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Supreme Court of Appeals
Richmond, Va.

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Record No. 6833

In the Supreme Court of Appeals of Virginia at Richmond

JULIA L. HAGAN, t/a, etc., et al.

v.

EVELYN HICKS, Executrix, etc.

FROM THE HUSTINGS COURT OF THE CITY OF NEWPORT NEWS

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. 6833

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 29th day of November, 1967.

JULIA L. HAGAN, T/A HAGAN TRUCK LINE, AND MARVIN H. BRYANT, Plaintiffs in error,

against

EVELYN HICKS, EXECUTRIX OF THE ESTATE OF LOUIS HICKS, DECEASED, Defendant in error.

From the Hustings Court of the City of Newport News
Conway H. Sheild, Jr., Judge

Upon the petition of Julia L. Hagan, t/a Hagan Truck Line, and Marvin H. Bryant a writ of error and *supersedeas* is awarded them to a judgment rendered by the Hustings Court of the City of Newport News on the 8th day of May, 1967, in a certain motion for judgment then therein depending, wherein Evelyn Hicks, Executrix, etc., was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said hustings court in the penalty of $45,000, with condition as the law directs.

RECORD

* * * * *

page 27 } Instruction No. 1

The Court instructs the jury that the word "negligence" as used in these instructions means the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or the failure to do some act which a reasonably prudent person would do under the same or similar circumstances.

The Court further instructs you that the words "reasonable care" or "ordinary care" mean that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.

C. H. S., JR., Judge

We the Jury find for the plaintiff and award the sum of $40,000.00 to be allocated as follows; to Mrs. Evelyn Hicks (widow) $25,000.00 to Ronnie Hicks (minor son) $15.000.00.

MR. E. V. FORETICH, JR., Foreman

page 28 } Instruction No. 3

The Court instructs the jury that they are the sole judges of the weight of the evidence and of the credibility of the witnesses, and the jury has the right to discard or accept the testimony, or any part thereof, of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case, but the jury has no right arbitrarily to disregard the credible testimony of a witness. And in ascertaining the preponderance of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

C. H. S., JR., J.

page 29 } Instruction No. 4

The Court instructs the jury that while the plaintiff, Evelyn Hicks, Executrix of the Estate of Louis Hicks, deceased, must prove her case by a preponderance of the evidence, this does not mean that she must prove the negligence of Marvin H. Bryant beyond a reasonable doubt as in a criminal case.

Preponderance of the evidence is that evidence which is most convincing and satisfactory to the minds of the jury.

The jury is entitled to draw all reasonable inferences from any facts proved and in arriving at its verdict, can base its findings on such facts and reasonable inferences drawn therefrom.

C. H. S., JR., J.

* * * * *

page 31 } Instruction No. 6-A

The Court instructs the jury that in the absence of any evidence to the contrary, it is presumed that the decedent, Louis Hicks, did his duty as he immediately approached the log truck; that he exercised ordinary care under the circumstances and did what an ordinary prudent man would have done under such circumstances.

C. H. S., JR., J.

page 32 } Instruction No. 7-B

The Court instructs the jury that if they believe from a preponderance of the evidence that the Hagan truck was stopped on the highway so as to impede or render dangerous the free flow of traffic by others, if he, the decedent, was exercising ordinary care for his own safety, had a right to assume that the lane ahead of him was free for ordinary travel and he had a right to rely upon this assumption until, in the exercise of ordinary care, the contrary appeared, or should have appeared, to him, but this did not relieve him of the duty to exercise ordinary care to keep a proper lookout.

C. H. S., JR., J.

page 33 } Instruction No. 9

The Court instructs the jury that as Marvin H. Bryant

drove a tractor-trailer unit loaded with piling in a northerly direction along Warwick Boulevard in the City of Newport News, it was his duty to use reasonable care:

1. To refrain from driving at such a slow speed as to impede the normal and reasonable movement of traffic, except when reduced speed was necessary for safe operation.

2. To refrain from driving in a manner so as to endanger life, limb or property of any person lawfully using the highway.

3. To refrain from stopping in such manner as to impede or render dangerous the use of the highway by others lawfully using the highway, except in the case of an emergency as the result of an accident or mechanical breakdown.

The Court further instructs you that each of the above duties were continuing duties, and if the jury believe from a preponderance of the evidence that the defendant, Mr. Bryant, failed in any one of the foregoing duties and that such failure, if any, was the sole proximate cause of the death of the decedent, Louis Hicks, then unless the decedent was guilty of contributory negligence, you must find your verdict for the plaintiff and fix damages in accordance with other instructions of the Court.

C. H. S., JR., J.

page 34 } Instruction No. 11

The Court instructs the jury that the driver of all motor vehicles, trailers or semi-trailers exceeding seven feet in height or in width shall use ordinary care to equip the same with lamps mounted at the extreme right and left rear top corners of such vehicles, each of which lights shall be capable of projecting a red light visible in clear weather for a distance of at least 500 feet to the rear of such vehicle; and the driver of such vehicle is required to use ordinary care to keep said lamps lighted from one-half hour after sunset to one-half hour before sunrise, or at any other time due to insufficient light or unfavorable atmospheric conditions persons or vehicles on the highway are not clearly discernible at a distance of 500 feet; and if the jury believe from a preponderance of the evidence that the defendant, Mr. Bryant, failed in the foregoing duties and that such failure, if any, was the sole proximate cause of the death of the decedent, Louis Hicks, then unless the decedent was guilty of contributory negligence which proximately contributed to cause the collision, you must find your verdict for the plaintiff.

C. H. S., JR., J.

page 35 } Instruction No. 12

The Court instructs the jury that the driver of any motor vehicle or combination of vehicles whose actual length, including the load thereon, exceeds 35 feet, shall use ordinary care when operating such vehicle during the hours of darkness, to have the same equipped with reflectors of a type approved by the Superintendent, and such reflectors shall be mounted on the widest part of the towed vehicle or the load thereon so as to be visible from the front and sides of the vehicle; and if the jury believe from a preponderance of the evidence that the defendant, Mr. Bryant, failed in the foregoing duty and that such failure, if any, was the sole proximate cause of the death of the decedent, Louis Hicks, then unless the decedent was guilty of contributory negligence which proximately contributed to cause the collision, you must find your verdict for the plaintiff and fix damages in accordance with other instructions of the Court.

C. H. S., JR., J.

page 36 } Instruction No. 14

The Court instructs the jury that contributory negligence is never presumed and contributory negligence as a defense must be proven by a preponderance of the evidence by the defendants unless such contributory negligence appears from the evidence in behalf of the decedent, Louis Hicks, or can be fairly inferred from all the facts and circumstances in the case.

Contributory negligence as a defense must be a contributing cause of the accident. And unless it is shown by a preponderance of the evidence, or from the evidence in behalf of the plaintiff, that the negligence, if any, of the decedent, Mr. Hicks, was a proximate or contributing cause, which combined with the negligence of the defendant, Mr. Bryant, and contributed directly to the death of Mr. Hicks, the plaintiff is not thereby barred from recovery by contributory negligence.

And if the jury are uncertain as to whether the decedent, Mr. Hicks, was guilty of contributory negligence, or if you believe that it is just as probable that the decedent was not guilty of any such negligence as it is that he was, then you cannot find the decedent, Mr. Hicks, guilty of contributory negligence.

C. H. S., JR., J.

page 37 } Instruction No. 15

The Court instructs the jury that if you find a verdict in favor of the plaintiff, Evelyn Hicks, Executrix of the Estate of Louis Hicks, deceased, then your verdict must be against both defendants, Marvin H. Bryant and Julia L. Hagan, t/a Hagan Truck Line.

C. H. S., JR., J.

page 38 } Instruction No. 16

The Court instructs the jury that under the evidence, the decedent, Louis Hicks, was forty-eight years of age, and according to the table of life expectancy as established by the law of Virginia, a male forty-eight years of age has a life expectancy of 24.4 years, and this is a fact to be taken into consideration in the jury's deliberation with other evidence as to the health, constitution and habits of such person.

C. H. S., JR., J.

page 39 } Instruction N. 18

The Court instructs the jury that if you believe from a preponderance of the evidence and other instructions of the Court that the plaintiff is entitled to recover, you may award such damages as to you may seem fair and just, not to exceed the amount sued for, and in assessing the damages, you may ascertain the same with reference to the following:

1. The pecuniary loss, if any, sustained by the widow and children of Louis Hicks, fixing such sum with reference to the probable earnings of the deceased if he had not been killed and in view of his health, business capacity and experience.

2. Compensation for loss of the decedent's care, attention and society to his widow and children.

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

And the jury may, in its discretion, if it sees fit, make such allocation of the sum awarded, if any, as it deems proper between the widow and children of Louis Hicks; the jury shall have absolute discretion as to who shall receive the whole or any part of the recovery.

C. H. S., JR., Judge

page 40 } INSTRUCTION NO. A

The Court instructs the Jury:

That no presumption arises that the defendant was negligent from the mere fact that the accident occurred, but that the burden rests upon the plaintiff to prove by a preponderance of all of the evidence that the defendant was negligent and that his negligence, if any, was a proximate cause of the accident in question. If upon all of the evidence the jury does not believe that the defendant was negligent, or it appears just as likely that he was not negligence as that he was, your verdict must be for the defendant.

C. H. S., JR., Judge

page 41 } INSTRUCTION NO. B

The Court instructs the Jury:

That it was the duty of Mr. Hicks to use reasonable care under all of the circumstances and conditions then existing to:

1. Keep a proper lookout, and the duty to maintain a proper lookout involves not only the physical act of looking, but a reasonable prudent reaction to what a proper lookout disclosed or should have disclosed in the exercise of ordinary care. If a person looks and does not see what an ordinarily prudent person would have seen under the circumstances in time to take the necessary precautions to avoid danger, he is as guilty of negligence as if he failed to maintain any lookout.

2. Keep his vehicle under proper control by making use of such of the mechanical apparatus of his vehicle as an ordinarily prudent person would have done under the same or similar circumstances.

3. Operate his vehicle at a speed not greater than was reasonable and proper under the circumstances then and there existing.

These were continuing duties to be exercised when they would be reasonably effective to avoid an accident, and if you believe from the evidence that the plaintiff failed in any one or more of said duties then he was negligent, and if you further believe any such negligence was the sole proximate cause or proximately contributed to cause the accident, then your verdict should be for the defendant.

C. H. S., JR., J.

page 42 } INSTRUCTION NO. C

The Court instructs the Jury that:

Every vehicle traveling upon the highway of this State shall be equipped with and have burning at night at least two head lamps, at the front of and on opposite sides of the motor vehicle. Such head lamps, if they be multiple-beam, shall provide an uppermost distribution of light of sufficient intensity to reveal persons and objects at least 350 feet ahead, and at least one lower, non-glaring distribution of light of sufficient intensity to reveal persons and objects at least 100 feet ahead.

C. H. S., JR., J.

page 43 } INSTRUCTION NO. D

The Court instructs the Jury:

That the driver of a motor vehicle shall not follow another motor vehicle more closely than is reasonable and prudent, having due regard for the speed of both vehicles and the traffic upon, and conditions, of the highway at the time.

C. H. S., JR., J.

page 44 } INSTRUCTION NO. E

The Court instructs the Jury:

That there can be no recovery of damages for an alleged accident unless the negligence charged as causing the accident was the proximate cause of the accident. Proximate cause does not denote closeness in point of time, but closeness in causal relation between the alleged negligence and the alleged accident. For negligence to constitute the proximate cause of an accident the accident must be the natural and probable consequence of the negligence and the consequence such as ought to have been foreseen in the light of the attending circumstances.

C. H. S., JR., J.

page 45 } INSTRUCTION NO. F

The Court instructs the Jury:

That proof by a preponderance of the evidence does not necessarily mean proof by the greater number of witnesses. In ascertaining upon which side is the preponderance of the evidence the jury should consider not only the number of witnesses, but also their credibility and the reasonableness

of their testimony when taken in connection with all the facts and circumstances of the case.

C. H. S., JR., J.

page 46 } INSTRUCTION NO. G

The Court instructs the Jury:

It is not necessary that material facts be proven by direct evidence; they may be proven by circumstantial evidence, that is, the jury may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them. However, an inference cannot be drawn from a presumption but must be founded upon some fact legally established.

C. H. S., JR., J.

page 47 } INSTRUCTION NO. H

The Court instructs the Jury:

That if you believe from the evidence that the sole proximate cause of the accident was the negligence of Mr. Hicks in the operation of his vehicle, then your verdict shall be for the defendant.

C. H. S., JR., J.

page 48 } INSTRUCTION NO. I

The Court instructs the Jury:

That if you believe from the evidence in this case that the accident was occasioned by the concurring negligence of both Mr. Hicks and the defendant which has contributed as a proximate cause of the accident complained of, there can be no recovery, as courts do not undertake to balance the negligence of the respective parties, where both have been at fault, in order to ascertain which one is most at fault.

C. H. S., JR., J.

page 49 } INSTRUCTION NO. J

The Court instructs the Jury:

That in the assessment of damages you are not to indulge in speculation or guess, and consequences which are contingent, speculative or merely possible are not to be considered, nor should you be swayed by sympathy or prejudice or any

emotion in favor of either party, but you shall be controlled wholly by the law and the evidence.

C. H. S., JR., J.

page 50 } INSTRUCTION NO. K

The Court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover, then the amount sued for is not evidence in this case, and the jury are told that such amount is not to be considered by them in arriving at the amount, if any, of their award.

C. H. S., JR., J.

* * * * *

page 58 }

* * * * *

Hustings Court of the City of Newport News, Monday, the 8th day of May, 1967.

* * * * *

This day again came the parties by counsel, and the defendants renewed their motion heretofore made on April 18th, 1967 to set aside the verdict of the jury as being contrary to the law and the evidence (and various other reasons assigned at the bar and urged leave to argue same) and grant the defendants a new trial, which motion the Court doth overrule, to which ruling of the court the attorneys for the defendants excepted, and the arguments of counsel being heard, it is considered by the Court that the plaintiff recover against the defendants the sum of $40,000.00 with interest thereon after the rate of six per centum per annum from the 8th day of May, 1967 until paid, and her costs herein expended.

It is ordered that the judgment of $40,000.00 be allocated as follows: To Mrs. Evelyn Hicks (widow) $25,000.00 and to Ronnie Hicks (minor son) $15,000.00.

And the defendants having noted their intentions of appealing to the Supreme Court of Appeals requested the Court to fix the amount of bond, which bond, the Court doth fix in the amount of $45,000.00.

* * * * *

NOTICE OF APPEAL

Julia L. Hagan, T/A Hagan Truck Lines, and Marvin H. Bryant, defendants, are aggrieved by a certain judgment of the Hustings Court of the City of Newport News, Virginia, entered on May 8, 1967, and by Order of the said Court entered on May 8, 1967 overruling the defendants' Motion to set the verdict of the jury aside as being contrary to the law and the evidence and to enter up judgment for the defendants, Julia L. Hagan, T/A Hagan Truck Lines and Marvin H. Bryant, and in the alternative to grant a new trial, in the above-entitled action at law, and the said defendants, Julia L. Hagan, T/A Hagan Truck Lines and Marvin H. Bryant, hereby file their Notice of Appeal and intention to apply to the Supreme Court of the State of Virginia for a writ of error.

ASSIGNMENTS OF ERROR

The defendants, Julia L. Hagan, T/A Hagan Truck Lines, and Marvin H. Bryant, assigns the following errors:

(1) The Court erred in overruling the defendant's Motion at the conclusion of the plaintiff's evidence, that page 62 } the plaintiff's evidence be struck and summary judgment entered for the defendants.

(2) The Court erred in overruling the defendants' Motion at the conclusion of all of the evidence, that the plaintiff's evidence be struck and summary judgment entered for the defendants.

(3) The Court erred in overruling the defendant's Motion to set aside the verdict as contrary to the law and the evidence, and to enter summary judgment for the defendants, or in the alternative to grant a new trial.

(4) The Court erred in granting Instruction Number 6A, offered in behalf of the plaintiff.

(5) The Court erred in granting Instruction Number 7B, offered in behalf of the plaintiff.

(6) The Court erred in granting Instruction Number 9, offered in behalf of the plaintiff.

(7) The Court erred in granting Instruction Number 11, offered in behalf of the plaintiff.

(8) The Court erred in granting Instruction Number 12, offered in behalf of the plaintiff.

(9) The Court erred in granting Instruction Number 14, offered in behalf of the plaintiff.

Officer Bill S. Holmes

(10) The Court erred in granting Instruction Number 18, offered in behalf of the plaintiff.

page 63 } (11) The Court erred in limiting argument of counsel to Forty-Five (45) minutes in the case.

JULIA L. HAGAN, T/A
HAGAN TRUCK LINES and
MARVIN H. BRYANT

By JOHN B. PRESTON
Of Counsel

JOHN B. PRESTON
PRESTON, PRESTON & WILSON, p.d.
318 Royster Building
Norfolk, Virginia 23510

* * * * *

Filed June 26, 1967.

GEO. S. DeSHAZOR, JR., Clerk

* * * * *

OFFICER BILL S. HOLMES, called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Pitchford:

Q. Will you state your name, please?

A. Yes sir, my name is Bill S. Holmes.

Q. What is your business or occupation?

A. I'm a police officer for the City of Newport News.

Q. How long have you been on the Newport News City Police Force?

A. I was employed here, sir, in May 3rd, 1963.

Q. Were you on duty on September the 22nd, 1966?

A. Yes sir, I was.

Q. On that day, were you directed to investigate an accident?

A. Yes sir, I was.

page 26 } Q. That had occurred between an automobile driven by Mr. Louis R. Hicks and a log truck driven by Mr. Bryant?

Officer Bill S. Holmes

A. Yes sir.
Q. About what time did you receive the call?
A. I received the call at 5:43 a.m. that morning.
Q. Do you recollect where you were?
A. Yes sir, I was in the vicinity of the Ferguson High School.
Q. Upon receiving the call, what did you do?
A. I immediately turned my police unit, I was traveling south, and headed north to the scene of the accident.
Q. What were weather conditions?
A. It was cloudy that morning.
Q. Was it daylight or dark?
A. It was darkness.
Q. All right, and where had the accident occurred?
A. The accident had occurred on Warwick Boulevard, approximately 384 feet north of the Oyster Point Road intersection.
Q. Were the vehicles still in place when you got to the scene?
A. The vehicle operated by Mr. Hicks had not
page 27 } moved. However, the log truck had travelled 81 feet north on Warwick, from the point of impact.
Q. All right. Now, would you come around to the board and draw, if you can, a freehand drawing showing what you found at the scene?
A. Yes sir.

* * * * *

Q. Now, Officer Holmes, is the Denbigh Baptist Church near that scene?
A. Yes sir, the Denbigh Baptist Church in relation to the point of impact, which is this black mark on the board here (indicating), would put it in this area here (in-
page 28 } dicating), would put the church approximately here (indicating).
Q. Could you indicate on your diagram approximately where the cross in front of the church is?
A. Yes sir. The cross?
Q. Yes sir.
A. I don't have the cross in my diagram. However, I am familiar with the area. It would be (indicating). Somewhere here (indicating).
Q. Would you also indicate on your diagram approximately where the church parking lot is and the area separating the entrance and the exit?

Officer Bill S. Holmes

A. Right here (indicating). This is—there are two entrances into the parking lot. Between the three concrete curbings in front of the Denbigh Baptist Church (indicating).

Q. I observe, from your diagram, that you have marked 384 feet to Oyster Point Road. I now ask you how you determined that officer.

A. Yes sir, I stepped it off, paced it off.

Q. You have also indicated on your diagram that 22 feet. What does that indicate?

A. The width of Warwick Boulevard on Warwick Boulevard.

Q. How did you determine that?

page 29 } A. Paced that off.

Q. Vepco pole 448356, and from it, you have an arrow of 33 paces?

A. Yes sir, that's—the point of impact was 33 feet north from the Vepco pole 448356; about 33 feet north on Warwick.

Q. Did you observe any skid or scuff marks on the scene?

A. No sir.

Q. You did not?

A. No sir.

Q. Now, what was the first thing you observed about the two vehicles when you got to the scene?

A. The first thing—I observed, naturally in the accident you find out if there's any injuries.

Q. I think you can go back to the witness stand. I think we're finished with the diagram for the moment.

Mr. Pitchford: At this point I would like to ask the Court to admit it in evidence as Plaintiff's Exhibit Number One.

Mr. Preston: I have no objection.

Court: No objection, admitted.

(The diagram was received and marked Plain-
page 30 } tiff's Exhibit One.)

By Mr. Pitchford:

Q. Tell us what you first did when you got to the scene?

A. The first thing when I got to the scene, there were two gentlemen were assisting with traffic and I—found Mr. Hicks into the steering wheel of his automobile that he was driving and at this time, I—Mr. Hicks was alive. I got up on the —broken part of the windshield, I sat on the part of the windshield and tried to kick the seat from around him. The

seat had wedged him into the steering wheel, to free him. He was jammed, and waited for the Fire Department ambulance to assist me.

Q. Did you call the ambulance?

A. Sir?

Q. Did you call the ambulance?

A. Yes sir, I did.

Q. Did you take Mr. Hicks or help take Mr. Hicks out of the automobile?

A. Yes sir, I did.

Q. And where was he placed when he was taken out of the automobile?

A. He was placed on a stretcher which the Fire Department ambulance carries and placed into the ambulance.

page 31 } Q. Did you observe whether or not there were lights on the Hicks vehicle?

A. There were—the tail lights were burning. I don't—I think that the headlights were—were knocked out. I don't recall on the headlights. I think they were broken.

Q. Now, did you look at the truck?

A. Yes sir, I did.

Q. When did you look at the truck?

A. After we had freed Mr. Hicks. I had to get the point of impact and this time I did look at the truck to see if there was any damage to the truck, to the rear of it.

Q. Did you determine the distance between the rear of the truck and the point of impact?

A. Yes sir, I measured the distance off that the truck had traveled after the point of impact.

Q. That distance was what?

A. 81 feet.

Q. Would you show that on your diagram?

(The witness complied with the request of counsel.)

By Mr. Pickford:

Q. Thank you. I believe that finishes the diagram. I overlooked that. Come back to the witness stand if

page 32 } you will, please.

(At this time the witness resumed his seat in the witness chair.)

By Mr. Pitchford:

Q. Now, in determining the distance between the point of the impact and the rear of the Hagan truck loaded with creosote poles, did you observe any lights or flares or warning devices about the truck?

A. When I—checked for the lights on the truck, there were three lights on the rear of the truck that were burning, very dimly. The—at the distance of 81 feet between—from Mr. Hicks' car to the truck, they were just barely visible.

Q. And—

A. Now, these are the lights that were burning, sir. There was one light on the extreme left hand side that was flickering very dimly.

Q. Did the Police make photographs at the scene?

A. Yes sir.

Q. Of the truck and of the automobile and of the dead man?

A. Yes sir.

(At this time certain photographs were handed
page 33 } to Defense counsel.)

A. Now, I would like to correct myself there. On the question that you asked me, I'm not positive. I think that they did not—obtain pictures of Mr. Hicks at the scene of the accident.

* * * * *

Q. Did you identify this picture (indicating)?

A. Yes sir. This is the picture of the truck driven by the Defendant sitting beside his two attorneys, in question, at the scene of the accident.

Mr. Pitchford: I ask that it be admitted in evidence as Plaintiff's Exhibit Number Two.

Court: No objection to this one?

page 34 } Mr. Preston: I have no objection, your Honor.

(The photograph was received and marked Plaintiff's Exhibit Number Two.)

By Mr. Pitchford:

Q. Now Officer Holmes, would you come around to the jury and show them what lights that you saw burning dimly?

A. Yes sir. This light, this light and this light (indicating) was burning very dimly.

Mr. Foretich (Juror): Would you show me those lights again?

A. Yes sir. This light and also this light (indicating).

Mr. Golden (Juror): The lights were burning, were they on the logs?

