Road, Arlington, Virginia.
Q. In May of last year, what was your business or profession or occupation?
A. I was a Corporal in the Hampton Police Traffic Bureau.
Q. When did you leave the Department?
A. May 19, 1966.
Q. May of this year?
A. Yes, sir.
Q. In the course of your duties, Mr. Baker, did you have occasion to investigate an accident on West Queen Street on Sunday, the 2nd of May of '65?
A. Yes, sir, I did.
Q. What time were you notified of the accident?
page 16 } A. 3:32 p.m.
Q. And do you know where you were at that time?
A. Hampton Institute, Tyler Street and—and Queen Street.
Q. Carver Street and Queen?
A. Tyler and East Queen Street.
Q. And did you go straight there?
A. Yes.
Q. About what time did you arrive?
A. Approximately 3:39 p.m.
Q. Now Mr. Baker, in the course of your investigation of this matter, did you make a diagram of the scene as you found it?
A. Yes, sir.
Q. I wonder if you would mind duplicating that diagram on this big board for me, if you would? You'll find a—
A. You want me to duplicate the accident diagram that I have here?
Q. Yes, please sir.

Robert Bernard Baker, Jr.

(The witness proceeded to draw the diagram).

By Mr. Wheeler:

Q. Now Mr. Baker, did you actually measure Queen Street with a tape?

page 17 } A. Yes, sir.

Q. And this two feet—how far is this distance here?

A. Two feet (indicating).

Q. So—this whole thing then from here to here is West Queen Street (indicating)?

A. Yes.

Q. And what sort of—traffic markings are there in the middle of West Queen Street, do you recall, whether it's broken or solid?

A. I think it's a solid line, I believe.

Q. Solid. Are you recollecting? Are you sure of that?

A. I'm not.

Court: He said he wasn't sure, if I understood him correctly. Just a minute, Mr. Wheeler. Mr. Baker, I'm going to ask you to speak a little louder. You're facing away from the jury. I guess you have to, to be able to see that but speak a little louder.

A. Yes.

By Mr. Wheeler:

Q. This two feet on either side of West Queen Street, what does that represent?

page 18 } A. It's a—the curb and then it has a concrete strip, two feet which separates the roadway and the curbing.

Q. Is that—made so you can drive on it?

A. Yes, sir.

Q. So you got 34 feet of driving space, is that right?

A. Yes, sir.

Q. Now, in connection with your investigation, Mr. Baker, did you take any photographs?

A. Yes sir, I did.

Q. Do you have them?

A. Yes sir.

Mr. Wheeler: May I see it, please.

(The photographs were then shown to both counsel).

By Mr. Wheeler:

Q. Mr. Baker, I hand you a photograph and I'll ask you to tell the Court and jury what that represents, please?

A. This is the—this is West Queen Street from looking—looking from south to north, across West Queen Street, representing the—the approximate place where the accident occurred.

Q. Does that photograph fairly and accurately represent the scene as it existed at the time of this accident?

page 19 } A. Yes sir.

Mr. Wheeler: All right, sir. I offer this in evidence as Plaintiff's Exhibit Two.

Court: Mr. Parker?

Mr. Parker: No objection.

Court: There being no objection, this photograph will be admitted as Plaintiff's Exhibit Two.

(The photograph was received and marked Plaintiff's Exhibit No. 2).

By Mr. Wheeler:

Q. I hand you another photograph and ask you to tell us what that shows?

A. This shows the West Queen Street in the area where the accident occurred, east and westbound lanes of West Queen Street.

Q. I see. Looking in what direction?

A. You would be looking in the easterly direction from where I am looking.

Q. And does that fairly and accurately represent the scene as it existed at the time of this accident?

A. Yes sir, it does.

Mr. Wheeler: All right, sir. I offer this as Plaintiff's Exhibit Three.

page 20 } Court: Any objection, Mr. Parker?

Mr. Parker: None, your Honor.

Court: Plaintiff's Exhibit Number Three will be received.

(The photograph was received and marked Plaintiff's Exhibit No. 3).

Robert Bernard Baker, Jr.

By Mr. Wheeler:

Q. One third one, would you tell us what that represents?

A. This was the vehicle involved in the accident (indicating).

Q. And does that photograph fairly—when did you take that?

A. It was approximately two and a half hours after the accident at Rutherford Street, in the City of Hampton.

Q. Does that fairly and accurately represent the condition of the vehicle immediately after the accident?

A. Yes sir.

Mr. Wheeler: All right, sir. That would be Exhibit Four, I believe, sir.

Court: Mr. Parker?

Mr. Parker: Yes, your Honor, it's perfectly all right.

Court: All right, sir. Plaintiff's Exhibit Number Four is admitted into evidence.

page 21 } (The photograph was received and marked Plaintiff's Exhibit No. 4).

