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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6835

In the Supreme Court of Appeals of Virginia at Richmond

GENERAL ANCIL DUNCAN, AN INFANT,

v.

LEWIS HOWARD COX, AN INFANT, ETC.

FROM THE CIRCUIT COURT OF FLOYD COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6835

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.

GENERAL ANCIL DUNCAN,
AN INFANT, Plaintiff in error,

against

LEWIS HOWARD COX, AN INFANT, WHO
SUES BY HIS NEXT FRIEND, EDNA
MALINDIA QUESENBERRY, Defendant in error.

From the Circuit Court of Floyd County
W. S. Jordan, Judge

Upon the petition of General Ancil Duncan, an infant, a writ of error is awarded him to a judgment rendered by the Circuit Court of Floyd County on the 3rd day of March, 1967, in a certain motion for judgment then therein depending, wherein Lewis Howard Cox, an infant, etc., was plaintiff and the petitioner was defendant; no bond being required.

RECORD

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page 1 }

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MOTION FOR JUDGMENT

* * * * *

The undersigned plaintiff, Lewis Howard Cox, an infant, who sues by his next friend, Edna Malindia Quesenberry, respectfully moves the Circuit Court of Floyd County, Virginia, for judgment against the above named defendant, General Ancil Duncan, in the sum of Fifty Thousand Dollars ($50,000.00) for the following wrongs, injuries and damages, to-wit:

1. That on Saturday, September 24, 1966, at approximately 6:00 p.m. the plaintiff was riding as a guest passenger in a 1955 Chevrolet owned by Cleve J. Duncan and operated with permission by his son, General Ancil Duncan.

2. That said vehicle was being operated in a northwest direction on State Route 787 and because of the grossly negligent act of the defendant, said vehicle left the highway and struck a tree stump with great force and violence causing personal injury to the plaintiff.

3. That immediately before and at the time of the collision in question, it was the duty of the defendant to operate his automobile in a careful, prudent and non-negligent manner in conformity with the laws of the State of Virginia.

4. That notwithstanding his duties aforesaid, the defendant, General Ancil Duncan, was then and there guilty of gross negligence in the operation of his vehicle in that he was operating said vehicle on an improper portion of the highway; failed to have his automobile under reasonable and proper control; failed to maintain and keep a proper lookout; intentionally diverted his attention from the high-
page 2 } way to a passenger in the front seat in an effort to secure and take candy then in the possession of the passenger in the front seat and otherwise operated his vehicle in a grossly negligent, reckless and careless manner in complete disregard of the safety of plaintiff.

5. That as a result of the gross negligence of the defendant as aforesaid, the vehicle operated by the defendant, General Ancil Duncan, ran off the highway and struck a

tree stump with great force and violence and as a result of the said collision, plaintiff was severely injured in that he received a severe compound comminuted fracture of the nasal bone and the nasal maxillary process and the nose was mangled with severe depression, a laceration under his left eye, bruises and abrasions about his entire body, has continuously suffered with headaches and dizzy spells, injuries to his nervous system from all of which injuries plaintiff has suffered great pain and mental anguish, has incurred hospital and medical expenses and will incur additional hospital and medical expenses in the future in an effort to be relieved of his pain and suffering, has been deprived of his ability to work and has been permanently injured, disfigured and disabled.

WHEREFORE, plaintiff moves this Honorable Court for judgment against the above named defendant in the sum of $50,000.00, plus costs. The plaintiff further moves the court to appoint a Guardian *ad Litem* for the defendant, General Ancil Duncan, an infant under the age of 21 years.

Respectfully,
LEWIS HOWARD COX, an infant, who sues by his next friend, EDNA MALINDIA QUESENBERRY

By RICHARD W. DAVIS
Of Counsel

RICHARD W. DAVIS
Attorney at Law
Radford, Virginia

Filed in the Clerk's Office the 23 day of Dec., 1966.

Teste:

W. E. SPENCER, Clerk

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GROUNDS OF DEFENSE

* * * * *

Comes now the defendant, General Ancil Duncan, by his attorneys, and for his grounds of defense says that:

(1) Defendant denies that he was guilty of any negligence which proximately contributed to the wrongs, injuries and damages complained of in the motion for judgment.

(2) Defendant did not violate any legal duties owed to the plaintiff.

(3) Defendant admits that on Saturday, September 24, 1966, he was operating a 1955 Chevrolet vehicle on Route 787, Floyd County, Virginia, when the said vehicle was involved in a single car accident. Defendant further admits that the plaintiff at that time was riding as a guest passenger in the said vehicle.

(4) Defendant expressly denies the acts of negligence charged in Paragraph 4 of the motion for judgment.

(5) Defendant alleges that the accident complained of in the motion for judgment was unavoidable insofar as he was concerned.

(6) Defendant further alleges that the plaintiff was guilty of negligence which was either the sole proximate cause of the injuries and damages complained of or proximately contributed thereto.

page 4 } (7) Defendant, while denying that he is liable to the plaintiff in any way, is not informed as to the nature and extent of the alleged injuries and damages, and he calls for strict proof thereof.

(8) All allegations of the motion for judgment not expressly admitted herein are denied.

Respectfully,
GENERAL ANCIL DUNCAN

By ROBERT J. ROGERS
Of Counsel

WOODS, ROGERS, MUSE, WALKER & THORNTON
105 Franklin Road, S.W.
Roanoke, Virginia

Counsel for Defendant

* * * * *

Filed in Clerk's Office January 6, 1967.

W. E. SPENCER, Clerk.

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ORDER APPOINTING GUARDIAN *AD LITEM*

* * * * *

It appearing that the defendant in this cause, General Ancil Duncan, is an infant under the age of twenty-one years, and thus incompetent to defend his interests in this cause;

WHEREFORE, Joseph Poff, a discreet and competent attorney at law, is hereby APPOINTED as Guardian *Ad Litem* for the said infant defendant to defend his interests in this cause with leave to file such pleadings in his behalf as he may be advised.

I have seen this Order:
JOSEPH H. POFF

Enter this order this 19 day of January, 1967

W. S. JORDAN, Clerk

* * * * *

page 5-A }

* * * * *

ANSWER OF INFANT DEFENDANT BY GUARDIAN *AD LITEM* AND ANSWER OF GUARDIAN *AD LITEM* IN PROPER PERSON

The answer of General Ancil Duncan, an infant under the age of twenty-one years, by Joseph H. Poff, his Guardian *ad Litem,* appointed by the Court as a competent and discreet Attorney at Law, to defend his interest in this case to a motion for judgment filed against him in the Circuit Court of Floyd County, Virginia, by Lewis Howard Cox.

This defendant by his Guardian *ad Litem* for answer to said bill says that he is an infant of tender years and therefore incapable of knowing and defending his rights in the premises. The defendant herein and the Guardian *ad Litem* in proper person hereby adopt the answer filed in this case by Robert J. Rogers of counsel for defendant in this case

as his answer to the aforesaid motion for judgment and further submits his interest to the protection of the Court and prays that no judgment or order may be rendered to his prejudice. And now having fully answered he prays to be hence dismissed.

GENERAL ANCIL DUNCAN, an infant

By: JOSEPH H. POFF, Guardian *ad Litem*

JOSEPH H. POFF, Guardian *ad Litem* in Proper Person

* * * * *

page 16 } INSTRUCTION No. 1-a

The Court instructs the jury that at the time and place of the collision in question it was the duty of General Ancil Duncan to exercise reasonable care:

1. To keep his vehicle under proper control, having due regard for the condition and surface of the highway;

2. To keep a proper lookout; and in this regard the Court further instructs the jury that the duty to keep a proper lookout requires not only the physical action of looking, but reasonable prudent action to avoid the danger which a proper lookout would disclose.