A. No sir, they were on the—on the truck bed itself. The body of the truck.

By Mr. Pitchford:

Q. Let me ask you this, Officer Holmes. Were there any lights on these logs that were not burning?

A. On the logs, yes sir. There were—I'd have to—obtain my notes.

Q. Get your notes and look and see and tell us
page 35 } if you will, how many lights there were on the logs, or bulbs.

A. Okay. From my original notes I obtained at the scene of the accident, there were seven lights with wiring to them connected on the logs itself. They were nailed there and out of these seven lights, three of these were broken — were broken and also there were three reflectors on the logs.

Q. Now, out of the seven lights you say three were broken?

A. Yes sir.

Q. What about the other four, were they burning?

A. No sir, there were no lights on the logs burning.

Q. No lights at all on the logs burning?

A. No sir.

Q. Can you take this photograph and point out to the jury where those lights were located on the logs on this particular morning; those broken as well as those not broken and not burning?

Mr. Foretich (Juror): May I say something? Could we distinguish the difference in the lights on the truck and the lights on the logs? There's some confusion here, it
page 36 } seems, when you say lights on the truck.

Court: This is Mr.

I'll let you ask him the question. I'd—

Mr. Foretich (Juror): When you say lights on the truck whether you mean on the body itself or on the cargo?

A. Yes sir, as I indicated before, the three lights that were burning, were on the body, the bed of the truck.

Mr. Foretich (Juror): Yes sir.

A. In other words, the superstructure. The seven lights I spoken to in reference to my notes were nailed onto the logs, the creosote logs on the truck which was the load. I don't know if I can pick out all seven of these lights from the diagram.

By Mr. Pitchford:

Q. All right—

A. This is one light (indicating).

Q. Was that light broken?

A. No sir. This light was intact.

Q. All right. Can you pick out another light—before we leave that light let the record show, if you will, the light on the left hand side of the truck on the log.

Court: On the log.

page 37 } Mr. Pitchford: That's what he pointed out.

By Mr. Pitchford:

Q. Now, can you point out another light that was intact and not broken?

A. This light looks intact from the—from the photograph; however, I can't be—I can't be sure because the photograph doesn't distinctly show the lights as well as the—the area. I had my spotlight on the back of the creosote logs at the time I made my notes.

Q. Now, I point to the extreme right of the truck, a log, and ask you what this object is?

A. Yes sir, that is a light also.

Q. Was that light intact?

A. Yes sir. That light was intact.

Q. Was that light burning?

A. No sir, it was not burning.

Q. Was there wires running to the light?

A. Yes sir, as far as I could remember there were wires running to all the lights on the—on the logs that were nailed onto the logs.

Q. All right, sir. Now, can you look at that photograph and see anywhere, any flags on the logs?

A. No sir, I can't find a flag.

Q. Do you recollect seeing any flags on the logs?

page 38 } A. No. If there had been a flag on the logs, I would have mentioned it in my notes.

Q. Did you so mention them in your notes?

A. No sir.

Q. Can you point out to the jury where the reflectors on the logs were located that night as distinguished from the lights?

A. Okay. The three reflectors, this is one, two and the third reflector (indicating).

Q. Now, I point out something else to you and that is the log on the left side where the light was intact and you said it wasn't burning and ask you if that log was laying on the bed of the truck or if it extended beyond the bed of the truck?

A. It did—extend a little beyond the side of the truck.

Q. Approximately how much beyond the side of the truck?

A. I—I would estimate approximately six inches to a foot.

Q. Now, I ask you to look at the log on the opposite side and see if that extended beyond the bed of the truck?

A. Yes sir. I'd say that log extended approxi-
page 39 } mately five inches, judging from the photograph.

Q. All right. Now, did you determine in your investigation whether or not there was an overhang of the logs beyond the bed of the truck?

A. Yes sir, there was a seven foot overhang of the logs. Extended seven foot beyond the end of the bed of the truck.

* * * * *

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* * * * *

Mr. Pitchford: Yes sir.

Court: You may go right ahead.

By Mr. Pitchford:

Q. Officer Holmes, as you approached the scene of this accident and the point of impact that you have indicated on Plaintiff's Exhibit Number one, is the road straight
page 44 } or curved?

Mr. Preston: Your Honor, we have just been out to view this scene and I don't think there's any problem. The jury has seen the scene and I don't think they're going to be helped in any way by Officer Holmes' evidence as to how the scene looks.

Court: I'm not going to stop him until I find out.

Officer Bill S. Holmes

A. Yes sir, there is a curve as you approach the Denbigh Baptist Church where the point of impact occurred.

By Mr. Pitchford:

Q. And the curve is in which direction? To your left or to your right?

A. The curve is to your left.

Q. During the course of your investigation, did you obtain the names of witnesses concerning the accident?

A. Yes sir, I did.

Q. Do you have that list with you?

A. Yes, I believe I do. Let me check my list to make sure. I obtained the—the statement from one witness.

Mr. Preston: Now, your Honor, I'm going to page 45 } object to what the witness said. Only the name.

By Mr. Pitchford:

Q. I just asked you the name of the witness.

A. Yes sir, his name was Yancey K. Noble, Junior.

Court: All he did was state his name so far.

By Mr. Pitchford:

Q. Now, at the risk of being repetitious, I will ask you if the three lights you saw on the body of the truck, the ones you pointed out down here, can you see this far?

A. Yes sir, I can see it.

Q. Were they of sufficient intensity to be seen a distance of five hundred fet under normal atmospheric conditions?

Court: Don't answer it.

Mr. Preston: He can not answer this question. It's going to call for a conclusion on his part because he does not know what the conditions of these lights were prior to the accident and I object to it.

Court: I'll hear you in Chambers if you want to be heard. I'll hear you both in Chambers.

page 46 } (At this time the Court and counsel for both sides retired to the Chambers of the Court.)

Mr. Pitchford: The Officer is not an expert in any way but we have a seven foot overhang of log.

Court: Seven foot is what he said.

Mr. Pitchford: And these lights here have not been touched in any manner. They have not been damaged in any manner.

Court: You mean the lights on the body of the truck?

Mr. Pitchford: The lights on the body of the truck; that's what I am questioning him about.

Court: You asked him could he see them five hundred feet.

Mr. Pitchford: If they were discernible five hundred feet, under five hundred feet.

Mr. Preston: That calls for a conclusion on the part of this Officer. Now—

Court: If he saw them, I'm going to let him testify.

page 47 } Mr. Preston: He did not see them prior to the time this accident happened. He came upon the scene after the accident. He doesn't know what the conditions—

Court: I'll let you cross examine him about that. At the time he saw them—

Mr. Preston: If, at the time he saw them. His phraseology was, "Could you see it?" He didn't qualify him.

Court: At the time he saw them, could he see them that far. I'll let you do that.

Mr. Preston: I think he'll have to ask him whether he was five hundred feet back and looked at them.

(At this time the Court and counsel for both sides returned to the Courtroom.)

Court: The jury is here. No need to poll the jury.

Mr. Preston: No objection.

Mr. Pitchford: No need to waive the call.

By Mr. Pitchford:

page 48 } Q. Officer Holmes, I refer to the lights beneath the logs, that you testified there was overhang that you testified and that you testified were burning after you helped Mr. Hicks out. I'll ask you when you first saw those lights?

A. When I first—

Court: Let me understand it now. The lights on the body of the truck?

Mr. Pitchford: The lights on the body of the truck is what I am talking about.

Officer Bill S. Holmes

A. When I first observed the lights, was after we had removed Mr. Hicks from the automobile and the ambulance had left. When I paced off the distance the truck had traveled from the point of impact.

By Mr. Pitchford:

Q. Could you tell us anything then about the intensity of the lights or how far they could be seen?

A. At that time, the three lights in question were very dim. The light on the extreme left hand side from my—position at the picture, was flickering slightly as if it—may be a short circuit in the electrical system but they were very dim. You could see them approximately from the distance of—

page 49 } Mr. Preston: Just a moment, if your Honor please. I'm going to object to any approximate distance except from the point where Officer Holmes was.

Court: What did you see? That's what we want to know.

A. I would—the truck was exactly 81 feet north from the car and I was at the car and I seen the truck's lights. It was between the distance, I was half way between the truck and the car.

By Mr. Pitchford:

Q. Did you test the truck in any way for lights or other equipment?

A. I did not, sir.

Mr. Pitchford: Cross examine.

CROSS EXAMINATION

By Mr. Preston:

Q. Officer Holmes, at no time other than after you arrived at the scene and after you helped extricate Mr. Hicks from his vehicle, did you go to any distance, any different than what you just testified to, to see the visibility of these lights, did you?

A. Like I said, I couldn't see the lights from page 50 } the car. I didn't go beyond that distance, no sir.

Q. You did not go back south, down toward Oyster Point Road to see how far the lights were visible?

A. No sir.

Q. You don't know how far they were visible?

A. Yes sir.

Q. Back beyond the point where you were, you didn't attempt to determine how far you could see those lights from any given point, did you?

A. Sir, what I mean, I could see the car from the—from the Hicks' vehicle so I would assume—

Q. I don't want any assumptions. I'm asking you from the only position you could see these lights very dimly?

A. I didn't go any further back than the Hicks' vehicle to look at the lights, no sir.

Q. My question is, from the point where you were south of where you were, you don't know how far back you could have seen them?

A. No sir.

Q. Now, Officer, approximately what time did you arrive at the scene?

A. I arrived at exactly 5:48 a.m.

Q. When you arrived, who was present there?

page 51 } A. It was a milk truck driver and another man. The identity of the other man, I don't know.

Q. You didn't get their names?

R. I talked to the man; Ferguson, I believe is his name. I'm not sure. I could identify the man if I was face to face with him but—I know he was the driver of the milk truck and assisted me with traffic, and traffic was very heavy at that time and I didn't have time to talk with him.

Q. Was the Reverend Young or do you know the Reverend Young?

A. I know Reverend Young. I can't recall if he was there at the time, or not.

Q. All right, sir. Now, you say that you got out and assisted Mr. Hicks out of the vehicle and then you went up to the truck and you examined these lights and you saw what you told us you saw burning on the vehicle. You saw those three lights burning, is that correct?

A. Not in that order, no sir. I stepped—from the point of impact, I stepped the distance off to the truck and at that time I observed the lights.

Q. Not necessarily in that order but after you had done these things, you then observed the lights on the rear of the vehicle, is that correct?

A. That's correct, sir.

page 52 } Q. And those lights were the ones you pointed out to the jury and the Court here a moment ago in this photograph marked, Plaintiff's Exhibit Number Two?

Officer Bill S. Holmes

A. That's correct, sir.

Q. Now, let me ask you if you will, Officer Holmes, to come down here again, please sir.

(The witness complied with the request of counsel.)

By Mr. Preston:

Q. In your examination of the vehicle to determine the lighting situation, the rear of the trailer, did you determine whether or not any of the wire that led to these lights that were tacked to the logs were broken?

A. Yes sir, there were—several wires broken to the lights itself.

Q. And, of course, that could have accounted for why they would not have been burning when you arrived?

Mr. Pitchford: I object to that as a conclusion.

A. I don't—

By Mr. Preston:

Q. If you know?

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

Q. They—you did see the wires broken?

A. Yes.

Q. They reflect on the photograph here?

page 53 } A. Yes, I can see the wires protruding down. This is one of the wires.

Q. On this photograph, on either side, on the bed of the truck, these are two running lights, are they not? They're burning lights?

A. Yes sir.

Q. And the same is true on the right hand side of the truck?

A. Yes.

Q. The two lights we see illuminated here are reflectors?

A. Yes.

Q. And there's a light here and a light to the reflector on the right hand side?

A. Yes sir.

* * * * *

page 54 } By Mr. Preston:

Q. Officer Holmes, and those two lights and the

reflectors, the three lights and the reflectors that you have indicated to be on the bed of the truck, was it the light on the left side, the outermost light on the left side of that bed of that truck that was broken, was it not?

A. It is possible that the crystal of the light might have been broken but the light was burning.

Q. That was one of those lights burning?

A. That's one of the three lights that was burning.

Q. The rear of that truck looked just like in this photograph did it not? You've identified that as being the rear of the truck when you arrived?

A. That's the rear of the truck, sir, but—the brilliance of these lights were caused from the reflection of the flashbulb at the time of the picture.

Q. A light had reflected on these reflectors to light them up?

A. That was the flashbulb that made the reflectors show up.

Q. They don't normally shine unless a light shines on them?

A. That's correct.

Q. My question, this whole rear picture of this

page 55 } truck is the truck as it appeared when you investigated?

A. Yes sir.

Q. That's correct?

A. Yes.

Q. No changes in it then, is that correct?

A. Not that I can determine.

Q. All right, sir. Now, was there damage to the rear of this truck?

A. No visible damage that I could—determine after talking with the driver of the vehicle. The only thing I could see was the bent—which—the bent steel bar which would serve as sort of bumper or protection from the wheel or lower part of the truck and Mr.—the driver stated that was already bent like that, so I could determine no damage to the truck.

Q. Did you find any evidence of where the vehicle of Mr. Hicks had run into the logs?

A. No sir.

Q. You did not?

A. I'm not sure. I just couldn't determine at the time.

Q. I'll ask you to look at Plaintiff's Exhibit Number Three, which you have previously identified as Mr. Hicks' vehicle. Is that correct, sir?

A. Yes sir.

page 56 } Q. Now, how high would you say Mr. Hicks'

Officer Bill S. Holmes

vehicle is from the top of the top of the vehicle to the bottom of the road, approximately?

A. I'd say approximately five feet six inches.

Q. And that would extend above then, the bed of the truck, would it not?

A. Yes sir.

Q. Beyond it?

A. Now, you're talking about the roof of the car?

Q. The roof, yes sir.

A. Yes sir, that would extend beyond that.

Q. And so—from the hood of the vehicle down would be approximately what distance, or what length, do you know?

A. I would say just a little over waist high. Approximately three feet. Almost four feet high.

Q. And the rear of this truck, the bed of this truck to the ground would be about the same distance?

A. Yes sir.

Q. Thank you, you may have a seat. Mr. Holmes, the only name of any witness that you obtained was that of Mr. Noble, is that correct, sir?

A. Yes sir. That's correct, sir.

Q. And the measurements that you have testi-
page 57 } fied here on this diagram, marked as Plaintiff's
Exhibit Number One, they are all paced off?

A. That's correct, sir.

Q. No ruler was used; no tape measure?

A. That's correct.

Q. Now, you have designated on this diagram three certain little islands which would be to the east of Warwick Boulevard and in general, the vicinity of the Baptist Church, the Denbigh Baptist Church, is that correct?

A. That's correct. It's the entrance to the parking lot of the church.

Q. Actually there's only one island and this extends back into nothing?

A. That's correct.

Q. And the same is true over here (indicating)?

A. I'm not sure about that one.

Q. All right, sir. Now, I think you said you measured the road as being 22 feet in width.

A. That's my pace.

Q. Now, the diagram reflects that the south-bound lane is a little wider than the north. That was not your intention, was it Officer Holmes?

A. No sir. I'm a very poor artist.

Q. They're of equal width?

A. Yes sir.

page 58 } Q. Now, you have shown that you took a measurement from what would be the curb line of the easternmost paved portion of Warwick Boulevard, to the right front side of Mr. Hicks' vehicle, as 60 feet. Is that correct, sir?

A. Where I measured the distance from on the road itself, on any black topped highway there's always a run out where the asphalt is hot and it runs beyond the curb but the regular paved portion where the white line is run is where I measured from.

Q. You could tell generally where a projected line of Warwick Boulevard would run through, what the area is would run over into the parking lot, is that what you are saying?

A. That's correct.

Q. That six feet is to what point on Mr. Hicks' vehicle?

A. To the front, right at the point of impact.

Q. To the center of the front of the car?

A. No, just a little beyond the center to the left slightly.

Q. So it would be west of the center of the car, is that correct?

A. Just slightly, yes sir.

Q. So then—this arrow should extend actually over into the front of the vehicle and not to the right front fender?

page 59 } A. That's correct, sir.

Q. So that would put the right side of Mr. Hicks' car closer to the eastern edge of Warwick Boulevard, wouldn't it?

A. No sir, Mr. Hicks' car was almost in the center of the —of the northbound traffic lane.

Q. Did you take the occasion to measure that distance between the side of his car and the paved side as opposed to six feet?

A. Yes sir.

Q. Of necessity, the six feet runs to the center of the car; the side of the car has got to be closer to the road, hasn't it?

A. It would appear that way.

Q. Yes sir. Now, the manner in which you have placed this vehicle on the diagram, that's exactly the direction and the manner it was sitting when you arrived, is*n't* it?

A. Yes sir.

Officer Bill S. Holmes

Q. He was heading in a directly straight northerly direction, or generally northerly direction?
A. Yes sir.
Q. And I think you testified you found no evidence of any skid marks or scuff marks?
A. No *skide* marks?

page 60 } Q. Now, you said you found lights on the rear of Mr. Hicks' vehicle?
A. Yes sir.
Q. When did you determine that these lights were burning?
A. When I first drove up on the scene of the accident?
Q. You saw them burning as you drove up?
A. Yes sir.
Q. Did your headlights illuminate them or could you see those lights shining?
A. I was traveling very slowly to pull my car to the extreme right and I seen the lights burning.
Q. Now, how did you come, Officer; down Oyster Point or down Warwick Boulevard?
A. Warwick Boulevard.
Q. As you were coming up, you didn't have any difficulty seeing this accident, did you?
A. No sir, they had—someone had a flare there when I arrived.
Q. There were flares out when you arrived?
A. Yes sir, there were flares.

Court: Someone had a flare?
A. No, there were flares.
Court: All right.

By Mr. Preston:

page 61 } Q. All right, sir. Did you have the occasion or take the occasion to walk around and look at the front of the vehicle?
A. Yes sir, I walked to the front of the truck.
Q. The truck?
A. Yes sir.
Q. Were all the lights burning on that?
A. The lights were burning on the truck.
Q. The headlights?
A. Yes sir.
Q. And how about the front lights?
A. I don't recall—I don't recall. I believe there was a

signal, turn signal light on the truck. I'm not sure which one.

Q. You don't recall?

A. No sir.

Q. Did your vehicle, as you approached the scene, pick up any of the reflectors on that truck or were you looking for that or primarily the car sitting in the road?

A. I wasn't—I couldn't see—actually I don't remember exactly. I'm afraid to answer.

Q. All right, sir. I don't want you to answer anything you don't know.

A. No sir, I won't.

page 62 } Q. What's the speed limit out there, Officer Holmes?

A. 45 miles per hour.

Q. And this road is constructed of what?

A. Black topped, asphalt.

Q. And it's relatively straight, clear, free of loose material at the point where this accident happened?

A. It's straight just for a—a certain length and it goes into another curve.

Q. There's a dip down beyond and curve to the right?

A. Yes.

Q. That would be north of the scene?

A. Yes sir.

Q. Generally in this vicinity it's straight and level and free of any loose material?

A. Yes sir.

Q. And it was dry?

A. Yes sir, it was dry. No defects to the road.

Q. All right, sir. Now, you have placed the vehicle number one on the diagram, Plaintiff's Exhibit One, as being that vehicle of Mr. Hicks, and you have placed it about opposite the island which separates the parking lot of the entrance and the exit to the Baptist Church. Is that the

page 63 } approximate position of it?

A. Approximately, yes sir.

Q. You didn't take the occasion to make any measurements as to how much of the island was splitting. Could it have been further north?

A. I have been—I have been to the scene of the accident four times since the time I—I originally investigated the accident because of the time; I was there, traffic was heavy, and it was very important that I get clear the vehicles off the road. That's why I paced it. Since then I have taped it

with a tape and I come up within inches of what I paced it.

Q. You're talking about the distance from this vehicle and the rear end of this vehicle (indicating)?

A. No sir, I'm talking about the point—the exact point of impact.

Q. How long was it after the accident that you went out there and measured it?

A. I can't recall, sir.

Q. So you don't really know?

A. It was very shortly thereafter.

Q. Was it—generally splitting this island this way (indicating), or was it further north?

A. I don't have the—the islands drawn on my diagram.

page 64 } I would say that the car, the front of the car where the point of impact is, is almost—approximately the way it is drawn on the diagram there, between the two islands, the entrance to the parking lot.

Q. Then I'll show you if I may, Mr. Holmes, a photograph and ask you if you can identify that for us, please sir (indicating)?

A. Yes sir, that's the—the picture of the area where this accident occurred.

Mr. Preston: Excuse me. Let me get it marked. Would you mark this Defendant's Exhibit One?

(The photograph was received and marked Defendant's Exhibit Number One.)

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By Mr. Preston:

Q. Now, Officer Holmes, would you come down here again, please sir?

A. Yes sir.

Mr. Preston: Your Honor, I don't think you'll be able to see this. Can all you gentlemen see this. Can all you gentlemen see that?

Mr. Foretich (Juror): Yes.

By Mr. Preston:

Q. This photograph, as you just testified, reprepage 66 } sents the scene of the accident where the truck and Mr. Hicks' vehicle collided, is that correct?

A. Yes sir, it does.

Q. To the right of this photograph, just off of the easternmost paved portion of Warwick Boulevard, we see the—what you have previously referred to as the parking area for the Denbigh Baptist Church, is that correct?

A. That's correct.

Q. I believe you had mentioned on your diagram here, certain islands. This island being the one that separates the entrance from the exit to the parking area, is that correct?

A. That's correct, sir.

Q. Now, did you have the occasion, Officer Holmes, to measure the distance from the curbing of this island to the shoulder of this road?

A. No sir, I did not.

Q. Are you able to approximate the distance for us?

A. I would say it is approximately six foot.

Q. Six feet. Now, how about the shoulder of the road as you proceeded down on the eastern side of Warwick Boulevard, do you know approximately how wide the shoulder is?

A. Yes sir, when you—go below the—go north page 67 } of this island here (indicating), there's approximately seven to eight feet of space before you reach the ditch line.

Q. All right, sir. Now, do you know of your own knowledge, or did you take the occasion to measure the width of the vehicle that Mr. Bryant was driving, the Hagan truck vehicle?

A. No sir, I—I estimated the width of the truck.

Q. What would you estimate it to be?

A. I would estimate it at just a little over eight feet.

Q. All right, sir. Now, you had previously placed this vehicle number one on the diagram, marked as Plaintiff's Exhibit One, as the Hicks vehicle, approximately opposite that little island dividing the entrance and the exit from the church yard, is that correct?

A. Yes sir.

Q. Can you better point it out on this photograph?

A. Yes sir, the point of impact would have been approximately at the tip of this shadow right here (indicating), putting it, the car, just a little north of the center island.

Q. Just a little north of the center island here (indicating), so this diagram or this photograph actually looking at *in* in prospective, is a little misleading?

page 68 } A. Yes sir.

Q. But your recollection is that Mr. Hicks' car was a little north of the center island here (indicating)?

A. Yes sir. In other words, to project from the center of the width between this island and this island (indicating).

Q. Yes sir.

A. Would almost be in the center there.

Q. Oh, I see. You may have a seat. Thank you, sir. Then, may I assume, I would have to assume, of course, that the diagram which you drew was not necessarily to scale nor necessarily as to the specific location of the vehicles, is that correct?

A. This—this—diagram, no sir, but this one is more accurate (indicating).

Q. I'm referring to this diagram (indicating).

A. No sir.

Q. So then, actually the vehicle of Mr. Hicks would have been north of this island and splitting the two curb lines of the north island and what would be the northernmost point of driveway?

A. I'm sorry. I didn't understand your question.

Q. Perhaps I'm speaking a little fast. From what you said a moment ago, I point to exhibit, Defendant's

page 69 } Exhibit One, the vehicle as reflected on Plaintiff's Exhibit one, as vehicle one, or Mr. Hicks' vehicle, is actually further north than—it was further north than you placed it on this diagram in reference to the island at the parking lot, is that correct?

A. Yes sir, if I may come to the diagram, I can show you?

Q. I wish you would, and put the position in the one you just testified to as being the correct position of Mr. Hicks' car.

(The witness complied with the request of counsel.)

A. I misplaced this island slightly. The—the correct point of impact would have probably—would have split the—this—the distance. In other words, half the distance between these two islands here (indicating). In other words, approximately right here (indicating).

By Mr. Preston:

Q. That would put it approximately how many feet north of where the diagram shows?

A. It would be—I just—if you wish I can draw it approximately right here (indicating). This island.

Q. All right. Would you do that?

(The witness complied with the request of counsel.)

page 70 } Mr. Preston: Let the record show the changing, the Plaintiff's Exhibit Number one, he's drawing up there.