By Mr. Wheeler:

Q. Now Mr. Baker, on Plaintiff's Exhibit Three I see one vehicle. Is that your police unit?

A. Yes sir.

Q. And did you park that there at the time that you came to the scene?

A. No, it was parked heading—west in the eastbound lane. I turned the vehicle around.

Q. I see.

A. I was getting the crowd dispersed.

Q. And when you arrived at the scene—by the way, let me ask you one thing. Did it appear that the Defendant's vehicle had been moved?

A. No sir, the vehicle was setting on top of the skidmarks.

Q. May I see your notes a minute, please?

A. Yes sir.

(The document was handed to Mr. Wheeler).

By Mr. Wheeler:

Q. Would you explain to us what that—that other little business is in front of the diagram, the car is at or that's just part of it?

Robert Bernard Baker, Jr.

page 22 } A. That is the actual car, approximating—this was just approximating that.

Q. I see. And where was the child when you arrived, Mr. Baker?

A. In the westbound lane of West Queen Street near the center line.

Q. That's where you have drawn him there, two feet five inches from the center line?

A. Yes sir, north of the center line.

Q. And 22 feet from the point of impact?

A. Yes sir.

Q. Was anybody else there when you arrived, aside from the child and Mrs. Evans?

A. Well, there was—a great number of people at the scene of the accident when I arrived.

Q. Yes. And what happened after you arrived and you made your measurements and—

A. When I first arrived, I immediately got out of my vehicle and went over to the child in the street and tried to assist the child until the ambulance arrived. After that I began taking measurements and—and I understand the driver had also gone to the hospital. I did not talk to her.

Q. How about—what was the condition of the child when you went over to it?

page 23 } A. He was bleeding out of his head and I asked the people not to move him until the ambulance came.

Q. Was he conscious or unconscious?

A. Sort of—unconscious state when I saw him.

Q. Did you see the child's mother there?

A. I saw some people holding the mother away from the—from the child.

Q. When the ambulance came, what happened?

A. They took the child to the hospital.

Q. Do you remember whether the mother went with the child?

A. No, I don't.

Q. All right, sir. Is that all you have to do with this? I mean as far as the investigation of this particular accident is concerned?

A. Well, I left the scene of the accident and went to—to Dixie Hospital, in the City of Hampton, where I tried to obtain information about the injuries sustained and the driver of the vehicle.

Robert Bernard Baker, Jr.

Mr. Wheeler: Right. Well, I won't ask you about that because that would be telling what somebody else told you. Thank you. Answer Mr. Parker please, Mr. Baker.

CROSS EXAMINATION

page 24 } By Mr. Parker:

Q. Officer Baker, Corporal Baker, now, a now civilian Baker, you investigated this accident and made your measurements and took these photographs. Did anybody else assist you in the investigation of the accident, sir?

A. No, I had a CD man helping me to hold the tape wherever I told him to.

Q. All right. Now, when you arrived at the scene of the accident, did you travel on Queen Street in the same direction that the Evans' car had traveled?

A. Yes.

Q. Did you come west on Queen Street?

A. Yes sir.

Q. And are these all of the photographs that you took of the accident scene?

A. I believe there's some more. I'm not too sure. I took quite a few.

Q. Did you also take a photograph looking west on Queen Street in the direction that she would have been traveling, in the direction that you traveled to reach the scene?

A. I believe I did. I wouldn't say.

Q. That one isn't here?

A. No sir.

page 25 } Q. Now, in your diagram that you drew for the Court and jury, as you travel in this westerly direction on Queen Street, this is the street itself and you've divided it in half?

A. Yes sir.

Q. And this would be either a white solid line or a broken white line but at any rate it is the division of the street?

A. White line.

Q. Yes sir. And you identified these two rectangles as apartment buildings, is that correct?

A. Yes.

Q. Now, what is the general description of the area here (indicating) adjoining this apartment building? What was—what occupies this space here where you have the north compass direction (indicating)?

Robert Bernard Baker, Jr.

A. In that area back there is—a driveway and a parking lot for the apartments.

Q. For the apartments?

A. Yes.

Q. Now, just to the east of this driveway and parking area for the apartments, did you observe some large shrubbery and bushes?

A. I don't recall, sir.

Q. You have no recollection of that?

A. No sir.

page 26 } Q. Now, what type of marks did you identify these marks as? Were they brake marks or were they skid-marks or what type of marks?

A. What one are you saying?

Q. The marks that you drew behind the car of Mrs. Evans?

A. Skidmarks.

Q. And what causes that type of mark?

A. Friction from the tire against the road.

Q. Does the application of brakes cause that?

A. Brakes, yes.

Q. Now, you of course saw Mrs. Evans at the scene of the accident, did you not?

A. Very vaguely.

Q. And did you subsequently question her about the accident?

A. Yes sir, I did.

Q. And did she make a statement to you?

A. Yes sir, she did.

Q. And what was the statement that she made to you?

A. Mrs. Evans stated she was traveling west on West Queen Street, westbound lane. "I saw a little boy running into the path of my car. I applied my brakes and turned to the right to avoid him and then my car struck him."

page 27 } Q. And is that statement that she made to you compatible with the investigation?