The Court further instructs the jury that if you believe from a preponderance of the evidence in this case that General Ancil Duncan was grossly negligent; that is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another, as distinguished from ordinary negligence as defined in another instruction, in failing to exercise reasonable care in the performance of any one or more of the foregoing duties, and that such gross negligence, if any, on the part of *the* General Ancil Duncan was a proximate cause of the collision and injury to the plaintiff, then your verdict shall be returned in the favor of the plaintiff.

Given. W. S. J.

page 17 } INSTRUCTION #2

The Court instructs the jury that in order for the plaintiff to recover in this action the burden is upon him to prove

by a preponderance of the evidence that the defendant, General Ancil Duncan, was guilty of gross negligence in the operation of his automobile at the time and place in question, and that such gross negligence, if any, was a proximate cause of the collision that resulted in the injury to Lewis Howard Cox.

The Court further instructs the jury that the term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the jury. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

The court further instructs the jury that the term "negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances.

The Court further instructs the jury that the term "gross negligence" is defined as conduct showing such indifference to others as constitutes an utter disregard of prudence amounting to complete neglect of the safety of another, that is, such a degree of negligence as should shock fair minded men, although something less than willful recklessness.

The Court further instructs the jury that the term "proximate cause" of an event is defined as a cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred.

Given. W. S. J.

* * * * *

page 23 } INSTRUCTION NO. B

The Court instructs the jury that you cannot base a verdict in this case upon speculation, surmise, conjecture or sympathy for the parties. On the contrary, your verdict must rest entirely upon the evidence in the case and the instructions of the Court.

The Court further tells you that the mere fact that an accident occurred places no responsibility on anyone and raises no presumption of negligence on the part of anyone. On the contrary, in order for the plaintiff to recover against the defendant, the burden is on him to prove by a preponderance of the evidence that the defendant was guilty of gross

negligence, as defined in other instructions of the Court, and that such negligence proximately contributed to cause the accident.

The Court further instructs you that if, after hearing all of the evidence, you are uncertain as to whether the plaintiff has carried the burden of proof, then you should return your verdict for the defendant. Moreover, if it appears equally as probable that the defendant was not guilty of gross negligence as that he was, then you should likewise return your verdict for the defendant.

Given. W. S. J.

page 24 } INSTRUCTION No. C

The Court instructs the jury that under Virginia law, a guest passenger may not recover from the driver of the vehicle unless the passenger shows that he was injured as a result of gross negligence by his driver. The Court further tells you that gross negligence means something more than lack of ordinary care. Gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another, such as to be shocking to reasonable men.

Ordinary or simple negligence is the failure to exercise that care which a reasonably prudent person would have exercised under the same or similar circumstances; and a mere failure to skillfully operate an automobile under all conditions, or to be alert and observant, and to act intelligently and operate an automobile at a low rate of speed may, or may not, be a failure to do what an ordinarily prudent person would have done under the circumstances, and thus amount to ordinary negligence; but such lack of attention and diligence, or mere inadvertence, does not amount to gross negligence.

And even though the jury may believe from the evidence that the defendant was guilty of some negligence, nevertheless if the jury are uncertain as to whether gross negligence, as defined in another instruction of the Court, has been proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendant was not guilty of any such gross negligence as it is that he was, then you shall return your verdict in favor of the defendant.

Given. W. S. J.

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page 26 }

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AT A CIRCUIT COURT CONTINUED AND HELD IN AND FOR THE COUNTY OF FLOYD AT THE COURTHOUSE THEREOF THIS 3rd DAY OF MARCH, 1967

* * * * *

ORDER

* * * * *

THIS DAY came the plaintiff in person and by counsel and by his next friend, and came also the defendant in person and by his counsel and by his guardian *ad litem.* Thereupon both sides announced ready for trial upon the pleadings heretofore filed.

Thereupon came a jury of thirteen (13) persons, and the plaintiff and defendant having each struck three of said jurors, the remaining seven (7) to-wit: Edward Epperly, Harold M. Turman, Garney W. Burnette, Hassell Alley, Bonnie Goff, Cody Hale, and Colon C. Wade were sworn to well and truly try the issue joined and having heard the evidence received, the instructions of the court, and heard the argument of counsel retired to consider their verdict and after some time returned the following verdict:

"We, the Jury, upon the issue joined find in favor of the plaintiff, Lewis Howard Cox, and award him damages for his personal injuries to the amount of $35,000.00 due to the gross negligence of the defendant, General Ancil Duncan.

Mrs. Ray G. Goff, Foreman"

Whereupon the jury were discharged.

Thereupon the defendant, by counsel, and by his guardian *ad litem,* moved the court to set aside the verdict of the jury on the grounds that the same was contrary to the law and the evidence in the case, and further upon the grounds that the verdict was excessive as a matter of law, and page 27 } further upon the grounds of misdirection of the court to the jury, and further upon the grounds of error of the trial court to which objection and exception had been previously made, which motion the court overruled and

the defendant, by counsel and guardian *ad litem,* duly excepted.

It is therefore considered by the court that the plaintiff, Lewis Howard Cox, do have and recover of the defendant, General Ancil Duncan, the sum of $35,000.00 together with the plaintiff's costs in this behalf expended.

And the defendant, General Ancil Duncan, by his counsel and by his guardian *ad litem,* having indicated to the court his intention to apply to the Supreme Court of Appeals of Virginia for writ of error to the action of the court herein, and upon the motion of the defendant for the suspension of the execution of the judgment in this case until such time as the Supreme Court of Appeals of Virginia has acted on the defendant's petition for writ of error, or, if the same be granted until an opinion is rendered by that Court, it is hereby ADJUDGED and ORDERED that, if the defendant duly files his petition for writ of error in accordance with the Rules of the Supreme Court of Appeals of Virginia within four months from the date of judgment, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon the said petition; and, if the writ of error be granted in this case, it is further ADJUDGED and ORDERED that execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia.

ENTER: W. S. JORDAN, Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

* * * * *

YOU ARE HEREBY NOTIFIED that the defendant, General Ancil Duncan, does hereby file with the Clerk of the Circuit Court of Floyd County, Virginia, this his notice of appeal and assignments of error from the order of judgment entered in this case on March 3, 1967, and the defendant announces his intention to apply for writ of error to the Supreme Court of Appeals of Virginia.

The defendant assigns as error the following:

(1) The action of the trial court in overruling defendant's motion to strike the plaintiff's evidence and enter summary judgment in favor of the defendant.

(2) The action of the trial court in granting any instructions on behalf of the plaintiff.

(3) The action of the trial court in granting Instruction No. 1-a requested by the plaintiff over the objection of the defendant.

page 29 } (4) The action of the trial court in granting Instruction No. 2 requested by the plaintiff over the objection of the defendant.

(5) The action of the trial court in overruling defendant's motion to set the verdict aside because of excessiveness.

(6) The action of the trial court in overruling defendant's motion to set the verdict aside as being contrary to the law and the evidence.

Respectfully,
GENERAL ANCIL DUNCAN

By ROBERT J. ROGERS
Of Counsel

WOODS, ROGERS, MUSE, WALKER & THORNTON
105 Franklin Road, S.W.
Roanoke, Virginia

Counsel for Defendant

* * * * *

This Notice of Appeal and assignments of error having been this day received in office, the same is herewith filed, this 28th day of March, 1967.

W. E. SPENCER, Clerk.

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NOTICE OF TENDERING OF TRANSCRIPT

* * * * *

YOU ARE HEREBY NOTIFIED that on Monday, the 3rd day of April, 1967, at 10:00 o'clock A.M., or as soon

thereafter as he may be heard, the undersigned will present to The Honorable W. S. Jordan, Judge of the Circuit Court of Floyd County, Virginia, at his office in the Circuit Court of Montgomery County, Christiansburg, Virginia, a transcript of the evidence in this case, pursuant to Rule 5:1, §3 (f) of the Rules of Court, and request that the same be certified as a true copy thereof and made part of the record of the purpose of an application for writ of error to the Supreme Court of Appeals of Virginia from a judgment entered in this case on the 3rd day of March, 1967.