Court: All right.

Mr. Preston: Let it show the change is reflected by Mr. Holmes' coloring in light gray with the crayon the island as it actually was in relation to the vehicle as opposed to the elliptical figure he previously made which had not been covered and that shows the vehicle of Mr. Hicks further north than he originally placed it. Is that correct?

A. Yes sir.

By Mr. Preston:

Q. Are you able to say, in feet, how much further north or do you know?

A. Well, the—I placed the vehicle exactly 33 feet north from the telephone pole. Fitting the islands in.

Q. I think you did place it exactly 384 feet back to the apex of the intersection of Oyster Point Road?

A. Yes sir.

page 71 } Q. Thank you, sir. Now, let me ask you about that 384 feet. In the—intersection of Oyster Point Road and Warwick Boulevard, it comes to a—point. There's a triangle type thing, does it not?

A. That's correct.

Q. Did you measure from the point of the triangle down?

A. I did, yes sir.

Q. And I believe you told us earlier that you came up Warwick Boulevard?

A. That's correct, sir.

Q. And as you approached up Warwick Boulevard, of course—your view is good up that way, isn't it?

A. I'm sorry, I don't—

Q. As you were driving down—Warwick Boulevard—

Court: Down or up, which are you going?

By Mr. Preston:

Q. Going north on Warwick Boulevard, prior to the time that you reached the apex of Oyster Point Road and—Warwick Boulevard, your view is clear north up that—Warwick Boulevard, is it not?

A. No sir, at nighttime when you round that curve, to your left, your lights travel in a straight angle. In
page 72 } other words, you're traveling, your car, you're looking at the direction your lights, your headlamps are. Your headlamps shine straight and then they swing around as you maneuver your car.

Q. That's as you get to the apex of the curve then?

A. That's correct, sir.

Q. So, from the apex of the curve then, to the point, your headlights are shining just about straight ahead?

A. That's correct, sir.

Q. Isn't that correct?

A. You got a slight curve as you stated before, to your left.

Q. Approximately your headlights are shining straight ahead, is that correct?

A. The headlights are shining straight ahead, yes sir.

Q. I ask you, Mr. Holmes, if you would please, can you identify this (indicating)?

A. Yes sir, that is the diagram of Oyster Point Road and intersection with Warwick Boulevard.

Q. You mean a photograph, do you not?

A. I'm sorry, a photograph.

Q. All right. That's looking in the direction
page 73 } that a motorist would be on Warwick Boulevard, would be proceeding, is that correct?

A. That's correct, sir.

Q. And then there's a sign in the apex and the apex does show in the photograph, does it not, of Oyster Point and Warwick Boulevard?

A. That's correct.

Q. I see. All right, thank you.

Mr. Preston: Would you mark this Defendant's Exhibit Two?

(The photograph was received and marked Defendant's Exhibit Two.)

Court: Any more questions of this witness?

Mr. Preston: Yes sir.

By Mr. Preston:

Q. Mr. Holmes, did you know Mr. Hicks before this accident?

A. Yes sir, I did.

Q. And did you know that Mr. Hicks was the gentleman who wore glasses?

A. Yes sir.

Q. And at the time you arrived and during the course of your investigation, did you determine whether or not you found any glasses around in the vehicle or any-
page 74 } where at the scene?

A. I didn't search for the glasses. However, I didn't see the glasses on Mr. Hicks.

Q. They were not on him when you extracted him from the car?

A. No sir.

Q. I believe you told us you had talked to Mr. Noble, the gentleman that gave you his name, and you inquired of him as to what—he knew about this accident?

A. That's correct, sir.

Q. I may have asked this question and you may have covered it, Officer Holmes, but on the side of this truck, you had previously described that there was a light, I think you said nailed onto the pole on the right side and a light nailed onto the pole on the left side, sticking out somewhere between six and 12 inches. Is that correct?

A. Yes sir, when we were discussing the overhang of the logs.

Q. These lights were on the overhang that you saw?

A. That are nailed to the logs that are on the overhang, yes sir.

Q. That would be, according to this photograph that you pointed out that would be the outermost log of
page 75 } the overhang, is that correct?

A. That's correct, yes sir.

Mr. Preston: Excuse me one moment, if your Honor please.

By Mr. Preston:

Q. Officer Holmes, do you know whether or not the impact between the vehicle of Mr. Hicks and the truck had in any way changed the load on this truck?

A. I couldn't answer that, sir.

Q. You don't know?

A. I don't know.

Mr. Preston: I don't have any further questions at this

time, your Honor. Excuse me,—I'm sorry. I didn't know you had some other questions. I'm sorry. Go right ahead. I'd like to have him remain if I could, for the purposes of additional—

Court: Any more questions, Mr. Pitchford? Go right ahead.

Mr. Pitchford: Yes sir. Let me see the Defendant's Exhibit of the scene.

Mr. Preston: May I approach the Bench?

Court: Yes.

page 76 } Mr. Preston: Mr. Pitchford—

(At this time counsel for both sides approached the Bench.)

RE-DIRECT EXAMINATION

By Mr. Pitchford:

Q. Come down here for a minute, if you will. Since there has been some change in the drawing by you on Plaintiff's Exhibit One, after the introduction of Defendant's Exhibit Number one, which exhibit shows the—the *locus* of the accident, I will ask you if you will take this pencil and mark on the Defendant's Exhibit one, the point of impact.

Mr. Preston: Could we agree to punch a hole?

By Mr. Pitchford:

Q. See if you can punch a hole. That seems to be a very hard finish and it might not—

A. Upon making this—figure or—mark on the picture, you do have a distortion of view of the road narrowing in. It would be hard to look at the picture and get an exact marking of the point of impact, I would say.

Q. Then, in view of what you have just said, is it possible for you to mark on this picture which is Defend-
page 77 } ant's Exhibit Number one, the exact point of impact?

A. No sir, I don't think I could because you—you would have a distortion of view looking, comparing the side of the —of the street here at the parking lot with the roadway.

Q. All right. In view of your answer, I will ask you then to rub out the mark you put on there.

(At this time the witness complied with the request of counsel.)

By Mr. Pitchford:

Q. Now, I will go back for a moment to Plaintiff's Exhibit Number Two, which is the picture of the rear of the Hagan truck. You have testified, on cross examination, that some of the wires to the damaged lights on the logs were broken. Now, how about the wires to the lights on the logs that were not broken—I mean by that, I mean the lights that you described as intact but not burning.

Mr. Preston: Intact—

A. This side light over the log protruding outwardly from the left of the truck is intack according to the diagram. I—I didn't make individual notes on this particular—I'm just going from the diagram.

By Mr. Pitchford:

page 78 } Q. Did you observe any broken wires to this light?

A. No sir, it shows no broken wires there (indicating).

Q. Now, the light on the opposite side that's nailed to the pole that projects a little bit beyond the bed, was the wire broken going to that light?

A. I can't answer that, sir. I can't see a wire at the—light on the—on the picture.

Q. All right. Now, go back to the witness stand, if you will, please sir. Did you, at the scene, question Mr. Bryant about when he had last checked his tail lights?

A. I did, sir.

Q. What statement did he make with reference to checking his lights?

A. He stated, and I quote, "I checked my lights when I left Chesapeake, Virginia, and they were working. There were four on the rear of the poles."

Q. How many lights were all together on the rear of the poles?

A. Talking on the pole, not the truck itself?

Q. Right.

A. Okay. There were seven lights.

page 79 } Q. Did he explain to you why the other three lights were not working when he checked them at Chesapeake before starting his trip?

A. No sir.

Mr. Pitchford: I have no further questions.

Officer Bill S. Holmes

RE-CROSS EXAMINATION

By Mr. Preston:

Q. Mr. Holmes, the string of lights across the rear of that truck are all connected to one wire, are they not?

A. I believe they were.

Q. So, if one wire was broken to the light you pointed to, if the continuous wire was broken in another place, none of them would work?

Mr. Pitchford: Objection. That's calling for a conclusion and based on a conclusion.

Court: I'll let him answer if he can answer it.

Mr. Pitchford: Exception to the Court's ruling.

A. I'm not—I said that all the lights were connected to one wire which I'm sure they were. It is possible. I
page 80 } used to drive a logging truck and I'm—relatively familiar with connecting a lights or warning system on the rear of logs like this in question. They could have been—one side of the lights could have been connected to the—either the tail light or the brake light on the right side of the truck and on the left hand side connected to the left tail or brake light, sir.

Q. Did you check this system to see whether it was either of those two kind?

A. No sir, the wires—some of the wires, as I said before, were—disconnected and I didn't check it.

Q. So you don't know whether this was a continuous system, or not?

A. I cannot answer that. No sir, I don't know.

Q. But if it was a continuous system, then the break of the wire would put them all out, wouldn't it?

A. That's correct, sir.

Mr. Preston: Thank you, sir.

Mr. Pitchford: One other question I forgot to ask you, if the Court would indulge me.

RE-DIRECT EXAMINATION

By Mr. Pitchford:

page 81 } Q. As you approach the scene of the accident, you have testified on cross examination that someone put out a flare?

A. I'm sorry, I didn't hear you.

Q. You have testified, as I understand on cross examination, as you approached the scene, someone had put out a flare at the scene of the accident?

A. There was more than one flare.

Court: He changed it to flares. He said flare, one time and changed it to flares.

By Mr. Pitchford:

Q. Do you recollect whether or not there was a vehicle there with a flashing light?

A. I believe that there was—a panel truck of some sort there with flashing lights.

Q. Was that ahead or behind the Hicks vehicle?

A. I can't answer that, sir. I just vaguely remember the truck.

Q. Vaguely remember the truck being there with flashing light?

A. Yes, but I do remember the truck with flashing lights.

Q. You had no difficulty in locating the scene?

page 82 } A. No sir.

Mr. Pitchford: Thank you, Officer.

Mr. Preston: I have one more question. I won't beg the issue any more.

RE-CROSS EXAMINATION

By Mr. Preston:

Q. Do you know, Mr. Holmes, who put the flares out there?

A. No sir, the—when I arrived on the scene, when I changed from flare to flares, there was one man standing at the south of the accident and one man standing at the north of the accident, to stop traffic.

Q. The vehicle that you saw there was a milk truck that you say?

A. No sir, I—I can't say if the vehicle with the flashing lights was a milk truck, or not. I do know that one of the men that was helping with the traffic was a driver of a milk truck.

Q. Being an old truck driver and being familiar with how you do it, were these the flares normally the kind used by truck drivers?

* * * * *

page 84 } YANCEY NOBLE, called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Pitchford:
Q. State your name, please?
A. Yancey Noble.
Q. Where do you live, Mr. Noble?
A. At the present time I live at 2705 Millwood Avenue—Millwood Drive, pardon me.
Q. Millwood Drive.
A. Newport News.
Q. Where were you living on September the 22, 1966?
A. 24 Church Road.

Mr. Preston: Would you ask him to speak up a little, Mr. Pitchford.
Mr. Pitchford: Can you speak up just a little louder?
Court: Talk right into that thing.

By Mr. Pitchford:
Q. You were living where on September 22, 1966?
A. Church Road.
page 85 } Q. Is that in the City of Newport News?
A. Yes sir.
Q. Where were you then employed?
A. Nice Brothers, Colony Equipment.
Q. What was your job with Nice Brothers?
A. I'm a heavy equipment operator, sir.
Q. On that particular day, where were you required to go to work?
A. In Williamsburg.
Q. And—did you have to stop some place before going to Williamsburg?
A. Yes sir.
Q. And where did you have to stop?
A. I had to stop at the office and turn in my time, sir.
Q. Where is the office located?
A. At 13127 Warwick Boulevard.
Q. Where is that with reference to Oyster Point Road or Menchville Road?
A. Menchville Road, about a quarter of a mile from Menchville Road.

Court: Is it north of there?
A. North, yes sir.

By Mr. Pitchford:

page 86 } Q. All right. In order to get from your home up to the Nice Brother's office, where you were going to turn in your time, waht highway did you elect to travel?
A. 60; highway 60.
Q. Is that also known as Warwick Boulevard?
A. Yes sir, Warwick Boulevard.
Q. Now, as you were proceeding along Warwick Boulevard in a northerly direction so as to get to Nice Brothers' shop and office, what if anything did you observe just north of Oyster Point Road?

Mr. Preston: Now your Honor, if we may; at this point I think this is a matter that's going to have to be taken up out of the presence of the jury.
Court: Come into chambers.

(The Court and counsel for both sides then retired to the Chambers of the Court.)

Mr. Preston: Mr. Noble had previously given a statement to the police officers in reference to this accident. He has given us a statement under oath which we took in December, regarding the time element involved from the time he passed

page 87 } a vehicle which he saw stopped until he returned to the scene of the accident which was some between 15 and 30 minutes. He has never, in any of these statements, identified this vehicle as being the same vehicle which he may testify to.
Court: I don't know whether he can, or not. I have no idea.
Mr. Preston: I understand. My point is before he should be asked, I think the proper foundation should be laid to show the time element to see whether or not he is going to say is too remote in time to be admissible into evidence because Mr. Noble has no idea when the accident—
Court: How about the time element? You'll have to put in—
Mr. Pitchford: Here's what I will develop.
Court: Develop the time element.
Mr. Pitchford: He passed the place shortly after—around 5:15 to 5:30. He saw this truck in the road with little or no lights.

Court: Is he going to fix the time element?

page 88 } Mr. Pitchford: I'm not going to ask him a thing.

Court: All right.

Mr. Pitchford: He was so incensed about it, he tried to come get a policeman to get it off the road and he heard about the accident and he came back and identified the truck, he almost ran it.

Mr. Preston: Some 15 or 30 minutes he passed it, he heard there was an accident. He doesn't know anything.

Court: I'll let him use the time element. If *the* doesn't connect it up, it's too bad. That's all I can tell you. Let him do it. I can't rule on that right now. You show it within that reasonable time.

(The Court and counsel for both sides returned to the Courtroom.)

By Mr. Pitchford:

Q. Now, Mr. Noble, what time were you driving up—

page 89 } Warwick Boulevard just north of Oyster Point Road?

A. Someplace around 5:30, sir.

Q. Around 5:30?

A. Yes sir. Between five and 5:30.

Q. What were the weather conditions?

A. Well, the weather condition at the time it was clear, but I think the night before it had been some rain. I was driving my car instead of my motorcycle.

Q. Was it dark or daylight?

A. It was dark, sir.

Q. Now, as you were driving along that place at the time you estimate to be around—what time did you say?

A. Between five and 5:30.

Q. Between five and 5:30 in the morning, what, if anything, did you see unusual in the way of traffic?

A. Well, sir, as I come around the turn, just approximately at the church, I come upon this truck. You couldn't see it. I didn't see it until the last moment and just in time to turn to miss it.

Q. Now, describe the truck that you came upon?

A. It was a tractor trailer loaded with piling, creosote piling.

page 90 } Q. Did you—see any lights or markings on that truck?

Mr. Preston: Your Honor, I'm going to object to him leading.

Court: Don't lead him. Ask him what he saw.

By Mr. Pitchford:

Q. What did you see on the truck beside the piling?

A. Just as I saw the truck, I don't know whether I saw a light or reflection or what it was, but it was something on the right hand corner of the truck. It wasn't on the back of the truck. It was more or less to the side of it. That's the reason I missed the truck, I suppose, and just something that—attracted my attention and I realized it was something in the road that shouldn't have been there.

Q. What did you do to avoid hitting this something in the road?

A. I had to turn sharp left, sir.

Q. Did you see anything else about the truck other than the pilings and this—reflector or light that you have mentioned on the side?

A. Not in the back of it but—as I went around the truck, sir, I noticed that the truck was sitting in the road with its headlights on on high beam and it's left hand turn signal on, sir.

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Q. Now, was the truck moving or was it standing still?

A. The truck was sitting still in the road, sir.

Q. Did you see the driver?

A. No sir.

Q. Did you see anyone in the truck?

A. No sir.

Q. After leaving there and seeing this condition, what did you do?

A. I went from there to Denbigh Boulevard and Warwick Boulevard looking for a City Policeman to—to turn the truck in for not having the lights on the back of them and sitting in the middle of the road with no flares.

Q. Did you find a policeman?

A. No sir, I continued on from there to—to a vacant service station across from Leggett and Jones where I had seen them sit before, and wasn't—no policeman there, so I went from there to Beachmont and Warwick Boulevard and wasn't—no law enforcement officer there, so I turned around and come back to Buster Mears' to see if he was open and—I was going to call the law and tell them about the truck and that's when I heard about the accident.

Yancey Noble

Q. When you heard about the accident, what did
page 92 } did you do?

A. I come back up and told the officer what had happened to me.

Q. When you say you came back and told the officer, what had happened to you, where did you come back to?

A. To the accident, sir.

Q. Now, when you came back to the accident, what vehicle did you observe at the scene of the accident?

A. Well, sir, the truck was parked in the middle of the—well, it had pulled off the road. I parked in front of it—on my left hand side of the road in his driving lane and went back and told the officer the truck had been sitting in the road when I come by earlier.

Q. Was it—the same or a different truck?

A. No sir, it was the same truck.

Q. How do you know it was the same truck?

A. It was sitting in the same position and—loaded with the same pound poles and it was an International truck.

Q. And—had that truck been moved from the—from the position in which you first observed it with no lights?

Mr. Preston: He's leading the witness. The
page 93 } man has just testified it was sitting in the same position.

Court: He said sitting in the same position. Don't lead him.

Mr. Pitchford: I didn't understand him to so say.

Mr. Preston: I think—

Court: I understand him to say the same position as when he went up the first time.

A. No sir.

Mr. Pitchford: He didn't say that.

A. No sir.

Court: The same place.

A. In the same place, sir; it had been moved.

Court: Go ahead.

By Mr. Pitchford:

Q. All right.

Court: The truck was in the same place—off the road?

A. Yes sir.

Court: Let him describe it.

By Mr. Pitchford:

Q. Describe then whether or not it had been moved and if so, approximately how far and to what position.

page 94 } A. Yes sir. Well, sir, the truck, from when I first — come upon it, was sitting in its — in its normal driving lane and when I come back, the truck had been moved about 75, 80 feet. Maybe shorter or longer. Just the nose of the truck had been pulled off the road. The rear of it was still in the highway (indicating).

Q. When you passed the truck for the first time, without the lights—

A. Yes sir.

Q. Were or were not all of the wheels of the truck on the travelled portion of the highway?

A. Yes sir, all of the wheels were right in the middle of the road, sir.

Q. All right, sir. I'm going to hand you a picture of the scene of the accident which has been evidenced—which has been placed in evidence as—

Mr. Preston: I'm going to object to this witness, what the evidence has been.

Court: He can show him the picture.

Mr. Pitchford: I'm just identifying the picture.

Court: All right.

By Mr. Pitchford:

page 95 } Q. Which has been placed in evidence as—Defendant's Exhibit One, and ask you if you can point out on that picture—come around in front of the jury—

(The witness complied with the request of counsel.)

By Mr. Pitchford:

Q. Point out to the jury, if you can and will, where the truck was setting when you came upon it without lights?

A. Yes sir, the truck was sitting right about approximately right here (indicating), when I come upon it without lights. You gentlemen know, from this morning, this turn is a slight turn and as I come around the turn, my lights didn't hit the truck until—

Mr. Preston: Your Honor, this is not responsive to the question he has been asked. He asked where the truck was when he came by it the first time.

Mr. Pitchford: All right.
Mr. Preston: I think he answered that question.

By Mr. Pitchford:
Q. You've answered that question. Now, as you came around this curve, as you approached the location of the truck, how did your lights shine?
page 96 } A. Well, as I was saying, I come around this turn and this truck was sitting right at the same —when my lights, when I come around the turn, my lights didn't hit the turn until I was dead on the back of it; as my lights swept around, the truck was sitting in front of me and I had to swerve hard to my left to miss the truck and—well—
Q. All right. You swerved hard to your left to miss the truck?
A. Yes sir.
Q. Now, did you, in passing the truck, cross the double line shown—shown on the photograph?
A. Yes sir, yes sir.
Q. Was there any other traffic in the immediate vicinity?
A. No sir.
Q. Do you know approximately what time you got back? You can go back up there now, if you will.

(The witness resumed his seat in the witness chair.)

By Mr. Pitchford:
Q. Do you know approximately what time you got back to the scene of the accident?
A. No sir, I don't know approximately what time it was, but—they had already taken the—the gentleman's statement, who was driving the truck, or had him in the car.
page 97 } I don't know whether they were taking a statement or not.

Court: I couldn't understand him.

(At this time the last answer was read by the Court Reporter.)

Mr. Pitchford: That's all I wish to ask the witness. Cross examine.

Yancey Noble

CROSS EXAMINATION

By Mr. Preston:

Q. Mr. Noble, where did you get on Warwick Boulevard?

A. Maxwell Lane, sir.

Q. And where is that in reference to where this accident happened?

A. Couple of miles, maybe three.

Q. South. You gotten on Maxwell Lane and Warwick Boulevard and you proceeded north on Warwick Boulevard ever since you gotten out of Maxwell Lane?

A. Yes sir.

Q. What time had you left home, approximately?

A. Well, approximately five or ten minutes be-
page 98 } before I got to where the truck was. I don't really know what time it was.

Q. Were the lights on, on your vehicle?

A. Yes sir.

Q. High beam or low beam?

A. High beam.

Q. And what kind of vehicle were you driving?

A. Driving a '63 Ford, '63 Ford convertible, sir.

Q. All right, sir. Now, no vehicles passed you going in the opposite direction?

A. No sir, none that I can recollect.

Q. And, of course, you're not aware of whether any—vehicles had preceded you up to this point?

A. No sir.

Q. Now, isn't Warwick Boulevard, at the point where you say you saw this truck, it's a two lane road, is it not?

A. Yes sir.

Q. And it's divided by a double line?

A. Yes sir.

Q. And speed limit is 45 miles an hour?

A. Yes sir.

Q. What was your speed?

A. Approximately 45. Maybe slower. I don't
page 99 } know for sure.

Q. Approximately 45 miles an hour?

A. Someplace around there.

Q. All right, sir. Now, you say as you came around the curve at the intersection of—Warwick Boulevard and Oyster Point Road, that your headlights did not pick up this vehicle until you were right up on the back of it?

A. Yes sir.

Yancey Noble

Q. Can you estimate how far you were?
A. No sir.
Q. Can you look at any distance in this Courtroom and tell us that?
A. No sir.
Q. You're not able to do that for us?
A. All I know, the truck was sitting there.
Q. What attracted your attention to the truck?
A. I couldn't tell you that either, sir.
Q. But you did see a light on the rear of it?
A. I seen something, sir. Something—I just knew it wasn't right. Something just wasn't right and—
Q. Did you see a light on the right hand lower part of that truck?

page 100 } A. I seen something on the right hand side, sir. I don't know whether it was a light or reflector, or what it was.

Q. Something caught your eye?
A. Something just told me it wasn't—wasn't supposed to be there.
Q. Now, when you saw this, I think you said you cut real sharp to the left?
A. Yes sir.
Q. But you're not able to tell us how close up to the rear of that truck you were?
A. No sir.
Q. You can't pick out an object in this Courtroom anywhere, Mr. Noble?
A. No sir.
Q. And attempt that?
A. No sir.
Q. You cannot. May I attempt to suggest to you, could it have been the distance of this Courtroom?
A. I couldn't tell you.
Q. How about half the distance?
A. I couldn't tell you.

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By Mr. Preston:
Q. Mr. Noble, would you come down here a moment, please sir, and walk over to this diagram.

* * * * *

Mr. Preston: May we agree that the red vehicle marked "Delivery", represents the truck of Hagan Truck Line?

Mr. Pitchford: I'm agreeable.

Mr. Preston: All right, sir. I placed that right
page 102 } there (indicating), not necessarily in the position, and may we agree that the blue and silver vehicle represents the vehicle operated by Mr. Noble at the time that he says he passed this truck?

By Mr. Preston:

Q. Will you take that vehicle, Mr. Noble, and stand to the side and so all the gentlemen and the Court can see what is done, can you show us graphically the manner in which you passed this truck, by using your vehicle, using distances and the angles that you had to turn sharply to pass the rear of this vehicle?