Mr. Wheeler: I would object to that, if the Court please. He's asking the Officer for an opinion and I submit it's invading the province of the jury. I think that's a fact for the jury to decide.

Mr. Parker: My question is not complete yet, your Honor.

Court: I thought you can wait until the question is completed and then state your objection. Don't answer the question, Mr. Baker, until he finishes.

Cynthia Holbert

Mr. Parker: Wait until I finish the question, Mr. Baker.

By Mr. Parker:

Q. Was the statement that Mrs. Evans gave you then compatible or did it fit in with your physical findings at the scene of the accident in a manner that you have drawn this automobile facing somewhat to the right and the projected skidmarks?

Mr. Wheeler: I object, if the Court please, for the reasons I have previously stated.

page 28 } Court: I'll allow him to answer that. This is the investigating Officer who testified he has been investigating accidents. The record will show your exception.

Mr. Wheeler: Thank you, sir.

Court: Go ahead.

A. Yes.

By Mr. Parker:

Q. Your answer is yes?

A. Yes.

Q. Now Mr. Baker, in photograph number three, which was introduced in evidence and it shows your police station wagon or prowl car?

A. Yes.

Q. Vehicle. That's facing east, is it not?

A. That is correct.

Q. So it would be the opposite side of the street that Mrs. Evans was traveling?

A. That's correct.

Q. This black car that's also shown in the picture would be the direction that her car would have been coming?

A. That's correct.

Mr. Parker: I have no further questions.

page 29 } Court: All right, do you have anything further from this witness, Mr. Wheeler?

Mr. Wheeler: No redirect, if the Court please.

page 30 } Mr. Wheeler: Call Cynthia Holbert, please.

CYNTHIA HOLBERT, called as a witness by the Plaintiff, being duly sworn, testified as follows:

Cynthia Holbert

Court: Now Mr. Wheeler, before you start examining this witness, I want to talk to her a minute. Is your name Cynthia?
A. Yes.
Court: How old are you, Cynthia?
A. Seven.
Court: Do you know what it means to tell the truth?
A. Yes.
Court: Is that what you are going to tell us today?
A. Yes.
Court: All right, sir.

DIRECT EXAMINATION

By Mr. Wheeler:
Q. Now, do folks call you Cindy?
A. Yes.
page 31 } Q. May I call you Cindy?
A. Yes.
Q. All right. Cindy, where do you live?
A. 103 McCall Court in Hampton.
Q. Do you go to school?
A. Yes.
Q. Cindy, is Bubby your brother?
A. Yes.
Q. Do you remember the day he got hit by the car?
A. Yes.
Q. Now, where were you and Bubba the day he got hit?
A. We were over on Miss Doris' house.
Q. Is that Mrs. Doris Bradley's house?
A. Yes. And then we went over Nell's house.
Q. Nell?
A. Yes.
Q. Do you know her last name?
A. No.
Q. Just before Bubba got hit, where were you and Bubba?
A. Bubba was playing with the boys and we were playing with the girls, sitting on the step.
Q. All right. Bubba was playing with the boys
page 32 } and you were playing with the girls. How many boys were there out there, do you remember?
A. Two of them.
Q. Two boys beside Bubba?
A. Yes.

Cynthia Holbert

Q. And how many girls?
A. Nell's little girl and—Mrs. Bradley's girl and me.
Q. Three of you all?
A. Yes.
Q. Three boys and three girls?
A. Yes.
Q. And did you see Bubba get hit?
A. Yes.
Q. Would you tell these gentlemen over here what happened, what you saw?
A. He—were crossing the street and he was looking to the left side and the car came and then—the car stomped on brakes and then hit him and then he slid up the street.
Q. Can you tell these gentlemen over here, Cindy, whether Bubba was running or walking before he got hit?
A. He was walking.
Q. And you say he was looking to his left?
A. Yes.

page 33 } Q. Now Cindy, in the place where you all were playing in front of where Mrs. Bradley lives and where Mrs. Lewis live, were there any cars parked on that side?
A. No.

Mr. Wheeler: Excuse me just a minute, Cindy. I'll be right back. All right Cindy, thank you very much. Would you answer Mr. Parker, please?
A. Yes.

CROSS EXAMINATION

By Mr. Parker:
Q. Cindy, where—were you standing when your brother was with these other boys playing?
A. We were over there sitting on the porch.

Mr. Parker: On the porch.
Court: Mr. Parker, I'm going to ask you if you would come over here. The jury can't hear.
Mr. Parker: Speak to me over here, Cindy.

By Mr. Parker:
Q. What porch were you standing on when you say you were standing or sitting on the porch?