Respectfully,
GENERAL ANCIL DUNCAN

By ROBERT J. ROGERS
Of Counsel

WOODS, ROGERS, MUSE, WALKER & THORNTON
105 Franklin Road, S.W.
Roanoke, Virginia

Counsel for Defendant

page 31 }

* * * * *

Received in Clerk's Office and filed, this 3-28-67.

W. E. SPENCER, Clk.

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EVIDENCE ADDUCED IN BEHALF OF THE PLAINTIFF.

TROOPER CHARLES T. HIGGINS called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Trooper Charles T. Higgins

page 17 } DIRECT EXAMINATION

By Mr. Davis:

Q. Trooper Higgins, would you state your full name for the record?

A. Charles Thomas Higgins.

Q. Trooper Higgins, were you on duty in this County on September the 24th, 1966?

A. Yes, sir.

Q. Were you called to investigate an accident which happened on Route 787 near the community of Indian Valley in this County?

A. Yes, sir.

Q. I believe Mr. Ancil Duncan was the operator of that automobile, is that right?

A. Yes, sir.

Q. The plaintiff here (indicating) was a passenger in that automobile?

A. Yes, sir.

Q. Would you go forward and state to the Jury and to the Court the investigation that you found there when you arrived?

A. I arrived on the scene at approximately 8:00 o'clock; it took place between the old Primitive Baptist Church near the Indian Valley school house—between there and Isaiah Quesenberry's store and State Route 787. There
page 18 } was one vehicle involved; it was there, a 1955 Chevrolet.

When I arrived at the scene I asked who the driver was. The Duncan boy advised me that he was the driver. I got his driver's license and registration, and the other boys—there was a Roy Quesenberry, Gary Quesenberry and Donny Quesenberry, who were at the scene and stated they were passengers, and another passenger, Louis Howard Cox, they advised me had been taken to the clinic.

Q. Trooper Higgins, I think it would be a big benefit to the Jury—I don't know whether you are an artist or not—but would you draw—you are prepared I believe to draw the scene of this accident?

A. You will find out that I'm not an artist (laughter).

(An easle was then erected, large paper was placed thereon and the witness attempted to draw a diagram of the scene.)

The Court: Gentlemen, it is a little hard to draw with the

paper in that position; suppose we take a short recess while the Trooper draws his diagram. Ladies and gentlemen of the Jury, you may go to your Jury room while the Trooper is drawing this, and we will call you when he is ready with it.

(Thereupon, a recess was taken from 11:45 o'clock A.M. to 11:50 o'clock A.M.)

The Court: All right, you may proceed.

page 19 } By Mr. Davis (continues examination):

Q. Trooper Higgins, I believe this is a diagram of the scene of the accident (indicating), is that right?

A. Yes, sir.

Q. You have indicated on there this is State Route 787 (indicating)?

A. That's right.

Q. Would you point out to the Court and Jury, please, as to where the Indian Valley Elementary School is in relation to your map?

A. It would be on back north of this (indicating). This road runs north and south (indicating).

The Court: A little louder, Trooper, please, we can't hear you.

The Witness: I don't know whether I can or not, Judge. This road runs north and south, north in this direction (indicating); the school house is approximately five or six hundred feet north of this place (indicating).

By Mr. Davis:

Q. Now how about the Primitive Baptist Church, where is that?

A. It is approximately from about two hundred and fifty feet from the mailbox to where the Church is, north (indicating).

page 20 } Q. Now, you indicate some mailboxes on the diagram, where are those mailboxes located?

A. They're approximately six foot off the pavement, approximately.

Q. Would you check your records and see if that is what the distance is that you have got on the mailboxes?

A. (Witness referred to notes.) I don't know whether I have it down or not; I didn't write it down; it is probably six feet.

Trooper Charles T. Higgins

Q. Let me ask you this: Have you measured the distance between the edge of the highway and the gravel over to the mailboxes?

A. Yes, sir.

Q. How far is that?

A. Approximately six feet.

Q. Six feet. Is there any curbing or berm there of any appreciable size, or does the road just go on over into the gravel?

A. Just goes on over into the gravel.

Q. In other words, there is no big drop-off or rise?

A. No, sir.

Q. Pretty much level?

A. Yes, sir.

Q. And it is six feet of gravel from the highway over to the mailbox?

page 21 } A. Yes, sir.

Q. Now, does that extend all the way down?

A. It extends down to this private entrance, private driveway (indicating).

Q. I believe that the private driveway goes to Guy Phillips' home, is that right?

A. I'm not sure who lives there.

Q. All right. Now from the point where the automobile first ran off the highway and you could tell that, I assume, by the marks in the gravel—

A. Yes, sir.

Q. —from the point where the highway went off the highway—where the car went off the highway, excuse me. From the point where the car went off the highway down to the end of this private driveway, do you have that distance?

A. Approximately seventy feet.

Q. Seventy feet. And the six foot gravel extends all the way down to the driveway, and then widens on into the driveway, is that right?

A. Yes, sir.

Mr. Rogers: Now, if Your Honor please, I want to interrupt Mr. Davis just one second. He's been leading this witness right along.

The Court: Yes, sir, I sustain the objection and caution you, Mr. Davis, not to lead the witness.

page 22 } Mr. Davis: All right, sir. I apologize to opposing Counsel and to the Court.

Mr. Rogers: All right, sir.

Trooper Charles T. Higgins

By Mr. Davis (continues examination):

Q. Now there was a stump that this automobile came in contact with?

A. Yes, sir.

Q. How far is that stump located off the highway?

A. Seven feet off the highway. It is indicated right here (indicating).

Q. Did all of this accident, all of the running off the highway occur on a straight stretch?

Mr. Rogers: Well, if Your Honor please, I've got to object to that because the Trooper wasn't there and didn't see the accident. I think it is bad for him—

The Court: I sustain the objection. The Trooper can testify to the condition of the road and what he found.

By Mr. Davis:

Q. Yes, sir. Trooper Higgins, your physical examination —excuse me, your physical examination of the scene of the accident where the automobile ran off, I believe you testified was *ninety* feet. Was that a straight stretch down to the stump?

A. Yes, sir.

Q. And did the car wheels' marks go in a

page 23 } straight stretch?

A. Yes, sir.

Q. How much damage was done to the automobile when it hit the stump?

A. I didn't check the damage; I estimated—

Mr. Rogers: Now, if Your Honor please, I've got to again object to that.

The Court: I sustain the objection.

By Mr. Davis:

Q. All right, sir. Trooper Higgins, if you would give the Jury and the Court the benefit of the damage that you witnessed that was done to the automobile in your investigation?

Mr. Rogers: Excuse me, Mr. Davis, just so I understand. You mean to describe the physical damage to the automobile?

Mr. Davis: Yes, sir.

Mr. Rogers: I have no objection to that.

The Witness: The grill and all the front of the automobile, where it had hit the bank and the stump, was pushed

in; the grill was pushed in, the hood was pushed in, the front bumper was just—it was a head-on collision, and all the damage was all up front.

By Mr. Davis:
Q. In other words, the entire front of the automobile?
A. Yes, sir.
page 24 } Q. Did you get a chance to talk to Mr. Cox?
A. No, sir, I never have talked with Mr. Cox.

Mr. Davis: Your witness.

CROSS EXAMINATION

By Mr. Rogers:
Q. All right. While you're standing, Trooper, would you mind putting, or indicating north and west so we will have some idea on the diagram?
A. Yes.

(Witness placed desired information on the map.)

Q. Thank you, sir. Now, Trooper Higgins, you indicated, in answer to Mr. Davis' question, that the Indian Valley school is in this direction (indicating), about five or six hundred feet east of the mailboxes, is that correct, sir?
A. Yes, sir.
Q. And in between the mailbox and the school, I believe, is the Church?
A. That's right.
Q. And I believe you measured that distance, did you not, sir?
A. Yes, sir, I did.
Q. And how far is that from the mailboxes to the—from the Church to the mailboxes?
A. Two hundred and fifty feet.
page 25 } Q. All right, sir, you may have a seat, if you will, and I can ask you some more questions.