A. I can't do that.

Q. You can't do that?

A. I can give you the approximation.

Q. Forget the curve; we get to the point where you realized you had to miss—turn to miss the truck—

A. Behind the truck.

Q. You were going 45 miles an hour?

A. Yes.

Q. Show us how you turned?

A. I don't know. All I know, I missed the truck.

Q. Did you turn left?
page 103 } A. Yes.
Q. You said you swerved sharply?

A. Yes sir. I had to swerve sharply to the left.

Q. Put that angle again?

(The witness complied with the request of counsel.)

By Mr. Preston:

Q. You had not applied your brakes?

A. Yes sir.

Q. When did you apply the brakes?

A. When I knew there was an object in the road.

Q. How did you apply them, Mr. Noble?

A. I couldn't tell you.

Q. You don't know whether you applied them forceably or gradually?

A. No sir.
Q. You can't recall?
A. At the moment, sir, spirit of the moment thing, I—the truck was there and I had to miss it—that was the object.
Q. Thank you, have your seat.

(The witness resumed his seat in the witness chair.)

page 104 } By Mr. Preston:
Q. You say it was the spirit of the moment and the truck was there and you knew you had to avoid it?
A. Yes sir.
Q. So it all happened almost instantaneously?
A. Yes sir.
Q. Now, when you went by this truck, Mr. Noble, was your car entirely in the southbound lane of traffic for Warwick Boulevard?
A. I couldn't tell you, sir. Sir, it took a little time longer than just, to get by the truck, to get back in normal position in the highway.
Q. I'm not talking about after you got by the truck. I asked you at the time you passed the truck, was your vehicle entirely in the southbound lane heading north?
A. I don't see how it could have been, sir.
Q. You don't see how it could have been?
A. Not if I swerved to miss the truck doing 45 miles an hour.
Q. You were in that lane?
A. I was in that lane, yes sir, but you said "entirely", sir.
Q. Could part of you car have been off the road?
A. Yes sir, part of my car could have been
page 105 } off the road.
Q. Do you recall making any statement regarding this situation on an occasion previous to this, Mr. Noble?
A. Yes sir.

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page 111 }

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By Mr. Preston:
Q. Mr. Noble, I ask you again on the 23rd of—excuse me,

the 14th of December, 1966 did you not give a statement of your own volition under oath to Mr. Morris Schneider in the office of Preston, Preston and Wilson regarding the facts of this accident?

A. Yes sir.

Q. Now, Mr. Wilson, did you not—Mr. Noble, at the time that was taken, do you recall saying when you changed—

page 112 } recall being asked the question when you changed lanes you got over to the on coming lane of traffic actually and your answer being yes sir?

A. I didn't understand the question.

Q. Do you recall the question being put to you at that time whether, "When you changed lanes you got over to the one coming lane of traffic actually". Do you recall that question?

Mr. Pitchford: Objection, I want—I don't want to keep objecting but I want to understand—the Court to understand that I object to this line as not proper cross examination for the reasons—

Court: He said did he remember making this statement before Mr. Schneider.

Mr. Pitchford: He has quoted a statement now that he is purported to have made under oath, some *ex parte* hearing.

Court: He asked him—he asked him did he make it.

Mr. Preston: I'm asking if he recalls that question being put to him and his answer.

A. I don't know the question you asked me.

page 113 } By Mr. Preston:

Q. My question to you, Mr. Noble, do you recall being asked by Mr. Mason, this gentleman (indicating) that when you changed lanes, you got over into the opposing lane actually. Do you recall that question?

A. What do you mean, "actually"?

Q. You were in the entire southbound lane or heading north in the southbound lane?

A. Isn't that what I told you a while ago?

Q. You do recall making that statement?

A. I suppose so.

Q. And do you recall saying that when you passed the truck that your car was heading due north?

A. I suppose so. I also remember telling you I passed the truck with the grace of God, sir.

Yancey Noble

Q. That's correct, you certainly did. I think your very word were, "was by the Lord's will."

A. Certainly.

Q. Your answer to my question a moment ago was you believe you did say that?

A. Yes sir.

Q. Now, can you tell us, Mr. Noble, approximately how close you passed to the truck as you went by?

A. No sir.

page 114 } Q. You cannot tell us. Didn't you—didn't you volunteer that information at that same hearing that it was less than three feet?

A. I couldn't tell you—I told you—well, let's say I don't know for sure but I think I told you something I missed the truck by the grace of God, sir.

Q. By God's will?

A. God's will or something.

Q. Now Mr. Noble, as you went by the truck, how far would you say you had gone north of the truck before you got back into the right hand lane?

A. I couldn't tell you, sir. By that time I was so mad, I just didn't pay too much attention to nothing but the front of the truck, see if the lights were on the front of the truck.

Q. You did see lights burning on the front of the truck?

A. Yes sir.

Q. Headlights?

A. Yes sir.

Q. Cab?

A. Yes sir.

Q. Cab lights?

A. Yes sir.

Q. Running lights?

page 115 } A. Running lights is your cab lights.

Q. Blinker lights?

A. Yes sir, left hand turn signal.

Q. On the cab those lights were very easy to detect?

A. Yes sir.

Q. They were not dim?

A. Yes sir.

Q. Not dim?

A. Yes sir.

Q. Why didn't you stop if you were so incensed because the truck was out there?

A. That's law's job. They passed so many civil rights

bills and all, how do I know it wouldn't be wrong for me to stop and check.

Q. You didn't know who was driving this truck?

A. No sir.

Q. You hadn't ascertained that anything had to do with civil rights?

A. No sir.

Q. You're a heavy equipment operator, are you not?

A. Yes sir.

Q. And being a heavy equipment operator wouldn't it be normal for you to go back and inquire whether

page 116 } this man needed assistance or whether there was anything to do to assist him? You didn't know what the condition was, do you?

A. If he was asking for help.

Q. How would he be asking for help, you were going by him at 45 miles an hour?

A. He shouldn't be in the road.

Q. Do you know how long he had been there?

A. No sir.

Q. I believe you told us a moment ago that the time you passed him, the time you realized you had to pass him until the time you got by him was almost instantaneous?

A. Yes sir.

Q. This is the period of time you identified this truck as being in exactly the position you found the car when you got back?

A. Sir, if you remember in that statement I also told you I knew the area pretty good; in fact I worked there.

Q. You helped build this road?

A. Yes sir.

Q. You helped pave that?

A. Yes sir.

Q. That's not got anything to do with the time element?

A. No sir.

page 117 } Q. My question is in an instant of—very short instant that it took you to realize you had to go around the truck at the distance you were from it when you first observed it, going around the truck, getting back into the proper lane and going by this truck at the speed and the manner in which you were, this is when you were looking at the truck to identify its exact position in relation to the highway when you got back up there 30 minutes or so later?

A. Yes sir.

Q. Is that correct?

A. Yes sir.

Q. How much period of time would you say elapsed? A second, two seconds?

A. Maybe.

Q. No more than that. You went on up the road and you looked at the two or three different places for a police officer?

A. Yes sir.

Q. Was there anything between where you say you saw this vehicle stopped and where you ultimately ended up at Buster Mears that you could have stopped to call anybody?

A. Of course there was.

Q. Why didn't you stop instead of looking all over Newport News?

page 118 } A. How long does it take to get a police officer from downtown?

Q. How do you know where the police officer they would call would be at that time?

A. I didn't. That's the reason I went to Denbigh Boulevard.

Q. How far would you say you went north of the scene?

A. About a couple of miles.

Q. In two miles you knew a lot of time was elapsing?

A. Yes sir.

Q. How was—were you driving, fast or slow?

A. Approximately the same speed.

Q. About 45?

A. Yes sir.

Q. You knew the longer you stayed on the road looking for a police officer according to what you believe, the longer this vehicle would be there?

A. Yes sir.

Q. You don't know whether he moved it at all before the time you came back or not, do you?

A. No sir.

Q. You don't have any idea whether the truck

page 119 } was moving or stopped at the time of the accident happened?

A. No sir.

Q. You wouldn't have any way of knowing that would you, Mr. Noble?

A. Not—when the accident happened, no.

Q. As a matter of fact, you don't know how long after you passed by the truck and got back into your right lane this accident happened do you?

A. No sir.

Q. Could have been a matter of a couple of seconds?
A. Yes sir.
Q. Now when you went back out there, Mr. Noble, you say you pulled your vehicle up on the left hand side of the road or what would be the east side, is that correct?
A. Yes sir.
Q. And your headlights were then facing the cab of the truck?
A. Yes sir.
Q. And of course the rear of the truck and Mr. Hicks' vehicle are all south of that point?
A. Yes sir.
Q. And you got out of your vehicle I assume; you walked around?
page 120 } A. The other side.
Q. Walked around this side?
A. Yes sir.
Q. The lights were still burning on this vehicle?
A. Yes sir.
Q. Still just as brightly?
A. I believe the headlights was off. I don't know for sure.
Q. Some one had turned the headlights on off?
A. I believe.
Q. All right, sir. When they turned the headlights off on this vehicle, are you familiar with this kind of tractor trailer set up?
A. If it's set up by ICC ruling, yes sir.
Q. If you turn the headlights off, the rear lights go on?
A. No sir.
Q. All of them stay on?
A. Yes sir.
Q. Separate switch?
A. Yes sir.
Q. When you walked back, did you take an occasion to look at the rear of the truck or did you go directly
page 121 } to the police officer?
A. I went directly to the police officer sitting over in the parking lot.
Q. Over here?
A. Up in the parking lot (indicating).
Q. Here somewhere in that general vicinity?
A. Yes.
Q. Somewhere in that vicinity. I'm not trying to pin you down. In reference to this island, where was Mr. Hicks' car sitting when you got back there?

Yancey Noble

A. Approximately where it is right now.
Q. Just about where it is right now?
A. Yes sir.
Q. His car was heading due north?
A. Yes sir.
Q. Wasn't turned either to the right or left?
A. I couldn't tell you—might have been—few inches or so but it was—approximately straight ahead.
Q. And approximately in the center of this lane?
A. Yes sir.
Q. And then you went to talk to the officer and you told him that you had seen a truck sitting out there?
A. The truck.
page 122 } Q. You identified it as the truck?
A. Yes sir.
Q. Because of the poles and because of the fact that this truck had been involved in an accident?
A. Well, put it any way you want to.
Q. I would like to have you put it for us.
A. I put it the way I thought it was. The same truck, sir, in the same spot.
Q. Your identification being the same as it was when you passed by?
A. Yes sir.
Q. Just by the poles and by the fact that it was a tractor truck and pound poles and the light you saw?
A. Yes sir.
Q. No name or anything on it?
A. No sir.
Q. Was there a name on the side of this truck that said Hagan Truck Company?
A. I didn't look at the front of it.
Q. At any time?
A. No sir, except—for the lights.
Q. All right, sir. Now did you take the police officer and point out to him what you had seen as you came upon the scene and almost ran into the truck?
page 123 } A. I didn't point it out to him. I told him what was what.
Q. You told him you knew what had happened?
A. I didn't know what happened. I told him the truck was sitting in the road when I passed him.
Q. And that you thought you had better come back and let him know what you had seen when you went by there 20 or 30 minutes ago?

A. Yes sir.
Q. It had been that long?
A. Approximately.
Q. And you gave a statement to the police, did you not?
A. Yes sir.
Q. And do you recall what that statement was, Mr. Noble?
A. The truck was sitting in the road the time I passed it, sir.
Q. Do you recall telling them you passed it about 5:30 and you got back about ten minutes after six?
A. The time I'm not too sure but I think it's some place along there.
Q. If someone were to testify to that, that would be correct?
A. I would assume it is, yes.

page 124 } Court: I couldn't understand it.

A. I said I imagine so.

By Mr. Preston:
Q. Mr. Noble, you told us that the way this curve coming up Warwick Road curved, it would be—that your headlights would not pick up the rear of any object in the road until you were just upon that object, relating it specifically to this truck, is that correct?
A. Yes sir.
Q. Would you say that—the defendant's exhibit number two represents a fair view of the scene of that accident (indicating)?
A. Yes sir, that is the scene of the accident.
Q. That is the curve that you are referring to?
A. Yes sir.
Q. But you're not able to tell us how close that was that you were able to pick up the object?
A. No sir.
Q. Now, were there any vehicles at the scene of this accident when you got back there, Mr. Noble?
A. Yes sir.
Q. How were these vehicles facing?
page 125 } A. Sir, the vehicles all over the place.
Q. Were there any facing the rear of the truck?
A. Yes sir.
Q. Did you see at that time any illumination on the back of the truck?
A. No sir.

Yancey Noble

Q. Looking at plaintiff's exhibit number two, can you see any illumination on the back of that truck there?
A. I see reflectors if that's what you mean, sir.
Q. How many do you see?
A. I see four.
Q. Do you see any other lights?
A. No sir, not burning.
Q. You don't see?
A. I see a clearance light; clearance light and two signal lights; no tag light.
Q. And you see something up on the poles illuminated?
A. Those are reflectors.
Q. They're reflectors?
A. I believe that might be a light there.
Q. You can see those?
page 126 } A. Yes sir.
Q. And I believe you said it was dark when you came along?
A. Yes sir. Both times, when I got there and when I got back.
Q. Dark when you got back also?
A. Yes sir.
Q. The position of Mr.—Hicks' car was as it's shown in this photograph marked Plaintiff's Exhibit number three?
A. Yes sir.
Q. Now Mr. Noble, did you talk to anyone at the scene of this accident other than to the officer?
A. No sir.
Q. Do you know the name of the gentleman that you were giving your statement to or the recitation of the facts as you knew them, the officer's name?
A. The one that put—wrote the statement down?
Q. Yes sir.
A. Not at that time, no.
Q. He wrote it right down there at the scene?
A. Yes sir.
Q. Did you see anyone out there you knew?
page 127 } A. Yes sir.
Q. Who was out there?
A. I went to school with—I can't think of his name now.
Q. Have you seen him?
A. Williams.
Q. Have you seen him here today?
A. Yes sir.
Q. He is an officer on the Force?

A. Yes sir, Lieutenant.
Q. Lieutenant Williams?
A. Yes sir.
Q. Anyone else that you knew out there?
A. Well—
Q. That you have seen here today?
A. No sir, I mean—not that I know of.
Q. Did you know Mr. Hicks before this accident?
A. No sir.
Q. Did you know Mr. Bryant?
A. No sir. I knew of Mr. Hicks but I didn't know him personally or nothing. I seen the truck.
Q. Have you talked to anyone about this accident other than our office, Mr. Noble?
A. No sir.
page 128 } Q. You never talked to Mr. Pitchford about it?
A. Oh yes sir, of course.
Q. Now, did you observe when you went back, Mr. Noble, a sign some distance north of where the Hicks' vehicle was stopped (indicating)?
A. What do you mean by a sign?
Q. Any lit up sign or anything that you could identify as a sign as such?
A. It wasn't lit that night. You're talking about the cross.
Q. It was not lit that night?
A. No sir, in fact it wasn't lit for three or four days after that.
Q. So you did see a sign?
A. No sir, it wasn't lit. How could you see it.
Q. How did you know it was there?
A. Mister, I have been here for five years. I know that sign is there.
Q. You are aware there is a sign there?
A. Yes sir.
Q. What does that sign say?
A. That sign says, "Christ Saves" I believe.
Q. Excuse me.
page 129 } A. I believe, sir. I'm not sure.
Q. And where in relation to that sign was this truck when you got back to the scene?
A. Approximately where it is on the—
Q. Just about the rear of it, just about opposite that sign?
A. I wouldn't say just about. I'd say approximately, sir. I didn't measure it.

Yancey Noble

Q. Your best ability to recall.

A. Yes sir.

Q. Now, Mr. Noble, you drive this road I assume quite often going back and forth to your office?

A. Yes sir.

Q. How wide would you estimate the shoulder of the road generally on the east side of Warwick Boulevard is?

A. Well, it depends on what—whereabouts on Warwick Boulevard you are. It varies.

Q. Right here the point—let's take 85 feet either side of this—scene.

A. Okay, behind the scene, sir, it's rather wide.

Q. Let me—behind, you mean south?

A. Yes sir.

Q. All right.

page 130 } A. It has been widened, the island of the church there. The road has been widened for—when the churchyard was put in for further—abutment on the highway and on the north of it, approximately couple feet above in front of the truck starts a ditch and goes down to the lake.

Q. When you say wide, that doesn't mean anything. Can you give it to us in feet?

A. Ten foot, behind it and maybe five or ten foot in front of it, I'm sure. I never measured it.

Q. How about the distance from the island you say you helped pave this road. Did you also put the island?

A. I worked on the churchyard, not on the road.

Q. How far would you say it was from the westernmost curb of this island, the entrance and exit to the Baptist Church to the paved part of Warwick Boulevard?

A. Approximately ten foot or 11 foot.

Q. How wide was this truck, approximately?

A. Approximately—truck approximately eight foot.

Q. There was plenty of room if you wanted to stop over here, he could have done so without obstructing the northbound lane?

A. Yes sir, the whole parking lot there.

Q. Whole parking lot here?

page 131 } A. Yes sir.

Q. Could have pulled right up there and stopped?

A. If he wanted to.

Q. And you say when you got back, the truck was approximately 75 to 80 feet but in a different position but the rear of it was still entirely on the road?

A. Yes sir.
Q. The whole rear?
A. No, I wouldn't say the whole rear. I believe the right hand wheels might have been off the road.
Q. Was this about the position that you saw, Mr. Noble, that the truck was in (indicating)?
A. Approximately, yes sir.
Q. You didn't run into the truck, did you?
A. By the grace of God I didn't sir.
Q. But you didn't hit it, did you?
A. No.
Q. You were able to go around it?
A. I got power steering, sir.
Q. My question, you were able to go around it?
A. Yes sir.
Q. And you saw it in time to be able to avoid it?
page 132 } A. By the grace of God, I did, sir.
Q. By the grace of God you did it, didn't you, Mr. Noble?
A. Yes sir.

Mr. Preston: Thank you, sir.

* * * * *

page 133 } REVEREND DAVID YOUNG, called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Pitchford:
Q. State your name, please sir.
A. David Young.
Q. What is your occupation or profession?
A. I'm a Minister.
Q. Where do you live, Reverend Young?
A. I live at 13009 Warwick Boulevard.
Q. Where is that with reference to the Denbigh Baptist Church?
A. This is across the street from the eastern corner of the parking area of the Denbigh Baptist Church.
Q. Were you at home on the night of September the 22nd, 1966?

Reverend David Young

A. I don't remember the date. I was at home the night of the accident, yes sir.

Q. Now, how did you learn about the happening of the accident?

A. I'm having a little trouble with my left ear but I think I understood you. I heard the noise while I was in bed. I heard the—a large boom or crash and—and I got

page 134 } out of bed at that time.

Q. And—did you get out of bed quickly or wait a little while, or what did you do?

A. I got out of bed right away.

Q. After you got out of bed right away, what did you do?

A. I jumped into my trousers and my shirt and buttoned as I ran downstairs out to the street.

Q. And when you got out to the street, what did you see and observe?

A. Well, there had been a few vehicles stopped at that time and—I saw the sandwich truck—smashed up in the street, stopped in the street by that central island from the parking lot and—and the truck with the logs some distance ahead, slightly off the road.

Q. And—could you estimate how much time elapsed between the time you heard the crash and the time that you went out and observed what you had just described?

A. That would be hard to do. I'd say two or three minutes.

Q. All right. Now—

A. Possibly that long.

Q. Now, when you observed this truck up the road some little distance, could you give us the approximate distance?

page 135 } Mr. Preston: Your Honor, I object to the form of that question. This gentleman has no idea whether they rolled or what happened to it.

Mr. Pitchford: I wanted to know how far away it was.

Court: Ask him how far away it was.

By Mr. Pitchford:

Q. How far away was it from the Hicks vehicle?

A. The log truck?

Q. Yes sir.

A. I think, perhaps, one hundred feet.

Q. What did you see and observe about the log truck when you looked at it?

A. The first thing I saw were the reflectors in the back.

Q. Did you see anything else in the back?

Reverend David Young

A. Well, I was interested mainly when I saw the logs, I was interested in the reflectors and—that's what I looked to see, if it was marked properly or somewhere near properly.

Q. Did you see any lights?

page 136 A. Not on. I don't—let me say this. I don't remember that they were on. I didn't pay any attention to that. I looked for reflectors and logs when I saw them.

Q. You saw the reflectors?

A. Yes, that's right. I have driven a tractor trailer and I was interested in that but I didn't pay any attention to the lights because—may I say why?

Q. Go ahead.

A. Because I recognized the fact that—on impact, lights are lost like that (indicating).

Q. All right. Now, what did you do after—after observing this condition?

A. I saw some gentlemen—some fellows who had stopped near the sandwich truck, were out looking it over, seeing what they could do and I asked him if they had any flares. I was going to get them out of my school bus. As I went out to the road, I—I called—as I came down the stairs, I called to my boys and they got up right away and I called the one and said, because I—I was sure it was an accident, I said, "Get the school bus out" because it has four way flashers on it and I knew they would be of advantage on the road at that time of the morning and—so when he pulled it out next to the road, I said, "Grab the flares out of the glove compartment", and I called to the men who were gathered near the sandwich

page 137 truck, but they said they already had some out of their trucks and—is that what you wanted to know?

Q. Were flares put down?

A. Yes, flares were put down.

Q. Did you pull your school bus with the flashing light into the road?

A. Yes, I did. I pulled it into the road behind the sandwich truck some feet behind so there would be some warning to vehicles coming from both directions. In the front I have two red lights and two yellow lights; in the back I have two yellow flashing lights. They would see it both ways.

Q. Was that before or after the Police arrived?

A. Before they arrived.

Q. Did other people come up before the Police arrived?

A. Yes, they were there before I got there. Some—

Q. Now, did you ever go up to the truck itself to observe whether or not there was any damage to the truck?
A. Did I go up to the truck?
Q. Yes sir.
A. The sandwich truck?
Q. No, not the sandwich truck, the log truck.
page 138 } A. The log truck. Well, actually, I wasn't particularly interested in the damage on that truck. I was interested in the—

Court: Did you go up to the truck? Did you go up to the truck?
A. Well, I was around the truck at the time but I was interested in the vehicles going by and my—I was concerned about—getting the traffic around. I went by it several times. I was by the front of it directing traffic.

By Mr. Pitchford:
Q. Now, when you went to the front of it directing traffic, did you observe any lights in the front of it?
A. Not turned on. I don't remember that they were turned on.
Q. You don't remember the lights being turned on, either the front or the back?
A. No sir, I don't.
Q. Do you remember paying any particular attention to the lights, either front or back?
A. No sir, I don't.

Mr. Preston: Your Honor, this is Mr. Pitchford's witness.
Court: Yes.

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* * * * *

CROSS EXAMINATION

ByMr. Preston:
Q. Reverend Young, the sandwich truck that you described, was it facing north also?
A. Yes sir.
Q. Was it entirely on the road?
A. Yes sir.

Q. Or partially off the road?

A. I think I can say it was all on the road.

Q. That would be behind the sandwich vehicle you referred to—the vehicle that—that was stopped just opposite the—the island on parking lot, is that correct? Or was it between the—this vehicle and the truck?

page 140 } A. I don't understand your question, sir. I didn't quite hear it. Excuse me.

Q. Excuse me. The vehicle which you say had come up, did you say a vehicle had come upon the scene or were you the first there?

A. No, I was not the first vehicle. There were many vehicles parked beside the road in—several vehicles in both directions. There was a milk truck.

Q. That's the one I was referring to. Was that truck headed northerly? Can you hear me?

A. Yes, the one I remember was not headed northerly. It was parked in front of my mail box. I'm trying to see.

Q. You live back over here, don't you, on the west side of the road?

A. That's correct.

Q. And the truck you recall—

A. Right where your hand is.

Q. Approximately where that pole is, is where your—

A. Not my—the milk truck.

Q. The milk truck was there?

A. Mine was on the road right in the lane behind number one and down by this—island, the lower island

page 141 } indicating). Right by there (indicating).