Cynthia Holbert

A. I was sitting on the last step.

page 34 } Q. Was this somebody's house?

A. Yes.

Q. Was it the house where your mother was visiting, the apartment house? Do you know what I mean by that?

A. No.

Q. Was your mother in the apartment buildings that were on Queen Street? Do you know—well, the street where your brother crossed from, do you remember some apartment buildings there?

A. Yes, she was in the house that in front of — Mrs. Bradley's house.

Q. And were you seated on the step in front of this house? Were you sitting down on the porch step?

A. On the step on the last—on the last—in the last row.

Q. And there were two other little girls with you?

A. Yes.

Q. Would you recognize a picture of this apartment if I showed it to you?

A. Yes.

Q. Now, what were the boys doing while you girls were sitting on the step?

A. Playing and started running around.

page 35 } Q. And do you know what game they were playing and running around?

A. No.

Q. Do you know where your brother was going when he went across the street?

A. Yes.

Q. Where was he going?

A. He was going to the store. He had a penny. He thought he could buy a soda with that.

Q. Did he say that to you?

A. Yes.

Q. And did you continue to sit on the porch that you told us about when he—left to go across the street?

A. Yes, and then—he went across the street and then—he got—when he got hit, he was—he just was—looking one way. That's why he got hit and then he—he was still walking when he got in the second half of the street and then the car came and hit him and then he slipped up the street and his shoes and socks came off.

Q. Now Cindy, when did you first know that you were going to come to Court about this accident of your brother's?

Cynthia Holbert

A. When the lawyer called and he said he was going to talk with my mother and father and see can I go to Court.

page 36 } Q. And did you go over it—what you have been telling us, with the lawyer?

A. Yes.

Q. And with your mother and father?

A. No.

Q. You haven't talked to your mother about it?

A. The lawyer did.

Q. But you did not?

A. No.

Q. What grade are you in, in school?

A. Second.

Q. Now, when you last saw your brother, where was he before he started across the street?

A. He came to us and told—told us what he was going to do.

Q. And where were the other boys at that time?

A. They went home and then—the other boy, he came and sit down on the step.

Q. And what color clothes did your brother have on that day, do you remember?

A. A yellow sweater. I don't remember the color of the pants.

Q. And you say that he walked across the street. He didn't run?

A. No.

page 37 } Q. And he kept looking to his left?

A. Yes.

Q. Which is your left?

(The witness indicated).

By Mr. Parker:

Q. And which is your right?

(The witness indicated).

Mr. Parker: All right. I have nothing further.

Mr. Wheeler: I have no further question of this young lady.

Court: All right, Cindy, suppose you go back to the room where you were. All right.

Mr. Wheeler: Call Mrs. Catherine Holbert.

Mrs. Catherine Holbert

Mrs. Frankie Jeanette Evans

MRS. CATHERINE HOLBERT, called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wheeler:

page 38-42 } Q. State your name, please, mam.
A. Mrs. Catherine Holbert.

****

By Mr. Wheeler:

Q. As you got out to the edge of the street, what cars were parked on the side from where you were coming?

A. There wasn't any cars on that side of the street.

Q. And do you remember whether there were any on the other side?

A. Yes, it was a few over there.

Q. There was a few on the other side?

A. Yes.

CROSS EXAMINATION

By Mr. Parker:

Q. Mrs. Holbert, you of course did not see the accident happen, did you?

A. No, I only saw—I saw it minutes after, just minutes.

Q. Yes. What I mean, you did not see the actual collision?

A. No.

Q. Between the boy and the automobile?

A. No.

page 43 } MRS. FRANKIE JEANETTE EVANS, called as a witness in her own behalf, being previously sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Parker:

Q. Mrs. Evans, you were on the stand before and I'd like to ask you to tell the Court and jury something about yourself. You are now—when you were living here, you were working at the VA Hospital, is that correct?

Mrs. Frankie Jeanette Evans

A. Yes.
Q. And you are a Registered Nurse by occupation?
A. Yes.
Q. Are you now working in that same capacity?
A. Yes.
Q. Where are you working now?
A. At the VA Hospital in Durham.
Q. All right. Now, coming back to the day of the accident, do you recall the approximate time that you left the hospital on that particular Sunday, any more than any other Sunday?
A. Sometimes at Sunday we would get off at 3:00 o'clock. We always got off early on Sunday, usually.
Q. That was the usual hospital routine on a
page 44 } Sunday?
A. Not necessarily a routine but we had an elderly lady who came on. She came on early and after she relieved us, we could go.
Q. Then on this particular day, you left the hospital and you came out of the hospital on the Queen Street exit, is that it, gate by the Hampton Institute?
A. Yes.
Q. Now, where were you going when you left the hospital?
A. Home.
Q. Now, what route do you travel to go to your home at that time from the hospital?
A. I usually traveled the Queen Street road down to across LaSalle and turn on Pembroke, turn left on Pembroke.
Q. And was this the—the street that you traveled all the time that you worked at the hospital?
A. Yes.
Q. Now, was anybody in your car with you on the date that you were involved in this accident?
A. No.
Q. And what kind of car were you driving?
A. A '61 *Chervolet Impalla.*
Q. Did this car have a standard type of trans-
page 45 } mission where you shift gears by hand or was it the automatic type of transmission?
A. Automatic.
Q. Automatic. Now, what kind of day was it as you recall?
A. It was pleasant.
Q. Clear?
A. Yes.