(Witness returned to witness stand and Mr. Rogers handed photograph to Mr. Davis for examination.)

Mr. Rogers: If Your Honor please, I am handing the photograph to the Court Reporter and request it be marked Defendant's Exhibit 1 for identification. I beg your pardon, I want to call it "Defendant's Exhibit A".

The Court: Exhibit A.

By Mr. Rogers:

Q. All right, sir. Trooper, I hand you Defendant's Exhibit A and ask you to look at that photograph, if you will, and indicate to the Jury which direction that photograph is facing?

A. That photograph is taken east of the accident scene.

Q. All right, sir. And so it would be facing in what direction?

A. West.

Q. And that is the direction that the car was going, is that not correct, sir?

A. Yes, sir.

Q. And it is taken east of the Church, I believe, page 26 } is that correct, sir?

A. Yes, sir.

Mr. Rogers: All right. If Your Honor please, I would like to introduce into evidence Defendant's Exhibit A.

The Court: All right, it will be received.

(Photograph referred to above was received in evidence and marked DEFENDANT'S EXHIBIT A, and then handed to the Jury for inspection.)

By Mr. Rogers (continues examination):

Q. All right, sir. Now, Trooper Higgins, I hand you Defendant's Exhibit B, so marked for identification, and ask you to tell the Jury which direction the camera was facing in that photograph? (Second photograph handed to the witness.)

A. The camera was facing the west.

Q. All right, sir. And I believe that picture was taken from directly in front of the Church?

A. Yes, sir.

Q. And I believe you testified that the Church was two hundred and fifty feet to the mailboxes?

A. Yes, sir.

Mr. Rogers: All right, sir. Now, if Your Honor please, I offer into evidence Defendant's Exhibit B.

The Court: So received.

(Second photograph referred to above was received in

evidence and marked DEFENDANT'S EXHIBIT
page 27 } B, and then handed to the Jury for inspection.)

By Mr. Rogers:

Q. Now, Trooper Higgins, I hand you Defendant's Exhibit C, so marked for identification, and request you to indicate to the Jury in which direction that is facing? (Third photograph handed to the witness.)

A. That is facing west also.

Q. I believe that was taken from a point midway between the Church and the mailboxes?

A. Yes, sir.

Q. And that would be approximately a hundred and twenty-five feet from the mailbox, would it not, sir?

A. Yes, sir.

Mr. Rogers: If Your Honor please, I offer into evidence Defendant's Exhibit C.

The Court: All right, it will be so received.

(Third photograph referred to above was received in evidence and marked DEFENDANT'S EXHIBIT C, and then handed to the Jury for inspection.)

By Mr. Rogers:

Q. Now, Trooper Higgins, I hand you Defendant's Exhibit D, so marked for identification, and request you to indicate to the Jury which direction that is facing?

A. It is also facing west.

page 28 } Q. I believe that is taken from the mailboxes?

A. Yes, sir.

Q. Which would be ninety feet to the stump, is that correct? Where the accident occurred.

A. Yes, sir.

Q. I believe that individual (indicating) standing there, that you can see just vaguely, happens to be me, is that correct?

A. Yes, sir, it is.

Q. I believe these photographs were taken on February 14th, when there was some snow on the ground?

A. Yes, sir.

Q. But I believe at the time of the accident it was dry?

A. It was dry, yes, sir.

Q. So this snow and water were not present at the time of the accident?

A. No, sir.

Mr. Rogers: If Your Honor please, I offer into evidence Defendant's Exhibit D.

The Court: It will be so received.

(Fourth photograph referred to above was received in evidence and marked DEFENDANT'S EXHIBIT D, and then handed to the Jury for inspection.)

By Mr. Rogers: (continues examination):

page 29 } Q. Now, Trooper Higgins, I think you probably indicated before you drew the scene of the accident that, like me, you were not an artist, is that correct, sir?

A. Yes, sir.

Q. And that sketch doesn't pretend to be to scale or anything, does it?

A. No, sir, it is not.

Q. And the curve (indicating)—you have a fairly sharp looking curve here on this diagram, but it is not quite that sharp, is it?

A. No, sir, it isn't.

Q. And I assume the photograph would indicate the nature of the curve?

A. Yes. Yes, sir.

Q. And did the accident—excuse me. The mailboxes I believe are a little bit closer here to this driveway (indicating), are they not, sir?

A. Yes, sir.

Q. And the mailboxes, or the point apparently where the vehicle went off the road is on a fairly straight stretch of road, is it not, sir?

A. Yes, sir, it is.

Q. At the time of the accident there, the road was fairly level and dry, was it not, sir?

A. Yes, sir, it was.

page 30 } Q. In other words, these photographs which are marked so that they start east of the mailboxes up around the Church area would show the nature of the road a little bit better than your diagram, is that a fair statement?

A. Yes, sir, it would.

Q. I'm not being critical of your diagram (laughter).

Now did you talk to this young man here, Ancil Duncan (indicating Defendant), at the scene?

Trooper Charles T. Higgins

A. Yes, sir. Yes, sir, I did.
Q. What did he estimate his speed to you?
A. He told me he was doing approximately twenty-five miles an hour.
Q. All right, sir. And what statement, if any, did he make to you as to why the accident occurred?
A. He said that he took his eyes—"I looked off the road for a second and it happened."
Q. "He took his eyes off the road for a second and it happened"?
A. Yes, sir.
Q. Did you check the road for any skid marks or any tire marks on the pavement itself?
A. Yes, sir, I did.
Q. Were there any marks?
A. No, sir.
Q. I believe the speed limit at that point was
page 31 } fifty-five miles an hour, is that correct, sir?
A. Yes, sir.
Q. Just so I understand correctly the distance from the mailbox to the stump, it was ninety feet, is that correct, sir?
A. Yes, sir.
Q. And the stump itself was seven feet off the pavement?
A. Yes, sir.

Mr. Rogers: All right, sir, that's all the questions I have, Your Honor.

RE-DIRECT EXAMINATION

By Mr. Davis:
Q. Trooper Higgins, I believe you testified that there were seventy feet from the mailbox down to the end of the driveway?
A. Yes, sir.
Q. Would you please indicate that on the map?
A. All right.

(Witness went to the diagram and placed desired information on same.)

Mr. Davis: If Your Honor please, we would like to offer this map in evidence as Plaintiff's Exhibit No. 1.
The Court: All right, Mr. Bieler, you mark it
page 32 } Plaintiff's Exhibit No. 1.

(Diagram referred to above was received in evidence and marked PLAINTIFF'S EXHIBIT NO. 1.)

Mr. Davis: I have no further questions.

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page 34 }

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MR. LOUIS HOWARD COX the Plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:

Q. You are Louis Howard Cox?

A. Yes, sir.

Q. How old are you, Louis?

A. Nineteen.

Q. How old were you on September the 24th, 1966?

A. Eighteen.

Q. I believe you live in the community of In-
page 35 } dian Valley, in this County?

A. Yes, sir.

Q. Now were you involved in an automobile accident on September the 24th, 1966?

A. Yes, sir.

Q. Were you a passenger in that automobile?

A. Yes, sir.

Q. Now, who was the operator?

A. Ancil Duncan.

Q. And who were the other passengers that were in the automobile?

A. Donny Quesenberry, Gary Quesenberry and Roy Quesenberry.

Q. Now I believe September the 24th was a Saturday, is that right?

A. Yes, sir.

page 36 } Q. Was it sometime in the afternoon?

A. Yes, sir.

Q. Where had you been?

Mr. Louis Howard Cox

A. We had been up to Indian Valley Elementary School house playing football.

Q. Now what time did you arrive at the school?

A. To play ball?

Q. Yes.

A. I'm not sure.

page 36 } Q. Was it sometime in the afternoon?