Q. So that's where you pulled the school bus?

A. Yes sir.

Q. Getting to the milk truck, he was headed back towards Newport News?

A. Yes sir.

Q. And on your side of the highway, or west of Warwick Boulevard?

A. He was not on the highway. He was off the highway.

Q. I say, but on your side of the highway?

A. Yes sir.

Q. Being west of the highway?

A. Yes sir.

Q. Heading south?

A. Yes sir.

Q. Right. How long would you say, Mr. Young, it was before the Police arrived? Are you able to tell us approximately?

A. Well, I think about 15 minutes. Now this—this is conjecture. I was busy. I was occupied directing traffic and I can't say that. I don't know.

Q. I believe, as you told us, that was your primary interest when you got out there because there were page 142 } other people there and you wanted to be sure other motorists would not be involved in this. Is that correct?

A. That's correct.

Q. Were you asleep at the time this happened?

A. Yes sir. That's correct.

Q. You don't recall then hearing any trucks go by or any trucks stopping out in front of your house, do you?

A. No sir.

Q. Can you hear those as they go by?

A. You bet, yes sir.

Mr. Preston: Thank you, Reverend Young.

* * * * *

RALPH HOWELL, called as a witness by the Plaintiff, being duly sworn, testified as follows:

page 143 } DIRECT EXAMINATION

By Mr. Pitchford:

Q. State your name, please.

A. Ralph Howell.

Q. Where are you employed, Mr. Howell?

A. Co-Op Shop—Co-Op Sherwood Shopping Center.

Q. How long have you been employed there?

A. About three years.

Q. In what capacity?

A. Produce.

Q. You're the produce—

A. Yes.

Q. Man. Now, may I direct your attention to the morning of September the 22nd, 1966, when there was an accident between the log truck and the sandwich truck. Do you recall that morning?

A. Yes.

Q. Were you in the vicinity about the time of the accident, or shortly after that?

Mr. Preston: Now, just a moment, please, Mr. Howell. This gentleman can't say when this accident happened. I think that question is improper. I think he can say he came upon a scene and unless he know and was an eye witness to this accident, he has no idea when it happened.

page 144

Court: Let him establish the time.

By Mr. Pitchford:

Q. About what time did you come upon the scene of the accident?

A. I come along about 20 minutes to six.

Q. What was the condition—

Court: Where were you coming along on Route 60, and where?

A. I came off Oyster Point Road onto 60.

By Mr. Pitchford:

Q. You came off Oyster Point Road onto 60. Where were you going?

A. To work.

Q. And your work was located—

A. At the shopping center, Sherwood.

Q. Was that north of Oyster Point Road?

A. Yes sir.

Q. Now, this, I believe you said, was what time?

A. 20 minutes to six.

page 145

Q. And what did you observe as you approached the area in front of the Denbigh Baptist Church?

A. Well, I saw—Mr. Hicks there in his wagon and saw the log truck up there.

Q. And what did you—see and observe about the log truck?

A. Well, I didn't see any lights on it.

Q. When you say you didn't see any lights, are you referring to the front or back, or both?

A. I didn't look in front. I didn't pay—look that far.

Q. Did you—did you look at the back very closely?

A. No sir, I didn't get right up on it.

Q. But you—how close to it did you get?

A. Well, I got right in front of Mr. Hicks' panel truck.

Q. And—while you were in front of Mr. Hicks' panel truck, was there a light on Mr. Hicks' panel truck?

A. I don't recall.

Ralph Howell

Q. When you—at what place were you when you looked at the log truck and saw no lights?
A. I was—looking right in the rear of it.

Mr. Pitchford: Thank you, sir.
page 146 } Cross examine.

CROSS EXAMINATION

By Mr. Preston:
Q. Mr. Howell, you were heading north?
A. Yes sir, I was on Route 60.
Q. You were coming up Oyster Point Road?
A. Coming on Oyster Point Road and hit 60.
Q. That would—we still—60 is Warwick Boulevard too, it is not?
A. Yes sir.
Q. And what was your speed, approximately?
A. Oh, 15, 20 miles an hour coming onto Warwick Boulevard.
Q. And your headlights were on, I assume?
A. Yes sir.
Q. It was dark?
A. Yes.
Q. And how far back were you from the scene when you first observed this condition up ahead, which you have described?
A. Just as I got on the—on the Route 60 I saw it.
Q. You had no trouble?
page 147 } A. No.
Q. That area out there is not illuminated by anything, is it? No lights or street lights or store lights or anything? Wasn't on this occasion?
A. I don't—whether street lights there or not.
Q. But when you picked it up at that point, you didn't have any difficulty seeing it, did you?
A. Well, they had a flare or something sitting on the road there.
Q. There was a flare sitting there?
A. Yes.
Q. Before you got there, there was a flare out, is that correct, sir?
A. I think it was a flare sitting on the road.
Q. Number—
A. Flashlight; someone had a flashlight.

Ralph Howell

Q. Number of cars, number of people already got there before you?

A. There was a number. There weren't too many there, I should say.

Q. Where did you—did you stop at the scene?

A. Yes sir.

Q. Where did you stop, Mr. Howell?

page 148 } A. I stopped on the right, behind it before I got too close.

Q. Behind which vehicle? The car sitting in the middle of the road?

A. I pulled over on the right.

Q. You pulled over here (indicating)? But you didn't get up as far as that vehicle was? Is that what you are saying?

A. Get up as far as what?

Q. As far as the rear of this vehicle?

A. Mr. Hicks'?

Q. Pardon?

A. Mr. Hicks'?

Q. Yes.

A. I didn't get up too close to him on the car. I walked up to there.

Q. That's my point. You pulled off over here (indicating) on the shoulder and you got out and when you got out the front of your car would have been south of the rear of Mr. Hicks' car, is that correct?

A. Something like that.

Q. Did you ever turn your truck around?

A. Did I turn my truck around?

Q. Yes sir.

A. I don't drive a truck.

page 149 } *A*. What were you driving?

A. A car.

Q. What kind of car?

A. '65 Ford.

Q. '65 Ford. All right, sir. Did you leave your lights on or turn them off?

A. Left my parking lights on.

Q. Parking *lit*. How about your headlights?

A. No, parking light.

Q. And then you walked up to the scene, is that correct?

A. Yes sir.

Q. Of course, you don't have any idea when the accident happened, did you?

A. No.

Ralph Howell

Q. You didn't see it?
A. No.
Q. When you got there, it had already happened?
A. Right.
Q. You don't have any idea whether the lights were burning on the rear of that truck at the time of the accident, or not, do you?
A. I don't know that.

Mr. Preston: Thank you.

RE-DIRECT EXAMINATION

page 150 } By Mr. Pitchford:
Q. Had Mr. Hicks been carried away when you got there?
A. No sir, he was still sitting in the truck.
Q. Did you see him carried away?
A. No sir, I left before they—they carried him away. I had to be at work at 6:00 o'clock, so I went on to work.
Q. Had the police arrived when you got there?
A. Yes sir.
Q. Before the ambulance got there?
A. Yes.

Mr. Pitchford: I thank you, Mr. Howell and I move that he be excused.
Mr. Preston: May I ask him one question?
Mr. Pitchford: Sure, go ahead.

RE-CROSS EXAMINATION

By Mr. Preston:
Q. Did you hear or read about this accident in the newspaper?
A. No, I—I glimpsed on it but I didn't—I didn't read it.
Q. Well, having arrived there, did you think
page 151 } anything you had to say would have been important enough to tell the Police about it?

Mr. Pitchford: Objection. That calls for all kind of conclusion.
Court: That's a conclusion.
Mr. Pitchford: Conjecture and hearsay.
Mr. Preston: I'll rephrase the question.

By Mr. Preston:

Q. Did you ever tell—

A. No.

Q. Offer to tell the Police that you had any information of this accident?

A. No sir.

Q. To whom did you offer this information, Mr. Howell?

A. Who what?

Q. Who did you tell that you had come up upon this scene?

A. I didn't tell anybody.

Q. How did they get you here today?

A. Someone—told, I guess, I stopped by there.

Q. Someone told that you were out there?

A. I stopped by there.

page 152 } Q. Is that correct?

A. Yes.

Mr. Preston: Thank you.

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page 153 }

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Mr. Preston: Waive the call. We would like to stipulate into the record, your Honor, if we may, certain things Mr. Pitchford and I have agreed to.

Court: That is not all of it on this piece of paper?

Mr. Preston: No sir.

Court: That's an exhibit that Mr. LaRue was supposed to make this morning.

Mr. Preston: It has been marked.

Court: All right. I can see something up there now.

page 154 } Mr. Preston: We are willing to stipulate that the rear of this truck is approximately eight feet in width. Am I correct?

Mr. Simmons: That's correct.

Mr. Preston: We want to stipulate that the length of this island which separates the entrance and the exit from the Denbigh Baptist Church, is approximately 24 feet. We want to stipulate that the distance between the northern end of this island and the cross is approximately 79 feet. Does that take care of it?

Mr. Pitchford: The overall distance is 93 feet, the way I understood it.

Mr. Preston: The overall distance would be a computation of this distance plus 79 or 24 and 79, 93 feet from the southernmost tip of the island at the entrance and the exit to the—Baptist Church, is that correct, sir?

Mr. Pitchford: Right. Can we stipulate as to the length of the truck with load—

page 155 } Mr. Preston: Just a moment. Not counting the load, we are willing to stipulate that the tractor and trailer is approximately 48 feet in length.

Mr. Pitchford: Would you stipulate that there was a seven foot overhang?

Mr. Simmons: 34 and 12. Excuse me, 46.

Court: 34 and 12 would be 46, that's right.

Mr. Preston: We'll stipulate six feet.

Mr. Simmons: The length of the trailer.

Court: He can't testify that way.

Mr. Preston: Six feet; we'll stipulate six feet.

Mr. Pitchford That won't help. It's not acceptable. I want to get the overall length.

Mr. Preston: You better develop it.

Court: He said he will stipulate the truck and tractor and trailer was 46 feet.

page 156 } Mr. Preston: Without the load, yes sir.

Court: That's what you said.

Mr. Preston: Excuse me. My computation was wrong, 103 feet from the south end of the island to the sign rather than 93.

Mr. Pitchford: 103 feet is right.

Court: Wouldn't it be well to put the stipulation on there somewhere? We're getting ahead of ourselves now.

Mr. Preston: May I draw a line opposite the southernmost part of the island of the parking lot, running from—as this diagram shows from west to east and similar line at the cross and then mark the distance of 103 feet to that point?

Mr. Pitchford: That is being done on Plaintiff's Exhibit Number One.

(Mr. Preston then made some marks on the diagram.)

Court: I think that's number one up there in the corner.

Mr. Pitchford: I'm keeping the *the* record

page 157 } straight.

Mr. Preston: Now I will draw a line at the northernmost part of that island with an arrow pointing to the cross as 79 feet. Is that correct?

Mr. Pitchford: That's also on Plaintiff's Exhibit Number one.

Court: All right. Now, you all through with this?

Mr. Preston: Yes sir

Court: You have stipulated those things.

Mr. Pitchford: Now, I'd like to call Mr. Ferguson for a witness.

Court: There was a stipulation in my office that the jury didn't get the benefit of this morning. You had, in writing, you said, something you wanted to stipulate in my office this morning.

Mr. Preston: Oh, yes. I think we can probably do that after—after the instructions.

Court: I wanted that done. It hasn't been done up to this time.

Mr. Preston: Yes sir, I understand.

page 158 } Court: Pardon me.

TERRY FERGUSON, called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Pitchford:

Q. What is your name?

A. Terry Ferguson.

Q. Where do you live, Mr. Ferguson?

A. Live at 1811 Womack Drive in Hampton; Buckroe area.

Q. Where are you employed?

A. Sealtest Foods, Route Salesman.

Q. How long have you been so employed?

A. Four years.

Q. Were you so employed on the day of the collision between the Hicks sandwich truck and a log truck?

A. Yes sir.

Q. Where did that accident occur?

A. On Route 60, just as Oyster Point Road intersects there, the "Y".

page 159 } Q. Did you come upon the scene after the accident happened?

A. Yes.

Q. In which direction were you driving?

A. Heading north toward Fort Eustis.

Q. Along what road were you driving just before you came upon the scene of the accident?

Terry Ferguson

A. Route 60.
Q. And your destination was what?
A. Fort Eustis Officers Club.
Q. Where had you started from?
A. 24th and Warwick Boulevard.
Q. Now, as you approached the scene of the accident, what did you first observe?
A. Well, as I came around the corner, the curve there on the Route 60, it appeared like a flashing of a bus, actually is what it looked, a school bus. There was someone in the road with a—a flare of some type and—of course I didn't know what would happen so, as I pulled on by the bus, I happened to look out one of my windows and I saw the front end of a car or panel truck, looked like it had been in an accident. I didn't know who had been involved with because I didn't see the other vehicle so—I pulled in front of the sandwich truck and then as I pulled in, I happened to see the—the reflectors of this—logs on the back of the pole hanging out.

page 160 } Q. Did you see anything else on the logs other than the reflectors?

A. It appeared to me there was lighting all around it but they weren't lit. The lights were out. The two reflectors is what I—what caught my eye.
Q. And when you pulled around directly—pulled in between the Hicks vehicle and the truck, about what speed were you moving?
A. Just—about two or three miles an hour.
Q. Did you ever go to the front of the log truck?
A. No sir, I didn't.
Q. Had Mr. Hicks been removed when you—arrived at the scene?
A. No, he hadn't. He was still in the car. There were several people there and—I went back to the car and, of course—the person in the car who I didn't know very well, I had seen him on my rounds, but he was at that time trying to move his head back and forth. He was still alive and—then the Police Officer arrived almost momentarily at the same time and—got out of his patrol car and tried to get Mr. Hicks from under the wheel of the car and he was wedged in by box or something that had slipped up toward the front. I tried to help him but we—it was to

page 161 } no avail, so he loaned me his flashlight and—and, of course, that's when I shined the light onto the—victim in the car and—by that time someone walked

up in dark clothing and said, "Oh my God, no", and of course I don't know who he was either.

Mr. Preston: I object to Mr. Ferguson's testifying to statements made by people he can't identify.
Court: That's right.

By Mr. Pitchford:
Q. Do you see—

Court: I sustain your objection.

By Mr. Pitchford:
Q. Do you see the man who made that statement?

Mr. Preston: I wish it would be—
Court: I'll strike that.
Mr. Pitchford: Won't you let me see if I can clear it up if he can testify the man who made the statement?
A. It was the man there (indicating). The guy with glasses (indicating).

By Mr. Pitchford:
Q. There's four pair of glasses over there. Walk over, if you will, and point to the man who made the statement, if you will.

page 162 } Mr. Preston: I don't think he needs to do that. Will you stand up, Mr. Bryant and let him identify you.

By Mr. Pitchford:
Q. Is this the gentleman you talking about?
A. Yes.

Mr. Preston: That's all that's necessary.
Mr. Pitchford: Then I move that it not be stricken.
Court: I will too. I will move that it not be stricken from the record.
A. And then—the—of course, the ambulance—
Court: He identified and I'll move that it not be stricken from the record.
A. The ambulance was arriving then and the patrolman came back to the scene and he got up on top and kicked the boxes away and the—

Terry Ferguson

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page 163 }

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By Mr. Pitchford:

Q. What did you do then?

A. We helped to get the victim out of the car and onto a stretcher and they drove him away. I waited around a few minutes to help traffic clear up. Someone held traffic to my job and I went to my job.

Q. Did you know Mr. Hicks before?

A. I didn't know him but I had seen him around. I didn't know him.

Q. Did you know Mr. Bryant, the driver of the log truck?

A. No.

Q. As you got in your milk truck and went on up the road, did you look back at the log truck?

A. I looked back but I didn't—make any—definite notice of—of any truck behind me, no sir.

Mr. Pitchford: All right. Cross examine.

CROSS EXAMINATION

page 164 } By Mr. Preston:

Q. Did I understand you to say, Mr. Ferguson, that you pulled your milk truck in between Mr. Hicks' car and the truck? Did I understand you to say that?

Q. Yes sir.

Q. And where—where did you stop?

A. I stopped—in between the two automobiles—I mean the two vehicles.

Q. Still on the road?

A. Yes sir, I was still on the pavement.

Q. Were your lights still on?

A. My headlights were on and my tag lights were on.

Q. That's when you saw the reflectors of the truck?

A. Yes sir.

Q. With your headlights?

A. Yes sir.

Q. You had no trouble picking them up?

A. I had no trouble after I got in between there, no sir.

Q. And—did you, at any time, ever turn to go back south again?

A. In my milk truck?

Q. Yes sir.

page 165 } A. No sir.

Q. You—when you got back in, you went north, didn't you?

A. Correct.

Q. You never stopped down here (indicating)?

A. No, I didn't stop there.

Q. Heading south?

A. No sir.

Q. You say the lights—all the lights were out all around the truck?

A. Sir, I didn't notice any visible lighted other than the reflectors. I did notice when my lights were on the back of the truck, there were lights, strings of lights, looked like they were on a couple of the poles and around on the side.

Q. Did you see any of the wiring hanging down?

A. That's what I saw, the lights hanging on the wire.

Q. Some of those wires were broken?

A. I did not notice that. I noticed they were hanging.

Q. You didn't look that closely?

A. No sir, I didn't. I was more interested in what was happening behind me.

page 166 } Q. About how long would you say you glanced at the truck to see these reflectors? You glanced at it and turned around and tried to help Mr. Hicks?

A. That's correct.

Q. Very short period of time?

A. Yes.

Q. Did you know Mr. Noble before this accident?

A. Beg your pardon?

Q. Do you know a gentleman by the name of Yancey Noble?

A. No sir, I don't.

Q. Have you seen anybody here today that you recognized as being at the scene when you came out there?

A. Anyone here?

Q. Yes sir. Other than this gentleman here.

A. That gentleman was at the scene of the accident—

Q. Not in the Courtroom, anywhere around here today. Have you seen anybody that you recognized as being out there that morning?

A. Mr. Howell.

Q. Mr. Howell? Howell?

A. Yes.

Q. Now, when you got there, you say there was a truck as you came around the curve, there was a truck flashing lights?

page 167 } A. It appeared to be a school bus, more or less.

Q. And this was when you were at the intersection of Oyster Point Road and Warwick?

A. As I was coming on the curve, that's what caught my eye first, was the flashing of the light.

Q. You don't know how long before this the accident happened?

A. No sir, I have no idea.

Q. You had no way of knowing what the conditions of the lights of the rear of that truck were at the time of the accident, do you?

A. No sir, I do not.

Q. But you do know there were lights on the rear of it and plenty of reflectors back there?

A. There were two large reflectors about four or six inches in diameter.

Mr. Preston: Thank you.

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page 187 }

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EVELYN EAGLE HICKS, called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Pitchford:

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A. Well, he got up about 5:00 o'clock and then I—he never

ate breakfast. He would always come back about 9:00 o'clock and 9:30 to eat his breakfast but I had to go down, we had a German Shepherd dog which we keep in the garage and I had to hold the dog while he backed the truck out and left for his route and then I put the garage door back down and put the dog in the side.

Q. About what time did he leave the house on that morning?

A. I would imagine somewhere around a quarter after five. I didn't look at the clock.

Q. Did Mr. Hicks usually wear glasses?

A. Always.

Q. Did he have glasses when he left the house?

A. Definitely.

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page 199 }

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CROSS EXAMINATION

By Mr. Preston:

Q. Mrs. Hicks, did I understand you to say you were up on the morning Mr. Hicks left home?

A. Yes sir.

Q. And you had both gotten up at approximately five—five p.m.—five a.m.?

A. Five a.m.

Q. And when he left, you were outside and he had gotten in his truck, I assume, and gone on his route?

A. Yes, the garage is in the basement of the house so I didn't really have to go outside.

Q. I see, but you saw him when he left the garage?

A. I closed the garage as he backed out.

Q. And you say at that time he had his glasses on?

page 200 } A. Yes.

Q. Did he wear them constantly?

A. Yes sir.

Q. Was he required to wear them to drive, do you know?

A. Yes, he wore them all the time.

Q. Had bifocals?

A. No.

Q. Just reading glasses?

Evelyn Eagle Hicks

A. Yes sir, just regular glasses.
Q. Pardon?
A. Just regular glasses.

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page 201 }

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Q. Do you know, Mrs. Hicks, when the last time the vehicle that your husand was driving had been inspected?
A. At the proper time whenever time was proper. I don't know what the sticker says.
Q. You can't recall though specifically as to this date of September 22nd, whether it had been a week or couple of months, or not. You don't know?
A. No, I don't know.
Q. Did you drive the vehicle at all?
A. I didn't drive at all. That's the reason I page 202 } said we went everywhere together. If I went, he took me. I didn't go anywhere unless I went with him.
Q. When he left, did he have his headlights on?
A. No. Now let me explain why. We live a distance from any other neighbors and my husband—my son and I were there by ourselves and he never turned the headlights on until he got down at the bottom of the hill so no one would know that he was leaving home and that we were there by ourselves.
Q. So when he left on this morning, he did not have headlights on?
A. No, but he turned them on at the bottom. I always went to the kitchen window to watch him going down the road so I would know when he got down to the bottom of the road and I saw him turn his headlights on and make the curve and go out Maxwell Lane.
Q. Did you do that on the 22nd of September?
A. Yes.
Q. You saw his headlights come on when he got to the bottom of the hill?
A. Yes.
Q. How far is that from your home?
A. Six hundred feet.
Q. How far is your home at Maxwell Lane,

page 203 } Mrs. Hicks, from the place where this accident happened?

A. I don't know. I have never measured it.

Q. You don't have any idea?

A. No, I have never measured it.

Q. How would he get to the point? Would he go down?

A. Maxwell Lane to Route 60 and then he would have to stop and make a left hand turn to get onto Warwick Boulevard.

Q. So he would then be coming up Warwick Boulevard right along, once he got off Maxwell?

A. That's right.

Q. Did he have any stops in between?

A. No.

Q. Where was his first stop, do you know?

A. He was going to Buster Mears.

Q. Pardon?

A. To Buster Mears, that morning.

Q. Do you know Mr. Yancey Noble?

A. No, I've never seen him until he took the stand.

Q. What model car was it, Mrs. Hicks, or do you know that?

A. '60 Chevrolet truck; sedan delivery truck.

Q. '60 Chevrolet sedan delivery truck?

page 204 } A. '60 or '61.

Q. You don't know the type of brakes this car had on, whether power—

A. No, it wasn't power.

Q. Did he have a gear shift?

A. Gear shift.

Q. Or automatic?

A. Gear shift.

Mr. Preston: Thank you, mam.

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page 205 }

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Mr. Preston: Your Honor, I'd like to move to strike the evidence of the Plaintiff on the grounds there's been no showing of any actionable negligence on the part of Mr. Bryant which was a proximate cause of this accident. Not one

page 206 } witness has testified as to what occurred or was occurring at the time Mr. Hicks ran right straight up in the rear end of this vehicle.

One man, Mr. Noble, has testified that he passed the scene of this accident about 30 minutes before, and that there was a truck stopped out there. From that point on, he doesn't have the vaguest idea what this truck was doing. He doesn't know whether it was moving or stopped at the time of the accident. He has no recollection or no knowledge as to what occurred at the time this accident happened. He doesn't even know how long after he passed the scene that this accident happened, and there has been no showing to which this jury can conclude there was any negligence on Mr. Bryant except through speculation.

By the same token, the fact Mr. Hicks, the decedent struck the rear of Mr. Bryant's truck, that there were no visible marks to show that he attempted to avoid the accident in any way; that his vehicle was heading in a due north direction; that he never took any evasive action and just ran

page 207 } dead up underneath that truck, is, in and of itself, sufficient to show from the physical facts and that the jury can infer that he was not keeping a proper lookout and that he was the cause of his own misfortune.

Mr. Pitchford: The only thing he has said that I agree with, is that the jury can infer—

Court: That's what they can, they can infer from the position of the truck he didn't get off the road. The lights and business—they'll have to do anything.

Mr. Pitchford: This is a jury case. *Ross* against *Armstrong* is pretty near all fours.

Mr. Preston: If you going to quote cases, let's see what they say.

Court: Hand me the case.