Mrs. Frankie Jeanette Evans

Q. And as you—as you traveled west on Queen Street. Now, Mrs. Evans, how far is it approximately from the VA Hospital to where the accident occurred?

A. I would have to give you an approximation. I guess it would be about a mile.

Q. Just a guess. About a mile?

A. Yes.

Q. And you traveled from the hospital on Queen Street direct, is that right?

A. Yes.

Q. So—you never left Queen Street up until the time of the accident?

A. No.

Q. All right. Now, I'll show you a photograph that has been introduced into evidence as Plaintiff's Exhibit Three (indicating). I ask you if that—to tell me what that photographs shows?

page 46 } A. It shows the apartment buildings. It shows the street that I was traveling. It shows the tall shrubbery.

Q. Now, does this photograph show the direction in which your car was traveling?

A. Yes (indicating).

Q. What direction were you traveling on Queen Street?

A. West.

Q. You would have been traveling west. Then you were coming in this direction from Patterson Avenue or back towards the hospital, is that correct?

A. Yes.

Q. Now Mrs. Evans, as you approached the area that you have pointed out and identified as the apartment buildings, was there anything that was obstructing your view to the left of the street?

A. Well, you can't see the apartment buildings until you get right at the apartment building because of these trees here (indicating).

Q. These are the trees and shrubs that you're pointing out to in this photograph (indicating)?

A. I said you couldn't see it.

Q. Are there one or two buildings that are there?

A. There are two. One is—is obstructed.

page 47 } Q. One is behind these bushes and trees?

A. Yes.

Q. Now, where with respect to the apartment buildings,

and these bushes and trees, was your car when you first saw these children at play?

A. Well, I had passed these bushes.

Q. Now, you have passed the bushes?

A. Yes.

Q. And at that time what, if anything, did you see on the right or the left-hand side of the street?

A. Well, on the left there were children and on the right there were—several people over there in front of that little —business center.

Q. And where did you see the children with respect to the two apartment buildings that—that you have described?

A. They were—behind—let's say the first apartment going west, on the side of it right here (indicating).

Q. They were between the two buildings?

A. On the side of this apartment (indicating).

A. Yes. Now—

Mr. Wheeler: Excuse me. I didn't hear that question or answer.

Mr. Parker: They were on the side of these two buildings (indicating).

page 48 } Mr. Wheeler: All right.

By Mr. Parker:

Q. Now Mrs. Evans, how fast were you traveling before you reached the shrubbery that you refer to in the photographs?

A. About 23 miles per hour.

Q. Did you have occasion to look at your speedometer or was this—your guess or—

A. Well, just before you enter this zone, there's a—a sign that says 25 miles per hour. Yes, I had occasion.

Q. And you were aware of that sign, was that it?

A. Yes.

Q. Now, what did you do when you first saw these children playing on your left-hand side?

A. Well, I slowed down. I slowed down. Applied brakes and slowed down and slowed my speed down.

Q. And did you continue to watch what those children were doing?

A. Yes.

Q. And would you tell the Court and jury what they were doing?

Mrs. Frankie Jeanette Evans

A. They were playing.

Q. Now, where was your car at this particular moment when you slowed down specifically for the children?

A. It was past the shrubbery.

page 49 } Q. It was past it?

A. Yes.

Q. And had you reached the children yet?

A. No, not—I had not exactly reached the children when I slowed my speed down.

Q. Then will you tell us what happened then?

A. Well, I saw these kids out there playing and I was watching the kids playing. As I was going on and all of a sudden there was a blur. This little boy was running real fast, right in front of my car and—I slammed on brakes and—and pulled my car over to the right, jerked it over there.

Q. Now, when you applied your brakes and swerved to the right, where was the little boy then? Did you have him in view? Could you see him?

A. When I applied my brakes?

Q. Yes, mam.

A. Yes, I saw him.

Q. And where was he with respect to your car?

A. He was right there in front, just—just in front of it.

Q. And were you able to stop your car before colliding with the boy?

A. Well, I stopped the car as soon as I could.

Q. Now, do you know what part of your car

page 50 } struck the child?