A. Yes, sir.

Q. Were there any purchases that were made by you or other occupants of the car before you went to the football field?

A. Yes, sir.

Q. What purchases were made?

A. I got—I bought a carton of pop and a poke of tobacco and some candy.

Q. Now, do you know how long you all played football up there at the school?

A. No, sir.

Q. Could you give the Jury some reasonable idea as to what time you left?

A. We left about 5:00 o'clock.

Q. And what time—where were you going?

A. To Ancil's home.

Q. That is Ancil Duncan's home?

A. Yes, sir.

Q. Now when you left the elementary school there in Indian Valley, what highway did you take?

A. 787.

Q. And headed which way?

A. Headed towards Isaiah Quesenberry's Store.

Q. That is back towards Indian Valley, is that right?

page 37 } A. Yes, sir.

Q. And what position were the occupants in the automobile?

A. Ancil was driving, Donny was in the middle of the front seat, and I was on the righthand side in the front seat, and Roy Quesenberry and Gary Quesenberry was in the back seat.

Q. Now as you proceeded down 787, would you go forth, in your own words, Louis, and just tell this Jury exactly what took place?

A. Well, we were going towards Ancil's home and we was driving down the road, and Ancil opened the door to spit some tobacco out about the Church. And I'm not sure that he

stopped just when he spit it out. I am sure he slowed down a little, and went on down.

Q. Let me ask you right there: Where did he get the tobacco?

A. I gave it to him at the school house.

Q. And he had it in his mouth since you left the school house?

A. Yes, sir.

Q. All right. Now take on up from where you left the Church?

A. Well, after we left the Church I asked Ancil if he wanted some candy and he said he did, so I started to reach it to him and Donny Quesenberry was in the mid-
page 38 } dle, and he got it and ate it. And then Ancil started to reach over to get it, and about that time we went off the road.

Q. All right. Now what did you say to Ancil with reference to the candy?

A. Well, I asked him if he wanted some.

Q. And what did he tell you?

A. That he did.

Q. Had Donny entered into the conversation at that time?

A. Yes, sir.

Q. What did Donny say?

Mr. Rogers: If Your Honor please—did you ask "what Donny had said"?

Mr. Davis: I asked him if Donny and he had entered into the conversation at that time, and then I asked him what was said, yes.

Mr. Rogers: Well, Donny is here, Your Honor, and I don't understand why he can't testify as to what he said. I think that is hearsay.

The Court: I sustain the objection. He is here.

By Mr. Davis:

Q. All right, sir. Now as you reached the candy over, I believe you testified that Donny was in the middle?

A. Yes, sir.

Q. What happened then?

page 39 } A. Well, when I reached it to Ancil, Donny got it and stuck it in his mouth.

Q. Well, how did Donny get it now? Now this Jury wasn't there and they don't know, so you explain it to them.

A. He got it from me when I was reaching it to Ancil.

Mr. Louis Howard Cox

Q. And what did Donny do with it?
A. He stuck it in his mouth.
Q. Now what was Ancil doing at this time?
A. He was trying to get the candy back from Donny.
Q. Was he able to get the candy back?
A. No, sir.
Q. How long after that had you run off the road?
A. It wasn't but a very few seconds.

Mr. Rogers: (interposing): I'm sorry, I didn't hear the answer. Would you read that?

(The Reporter read the last two questions and answers above.)

Mr. Rogers: Louis, would you speak up so I can hear you?
The Court: If you face this way, Louis, and face the Jury instead of facing in Mr. Davis' direction, we will all hear you. And speak a little louder, please.

By Mr. Davis (continues examination):
Q. After the car ran off the road, Louis, was Ancil able to get it back on the highway?
page 40 } A. No, sir.
Q. Was any statement made by anybody?
A. No, sir—yes, sir.
Q. What statement did they make?

Mr. Rogers: If Your Honor please, I would like to know—I think he can ask if any statements were made, but as to what the statements were about and by whom, then I would have to object.
The Court: I would have to overrule that objection, that is part of the *res gestae.*
Mr. Rogers: I except.

By Mr. Davis:
Q. Go ahead, Louis.
A. Sir?
Q. Answer my question.
A. Well, when I noticed we was off the road I hollered at Ancil to try to get the car back on the road.
Q. Was there any other remark or exclamations made by anybody else in the automobile?
A. No, sir.

Mr. Louis Howard Cox

Q. Was he able to get it back on the road?
A. No, sir.
Q. What took place then?
A. Well, he tried to get it back on the road, but he just couldn't.
page 41 } Q. Well, what happened?
A. When, sir?
Q. Did you eventually hit the stump?
A. Yes, sir.
Q. I believe the Trooper's testified that it was near a private driveway, is that right?
A. Yes, sir.
Q. This map has been introduced in evidence, or this drawing, as "Plaintiff's Exhibit No. 1". You think that is a reasonable facsimile of the scene of the accident?
A. Yes, sir.
Q. You can see the mailboxes here (indicating) and the private driveway (indicating)?
A. Yes, sir.
Q. And the stump is some seven feet off the road?
A. Yes, sir.
Q. Now what happened immediately before you hit the stump, what were you doing?
A. I don't remember.
Q. Do you recall the automobile hitting the stump?
A. No, sir.
Q. Do you recall being injured?
A. Yes, sir.
Q. How were you injured?
A. Well, my nose hit the dash and it broke all
page 42 } the bones in my nose (indicating).
Q. Now what was your condition, your physical condition following the accident?
A. Well, I was bleeding pretty bad when I got out.
Q. Were you able to stop the bleeding yourself?
A. No, sir.
Q. What assistance did you have?
A. Well, they went—some of them went down to Guy Phillips' to call for Isaiah Quesenberry to come down and get me.
Q. Were you treated in Floyd?
A. No, sir.
Q. You didn't see any doctor in Floyd?
A. Yes, sir, the ambulance stopped there and they went in, and Dr. Marshall I believe looked at me, and then said that we'd have to go on down to Roanoke.

Mr. Louis Howard Cox

Q. Were you taken to Roanoke?
A. Yes, sir.
Q. What hospital were you admitted to in Roanoke?
A. Jefferson Hospital.
Q. And who was your attending physician?
A. Dr. Kang.
Q. K-a-n-g? Now what treatment did Dr. Kang administer to you while you were there on the 24th, the evening of the 24th?
page 43 } A. He sewed my nose up and placed—and a place under my eye.
Q. And were you admitted to the hospital?
A. Yes, sir.
Q. How long were you a patient there at the hospital?
A. Thirteen days.
Q. Were you then released to come back to Floyd County?
A. Yes, sir.
Q. Have you been back to see Dr. Kang since then?
A. Yes, sir.
Q. Have you seen any other doctors?
A. Yes, sir.
Q. What other doctors have you seen?
A. Dr. Tuck and Dr. Stone.
Q. Now, what was the reason for seeing Dr. Tuck?
A. Well, my eye was watering and I told Dr. Kang about it, and he made an appointment with Dr. Tuck for him—for me to see him.
Q. Did you see Dr. Tuck?
A. Yes, sir.
Q. When was that?
A. I'm not positive of the date.
Q. Do you know the approximate month?
A. It was after October.
page 44 } Q. Now when you saw Dr. Tuck, what did Dr. Tuck advise you?
A. To have an operation.
Q. And were you subsequently operated on by Dr. Tuck?
A. Yes, sir.
Q. When did that operation take place?
A. Last Friday.
Q. Were you readmitted to the hospital again?
A. Yes, sir.
Q. And how long were you in the hospital on this occasion?
A. Six days.
Q. And Dr. Tuck operated on you at that time?