Mr. Preston: There is no question—by Mr. Holmes, by the drivers of the respective vehicles, he has called, with the exception of one man, Mr. Noble, that when they come to the

page 208 } apex of Oyster Point Road and Warwick Boulevard, from that point on, your headlights will pick up an object and there were reflectors on the rear of this truck, which is uncontradicted whether there were lights or not. Not only that, Mr. Holmes saw, but all of these other people saw, and there's evidence that there was a light on the rear of that truck. Whether it was one or more, makes no difference. Here's a man driving down the highway with his headlights on; according to Mrs. Hicks

he travels 384 feet and never sees something if they believe Mr. Noble, that was there in front of him, which was in plain and obvious view. He never sees it because he never—hit his brakes; he never turned his wheel; he never did one thing but run right underneath that truck, and it is obvious there, from that evidence, in order to allow this jury to get this case, they would have to speculate on any negligence and they would have to disregard the physical facts which show very plainly that Mr. Hicks was not complying with the statutory duties of keeping his car under control; keeping

page 209 } a proper lookout, and taking such action and using such mechanical apparatus that was available to him to avoid this accident.

Mr. Pitchford: Now, that might be a very good jury argument. First Mr. Hicks had a right to assume that the lane was clear.

Mr. Preston: Only until the contrary appeared, or in the exercise of ordinary care—

Mr. Pitchford: Let me talk and you can talk back. I was courteous enough to keep quiet for you. As long as Hicks was driving in a reasonable manner and we have to assume that he was because he is dead, he had a right as a reasonable person to assume that the lane ahead of him was clear until it appeared to him, or should have appeared to him, by the exercise of ordinary and reasonable care, that the lane was blocked. We have the testimony of Noble that has not yet been contradicted, that only by the grace of God he sensed or saw, and barely missed hitting the truck ahead of him.

page 210 } He, Noble, was going in the same direction that Hicks was going in. Noble did not see the reflectors in time to—he saw them barely in time to avert the accident. Hicks did not see them. That is the only difference there. He is ignoring the—duties, in his argument, devolving upon the operator of heavy equipment.

We have stipulated eight feet or over about the dimension lights and all of that and there are no dimension lights have been seen on the truck by anybody, either before or after the accident and, at this stage of the case, the Court—the Supreme Court of Appeals has said over and over again, that the evidence must be viewed in the light most favorable to the Plaintiff and all reasonable inferences drawn therefrom and under the argument of Mr. Preston, he would have you hold, as a matter of law, that Hicks is barred by contributory negligence, from recovery because we have no eye witness, but we do have the witness who saw the—the

page 211 } truck blocking the highway a matter of minutes

before it happened and was—who was so incensed that he went out and tried to get a police officer to clear up the condition because he puts it, he don't know what his rights are now that the Civil Rights are in effect.

Mr. Preston: Your Honor, we're dealing here with proximate cause. Let's assume, for the sake of argument, and assume only for the sake of argument, that the vehicle operated by Mr. Bryant was stopped. Let's assume, for the sake of argument that it had no running lights on. By Mr. Pitchford's own statement, what Mr. Noble did is the crux of the whole thing. Mr. Noble is traveling 45 miles an hour and he sees this truck in time to avoid it. There is no evidence that there was any oncoming vehicle which would have caused or—deterred Mr. Hicks from turning in either direction. There is no evidence why he never put on his brakes. He just went straight into the rear end of this truck and never varied one way of the other, and that evi-
page 212 } dence, alone, is sufficient to show, with the facts and circumstances, that—he was not keeping the lookout required by him my law. Mr. Noble may have not have been keeping a diligent lookout as the law required but he was keeping a better lookout than Mr. Hicks.

He didn't run into the truck and he saw it in time, something picked it up. We know the reflectors were there. We know, from Officer Holmes, you could see and you were almost straight from 384 feet back. If his headlights were on, there is no reason for him not having seen those lights except one, and that is he wasn't looking and he wasn't operating that automobile as the law required.

If he had of been, he had ample time to take some evasive action and the physical facts are uncontradicted, he never took one iota of evasive action, by the application of brakes or the turning aside of that vehicle or anything else. Now, Mr. Pitchford is not correct when he says—excuse me, that's too harsh. I take issue with Mr. Pitchford's state-
page 213 } ment that the Supreme Court has held at this stage of the proceeding everything is presumed and all inferences are held favorable to the Plaintiff. That's the time the case is appealed and the Defendant has lost and the party who one is entitled to the presuming that until such time as shown by the record, it is incorrect. If the evidence before the Court is such that reasonable minded men cannot differ, there isn't one thing to do and that is for the Court to take it from the jury and rule as a matter of law that Mr. Hicks was not guilty of contributory negligence but was guilty of negligence which was the sole proximate cause of this accident because of the physical facts that we

have here and in anything else would allow this jury to speculate and to base—any verdict on conjecture and on guess.

Court: I think it is sufficient to let it go to the jury and I'm going to let it go and let them pass on it.

Mr. Preston: Note my exception. * * *

page 214 }

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LIEUTENANT H. T. WILLIAMS, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Preston:

Q. Would you state your name, please sir?

page 215 } A. H. T. Williams.

Q. Mr. Williams, where are you employed?

A. Newport News Police Department.

Q. And were you so employed on the 22nd of September, 1966?

A. Yes sir, I was.

Q. Did you have the occasion to investigate an accident which occurred on Warwick Boulevard, approximately adjacent to the Denbigh Baptist Church, involving the vehicle operated by Mr. Bryant, tractor trailer—

A. Yes, I went there.

Q. And a vehicle operated by a gentleman by the name of Mr. Hicks?

A. Yes sir, I did.

Q. Now, do you know when the accident happened, Lieutenant Williams?

A. No sir, I do not.

Q. You just know that you got a call and you went to the scene, is that correct?

A. That's right.

Q. When you arrived at the scene, Lieutenant Williams, who was—present, if you recall?

A. Officer Holmes was there, the wrecking truck was there and several other people I don't know. I know the wrecking truck was there and I know Officer Holmes was

page 216 } there.

Q. When you arrived, do you recall where the vehicle that had struck the rear of the truck was sitting?

A. It was in the northbound lane.

Q. And do you recall where the truck was?

A. It was some feet further up the road.

Q. All right, sir. Do you know how far?

A. 81 feet, I believe it was.

Q. All right, sir. Now, when you arrived, where did you park, Officer Williams, if you remember?

A. I parked in the south of the Chevrolet that had hit the back of the truck.

Q. And then—off of the road or—still in the northbound lane?

A. No sir, I parked on the shoulder.

Q. On the shoulder. Now, this—Lieutenant Williams, has been introduced as Plaintiff's Exhibit one which is a—diagram, not to scale of the scene of the accident, purporting to represent the various position of the vehicles and the geographical locations. Does that look familiar to you, as you recall it?

A. Yes sir.

Q. Now, when you arrived, I assume you got out of your vehicle and walked up to the actual scene, is that correct, sir?

page 217 } A. Yes sir.

Q. Did you observe whether or not there were any lights on the rear of the Chevrolet or the panel vehicle?

A. No sir.

Q. You did not observe it?

A. There wasn't any lights on on the back as I saw.

Q. There were no lights on on the back of that vehicle?

A. Not burning.

Q. Did you observe whether there were any lights burning on the rear of the tractor trailer?

A. Yes sir.

Q. Where were these lights located, Lieutenant Williams, if you recall?

A. The—a light was located on the bed of the trailer on the left hand side, which I could see when I walked up to it.

Q. Now, was this a—a burning light?

A. This was a burning light, not a reflector.

Q. All right, sir. Did you see any other burning lights that were on on the rear of that vehicle?

A. I got down and—went up under the logs that were sticking over the bed and there was two other lights that were burning and you just could—just could see

page 218 } a glare in the light.

Q. All right, sir. Now, did you see—observe whether there were any reflectors on the rear of this truck?

A. Yes sir, there were reflectors.

Q. Do you recall or did you take the occasion to determine how many?

A. I believe there were seven lights all together in the back of the trailer. I can't say how *mnay* reflectors but I know there were some.

Q. And when you say seven, are you including reflectors?

A. I'm including reflectors, yes sir.

Q. Now, I show you, Lieutenant Williams, Plaintiff's exhibit number two, strike that. Were any photographs taken out there?

A. Yes sir.

Q. Did you take them?

A. Yes sir.

Q. I show you Plaintiff's exhibit number two and ask you if this is one of the photographs that you took of the rear of the truck (indicating)?

A. This is one of them.

Q. And does that reflect the reflectors and the lights you were referring to?

A. Yes, it does.

page 219 } Q. Do you have any pictures with you today that you took out there; the original of the prints?

A. I have them. They're in the office there.

Mr. Preston: May me ask him to get them? I think there's a couple—

Court: You may go get them.

(At this time the witness left the Courtroom and returned.)

By Mr. Preston:

Q. Would you take those photographs out. I think some of them may have been—we may have some of them. May I see them, please sir? Now, I show you, Lieutenant Williams, a photograph and ask you if this is one of the photographs which you took?

A. Yes sir.

Q. And what—do you recall approximately how long after you arrived that this photograph was taken?

A. I arrived there roughly at six o'clock and this photograph was taken about 6:15.

Q. Was it still dark?
A. Yes sir.
Q. And how did you take that photograph?
A. I took it with a—camera owned by the Police Department and it's a graphlex four by four camera.

Q. Had a flash bulb?
page 220 } A. Yes.

Q. Did you take the occasion to measure the distance you were from the rear of the truck when you took that flash?
A. I can't say exactly. I can estimate it.
Q. Would you do so?
A. 25 or 30 feet.
Q. All right, sir. That reflects the position of the vehicle as it was when you arrived?
A. That's like it was setting when I arrived, yes sir.

Mr. Preston: I'd like to offer this.
Mr. Pitchford: Let's see the writing on the back. I don't know what that says. I don't see anything wrong with the writing. I have no objection.
Court: Nothing on the back objectionable?
Mr. Preston: It states the time and the date and time of the accident and the parties involved.

(The photograph was received and marked, Defendant's Exhibit Number Three.)

page 221 } By Mr. Preston:

Q. While he's marking that, Lieutenant Williams, let me ask you another question. Is this photograph, Plaintiff's Exhibit Number Three, the one you previously identified as having taken, is that the vehicle of Mr. Hicks?
A. Yes sir.
Q. And is that the position that it was in when you arrived?
A. Yes sir.

Mr. Pitchford: That's already in evidence.
Mr. Preston: I know.

By Mr. Preston:
Q. Now, during the course of the investigation, Lieutenant Williams, there were more than you as an officer at the scene, is that correct?

A. Yes sir.

Q. And while you were there, did anyone volunteer their names to you as a witness?

A. Yes sir.

Q. Can you recall what that — those individuals' names were?

A. I know one, Yancey Noble.

Q. And did he relate to you his version of how this accident happened, or what he knew about this accident?

page 222 } A. He told Sergeant Hollis.

Q. Now, excuse me, don't tell what he told. Did he relate to you?

A. No sir, he did not.

Q. He did not relate to you what he knew about it?

A. No sir.

Q. That was given to another officer?

A. Given to another officer.

Q. That was who?

A. Sergeant J. C.Hollis.

Q. All right, sir. While you were there at the scene, did you take the occasion to look around the front of the tractor-trailer?

A. No sir, I didn't go in the front of the trailer.

Q. So, insofar as any lighting is concerned there, you don't know?

A. No sir.

Q. Now, I'm not sure I recall what you said. How many lights did you say were burning on the rear of this truck?

A. Three.

Q. Did you look at the truck itself for any physical damage?

page 223 } A. There was no damage that I can see to the back of the truck.

Q. Was there any damage to any of the wiring that you could see?

A. Yes sir, there was.

Q. And where was this wiring located, Lieutenant Williams, in reference to the lights across the rear of that truck?

A. The truck had—lights that would have to be removed when the piling—would be removed. Looked like they were nailed on. There was three of those and—the wires were hanging down when I got there.

Q. And the—strike that. How did you arrive, by coming up Warwick Boulevard?

Lieutenant H. T. Williams

A. Yes sir, I came—south—north on Warwick Boulevard to the scene of the accident.

Q. And when this—this picture that you took, these pictures that you took, specifically Defendant's Exhibit Three, was taken, there was nothing between you and the truck, was there?

A. No sir.

Q. What were the lighting conditions generally at the scene of this accident?

A. It's dark there.

Q. No street lights or stores illuminating the
page 224 } highway?

A. No stores. The church, that has a sign out front. It's red, when it's lit.

Q. Was it on when you arrived, do you recall?

A. I don't recall.

Q. Is that where the Hicks vehicle was or is that in some other location?

A. It would be a little further north, over into the church yard.

Q. The camera that you used, what sized bulb, flash bulb, did you use?

A. Press 25.

Q. Would you show us approximately the size of that, with your fingers. You can do it. Is it a large bulb?

(The witness complied with the request of counsel.)

By Mr. Preston:

Q. Approximately that large?

A. Yes.

Q. Do you recall the approximate size of the reflectors you saw on the rear of this truck?

A. I would say they would be three inches in diameter or close thereto.

Q. Does that look like one of the reflectors that
page 225 } you saw?

A. It was of a similar nature, yes.

Q. And of a similar size?

A. Yes sir.

Mr. Preston: I'd like to offer this as an exhibit.

Court: He's offering it as an exhibit.

Mr. Preston: It would be Number Four, I think.

Mr. Pitchford: I'm objecting to it. The jury has viewed

the truck and seen the exhibits—on the truck. That ought to be sufficient and there has been no evidence that this is the same.

Court: He said—one similar or like it.

Mr. Pitchford: Similar or like it. That doesn't make it admissible.

Court: Is that right?

A. Yes sir.

Court: For all it's worth, similar and same size.

(The reflector was received and marked Defendant's Exhibit Number Four.)

page 226

Mr. Pitchford: I except to the Court's admitting it in evidence.

Court: All right, sir.

Mr. Preston: Would you answer Mr. Pitchford please, Lieutenant Williams?

A. Yes sir.

CROSS EXAMINATION

By Mr. Pitchford:

Q. Lieutenant Williams, you were not in the traffic department but were in the Detective Bureau at the time of this accident, weren't you?

A. Yes sir.

Q. And was it not your primary purpose in going to the scene to make photographs?

A. Yes sir.

Q. And is it not a fact that that is what you primarily concerned yourself with when you went to the scene?

A. Yes sir.

Q. And you got there, I believe you said, somewhere around 6:00 o'clock and took—started taking pictures about a quarter past six?

A. Yes sir.

page 227

Q. And where are the pictures now? I would like to see them.

(At this time certain photographs were handed to Mr. Pitchford.)

By Mr. Pitchford:

Q. Come around here, if you will, Lieutenant, please sir.

Lieutenant H. T. Williams

(The witness complied with the request of counsel.)

By Mr. Pitchford:

Q. We have here, I'm referring, for the record, to Plaintiff's Exhibit Number two which is also a picture taken by you?

A. Yes sir.

Q. And ask you where the three lights that you saw burning were located?

A. This (indicating); one here, by the license plate and this one over here just could see it (indicating). You had to get up right on it.

Q. You just could get right on it?

A. Yes sir, just a glow in the bulb.

Q. You mean by that, it was weak?

A. Real weak.

page 228 } Q. The light over the license plate was that weak or not weak?

A. I could see it from getting down and going up under it.

Q. Now when you say you could see it, how would you have to get to see it?

A. Close.

Q. Could you stand up and see it or sit in an automobile or see it, or would you have to squat down and look under the logs?

Mr. Preston: That calls for a conclusion. I don't think he's able to say.

Court: He said—

Mr. Preston: If he says sit down in an automobile or squat down or stand up, if he can qualify that by asking him what position he was looking.

Court: I'll let you qualify it if you can. He's on cross examination.

Mr. Preston: I understand that.

Court: That's right.

A. I could see the light standing from where I was taking the pictures, 25 or 30 feet. I could tell it was burning.

By Mr. Pitchford:

page 229 } Q. And the light on the extreme left side?

A. This one I could see.

Q. Was that bright?

Mr. Timberlake (Juror): Which one?
A. This line.

Mr. Golden (Juror): That over the truck's body or the timber?
Court: Let me get your name.
Mr. Timberlake (Juror): Timberlake.
Court: Your name?
Mr. Golden (Juror): Golden. Are you speaking of seeing the light? Now, the light that he distinguished, is that on the truck body or the timber?
A. It's on the body.
Mr. Golden (Juror): On the body of the truck?
A. Body of the truck.
Mr. Pitchford: You had a question?
Mr. Timberlake (Juror): That's it.
Mr. Pitchford: You had the same question.

page 230 } By Mr. Pitchford:
Q. Over these logs, how many lights did you see intact; that is, lights not broken?
A. Not broken?
Q. Yes.
A. These lights are not broken but the wires, as you can see, are broken and they were not burning when I arrived.
Q. How many lights were all together on there?
A. Three portable lights and, I believe there were seven that I counted on there.
Q. Seven?
A. Yes sir, I believe so.
Q. Burning kind of lights in addition to the reflectors?
A. No, I believe it was seven including the—the reflectors. Maybe—I don't recall exactly how many it was other than—
Q. You just don't recall?
A. No sir, I don't. I know there was three, I could see that—that were burning.
Q. What course did these unburning lights take over here? I see one on this pole and one on this pole here. Where else can you see a light?
A. It was one on the top, right up in here (in-
page 231 } dicating).
Q. Right up in there?
A. Yes sir, and one on the side. This is a portable type thing where it could be removed as the logs are removed.
Q. Portable type thing?

A. I would say so, yes sir.
Q. Was any blinker light on?
A. I didn't see any.
Q. Did you test the equipment in any way?
A. No sir.
Q. Did you do anything other than take the pictures and come on back?
A. No sir, no sir.
Q. Thank you, sir. Now, Lieutenant, do you have any recollection of how much overhang there was of the logs from the body or bed of the truck?
A. Yes sir, I did not have a rule. When I walked up to the truck, I put my tips of my fingers on the bed and stretched my arms out this way (indicating), and it was about that much further than I could reach.
Q. Could you estimate what distance that would be?
A. I can reach nearly six foot and it was about—maybe 14 inches or 12 to 14 inches (indicating) past the
page 232 } depth of my hand (indicating).
Q. That would be a distance of around seven feet?
A. I would say around seven feet.
Q. All right. Now, do you have any recollection of how high these poles were from the surface of the road?
A. I would have to give you an estimated guess, sir. I didn't measure it.
Q. Give us a—your best approximation, if you will?

Mr. Preston: Which poles are you referring to, the one on the bottom or the ones on the top, or the ones in the middle?
Mr. Pitchford: I couldn't possibly be referring to any but those on the bottom when I talk about those closest to the road.
Mr. Preston: Your question was, "can you tell us how close to the road the poles were?"
Mr. Pitchford: The poles on the bottom of the load.
A. It would take me about here (indicating).

By Mr. Pitchford:
Q. Strike you about there?
A. Yes sir.

page 233 } Mr. Pitchford: All right, thank you, Lieutenant. I believe that's all I need to ask you.

Lieutenant H. T. Williams

RE-DIRECT EXAMINATION

By Mr. Preston:
Q. How tall are you, Lieutenant?
A. Five-eleven and a half.
Q. Right here would be approximately how far from the ground on you?
A. I'd say about four and a half feet.
Q. Primarily being there to take photographs, there isn't any question in your mind that you saw the lights you've testified to, is there?
A. No sir.

Mr. Preston: Thank you.
Mr. Pitchford: Let me ask you about the light.

RE-CROSS EXAMINATION

By Mr. Pitchford:
Q. Was the light of sufficient intensity to be seen five hundred feet away by a—under ordinary atmos-
page 234 } pheric conditions?

Mr. Preston: This calls for conclusion on the part of this witness.
Court: I think it calls for a conclusion. You already testified on direct examination, however, he could see it from where he took the picture.
Mr. Preston: He doesn't have any idea beyond that point. It would be speculation.
Court: If he can find out any more about it, I'll let him cross examine it.
Mr. Preston: Exception.

By Mr. Pitchford:
Q. Canyou answer it?
A. Repeat it.
Q. The one red light you saw burning on the bed or body of the truck, was that of sufficient intensity to be observed five hundred feet away under ordinary atmospheric conditions in the nighttime?
A. I can't answer that question. I don't know.
Q. Was there any other light about the truck capable of being observed five hundred feet away under ordinary atmospheric conditions during the nighttime?

page 235 } A. I don't think so.

Mr. Pitchford: Thank you, sir.
Mr. Preston: May he be excused?
Court: He may be excused.
Mr. Preston: Thank you, Mr. Williams. Mr. Bryant.

MARVIN H. BRYANT, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Preston:
Q. Would you state your name, please?
A. Marvin H. Bryant.
Q. How old are you, Mr. Bryant?
A. 63.
Q. Now, can you hear me all right?
A. Yes.
Q. Do you have any hearing difficulty?
A. A little bit.
Q. All right, sir. Now Mr, Bryant, where are
page 236 } you employed?
A. Miss Julia Hagan, Hagan Truck Line.
Q. How long have you been employed with Mrs. Hagan?
A. Three years this coming July.
Q. And how long have you been a truck driver?
A. Off and on 40 years.
Q. All right, sir. Now, on the morning of—September 22, 1966, were you operating a tractor-trailer rig for Mrs. Hagan?
A. Yes sir.
Q. And was that vehicle involved in an accident on Warwick Boulevard with a vehicle operated by Mr. Hicks?
A. Yes sir.
Q. Now, going back, Mr. Bryant, to the day prior to the accident. Can you tell us who loaded that truck?
A. I don't know who loaded it.
Q. Well, did you ever observe it loaded after it was loaded?
A. Yes sir.
Q. And, as a truck driver, what is it your duty to do before you take that truck out?

Mr. Pitchford: Objection what his duty was.
page 237 } The question should be what he did.
Court: That's right.

Mr. Preston: I think it is relevant to show what he is required to do and I shall ask him what he did.

Court: I reckon that will be all right if you are going to do that.

Mr. Pitchford: Exception.

A. Supposed to check it and see it's in proper condition, all lights burning and ready to go.

By Mr. Preston:

Q. And, on the evening prior to this accident, did you do that, Mr. Bryant?

A. Yes sir.

Q. What did you check?

A. I checked the lights, the brakes, horn.

Q. Was there anything you did to this vehicle? Did you append anything to it other than what was already affixed to it?

A. Yes sir, put—five running lights on the rear of the logs.

Q. How are they put on the logs?

A. Two outside ones was placed sticking out and the other was equally divided between them. One stuck out

page 238 } on the side, is the way you can look in your front mirror and observe them back there, whether they're out or burning.

Q. Now, were these lights affixed to this load?

A. Yes sir.

Q. Was there anything else affixed to the logs themselves?

A. Three flares.

Q. Now—

A. Reflectors.

Q. Three what?

A. Reflectors.

Court: You said flares. You didn't mean flares?

A. Reflectors.

By Mr. Preston:

Q. Now, Mr. Bryant, I show you Defendant's Exhibit Number Four and ask you what that is?

A. That's a reflector.

Q. Is this a reflector of the same type that was on the truck the morning of this accident?

A. Yes sir.

Q. Do you recognize this reflector?

A. Yes sir.

Marvin H. Bryant

Q. Where did that reflector come from?

A. Come from our truck line.

page 239 } Q. All right, sir, and is that of the same size?

A. Same size.

Q. And shape?

A. Yes.

Q. Now, how many of these reflectors did you affix to the logs, Mr. Bryant?

A. Three.

Q. Were there any other reflectors on this vehicle?

A. One on each corner of the truck; two on each corner; one in the back and one on each side of the corner of the truck, and one in the center.

Q. Are these permanently affixed or are these attached that morning?

A. They're permanent.

Q. All right, sir. Now, approximately what time did you leave Hagan Truck yard?

A. Around 4:00 o'clock.

Q. What did you do before you left there?

A. I went around and bumped my tires and checked all the lights.

Q. You did what to the tires?

A. Bumped them.

Q. Bumped them?

A. Bumped the tires to see if there was any

page 240 } play.