A. Well, I assumed—I can't say.

Q. If you don't know, you don't know. I see Mrs. Evans you wear glasses. Do you wear glasses at all times for vision?

A. Yes.

Q. To see at distance?

A. To see. I wear them all the time.

Q. And were you wearing your glasses on the day of the accident?

A. I wear them all the time, yes.

Q. Now, do you recall how many children you might have seen in that vicinity of those apartment buildings?

A. There were several there. More than one or two or three.

Q. Could you identify them by sex, boys and girls or did you—have that much of—a recollection?

A. They were boys and girls playing there.

Q. Now, you're familiar with that area, are you not?
A. Yes.
Q. And you're telling the jury and the Court that the first time you saw these children playing was when your car passed the shrubbery and trees that are on that photograph?
page 51 } A. Yes.
Q. So you could see before you passed the trees and the shrubbery if there was anybody to the left there?
A. No, you can't see before you pass the trees.
Q. I see. Now, did you after the accident, have any conversation with the boy's mother?
A. Yes.
Q. And where did that take place?
A. At Dixie Hospital.
Q. And what, if anything, did you say and what did she say?
A. Well, Mrs. Holbert was sitting out there on a bench, just as you go into the emergency room.

Mr. Wheeler: If the Court please, I think that's—that's hearsay and would not be admissible.

(Counsel for both side then argued the matter before the Court).

(Counsel for both sides then approached the Bench).

By Mr. Parker:
Q. Mrs. Evans, on this particular day were you in any hurry to get anywhere?
A. No.
Q. Did you know that your husband was working
page 52 } at the Shipyard that day?
A. He wasn't working that day.
Q. He was not working that day?
A. No.
Q. I thought you had said earlier he was working that day.
A. He was not working.
Q. So you were just simply driving home from the hospital?
A. Yes.
Q. Now, was your car in good mechanical condition?
A. Yes.
Q. And the brakes were working properly?

Mrs. Frankie Jeanette Evans

A. Yes.

Q. And how long had you worked at the VA Hospital here in Hampton until the time that you left?

A. Until when I left this time?

Q. Yes, mam.

A. Oh, approximately 16 months I guess. In November of 1964 and I left in April—

Q. Of 1966?

A. Yes.

Q. Now, one last question. Did you see anything thrown out on to the street such as a ball or child's toy before the child ran out?

page 53 } A. No.

Q. And when you saw the child, was it walking or was it running?

A. He was running.

Q. There is no question about that?

A. There is no question.

Mr. Parker: All right. You may examine, counsellor.

CROSS EXAMINATION

By Mr. Wheeler:

Q. Mrs. Evans, this picture that Mr. Parker handed you, that picture is accurate, is it?

A. Yes.

Q. I mean that's just the way it looked the afternoon this accident happened, didn't it? You don't see any change in the scene there between that photograph and the way it looked that afternoon when the accident happened, do you?

A. No, I don't.

Q. And can you see to the west of the trees? These are the trees you were talking about (indicating), aren't they?

A. Yes.

page 54 } Q. And you see to the west of them the break in the pavement there (indicating)?

A. Yes.

Q. That's the parking lot right there, is it not?

A. Right there (indicating).

Q. Yes, that goes in by the apartments?

A. That's the road that goes into the apartment.

Q. You are familiar with that too, aren't you?

A. I see the road there.

Mrs. Frankie Jeanette Evans

Q. And on the other side of that is the first apartment that you would approach, isn't it?

A. Yes.

Q. So you go from the trees to the road beside the apartments and then the—the apartments themselves on the other side of the road, isn't that right?

A. The apartments on the other side of the road?

Q. Yes.

A. Yes.

Q. All right. And I believe you said that you saw the children playing when you got to the trees or past the trees?

A. Past the trees.

Q. All right. And at the time you passed the trees, you were going 22 miles an hour, isn't that what you

page 55 } said?

A. Approximately 23.

Q. Approximately twenty what?

A. Approximately 23. I think that's what I said.

Q. Approximately 23 miles an hour?

A. Yes.

Q. And that when you saw the children, you started braking your speed at that time?

A. Yes.

Q. Then you saw this blur?

A. Yes.

Q. And you hit your brakes to stop your automobile and cut to the right?

A. Yes.

Q. Now, were you present when this photograph of your automobile was taken (indicating)?

A. Yes.

Q. And this dent that shows right here (indicating) on your hood, that wasn't there before the accident, was it?

A. This was not a new car when I bought it.

Q. I see. Do you know whether that dent was there before the accident?

A. I don't know.

page 56 } Q. So you don't know whether that's the dent caused by the little boy's head or not? Is that what you are saying?

A. Well, he didn't get in the middle of my car.

Q. Well, I'm asking you whether you know whether that's the dent caused by his head or not?

A. No.

Mrs. Frankie Jeanette Evans

Q. You don't know.
A. No.

Court: That was Exhibit Four, you were talking about?
Mr. Wheeler: Yes sir.
Court: All right.