Mr. Louis Howard Cox

A. Dr. Tuck and Dr. Stone.
Q. Dr. Tuck and Dr. Stone?
A. Yes.
Q. And you were released when did you say? Did you tell us?
A. Wednesday afternoon.
Q. This past Wednesday?
A. Yes, sir.
Q. Now you told us you had been seeing Dr. Kang all this time. Do you have an additional appointment with Dr. Kang in the future?
A. Yes, sir.
page 45 } Q. How about Dr. Tuck?
A. Yes, sir.
Q. Now, Louis, Mr. Gardner's previously testified before you concerning his hiring of you at the Exchange Mill?
A. Yes, sir.
Q. Did you go to see Mr. Gardner?
A. Yes, sir.
Q. When did you see him?
A. I saw him on a Wednesday, the week before the accident.
Q. And were you hired by Mr. Gardner?
A. Yes, sir.
Q. And when did he tell you to report?
A. He told me before to report on Wednesday, but then I called and told him and asked him would it be all right to come in on Monday, and he said it would.
Q. Now when was that Monday in relation to the accident?
A. After the accident.
Q. Was it the following Monday?
A. Yes, sir.
Q. The accident occurred on the 24th, so you were to report in to the Exhange Mill on the 26th?
A. Yes, sir.
Q. Did you report in?
page 46 } A. No, sir.
Q. At that time I believe you were a patient in the hospital?
A. Yes, sir.
Q. Now have you been gainfully employed since the accident?
A. No, sir.
Q. Why have you not been gainfully employed?
A. Because I have not been able to work.

Mr. Louis Howard Cox

Q. What reason, why physical—
A. Well, because when I start to work I just can't last out very long, and I have to quit and rest a while.
Q. Had you ever had these weakening spells before the accident?
A. No, sir.
Q. Louis, I'm going to hand you a picture (photograph handed to the witness). Would you identify it?
A. Yes, sir.

Mr. Rogers: May I look at it?
Mr. Davis: Let me see if Mr. Rogers approves.

(Photograph was then handed to Mr. Rogers for inspection and returned to Mr. Davis.)

By Mr. Davis:
Q. Would you identify this picture, please?
A. Yes, sir, that is myself.
page 47 } Q. When was it taken?
A. About three years ago.

Mr. Davis: If Your Honor please, we would like to introduce the picture taken approximately three years ago of Louis Cox.
The Court: Give it to the Reporter and let him mark it Plaintiff's Exhibit No. 2.

(Photograph of Plaintiff referred to above was received in evidence and marked PLAINTIFF'S EXHIBIT NO. 2, and then handed to the Jury for inspection.)

By Mr. Davis:
Q. Now, Louis, you have told us about the injuries to your nose and to your eye. Did you sustain any other injuries in this accident?
A. No, sir.
Q. How have you felt since the accident?
A. I felt pretty weak since the accident.
Q. How have you felt with reference to the appearance of your face?
A. Well, I have been embarrassed by people sitting and staring at me, and some making remarks.
Q. Do you have a girlfriend?
A. I used to have.

Mr. Louis Howard Cox

Q. Have you had a date since the accident?
A. No, sir.

page 48 } Mr. Davis: Your witness.
The Court: Cross examination.

CROSS EXAMINATION

By Mr. Rogers:
Q. Louis, how old are you?
A. Nineteen.
Q. You are a little bit older than—a couple of years older than these other boys, weren't you?
A. Yes, sir.
Q. And you haven't been in school for sometime, have you?
A. No, sir.
Q. I believe prior to this accident you hadn't worked for two or three months, had you?
A. No, sir.
Q. You had worked prior to that time, before the lay-off, two or three months, you had worked down in Salem somewhere, didn't you?
A. Yes, sir.
Q. Where was that?
A. The Salem Tie Yard.
Q. And you were working there about how long?
A. About three or four months.
Q. And you quit there just because you just wanted to quit, didn't you?
page 49 } A. No, sir.
Q. Sir?
A. No, sir.
Q. Why did you quit?
A. Because that I was going to be examined for the Army.
Q. Going to be examined for the Army?
A. Yes, sir.
Q. All right, sir. And then you stayed around for a couple of months after that?
A. Yes, sir.
Q. Now before you worked in Salem, I believe you worked up in Baltimore, or Maryland somewhere?
A. Annapolis, Maryland.
Q. You worked there how long at Annapolis?
A. About three or four months.

Mr. Louis Howard Cox

Q. Right. Now you have told us, or this Jury that since this accident you felt pretty weak, haven't you?
A. Yes, sir.
Q. Felt pretty bad. And I take it you haven't been able to do anything, have you?
A. No, sir.
Q. As a matter of fact, Louis, you have been able to play basketball, haven't you?
A. I have, a little.
page 50 } Q. You have played right often, haven't you?
A. No, sir.
Q. Louis, haven't you been playing with Ancil Duncan after this accident, and these boys over here, sitting in the Courtroom (indicating)?
A. I have.
Q. And played a number of times pretty soon after you came out of the hospital, didn't you?
A. Yes, sir.
Q. And you had been hit in the face several times with a basketball, haven't you?
A. Two or three times.
Q. It hurt you too, didn't it?
A. Yes, sir.
Q. And I believe you had a little sled accident back in January, or back in December, wasn't it, when it snowed pretty hard? Didn't you fall off the sled or something?
A. No, sir.
Q. Didn't hurt your jaw?
A. I was standing up on the ice and fell.
Q. Hadn't you been sleigh riding at the time?
A. Yes, sir.
Q. And now you indicate to the Jury that you had a girlfriend and that you haven't dated her since this accident. Are you sure about that?
page 51 } A. Well, I might have once after I came out of the hospital.
Q. You had a couple of dates with her now, haven't you, Louis?
A. No, sir.
Q. You're telling this Jury that you lost your girlfriend because of this accident?
A. Yes, sir.
Q. All right, sir. Now with respect to the accident, you had ridden with Ancil here before, hadn't you?
A. Yes, sir.

Mr. Louis Howard Cox

Q. You had ridden with him a number of times, hadn't you?
A. Yes, sir.
Q. And rode in his car, didn't you?
A. His father's car.
Q. His father's car. But he was driving and let you ride, didn't he?
A. Yes, sir.
Q. And you didn't pay anything for the gas or anything, did you?
A. No, sir.
Q. He was glad to let you ride, wasn't he?
A. Yes, sir.

page 52 } Q. You all had been playing touch football or something up there at the school prior to this accident?
A. Yes, sir.
Q. Having a good time, I take it?
A. Yes, sir.
Q. All of you were friends, weren't you?
A. Yes, sir.
Q. You were a friend of Ancil's here, weren't you?
A. Yes, sir.
Q. Then after you finished, you started on back to Ancil's house and you all were going home, weren't you?
A. Yes, sir.
Q. And you left the school house, and that's only about five or six hundred feet from where the accident occurred, isn't it?
A. Yes, sir.
Q. And Ancil was driving and moving at a very slow rate of speed, wasn't he?
A. Yes, sir.
Q. Wasn't going, what? Twenty-five miles an hour?
A. Thirty miles an hour when I looked at the speedometer.
Q. Oh, you looked at the speedometer?
A. Yes, sir.
Q. How did you happen to look at the speedometer?
A. I just glanced over at it and saw it.

page 53 } Q. Where were you when you looked at the speedometer?
A. Between the Church and where it happened.
Q. Between the Church and the mailbox, would you say?
A. Yes, sir.
Q. And you looked at the speedometer?
A. Yes, sir.

Mr. Louis Howard Cox

Q. And you were sitting on the far right, as I understand it?

A. Yes, sir.

Q. Could you see the needle on the speedometer from where you were sitting?

A. Yes, sir.

Q. And it was thirty miles an hour?

A. Yes, sir.

Q. All right, sir. Now I want to go back. You indicated I think that—let me start this question over again.

After you left the school house Ancil stopped the car, I believe to spit out some tobacco, didn't he?

A. I'm not positive.

Q. Well, he did, didn't he?

A. He may have.

Q. You're not going to deny that he stopped, are you?

A. No, sir.

Q. Sir?

A. No, sir.

page 54 } Q. All right. And he stopped and spit out the tobacco about right there in front of the Church, didn't he?