Q. You wanted to know if they were pumped up?

A. Yes.

Q. You checked your lights?

A. Yes.

Q. Were they operating?

A. Perfect.

Q. Were they dim, bright, or—mediocre?

A. Well, they're bright enough anybody can see them. They was all right.

Q. All right. Now, when you left Hagan's, what Route did you take?

A. I took—158, 258 out to—460 out to—Trucker's Ridge and run it down to 17. I stopped the truck at Trucker's Rest and had a cup of coffee.

Q. How long were you at Trucker's Rest?

A. About 15 minutes.

Marvin H. Bryant

Q. When you came out of Trucker's Rest, what did you do, if anything?

A. I had my four way blinkers on and checked them all the way around.

Q. Were they all operating properly?

A. Operating, yes sir.

Q. Then, from the time you left Trucker's Rest, did you stop anywhere else until the time this accident

page 241 } happened?

A. Nowhere until I got to the toll booth at James River Bridge.

Q. Did you stop there?

A. I stopped and paid the toll, yes sir.

Q. From the James River Bridge up to the point where this accident happened, you didn't stop again?

A. I stopped at the stop sign going in on Warwick Boulevard.

Q. For signs or lights of that type of thing, is that correct?

A. Yes.

Q. All right, sir. Now, Mr. Bryant, as you came down Warwick Boulevard, what had been your speed?

A. About 30, 35 miles an hour.

Q. Were you able to see with the lighting conditions on your vehicle?

A. Sir?

Q. Were the lights able to pick up the reflection in the road so you could see to drive?

A. Yes, sir.

Q. Now, at the time the accident happened, was your vehicle stopped or was it moving?

A. It was moving.

Q. Approximately how fast was it going?

page 242 } A. About 12, 15 miles an hour to my best knowledge.

Q. Why had you slowed down to 12 or 15 miles an hour?

A. Well, I knowed—after I pass Oyster Point Road, and that church there, I coming near the Menchville Road and that's the one I want to take.

Q. Where were you going, Mr. Bryant?

A. Taking out poles to delivery down on the—marsh, I call it. Down through the junkyard or trash yard, whatever you call it, right off Menchville Road.

Q. At the time you were struck, did you have any signal light on, on your vehicle?

A. Left signal.

Q. And what called your attention to the fact that there had been an accident?

A. Well, I just did feel a slightest of a—impact and I know somebody had hit in the back and I drifted off to the side of the road about 81 foot and run back there, to see what had happened.

Q. And what did you find, Mr. Bryant?

A. I found this panel truck had run up under the poles and smashed back and Mr. Hicks was laying over on the steering wheel and then I begin to holler for help for somebody to call an ambulance. Prior to that, I run

page 243 } back up and a handful of fusees—

Q. What is a fusee?

A. That's a fusee, pop the top off and light it; red light.

Q. Where did you get that?

A. Out of my truck.

Q. Go on and what did you do?

A. I begin to break them open and light them and that's —I don't know a soul down there. Couldn't recognize none of them and handed it to them and asked them would they go back each way and set them down.

Q. Did they do that for you?

A. Yes sir, they did.

Q. All right, sir. Now, Mr.—Mr. Bryant, the lights that were affixed to the logs that you have told us were there, how were they attached to the logs and how were they connected together?

A. Well, I think—there was a—drove in the logs, but that little piece that—put screws through, screw them in the middle, we take them with a hammer and knock them down into the log.

Q. How were those lights connected, do you know?

A. They're connected by wire across.

Q. How many wires?

A. There's one hot wire and a ground wire.

page 244 } Q. Now, are all of these lights operated off the same wire?

A. Yes sir.

Q. If the wire is broken will any of the other lights burn?

A. One ground will put them all out.

Q. At the time you examined the lighting and wiring at Hagan's and again at the truck stop, were any of these lines broken?

A. No sir.

Marvin H. Bryant

Q. I show you, Mr. Bryant, Plaintiff's exhibit number two and ask you if that's the picture of the rear of the vehicle that you were operating on the morning of this accident (indicating)?

A. Yes sir, it is.

Q. Do you see in that photograph, any wires, Mr. Bryant?

A. Hanging down there.

Q. Is that the way they looked when you left Hagan's Truck Line?

A. No sir.

Q. Is that the way they looked when you stopped at the Trucker's Rest?

A. No sir.

Q. Is that the way they looked at the time your

page 245 } vehicle was struck?

A. After it was struck.

Q. Did the impact cause that, Mr. Bryant?

A. Nothing else could have caused it.

Q. Now, Mr. Bryant, did you ever have any warning of any kind that you were going to be struck in the rear by this vehicle?

A. No sir.

Q. Were your windows up or down, or do you recall?

A. I don't recall that.

Q. Did you ever hear any horn blow?

A. No, no horn.

Q. Did you ever hear any brakes being applied?

A. No sir.

Q. Did you stop your vehicle out there on that highway, Mr. Bryant and stay there with no lights on?

A. No sir.

Q. Are you sure of that?

A. I didn't have any occasion to stop out there at all. I wasn't looking for anybody on 60.

Q. Pardon?

A. I didn't have any occasion to stop out there at all.

page 246 } Q. If somebody had said that you had been out there for some period of time, would they be correct or incorrect?

A. It wouldn't be correct.

Q. Mr. Bryant, do you know of your own knowledge, after this accident happened, did you take the occasion to observe the shoulders of the road or any of the geographical features around this scene?

Marvin H. Bryant

A. No sir, I didn't. They got me off and was questioning me and I didn't know nothing else much but answered their questions.

Q. Did you talk to anybody after getting out of your vehicle and going back to the scene or make any comment?

A. No.

Q. Did you talk to the Police Officer?

A. Yes sir, I talked to them.

Q. Now, you saw Mr. Noble here this morning. Did you see that gentleman at the scene?

A. I didn't see him.

Q. You did not see him?

A. No sir.

Q. Did you make any statement of any way in which this accident had happened, in the presence of Mr. Noble?

page 247 } A. Well, Officer come back to me after he had questioned me and said, "One of our friends come and said that you were stopped here".

Q. And what did you tell the Officer?

A. I told him I was not.

Mr. Preston: Mr. Bryant, answer this gentleman, please sir.

A. Yes.

CROSS EXAMINATION

By Mr. Pitchford:

Q. Mr. Bryant, you are the Defendant in this law suit too, weren't you?

A. Sir?

Q. You're a Defendant in this law suit too, weren't you?

A. Yes sir.

Q. You have an interest in the outcome of it, don't you?

Mr. Preston: Well, your Honor, I don't think that's a proper question. Certainly he has.

Mr. Pitchford: Effect his credibility.

Mr. Preston: Certainly he has an interest in

page 248 } the outcome.

Court: He's the Defendant.

Mr. Pitchford: Yes.

By Mr. Pitchford:

Q. Would you answer the question, please sir.

Mr. Preston: No, Your Honor has ruled he may not answer.

Court: I think he's the Defendant. I think that answers the question. He has an interest. I think that's right, he has an interest. He is the Defendant.

By Mr. Pitchford:

Q. All right. Now, how many times had you made this trip from Chesapeake over to where you were delivering these poles before the accident occurred?

A. I hadn't been to this direct place any time but I have been down—

Q. This was your first trip, wasn't it?

A. Sir?

Q. This was your very first trip, wasn't it?

A. Not the first trip down Warwick Boulevard, no.

Q. It was your first trip down Menchville Road to deliver—

A. Yes.

page 249 } Q. To deliver pilings, and is it not a fact—

A. Sir?

Q. Is it not true that you were not all together familiar with Menchville Road?

A. Well, I know where to turn off at.

Q. Somebody had drawn a map or diagram for you to tell you where to turn off?

A. No sir.

Q. Did you have a road map?

A. No sir.

Q. How had you found out that Menchville Road was a little ways ahead?

A. Well, I've told after I passed Oyster Point Road, and that church, it was just a short distance.

Q. And you had gotten to the church when the accident happened?

A. I gotten to the Baptist Church but I hadn't gotten to the Mennonite Church.

Q. You had gotten to the Baptist Church and not the Mennonite Church. Where did you start giving your left turn signal?

A. After I passed Oyster Point Road.

Q. Did you have a signal indicator light in your truck?

A. Indicator light?

page 250 } Q. Yes, indicator light showing whether or not your signal light was working?

A. Yes sir, yes sir.

Marvin H. Bryant

Q. What did that show?
A. Showed left turn.
Q. It was working properly?
A. Yes sir.
Q. Did a truck—did any other automobiles pass you while you were traveling—you said 12 or 15 miles an hour?
A. I wouldn't recall. I don't remember if they did or not.
Q. You just don't remember that. Do you remember talking with the Police Officer, Mr. Holmes, who made the investigation?
A. I talked to so many, I don't know which it was.
Q. Mr. Holmes was the Police Officer wearing the uniform. The uniform Police Officer; do you remember talking to him?
A. I talked to two. I don't know—what their names was.
Q. Well, do you remember talking to the Police Officer who was—the first witness here this morning and who stayed on the stand most of the morning?
page 251 } A. No, I don't remember that.
Q. You don't remember him at all?
A. No.
Q. Do you remember telling him, or some other Officer, that you checked your lights before you left Chesapeake and there were four burning?
A. I remember telling the Detective.
Q. But isn't it a fact, sir, there were eight—seven lights on the rear on the pole, rather than four?
A. There are five running lights and—three reflectors, which would count seven.
Q. Five running lights and three reflectors would count for seven?
A. Eight.
Q. It would be eight. Now, where, on the—on the tractor is the wire hooked up to make the lights on the logs burn?
A. Well, there's a—wire come out of the tractor up and plugs into the trailer. Four wires, a signal light, running light and brake light.
Q. All plugs into one thing?
A. One plug, the front.
Q. In the front?
A. Yes sir.
page 252 } Q. That plugs into the trailer or the tractor?
A. Come off the tractor and plugs in the front of the trailer.
Q. And then that takes care of all the lighting of the trailer?

A. All on the trailer, yes.

Q. All right. Now, you pointed out what you said was a broken wire. Point it out to me. I don't seem to be able to see it.

A. Broken line or wire?

Q. Wire?

A. Here's the wire hanging all down here (indicating). You see?

Q. Isn't that the wire that you were running across, to run your lights across from one to the other here (indicating)?

A. That's right.

Q. You were running the wire from this pole that was a little bit over the bed, to this pole that was a little over the bed (indicating)?

A. Run from this pole (indicating).

Q. Come around here so the jury can see it, please sir.

A. It will run from this pole here (indicating).

Mr. Preston: Turn it around. Hold it up. Let
page 253 } me hold it for you, if I may. Is that right? All right?

Mr. Pitchford: Sure.

A. Run from this left hand side right down across the pole (indicating) and the wire run from the end of this pole right down to the side of the trailer (indicating) and was coupled into the main line which runs to the plug on the front which gives a light back here. You got to have every one of them lights grounded with another wire.

By Mr. Pitchford:

Q. Is it the two wires or one wires that runs?

A. There's a hot wire and there's a ground wire. That's two wires.

Q. It takes two wires?

A. Yes sir.

Q. So then your power for this light is the one closest to the trailer supply, is that right?

A. The power?

Q. Yes, the hot line.

A. Yes, the hot wire comes onto all of those lights.

Q. But this one here (indicating), the hot line here (indicating), is that the first light, the hot light hits?

A. That's the first one it hits.

page 254 } Q. Where is the next?

A. The second light.

Marvin H. Bryant

Q. The next light the hot line hits?

A. The same line comes on across to each light that's nailed on these logs.

Q. Now, you say that—the hot line comes around this way and the line is broken over in here?

A. Comes across the poles.

Q. Comes across the poles?

A. Yes.

Q. Are you saying to the Court and jury, breaking the hot line in here (indicating), would put out this light here (indicating)?

A. Breaking the ground, yes sir.

Q. Where—what was this light grounded to?

A. Grounded to the trailer. You don't ground them back to the trailer, won't any of them burn.

Q. Isn't that a light grounded to the trailer?

A. That's the light on the trailer.

Q. I'm talking about this line here (indicating). What is that?

A. That's the line that fell from the poles.

Q. That's the line that fell from the poles. Did you have any lights up here on the outside (indicating), the lights on the poles near the top?

page 255 } A. No.

Q. Just right across the back and right across the bottom?

A. Yes.

Q. Now, was any part of your truck damaged?

A. No sir, not on the—a little beam bent a little.

Q. Point out the little beam that you say was bent a little.

A. Right there (indicating).

Q. Was there anything about that damage that would interfere with the working of the lights on the body of the truck?

A. The truck run under there, tore these up.

Mr. Preston: I can't hear you.

Court: I didn't hear you.

A. I say, the compact of the other car tore these wires up when it hit under.

By Mr. Pitchford:

Q. How much of the other car got up underneath you?

Mr. Preston: I don't think he has any way of knowing that.

Court: He can say he doesn't know. You just
page 256 } let him go.

Mr. Pitchford: Let him answer.

Mr. Preston: I'm objecting to the question on the grounds he doesn't—can't answer that question. He has no way of knowing it.

Court: If he can answer, I'll let him answer. If he doesn't, he can say he doesn't.

By Mr. Pitchford:

Q. Do you know or not, Mr. Bryant?

A. Repeat it again please.

Q. How much of the other car went under your load of logs, do you know?

A. I don't know how many inches or feet it was but anyhow, it went under there far enough that it tore the cab back.

Q. The cab on what?

A. On the—on the panel truck.

Q. On the panel truck, and this is the only part of your truck that was damaged, this bumper bar, so to speak, here (indicating)?

A. Yes sir.

Q. And that is far removed from the lights?

A. I mean except those wires there.

page 257 } Q. And that was up here (indicating), up on the logs? The wires were hooked on the logs?

A. When they hit, the front hit them poles, tore them wires loose.

Q. How much overhang did you have?

A. Between six and seven foot. We had a 40 foot bed and —I mean 34 foot bed, and 40 foot poles.

Q. 34 foot pole?

A. 34 foot bed, 40 foot poles and they were loaded parallel with the front of the trailer.

Q. Now, we saw, this morning, the trailer down at the—on the street and—I recollect, you correct me if I am wrong, there was a pole or something up here (indicating)? Some sort of stanchion to hold these stakes in place?

A. The stake in the second pocket on the side of the truck.

Q. Stake in the second pocket on the side?

A. Yes.

Q. Was the stake in the second pocket on the side the night this happened?

A. Yes.

Mr. Preston: This accident happened in the morning nearly.

Mr. Pitchford: Early morning. I said morning or in the dark all the same.

page 258 } A. It was dark all right.

By Mr. Pitchford:

Q. It was dark?

A. Yes.

Q. All right. Now, on the same truck we viewed this morning, I observed several flags across here (indicating).

A. We had flags on that one.

Q. You had flags on that one?

A. Yes sir.

Q. What happened to all the flags?

A. They got knocked off.

Q. All the flags got knocked off?

A. Yes, one on this corner here left (indicating).

Q. Show it to us.

A. On one corner or the other. I know there were three flags on it. They must have gotten knocked off.

Q. There's no flags in that picture, is it?

A. I don't see any there.

Q. Did you see any flags laying in the road?

A. I didn't look.

Q. Now, Mr. Bryant, don't you observe from looking at this picture that there is—there is an overhang of your poles on the left hand side and an overhang on the

page 259 } right hand side?

A. Six, seven foot.

Q. You—that's not what I mean. I'm talking about, turn around this way so the jury can see. The body of the truck, you see it starts here and ends here (indicating).

A. That's the width of it.

Q. That's the width of it.

A. Width of the flat.

Q. Now, does it not appear to you that the pole on the left side is almost hanging out beyond the body or bed of the truck?

A. Well, that's the big end of it.

Q. That's the big end of it?

A. Yes sir.

Q. And what is the explanation for the one over this side (indicating)? Is that the big end too?
A. Yes sir, it is.
Q. So that sticks out beyond eight foot truck? The truck is eight feet wide?
A. The back end might have been a little out.
Q. And — it was loaded like that even with those steel stanchions in there we saw this morning?
A. Yes sir.
Q. You can load them with those steel stanch-
page 260 } ions?
A. Yes sir.
Q. Like that (indicating)?
A. Yes sir.

Mr. Pitchford: Thank you. Have a seat back up there, please sir. I think that's all I want to ask you, Mr. Bryant. Thank you.
Mr. Preston: Wait just a minute, Mr. Bryant. I have a question to ask you.

RE-DIRECT EXAMINATION

By Mr. Preston:
Q. How do you know the flags were on the truck?
A. Sir?
Q. How do you know the flags were on the truck? Were they there when you left?
A. I put them on there.
Q. On the morning of this occasion?
A. The evening before.
Q. The evening before.
A. And they were on there when I left the Trucker's Rest.
page 261 } Q. All right, sir. Do you know, Mr. Bryant, whether the impact with your truck and load, in any way caused the load to shift on it?
A. No, I never did pay that much attention to it.
Q. You were not concerned with that at the time, were you?
A. No sir.

Mr. Preston: Thank you, sir. Anything further?
Mr. Pitchford: Nothing further.
Mr. Preston: Come down, Mr. Bryant.
Court: Come down.
Mr. Preston: That's the Defendant's case.
Court: All right, the Defendant rests.

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Mr. Preston: I don't think your Honor, the record reflects that I want to renew my motion at the conclusion of all the evidence to strike the evidence of the plaintiff.

Court: All right.

Mr. Preston: On the grounds that there was no evidence that Mr. Bryant's actions, whatever they may have been, was a proximate cause of the accident but all of the evidence is to the contrary. The physical facts show very plainly that Mr. Hicks was not keeping a proper lookout, did not have his vehicle under proper control under the circumstances and conditions and was driving at a speed which was in excess of that that was reasonable and prevailing at the time because it was uncontradicted he ran under the rear of that truck without taking evasive action. He never applied his brakes, never turned his vehicle aside and also uncontradicted there was no other traffic on the highway which affected the movement of his car as to attempt to avoid—

Court: That's your contention.

page 270 } Mr. Preston: That's the basis for my motion.

Court: Yes.

Mr. Preston: And therefore to allow this jury to take this case would be to allow them to do so on pure speculation and surmise not supported by the evidence.

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PLAINTIFF'S INSTRUCTION NO. 6-A (Granted):

Mr. Preston: I object to this instruction.

Court: This is better than the other one.

Mr. Preston: I agree with that but I still object to it.

Court: Doesn't leave it up to the jury again.

Mr. Preston: He's telling them the truck was parked.

Mr. Pitchford: I did not.

Mr. Preston: Read your language of your instruction.

Mr. Pitchford: All right, I see the parked. I agree "parked" does not belong in there. I'm willing to take that—

Mr. Preston: There's some more objectionable
page 277 } parts.

Mr. Pitchford: Take out, "Parked".

Mr. Preston: That he exercised ordinary care under the circumstances with which he was confronted. The language is not applicable, Mr. Pitchford. You don't know with what he was confronted and that implies a situation which is not evidence.

Mr. Pitchford: You got to put into evidence what he was confronted with.

Court: You said the truck wasn't parked.

Mr. Pitchford: I pulled out, "Parked".

Court: Take out "Parked", that's right.

Mr. Preston: Exercised ordinary care under the circumstances and did what an ordinary prudent person would have done under such circumstances is presumed but this business about what he was confronted implies something that is not an element of this case, Mr. Pitchford.

Mr. Pitchford: He was confronted with something and everybody knows he was confronted with something and otherwise there would have been no accident.

Mr. Preston: A confrontation implies something not brought about by the actions of that individual. There's no evidence he didn't bring about this confrontation.

Mr. Pitchford: You're getting away from the presumption.

page 278 } Mr. Preston: I'm not getting away from the presumption. I think the law is he is presumed to have exercised ordinary care in the ordinary care of his vehicle in the absence of any evidence to the contrary or in the absence of any factual evidence from which his lack of ordinary care could be presumed and this is not what this instruction says.

Court: How are we going to get around that confronted. I don't believe that's right. You can take out the "parked" all right.

Mr. Preston: Yes sir.

Court: Approached the log truck. Take that out. Take out the word, Parked".

Mr. Preston: The way this should be connected in the second part of that, your Honor—

Court: I don't want to write on it yet.

Mr. Preston: In the exercise of ordinary care under the circumstances and did only what an ordinary prudent man would have done under such given circumstances.

Mr. Pitchford: All right, I'll buy that. That he exercised ordinary care under the circumstances. Take out that language right there (indicating).

Court: That he exercised ordinary care under the circumstances. Take out, "With which he was confronted." The "and" stays in there.

Mr. Preston: I would say, "And" after the
page 279 } word, "Truck" your Honor. Strike out the word, "Only". I don't think that's proper.

Mr. Pitchford: I now offer Instruction 6-A.

Court: Get this one like that one except put the "and" in proper place like you've got it over there and I think we can get it.

Mr. Preston: In the form as altered.

Mr. Pitchford: To keep the record straight, in view of what the Court has said, I am deleting from the first word in line five which is "parked", covering it up with ink and then I'm going down to six, seven—

Court: Take out, "Confronted."

Mr. Preston: With which he was confronted.

Mr. Pitchford: We've taken out, "With which he was confronted."

Court: Leave the "And" where it is.

Mr. Pitchford: Leave the "And" where it is and take out "Only". Without waiving my objection to six as originally offered, I offer 6-A as offered.

Mr. Preston: I object. I want to object on the grounds the evidence takes it out of the presumption under which Mr. Hicks would have been operating ordinarily because it shows he ran into the rear of the vehicle without
page 280 } taking any evasive action which in and of itself shows he was not keeping a proper lookout and did not have his vehicle under proper control under the circumstances and conditions prevailing.

Court: I'm going to give 6-A like you got it.

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PLAINTIFF'S INSTRUCTION NO. 7-B (Granted):

Mr. Pitchford: "The Court instructs the jury
page 291 } that the decedent, Louis Hicks, is exercising ordinary care for his own safety, had a right to assume that the lane of travel ahead of him was free and he had a right to rely upon such assumption and that the Defendant's truck was not stopped on the highway ahead of him

until in the exercise of ordinary care the contrary appeared, or should have appeared to him but this did not relieve him of the duty to exercise ordinary care to keep a proper lookout." I got the truck stopped there.

Mr. Preston: I disagree. You haven't got the truck stopped. You said, "Not stopped." "The Court instructs the jury that if you believe from the evidence that the Hagan truck or the vehicle operated by the Defendant, Bryant, was stopped in such a manner—stopped on the highway in such a manner as to render dangerous the use of the highway by other vehicles." I'm not saying that the instruction that I'm dictating to you is agreeable to me. I'm saying it would be in more proper form. I don't—

Mr. Pitchford: All right, dictate it if you will then what you believe to be in proper form.

(At this time, Mr. Preston dictated an instruction which was typed by the Reporter and handed to the Court.)

Mr. Preston: Here's what I say, your Honor.

page 292 } I think it still doesn't go far enough. The mere fact that the vehicle may be stopped on the highway is not sufficient. It must be stopped in such a way as to render dangerous the use of the highway by other motorists or to render the free flow of traffic impossible.

Mr. Pitchford: Not impossible—

Court: Impaired.

Mr. Preston: Impede the free flow of traffic or render dangerous the use of the highway.

Court: Impede—

Mr. Preston: Here's what I suggest. My suggestion was that the instruction read this way. "The Court instructs the jury that if they believe from the evidence that the Hagan truck was stopped on the highway in such a manner as to render dangerous the use of the highway by others or so as to impede the free flow of traffic."

Court: Let's put "impede the free flow of traffic."

Mr. Pitchford: So as to impede the free flow of traffic.

Mr. Preston: I don't think that's going to cure it. I think the law says it must render it dangerous, the use of the highway.

Mr. Pitchford: The law says to impede or render dangerous. Let's make it this way; "So as to impede

page 293 } and render dangerous.

Mr. Preston: Here's what it says. "If you believe from the evidence".

Court: Let me write this. "So as to impede or render

dangerous the free flow of traffic by others." "By others using same."

Mr. Preston: I don't think that's necessary.

Court: I've got both in there. All right, now let's go ahead.

Mr. Pitchford: We were on seven. I do not waive the exceptions to the seven as originally offered or to the amendments. This amendment, I'm offering that in lieu of, without any waiver.

Mr. Preston: Let the record show we have not agreed upon the one you agreed to be in the form which you have offered.

Mr. Pitchford: The instruction as we have amended it and offered it as a substitute, "The Court instructs the jury that if they believe"—I think, "from a preponderance of the evidence."