By Mr. Wheeler:
Q. So when Mr. Baker, the Police Officer, took that picture to show that dent as being where the child struck the car, you wouldn't know whether it was right or not. You couldn't disagree with Mr. Baker, could you?
A. No, I couldn't disagree with you.
Q. Thank you very much. Now, I believe you said it was about a mile from Kecoughtan Hospital to where this accident occurred and you also said that you got off sometime about 3:00 o'clock?
A. I didn't say exactly what time I got off. I
page 57 } I got off—you know—
Q. Between three and three thirty?
A. Yes.
Q. All right. And you had covered the length of downtown Hampton and had started on the block between Back River Road and LaSalle Avenue at the time the accident happened?
A. Yes.
Q. Now, you didn't move your automobile after the child was struck, did you, Mrs. Evans?
A. No.
Q. And when the Police Officer came on the scene and found the car, it was right where it had come to rest, isn't that right?
A. Yes.
Q. So that his representation of the scene here that your car was, the front was three and a half feet from the center line and the back, two feet from the center line, that's accurate, is it not?
A. I didn't measure it.
Q. You didn't measure it but—you had not moved it?
A. I had not moved it.
Q. And you were not there when he measured, were you or were you? Did you see him measuring it?
A. He was measuring it I think before we left
page 58 } to go over to the hospital.

Mrs. Frankie Jeanette Evans

Q. So you were there?
A. He was measuring the process.
Q. Before you left to go to the hospital?
A. Yes.
Q. So you were still there, weren't you? If he was measuring before you left, then you were still there, isn't that right?
A. Yes.
Q. That's what I asked you. And he didn't move the car before he measured, did he?
A. No.
Q. Now, on this side of the street there is a parking lot for these stores there, is there not (indicating)?
A. Yes.
Q. And you said people were over there. You talking about cars or people or both?
A. They were both.
Q. Both, and they were in the parking lot, weren't they?
A. Yes.
Q. So as I understand it, Mrs. Evans, you had begun to slow down before you saw this blur?
A. Yes.
Q. And then when you saw the blur and saw
page 59 } the child in front of your car, then you hit your brakes and cut to the right, is that right?
A. Yes.
Q. And thereafter slid 42 feet and hit the child, isn't that what you are saying?
A. I don't know how many feet I slid.
Q. I see. And I believe you testified when I examined you this morning that the road is flat and straight?
A. Yes.
Q. Isn't that right. And it's not—it's a black-topped road. It's not loose gravel or anything like that, is it?
A. No.
Q. And your car was in good condition and the brakes were in good working order?
A. Yes.
Q. What is your vision uncorrected, Mrs. Evans?
A. I don't know.

Mr. Parker: I object to that, your Honor. I don't think it's material. It's totally unrelated to this case. The woman testified she wore her glasses.

Mr. Wheeler: She says she doesn't know.

Mrs. Frankie Jeanette Evans

page 60 } Mr. Parker: I don't see where it is material.

By Mr. Wheeler:

Q. Do you remember whether you were wearing white glasses or sun glasses on that particular day?

A. I was wearing these.

Q. Those glasses you have on now?

A. Yes.

Q. Do you know how far your car traveled to the right after you started to cut it to the right before it stopped?

A. No.

Q. But you don't deny that this is exactly where it ended up?

A. Well, that's the police's diagram.

Q. But you say you didn't move it?

A. I didn't move it.

Q. And he didn't move it?

A. No.

Q. And he measured it?

A. He measured it.

Mr. Wheeler: Thank you. I have no further questions.

RE-DIRECT EXAMINATION

By Mr. Parker:

page 61 } Q. Mrs. Evans, there was a question that you were asked. I had asked you prior but I'm going to ask you something again and that was this. When you passed this bush, this shrubbery and first saw these children in view, when was it that—that you applied your brakes to avoid this child? Was the child in front of your car or was the child running from your left as you had testified?

A. Running.

Q. It was running?

A. Yes.

Q. So it was not in front of you when you applied the brakes?

A. No.

Mr. Parker: All right, that's all. We'll rest, your Honor.

page 62 } DEFENDANT'S INSTRUCTION "D" (Granted):

Mr. Wheeler: I still think "D" is repetitious of "B" and I object to it for that reason. In Instruction "B" the jury is told that the burden is on the Plaintiff to prove by a preponderance of the evidence that the Defendant was guilty of negligence and that her negligence was a proximate cause of the accident. If after hearing all the evidence you conclude that the Defendant was not guilty of negligence or if you are in doubt as to whether he was guilty of negligence which was a proximate cause of the accident and it appears equally as probable that she was not guilty of negligence as that she was, you got proximate cause all throught that and—this is just a re-emphasis on that which I think is improper.

Court: Well, I'm inclined to think that the answer to that is very similar or very much like a similar discussion we had in connection with the—with the Plaintiff's Instruction. I'm going to grant "D" and your exception will be noted.