A. Yes, sir.

Q. And then he started on and was going at a fairly slow rate of speed when the car left the road, isn't that correct?

A. Yes, sir.

Q. Now, as I understand your testimony, you said something to him about some candy?

A. I did.

Q. And you started to pass it over to him, and friend Donny, sitting in the middle, kind of intercepted it, didn't he?

A. Yes, sir.

Q. And he put it in his mouth?

A. Yes, sir.

Q. Rather than letting Ancil get it, is that right?

A. Yes, sir.

Q. And then I think you said Ancil reached for it, and about that time the car went off the road?

A. Yes, sir.

Q. All of this happened within a couple of seconds, didn't it?

A. Yes, sir.

Q. Ancil looked over in your direction not over a second or two, did he?

page 55 } A. No, sir.

Q. In other words, what I'm getting at is: He

Mr. Louis Howard Cox

didn't take his eyes off the road for more than one or two seconds, did he?

A. No, sir.

Q. And you all weren't horseplaying or anything like that, were you?

A. We were only talking.

Q. Right. But you weren't cutting up in the car or anything, were you?

A. No, sir.

Q. And then when the car went off the road, I think you yelled, or—you yelled I believe, didn't you?

A. Yes, sir.

Q. And at that time, as soon as the car went off the road and Ancil was doing his best to get it back on the road, wasn't he?

A. Yes, sir.

Q. He was fighting that steering wheel all the way, wasn't he?

A. Yes, sir.

Q. And he only went a short distance before you hit the stump. Isn't that true?

A. Yes, sir.

Q. In other words, when you went off the road, page 56 } you went a very short distance, and all the time he was trying to get back on before you hit the stump?

A. Yes, sir.

Q. All of this happened within two or three seconds, didn't it?

A. Yes, sir.

Q. The whole episode?

A. Yes, sir.

Q. Now up to the point that you went off the road, I say "you"—and I mean the car went off the road—no one had made any complaint to Ancil about his driving, had they?

A. No, sir.

Q. He had been driving slowly, so far as everybody was concerned, hadn't he?

A. Yes, sir.

Mr. Rogers: I believe that's all I have, Your Honor.

The Court: You may stand aside.

* * * * *

Dr. Young S. Kang

page 57 } DR. YOUNG S. KANG called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:

Q. I believe you are Dr. Young S. Kang, is that right, sir?

A. Yes, sir.

Q. And where do you practice medicine, Doctor?

A. Roanoke, Virginia.

Q. And how long have you practiced medicine?

A. Since—excuse me. Would you repeat the question?

Q. Yes, sir. How long have you been in the practice of medicine?

A. I graduated from medical school in '57.

Q. And what medical school was that?

Mr. Rogers: If Your Honor please, I'd be glad to stipulate the qualifications of Dr. Kang. I know that he is well qualified.

Mr. Davis: If Your Honor please, I appreciate Mr. Rogers being willing to stipulate that, but I would like to have the Jury have the benefit of his qualifications.

Q. Go ahead, Dr. Kang, give us your qualifications, please, sir?

page 58 } A. I went to medical school in Seoul University, Seoul, Korea; I graduated in '57. And do you want me to go all the way?

Q. Yes, sir.

A. I have been in training until '64; internship, four years of general surgery residency, and I had two years of plastic surgery residency and started practicing in July of '64 in Roanoke, Virginia, in the practice of reconstructive and plastic surgery.

Q. Are you associated with anybody, Dr. Kang?

A. Yes, Dr. Henry T. Brobst is my associate.

Q. Now did you have an occasion in September of this year, Dr. Kang, to examine this young man (indicating Plaintiff)?

A. Yes.

Q. Under what circumstances?

A. I was called by Dr. Marshall—take that back. In the record it says "referred by Dr. Marshall," but I'm not sure if I was called or that I was called from the emergency room after the arrival of the patient.

Dr. Young S. Kang

But this patient was referred by Dr. Marshall in Floyd, Virginia and in regard to his extensive nasal injury and facial injury following an automobile accident.

Q. Now, Dr. Kang, would you give the Jury, as best you can, the condition of Louis Cox as you examined him there in the emergency room on September the 24th?

page 59 } A. Yes. I saw him first approximately 10:30 P.M., September 24th, at which time the patient was suffering from severe facial injury, mainly on the nose. And it's actually a mangled nose, with a lot of irregular lacerations and moderately swollen. And he was also suffering from severe bleeding.

I have a photograph here that I took at the time of the treatment, after cleaning up all the draining of the blood, and when I was ready to do emergency surgery in the emergency room, so if you want to—

Q. Do you have a photograph there?

A. Yes.

Mr. Rogers: If Your Honor please, may I see the Court in Chambers before we get into that aspect of it?

The Court: All right, sir.

IN CHAMBERS AT 11:50 O'CLOCK A.M.

(Out of the presence of the Jury.)

Mr. Rogers: If Your Honor please, I want to object on behalf of the Defendant to the introduction of evidence of color slides or photographs of the Plaintiff taken at the time he was—of his admission to the hospital. I think they are highly prejudicial to the Defendant. I think the Doctor can describe the extent of the injuries, which will be sufficient for the Jury's purpose, but that the admission of the photographs, particularly color photographs, are prejudicial to the Defendant's viewpoint and I respectfully ask

page 60 } that they not be admitted. There is a Virginia case on that point, and I'm frank to say I do not have it with me because I didn't know it was coming up.

The Court: I think the Virginia case says it is discretionary with the Court, and if the Court is of the opinion that it would aid the Jury in the determination, that it should be admitted. And I feel that it would aid, and I have been in the same shape you're in, Bob, so I will overrule your objection.

Dr. Young S. Kang

Mr. Rogers: All right, sir, we note an exception.

(Thereupon, Court and Counsel returned to the Courtroom where the trial continued before the Jury as follows:)

(Thereupon a screen and slide projector were brought into the Courtroom.)

The Court: I expect that the Doctor can stand at the end of the table and move the screen around the other way.

Mr. Davis: Yes, sir. Can you all see the screen now?

By Mr. Davis (continues examination):

Q. Dr. Kang, I believe you told us that you took some pictures, made immediately prior to—

A. Yes, there are two views.

(Mr. Davis operated the slide projector and the witness was handed a pointer with which to demonstrate the views projected on the screen.)

page 61 } Q. Will you explain to the Jury, Dr. Kang, these pictures?

A. It is a limited view; the area is all washed out (indicating). Now it is all numbed, ready to be repaired. This is a side of the nose we call "ala" (indicating), and the laceration is hiding underneath of the nose. This base of the nose was evulsed (indicating) and the laceration extended underneath and goes to this area (indicating). And this nasal frame (indicating), which is already depressed to a certain extent, you notice this is a short—this injury involves this portion of the nose (indicating) and the side of the nose, and we call it "septum" (indicating).

The supporting part of the nose which divides the nostril in two parts were mangled, and broken fragments were at least, say a dozen and a half to two dozen; it is shattered.

At the time of the examination this frame (indicating) is only supported by clotted blood underneath and he actually did not have any boney frame (indicating). Another view, please.

(Second slide placed in projector.)

This is a view from the front, and you notice this laceration here (indicating) and the collapse. And these lacerations extend all the way up inside (indicating). And I can explain to you with the skull better than this picture later.

Dr. Young S. Kang

page 62 } And the treatment consisted of cleansing here—he was suffering from profuse bleeding—and sucking the clotted blood off and so forth. Stopping the bleeding was the main thing to be done at that time, and then repair these lacerations inside of the nose (indicating) and the anatomical layers as best you can, temporarily.

So after repair and some manipulation of the shattered fragments, this was actually—it is a frail thing, or just a hunk of meat (indicating) and molded up with a packing—that was the first operation that was done temporarily. And the second operation was done later, in about a week later, after this wound settles down and the swelling subsides. Then he was taken back to the operating room on October the 1st, where he was put to sleep because he was prepared, whereas the time we couldn't do it because we weren't sure about what is in the stomach, and if we did put him to sleep we'd lose the time and he'd be losing more blood and lead to an unnecessary complications.