Mr. Preston: That's correct because you're the plaintiff.

Mr. Pitchford: "That the Hagan truck was stopped on the highway so as to impede or render dangerous
page 294 } the free flow of traffic by others, the decedent if exercising ordinary care for his own safety had a right to assume that the lane of traffic"—

Court: If in exercising ordinary care.

Mr. Pitchford: Wait a minute. "That he, the decedent if exercising ordinary care for his own safety had a right to assume that the lane of travel ahead of him was free for ordinary travel and he had a right to rely upon this assumption until in the exercise of ordinary care the contrary appeared or should have appeared to him but this did not relieve him of the duty to exercise ordinary care to keep a proper lookout."

Court: That's nearer right than we had it yet.

Mr. Pitchford: Let's make this 7-B.

Mr. Preston: I object to the granting of Instruction Number 7-B on the ground there's no evidence to support this instruction and that to allow the jury to consider this element of the case would be to allow them to speculate on the facts which are not before them from the evidence or which cannot be reasonably inferred from all the facts and circumstances of the case and further that this makes an insurer of the defendant, Bryant.

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PLAINTIFF'S INSTRUCTION NO. 9 (Granted):

Mr. Preston: I object to this instruction, your Honor.

Court: Which one is wrong?

page 302 } Mr. Preston: Shall we take them paragraph by paragraph?

Court: Yes.

Mr. Preston: Number one is wrong. There's no law as to say what such a slow speed is as to render dangerous the normal and reasonable movement of traffic. Who can say 12 or 15 miles an hour is automatically such a slow speed.

Court: Under the circumstances. I can't either.

Mr. Pitchford: You can't but—the General Assembly has.

Mr. Preston: There's no vehicles on—

Mr. Pitchford: 46.193 Section 28, 1967 replacement volume, page 158 places that duty upon the drivers of motor vehicles not to—obstruct traffic and I'd like to show your Honor the law from which I took it.

Court: There is a statute on it.

Mr. Preston: There's a statute on it, your Honor, but it has got to be based upon the factual circumstances. This tells this jury that he was driving at such a slow speed that it did render it.

Mr. Pitchford: It does not because read the bottom part of the instruction.

page 303 } Mr. Preston: Where is there any evidence that 12 or 15 miles an hour first on—on the fact that we believe Mr. Bryant that that was such as to render or impede the normal and reasonable movement of traffic. There wasn't any other movement of traffic out there other than Mr. Noble on one occasion and Mr. Hicks on the second.

Court: I understand. That's the statute.

Mr. Pitchford: And it's the law and an instruction—it's for the jury to say whether or not under his testimony he created a dangerous condition by driving at such a slow speed. We had a 45 mile speed zone and he says he's going 12 or 15 miles an hour around the curve. Now, it's up to the jury to say whether or not that was an unreasonable speed at the time and under the circumstances obtaining.

Mr. Preston: Your Honor, at the time he went around the curve, there was no other traffic on the highway. There's no evidence that in any way, the manner in which he was operating his truck in any way impeded or rendered dangerous

the use of the highway at this speed. To grant even the—the statutory—

Court: That principle of law, there is such a statute.

Mr. Preston: There isn't any question there is a statute.

Court: That's right.

page 304 } Mr. Preston: But the statute itself cannot come into play unless there's evidence to support it and which a jury could reasonably approve these things. If he had proved there—

Court: There was other traffic on the highway.

Mr. Preston: No evidence other than Mr. Noble and Mr. Hicks.

Court: That's right. That's other traffic.

Mr. Preston: Any speed whatsoever as long as it is not effecting the normal flow of traffic.

Mr. Pitchford: It says the normal flow of traffic.

Mr. Preston: Mr.—Pitchford, you're going to allow by stating this to the jury, this abstract principle of what the statutory provisions are, this jury is going to be able to speculate at 12 or 15 miles an hour that wasn't reasonable speed under all circumstances.

Court: Doesn't say that in here.

Mr. Preston: That's exactly what it says.

Mr. Pitchford: In the finding part of it, leaves it strictly up to the jury.

page 305 } Mr. Preston: Plus the fact he made a—made a signal and he's going to turn. To grant this instruction in this way even though it is a—a statement of the—what the law says, is not proper under the facts and circumstances of this case.

Court: I'm going to let the jury decide it anyway. If he impeded the traffic by a slow manner—

Mr. Preston: Number two I object to as being the same as previously given in another instruction. He's already got this business in 7-B and he's got it in one above; one and two are repetitious of 7-B.

Court: Let's see what 7-B says.

Mr. Preston: It says he has the right to assume this business.

Mr. Pitchford: That's assumption. This is the duty of instruction.

Mr. Preston: Isn't one and two in this instruction the same thing?

Mr. Pitchford: No sir. Different sections of the Code and two different principles.

Court: 7-B doesn't cover the same we got here, to refrain—this is an abstract principle of law to refrain from driving in such a manner—

Mr. Preston: Is it your theory, Mr. Pitchford, Mr. Bryant was driving this vehicle as to render the—dangerous the use of the highway at such a slow speed to do that?

page 306 } Mr. Pitchford: It is my theory—

Mr. Preston: What's your evidence?

Mr. Pitchford: That—it was his duty to refrain from driving in a manner so as to endanger life, limb or property of any person lawfully using the highway. There's as much evidence one way or the other and it could have to do with the lights, the placing of the lights, the manner of driving, the stopping, the—giving or failure to give signal lights, the over-hang of the logs. All of those play into it.

Mr. Preston: In your evidence in this, isn't your evidence in this case the vehicle was stopped?

Mr. Pitchford: No.

Mr. Preston: That's not your evidence?

Court: Both ways.

Mr. Preston: How can he offer an instruction on refrain—

Court: The Court is instructing them. I think three is applicable to stop in such a manner—

Mr. Preston: I submit again that 7-B covers the same thing.

Court: I think some of it is pretty well the same.

Mr. Preston: So is number four the same as number one, two and three. They're all repetitious of one another, I submit.

page 307 } Court: There's a source of potential danger. Is that what the statute says on this one?

Mr. Pitchford: Number four; 2802 of the Virginia Jury instructions, citing case of *Moore* vs *Virginia Transit Company,* 188 Virginia 493, page 500.

Mr. Preston: You're not citing us any of the facts of this case. You're merely citing us cases from which you have drawn this instruction. Obviously instructions have to fit the facts of the case and the evidence of the case. You can't take an abstract principle of law—

Mr. Pitchford: It is basic law without—so well understood that without the citing of any authority that every motorist must exercise ordinary care under existing circumstances, not to obstruct the highway in such a manner as to—be a source of potential danger to the traveling public. That's why you stopped. On the wrong side of the road without lights, with the over-hang load, with too wide load. All of those things are covered in Number four.

Mr. Preston: One, two, three, four all say the same thing; repetitious of each other.

Mr. Pitchford: I can't agree on that by any means.

Court: I think a lot of it is covered in other instructions. These lay down duties.

Mr. Preston: He's telling them here in para-
page 308 } graph four that he was obstructing the highway, not obstruct the highway.

Mr. Pitchford: I do not tell them not to obstruct the highway. The term here, if they believe he failed in that duty then he was negligent and if such negligence was a proximate cause of the accident.

Court: But you got—one, two and three, Frank, you got "to refrain from running too slowly, obstructing the highway." Two is refrain to endanger life, limb and property. I think four is not necessary.

Mr. Pitchford: What do you propose to do, take four away from me?

Court: Yes, I'll let you have one, two and three.

Mr. Pitchford: You will grant the instruction with one, two and three and delete four?

Court: I'll do that for you.

Mr. Preston: I'll note my exception on the grounds this—

Mr. Pitchford: I want to except to you taking four away from me.

Court: I think you got it covered.

Mr. Pitchford: It may perhaps be—a little repetitious of something that has or will be said in other instructions but it is a proper statement of the law and it is a
page 309 } duty instruction enumerating the various duties.

Court: That's right but you got it covered.

Mr. Pitchford: All right, I'll except to you taking out four for the reasons stated. Since you marked it out, let me put in the record what you are taking away from me.

Court: All right.

Mr. Pitchford: You're taking, in Instruction Number Nine, sub-paragraph four, the Court is deleting "To exercise ordinary care under the existing circumstances not to obstruct the highway in such a manner as to be a source of potential danger to the traveling public." Now I object to the Court taking that out. That is a proper statement of the law and it is supported by the case of *Moore* vs *Virginia Transit Company,* 188 Virginia 493 at Page 500.

Court: All right. There's no objection to the final paragraph, is there?

Mr. Preston: I think the word, "injuries" ought to come out. The sole proximate cause of the death of the decedent. We're not dealing with any injuries he may have had. We're dealing with his death, solely.

Mr. Pitchford: I don't object to taking out "injuries" because I don't think he suffered long enough to recovery from that.

page 310 } Mr. Preston: I think that's obvious.

Mr. Pitchford: Instantaneous. We'll take out, "injuries and".

Court: We got now sole proximate cause of the death of the decedent.

Mr. Pitchford: I have no objection to that amendment, the amendment being by taking out the word, "injuries and" on line five from the bottom.

Mr. Preston: The remainder of that instruction I have no objection. Let me state my objection for the record. I object to the granting of Instruction Nine on the grounds that the abstract principles of law stated in this instruction are not supported by the evidence in this case; that the instruction as worded is misleading to the jury; that it is repetitious in each of its own paragraphs as well as being repetitious inso far as a consideration of the Instruction 7-B previously granted by the Court is concerned and this instruction in the form offered and granted makes an insurer of Mr. Bryant, the operator of the vehicle involved in the accident with Mr. Hicks.

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page 311 } PLAINTIFF'S INSTRUCTION NO. 11 (Granted):

Mr. Preston: I object to this instruction.

Court: What is the objection.

Mr. Preston: There's no evidence these lights were not visible for 500 feet.

The Court: I'm not saying they are or were not.

Mr. Pitchford: One way or the other.

Mr. Preston: This is telling the jury they were not.

Court: Where does it say that?

Mr. Preston: It doesn't say it, your Honor. It implies to them it was not and it's not based on any evidence in the case. There's no question this vehicle was equipped with all the lights because all the evidence is that those lights were on it. It's a question—

Court: There is a whole lot of questions about being dim.

Mr. Preston: The question whether they were burning or not but—

Court: Question whether they could see them that distance; one of them so dim you couldn't see at all according to one of the witnesses.

Mr. Pitchford: Another witness, the investi-
page 312 } gating officer testified he could barely see from the Hicks vehicle.

Mr. Preston: Nobody has testified they ever got back at 500 feet and couldn't see it. I think it's common knowledge even the smallest pin point at night can be seen for a considerable distance.

Mr. Pitchford: That's very good jury argument but this is a duty.

Mr. Preston: Not based on the evidence. There's no evidence that these lights, the one seen by the police officers were not discernible at 500 feet.

Court: Enough evidence to let it up to the jury to see whether they could or not.

Mr. Preston: I disagree. Let me read the rest of it. I object to the last part of it because he keeps repeating this business about—you must find your verdict for the plaintiff and fix damages in accordance with other instructions of the Court. He has the same thing in another instruction.

Mr. Pitchford: That's always a part of the finding instruction. You got to take in all elements of the case.

Mr. Preston: I disagree with you. All you got to do is say you must find your verdict for the plaintiff. The damage instruction will cover that.

page 313 } Court: Is that all you object to? I'll—

Mr. Preston: I object to the instruction as a whole, not being supported by the evidence and—

Court: I think you got that enough too, fix your verdict for the plaintiff, period. I'll give it down to there.

Mr. Pitchford: All right, I'm not going to object to that.

Court: Then I'm going to strike out the rest of it.

Mr. Pitchford: Now, for the record, the Court has stricken out, "And fix damages in accordance with other instructions of the Court" on the last and next to the last line of the instruction and the plaintiff has no objection to the deletion of that language on the part of the Court.

Mr. Preston: I don't know whether I clearly stated my objection or not, Mr. Schneider, but my objection being there's no evidence to support the instruction and the record is completely silent as to whether or not the lamps that were testified to as having been burning subsequent to this accident were visible for 500 feet and there is no positive evidence that there were no lamps burning at the time this accident happened. The only conceivable evidence this jury could believe there were no lights burning on it, was Mr.
page 314 } Noble's and he himself has not stated positively that there were no lights. He said he saw no

lights and Mr. Noble has no idea as to when this accident occurred. He has no idea as to what the conditions of the light were at the time Mr. Hicks ran into the rear end of this vehicle. Therefore, it's misleading to the jury and allows them to consider an element not supported by the evidence.

Court: Granted.

PLAINTIFF'S INSTRUCTION NO. 12 (Granted):

Mr. Preston: This is obviously right in the teeth of even your evidence. There is no question that there were reflectors on this truck. Even your witnesses have testified to that.

Mr. Pitchford: Read the instruction.

Mr. Preston: I have read it.

Mr. Pitchford: Such reflectors shall be mounted on the widest part of the total vehicle of the load thereon so as to be visible from the front and side on the vehicle and we have got—

Mr. Preston: All the evidence is exactly that.

Mr. Pitchford: We have got in evidence an exhibit which shows that condition did not exist.

Mr. Preston: After the accident. You have not got any evidence that there were not reflectors placed
page 315 } properly on that truck and all the evidence is—

Mr. Pitchford: We have got—

Mr. Preston: The photograph speaks for itself.

Mr. Pitchford: We got Mr. Bryant who testified about the lights and who told the police officer first that there—seven lights on it and four were burning when he left Chesapeake and three weren't and he got up there and started to count reflectors and he took the picture and counted these are what I would call the lights. Isn't that exactly what he said?

Mr. Preston: That's not exactly what he said. There is uncontradicted evidence even by your own witnesses that these reflectors were on the logs. There were reflectors on the truck and that's uncontradicted.

Mr. Pitchford: And you have offered in evidence and received in evidence over my objection a reflector and there has been no proof on your part—

Mr. Preston: I disagree with you.

Mr. Pitchford: That this reflector has been approved by the Superintendent as required by the section.

Mr. Preston: The Judge has already ruled.

Court: He got that in evidence.

Mr. Preston: He ruled on its admissibility.

page 316 } Mr. Pitchford: I agree with that but—the pictures themselves show there is not reflectors and nobody has contended any reflectors were knocked off. You have contended the wires were broken to the lights. You have contended that the flags were knocked off but nobody has contended any reflectors were knocked off. Nobody has picked up any reflectors and all the evidence has been to the effect that the reflectors on the logs as shown in the photographs are just as they existed at the time.

Mr. Preston: Aren't the reflectors on either side and one up in the middle?

Mr. Pitchford: That does not show the widest part of the top. The pictures do not show that and that is what the law requires.

Court: That's a matter for argument. This is the law covering the thing, I think. I think—

Mr. Preston: It's not supported by the evidence, your Honor. All the evidence is to the contrary.

Court: I don't think so. Not all of it. I think there's some evidence to support it and I'm going to give it.

Mr. Preston: Note my exception on the grounds there's no evidence to support the instruction. All the evidence in the case is to the effect the reflectors were page 317 } mounted on the truck. They were seen by each of the witnesses. The photograph fully and fairly and accurately depicts where they were and what was seen at the time the flash bulbs went off and the jury has viewed the truck in exactly the same condition as it was on the day of this accident by the view of the truck taken on the morning that this trial began at which time those reflectors were in the same position; they were in the same position.

Mr. Pitchford: That is Mr. Preston's evidence. I bore Mr. Preston's statement in mind when he made a motion for a view which I did—I offered no opposition. When the defendant, Bryant was on the witness stand, we asked him to point out why this—log projected beyond the bed of the truck and he said that was the big end of the log. There were no big ends of the logs on the truck we saw. I looked for that very carefully.

Court: All right.

Mr. Pitchford: That's a jury issue.

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page 318 } PLAINTIFF'S INSTRUCTION NO. 14 (Granted):

Mr. Preston: This is not the law. This is not a complete

statement of the law. As far as it goes, it is correct but it does not go far enough.

Court: I think that would be all right.

Mr. Preston: I don't think that's all right. I think the law is—contributory negligence—the burden of proof of contributory negligence is on the defendant.

Court: Yes.

Mr. Preston: And he must prove this by a preponderance of the evidence or unless contributory negligence can be presumed from all the facts and circumstances of the case or as shown by the *eivdence* of the plaintiff.

Mr. Pitchford: Isn't that exactly—

Mr. Preston: You don't go far enough.

Court: You haven't got the other facts.

Mr. Pitchford: Appears from the evidence in behalf of the decedent, Louis Hicks.

Court: Or other evidence in the case. If you put that—

Mr. Preston: I think this instruction—the Court instructs the jury that contributory negligence is never presumed and contributory negligence as a defense must be proven by a preponderance of the evidence by the defendants
page 319 } unless such contributory negligence appears from all the facts and circumstances of the case or can reasonably—unless it appears from the plaintiff's own evidence or can reasonably be inferred from all the facts and circumstances in the case.

Mr. Pitchford: That last part is absolutely wrong because —it takes away from you the burden of carrying the proof.

Court: It can appear from other facts in the case.

Mr. Pitchford: From the evidence in behalf of the decedent. If he shows by his own evidence that he was guilty of contributory negligence then the defendant does not have to prove it.

Mr. Preston: I say—

Mr. Pitchford: But if his evidence does not so show, a duty devolves upon the defendant to prove by a preponderance of the evidence that the plaintiff was negligent and this language—

Court: I understand you got other facts in the case will cure it.

Mr. Preston: Here's the instruction where the defendant relies upon contributory negligence of the plaintiff as a defense. Such contributory negligence is not presumed but the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of such negligence and that any such negligence proximately
page 320 } contributed to cause the collision and unless the

defendant does prove the existence of such negligence or unless such—any such negligence appears from the plaintiff's own evidence or can fairly be inferred from all the circumstances of the case, then you cannot find the plaintiff guilty of contributory negligence. That's exactly what I said.

Court: From other facts in the case would be added in there.

Mr. Pitchford: All right, make the amendment. I won't—waive as it is offered. Write—

Mr. Preston: Appears down, after the word, "from the plaintiff's own evidence."

Court: You got "plaintiff".

Mr. Pitchford: Appears from the evidence in behalf of the decedent.

Mr. Preston: Where do you see that?

Court: Appears from the evidence on behalf of the decedent.

Mr. Preston: Or can be fairly inferred.

Court: From other—

Mr. Preston: From all the circumstances of the case.

Court: I'll add this to it. "Or can be fairly inferred from all the circumstances"—should be "other circumstances"—from all the circumstances.

page 321 } Mr. Preston: From all the facts and circumstances is what it ought to be.

Court: I believe that will help, facts and circumstances in the case. I'll add that to the bottom.

Mr. Pitchford: The bottom of paragraph one.

Court: Or can be fairly inferred from all the facts and circumstances in the case.

Mr. Pitchford: I will accept those amendments under protest and except to the Court's ruling.

Court: You're accepting it.

Mr. Pitchford: I said under protest.

Court: You're protesting and accepting at the same time.

Mr. Pitchford: The word is excepting—and excepting.

Mr. Preston: Paragraph two is—is almost a repetition of paragraph one.

Court: Let me get this one. Now what's the matter with two?

Mr. Preston: Repetitious of other instructions and and repetitious of this instruction, paragraph one.

Court: You got some on it too.

Mr. Preston: That's my point and I think this is going to be repetitious of not only of itself, paragraph

page 322 } one is worded but I think it's repetitious of the other instructions of the Court and—

Court: Which one have we got now that's repetitious of?

Mr. Preston: Paragraph one. You said almost identically the same thing.

Mr. Pitchford: It does not.

Mr. Preston: It doesn't?

Mr. Pitchford: No sir.

Court: I don't see it in there. Point it out.

Mr. Preston: He says up here, "The Court instructs the jury contributory negligence is never presumed and contributory negligence as a defense must be proven by a preponderance of the evidence. Contributory negligence as a defense must be a contributing cause of the accident unless this is shown by the preponderance of the evidence. The same thing it says right up here. I won't object to it too much. If you want to repeat it, let it go but I do object to paragraph three. That's not a correct—that's not a complete statement of the law. It's correct as far as it goes. Just doesn't go far enough again.

Court: I don't think you go far enough either.

Mr. Preston: The language is—the Court in-
page 323 } structs the jury if you are undecided whether
or not Mr. Hicks was guilty of contributory negligence and it should then say or if you believe it is just as probable that the plaintiff was not guilty of any such negligence as that he was.

Court: Then you put that in there.

Mr. Preston: Then—

Mr. Pitchford: That comes from the proposition that it is an affirmative defense and the duty devolves upon the defendant to prove by a preponderance of the evidence—that he was guilty of—contributory negligence and if the defendant fails to carry the burden of proof then—the doubt if any there be must be resolved in favor of the decedent having exercised ordinary care. It's the same instruction the plaintiff has used for years when—and the very language has been approved in the case of *Powell* vs *Virginia Railway Company.*

Court: Let me see that one.

Mr. Pitchford: 187 Virginia, Page 390. The burden was on the plaintiff to prove not only—I cannot see it in the book but I have used it before and—and making my notes of the citation of it, I put down Page 390. I cannot see it. That comes from *Powell* vs *Virginia Railway,* 187 Virginia, 384. I can't see it in this case this morning. I cited it many times before. It's probably here somewhere but I can't see it. I have no authority for the last one. It's one we have been
using over the years.

page 324 } Court: Unless you show me some authority, I'm going to have to take that one out of there. Unless you can show me some more supportive authority for it, I'll have to take it out.

Mr. Pitchford: I move—I have used it and I think paragraph three of Instruction 14 properly states the law but I'm willing to take the language from the bottom of Instruction 1204 from Virginia Instructions that in effect says the same thing. They cite authorities for it, that part, and if the jury are uncertain as to whether the plaintiff was guilty of contributory negligence or if you believe that it is just as probable that the plaintiff was not guilty of any such negligence as it is that he was, then you cannot find the plaintiff guilty of contributory negligence. I move that we substitute that language.

Mr. Preston: That's what I was trying to get you to do.

Court: If you put that on there, I'll give it to you.

Mr. Pitchford: I'll re-write it.

Court: If you do that, I'll give it to you. It is different too.

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PLAINTIFF'S INSTRUCTION NO. 18 (Granted):

Mr. Preston: I'm going to move it has been mentioned by the Court and it has been mentioned by Mr. Pitchford on two occasions in his opening remarks and I'm going to ask the Court to restrict him to mentioning it only one time in his closing argument because the amount of damages sued for is not evidence.

Court: I'm going to let him mention it one time.

Mr. Preston: One time but beyond that he cannot continually harp on the amount because that would give the jury the impression the amount sued for is evidence.

Mr. Pitchford: You want to restrict me in what part of my argument I can say it?

Court: No, I just said don't do it but one time but you can't lay too much emphasis on it. You understand that.

Mr. Preston: In paragraph one of 18, there has been no showing of any pecuniary loss to the children other than Ronnie.

Court: I cannot discriminate between one or all.

page 328 } Mr. Preston: I think you can, if there's no evidence to support it. There's no evidence that Aubry and—I forgot the other young lady's name.

Court: Carolyn.

Mr. Preston: There's no evidence of any pecuniary loss to them. As a matter of fact, I asked Mrs. Hicks whether or not they contributed to the family and they said no. There's —and they were all gone other than Ronnie.

Court: I'm going to leave it in there.

Mr. Preston: Exception. No objection to the rest of it. I do object to paragraph one.

Court: The widow and the children, I'll leave it in there. Granted.

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Court: I'm not going to comment on it. 45 minutes to a side ought to be enough.

Mr. Pitchford: I would suggest reading the instructions of the jury and come back and argue the case.

Mr. Preston: I would suggest we eat first and read it; it would all be a continuous thing, but I want on the record I would require more time than 45 minutes and you already ruled on that.

Court: Give him 50 minutes.

Mr. Preston: I'd like an hour.

Court: I'm going to give you 50 minutes to a side.

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Mr. Preston: Your Honor, I'd like to move to set aside the verdict as contrary to the law and the evidence and further on the grounds that the instructions of the Court were in error in being granted and refused and I'd like time to have the record written up for argument.

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A Copy—Teste:

Howard G. Turner, Clerk.

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