Mr. Wheeler: Note my exception for the reasons stated in my argument.

page 63 } DEFENDANT'S INSTRUCTION "F" (Granted):

Mr. Wheeler: I object to "F" because this is not an unavoidable accident case. There is evidence from which the jury can properly conclude that the Defendant was responsible for this accident and the Court of Appeals has been extremely critical of the granting of unavoidable accident Instructions in cases where there is evidence from which negligence can be inferred by the jury. This is inviting the jury to take an easy way out and say, well, it was just unavoidable. There is evidence here of negligence and I submit that since there is, then an unavoidable accident Instruction is not proper. I further submit that there was a variance between the *Allegata* and the *Probata* in that it was never pleaded and I submit that an Instruction on this—on this phase of the law is not applicable to this case. It's not an unavoidable accident case.

Mr. Parker: Of course our position, your Honor, is that it is—we deny all the material allegations of the Plaintiff's complaint in his lawsuit and it is also known that under the rules of practice in the State of Virginia, it is not necessary to allege as an affirmative defense unavoidable accident. Insofar as the Instruction itself is concerned, I think it states

the law correctly that we recognize that there are unavoidable accidents. This has been the contention of the De-
page 64 } fendant in this case and there is as much evidence to weigh in her favor insofar as this defense is concerned as there may be evidence for the Plaintiff who disputes the—the fact, or defense of unavoidable accident but nevertheless I feel we are entitled to the Instruction on the basis of the evidence that was presented and that it is a correct statement of the law and it's applicable in this case and it becomes a question of whether or not the jury is going to believe it's unavoidable or—or find to the contrary.

Mr. Wheeler: If the Court please, the evidence bearing on this point is several different things. One, is that—that the child was walking in the street, looking the wrong way. Of course the child is not guilty of negligence and we got no question about that but there's evidence of some speed on the part of the Defendant from the point of view of skidmarks. There's evidence that she saw the children and was not keeping her—not watching them as she should have. There is the evidence of her extremely slow speed according to her testimony and the speed—skidmarks which show that it was actually in excess of 25 miles an hour. The posted speed limit and I respectfully submit that the Defendant is not entitled to an unavoidable accident Instruction unless the evidence is devoid of showing of negligence on her part and there is some evidence to support the fact that the evidence—the accident was unavoidable. The accident could have been avoided in any number of ways.

page 65 } Court: If you take the Defendant's evidence standing alone though, Mr. Wheeler, what she said happened. All the other evidence came from the Plaintiff's witnesses.

Mr. Wheeler: If you take her evidence, standing alone, you've got a contradiction in and of itself because she says on adverse examination this morning that she saw this—children when she passed the trees and there's a photograph in there showing where the trees are with relation to where she said the children were. She placed—the children between the two apartments by her own testimony and if the Court please, Mr. Baker testified where the trees were on the other side of the driveway so there's no basis even on her testimony, standing alone, to say that the accident was unavoidable. She could have avoided it. She could have stopped. *Baker* against *Richardson* says rather than injure children, that's exactly what you have to do so it's not an unavoidable accident case, if the Court please. The question is whether

or not the lady was negligent and if she was negligent and the jury so find and we're entitled to a verdict. If she was not negligent, then she was not negligent but it was not an unavoidable accident.

Mr. Parker: Now, as I remember the evidence of Officer Baker in reply to a direct question of mine as to the existence of shrubbery and bushes and trees, he had no

page 66 } recollection.

Court: He couldn't remember. That's right.

Mr. Wheeler: He further said that the—trees were to the east. There were trees to the east of the driveway going in beside the apartment.

Court: Now, Baker was asked specifically about the shrubbery and testified specifically. He testified they might be there but he had no recollection. Baker now. Other people testified about the bushes.

Mr. Wheeler: I distinctly remember that and I will not argue with the Court about it.

Court: Well, all right. I'm going to grant "F". The exception of the Plaintiff is noted.

Mr. Wheeler: Note my exception for the reasons stated in objecting to it, sir.

* * * * *

page 67-A } JUDGE'S CERTIFICATE

I, Nelson T. Overton, Judge of the Circuit Court for the City of Hampton, Virginia, who presided over the foregoing case of Oliver A. Holbert, III, an infant who sues by and through his mother and next friend, Catherine Holbert vs Frankie Jeanette Evans, tried on September 14, 1966, in the said Court in Hampton, Virginia, do certify that the foregoing is a true and correct report of all the evidence stated herein, together with certain motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and certain other incidents and exceptions of the respective parties as herein set forth.

I do further certify that the attorney for the Defendant had reasonable notice, in writing, given by counsel for the Plaintiff, of the time and place when the foregoing report of the testimony stated herein, objections and exceptions of the trial would be tendered and presented to the undersigned for signature and authentication, and that the said report was presented to me on the 27th day of February, 1967, within sixty days after the entry of final judgment in said case.

Given under my hand this 8th day of March, 1967.

NELSON T. OVERTON
Judge of the Circuit Court for the
City of Hampton, Virginia.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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