Q. I understand he was conscious during this period, Doctor?

A. Yes, he was extremely restless. Well, he was suffering from pain and bleeding and fear, so he was extremely restless, but we were able to manage it after the numbing of the area. Next slide, please?

Q. Do you want it now?

page 63 } A. If you're going to show it later, it's all right.

Q. Doctor, will you take the witness stand, please, again, sir?

(Witness returned to the witness stand at this time.)

Q. Doctor, you have shown his condition immediately after he was cleaned up and immediately before this surgery began. That was the initial surgery on the 24th?

A. Yes, yes.

Q. What procedure was used by you on the 24th to correct this?

A. Repair—anatomical repair of the lacerated soft tissue, which includes inside of the nose and outside of the nose, and the so-called "closed reduction" means manipulate without looking at each, or identifying each fragment of the bones and insert some instrument into the nostril and hold it with the hand outside, and so forth, and sort of mold it in position as best you can. We call it "closed reduction of the nasal—"

Q. And that is molding the boney fragments as best you can in there with your hand?

Dr. Young S. Kang

A. Right.

Q. I understand. Now this second operation, what was that?

A. The second operation was that elevation of the depressed part. This involves—if you have a skull, I can point it out better.

page 64 } (Mr. Davis then procured skull and handed same to the witness.)

Mr. Davis: Any objection, Mr. Rogers?

Mr. Rogers: No objection.

The Witness: Thank you. This skull does not show it. There is a soft bone and the skull doesn't show it because you cannot preserve soft bone; this is an imitation skull (indicating); it is made by a plastic material, and the nose is confined on this area (indicating). You see the crease here, or the pyramid and, as you see, this nose is a structure that is lying over the sinus and located in the middle portion of the eye fossa—the eye socket. And his injury involved actually—now I'm not marking it—but both sides, from here beyond the nose and on both sides (indicating), and way back here (indicating). And this was crushed in (indicating), and also downward.

The separation between this portion of the bone and here (indicating) was about a sixth of an inch; this portion was wholly broke and was depressed. This involves the sinus, which we call "ethmoidal sinus". You are familiar with the "maxillary sinus" where you get pain when you suffer sinus trouble here (indicating).

There is a sinus behind this nose (indicating),
page 65 } the ethmoidal sinus, and part of the supporting bone is a component of this ethmoidal sinus, and those were all crushed in, inward and downward.

The second operation consisted of contemplating elevation of all those and block as much as you can, whereas also the further better manipulation of the shattered bone fragments, and those were consisting of the second operation. And also was able to examine through the soft lacerations in deep area, because the patient was asleep, and to see how the boney fragment is lying. And so the title of that operation was "open and closed reduction of the nasal bone".

And after that, if you're left alone, or after the elevation will sink because there is no supporting structure, so this nasal bone (indicating) had to be held by a metal plate and a wire through it. And this is a transfixation procedure. Those were the procedures done.

Dr. Young S. Kang

Q. Have you explained fully your procedure on the second operation, Dr. Kang?

A. Have I explained—

Q. Yes.

A. —the title is a "closed and open reduction in the nasal bone and transfixation of the nasal frame".

Q. And I believe pictures were taken following
page 66 } the second operation?

A. Yes, this was approximately nineteen days later, where he still has a metal plate to support the elevated nasal frame.

(Third slide placed in projector.)

Q. Would you point that out, please, Doctor?

A. (Witness then left witness stand and approached screen.) You see those metal plates (indicating)? That was holding through this wire (indicating) the elevated nasal frame, where he has a few scattered boney fragments, and those are healed scars at that time (indicating); his nose still carries it. Now even up to this point, in elevation, when the underlying structure behind the nose, which I have pointed out, the so-called "the framework of the ethmoidal sinus", if that wasn't collapsed there is no supporting ground structure, so that you can maintain so high.

And it's many times expected that possibly it will sink back to a certain extent, and I have reasoned to Mr. Davis what the future procedure is to be done to improve this disfigurement.

Q. All right. Were these wires, Doctor, do I understand they were (indicating)?

A. Yes, going through the nose.

Q. Going through the nose?

A. Right.

page 67 } Q. Now, they were to hold the metal plates on there?

A. Right.

(Fourth slide placed in the projector.)

A. As a profile then, though he has this metal plate, you notice (indicating) still, if you have viewed his previous picture.

Dr. Young S. Kang

Mr. Davis: I'm going to ask Louis, if he would—Louis, stand up here. Stand right in front of the Doctor and look over toward the window so that he can demonstrate this.

The Witness: Well, what I was going to compare with was a photograph of his prior to the injury. I'm trying to point it out, even though he underwent this procedure, he still has a depression and a shortening of the nose which you will notice by this (indicating).

Q. How about the lip, Doctor, what is that?

A. The lip still carries, yes, retraction is because of a shortening of the nose and also residual swelling. When you get the swelling it sort of draws (indicating) on this particular area, as at times it gives out. But in this particular instance, this is a pulling of the lip up because of the swelling (indicating).

(Witness then returned to witness stand.)

Q. Doctor, when did you see Louis again?

page 68 } A. He was dismissed from Jefferson Hospital on October the 7th, 1966, which is seven days after the second operation, and he was seen in the office on the 10th of October, October 19th, October 24th, and that was in '66. And January 16th and February 20th; '67; altogether, five occasions.

Q. Now tell us what your examination on October the 24th, Doctor, revealed, please, sir?

A. Here it is in the record (indicating). "Careful examination shows a shortening of the nose and a depression of the dorsal of the nose and a collapse." "Collapse" means, you understand, it's a narrowing of the lumen, the right nostril, right side of the nostril, and posterior narrows means inside of the nose on the floor (indicating), due to the deviation of the septum. "Septum" means one, you see in the middle (indicating), to divide the two compartments of the nostril. Due to the deviation of the septum—

Q. Was anything indicated to you in your examination on the 24th as to additional surgery?

A. Yes, I have recorded here that he will probably need sub-mucus resection to straighten the septum of the nose and to be able to breathe better, and a bone graft to be able to restore the nasal contour.

Q. Doctor, I believe the term—the medical term used is "rhinoplasty"?

Dr. Young S. Kang

A. Yes.

page 69 } Q. I believe that is where they get the name for the rhinoceros, is the nose, is that right?

A. Yes, sir.

Q. That is plastic surgery to the nose?

A. Yes.

Q. Now, when will that be done?

A. After the swelling has completely subsided. Where he still carries swelling and I expect it will be about at least six months to nine months somewhere.

Q. Now how long do you think he will be in the hospital, would you estimate, on that occasion?

A. The first procedure?

Q. Yes, for the first procedure.

A. Four or five days.

Q. Now the second procedure—the bone graft?

A. That will be a week to ten days at least.

Q. How about the scar revision, Doctor?

A. Scar revision, that comes later, and we usually keep them a couple of days each time.

Q. Will you be doing all this?

A. Yes.

Q. Now, did you see him on January the 16th, Doctor?

A. Yes.

Q. Would you tell the Jury about that examination?

page 70 } A. This patient was complaining of excessive tearing on the left eye, and irritation; there was some redness in the eye and there was excessive tearing on the lower punctum. Dr. Tuck can explain this pathology better than I can later.

This is a drainage system of your tear—the tear comes from the upper lateral side of the eyelid (indicating) and cleans your eye, and it drains to a medial part of the eye and drains into the nose. You have two openings and a sac, and there is an opening inside of the nose (indicating): and I consider this was due to the obstruction of the tear sac, due to the fracture and subsequent irritation and the scarring, which will interfere with the drainage of the tear. And when the flow becomes slow, you tend to get infection and therefore, he was having trouble in the eye.

So this patient was referred to Dr. Kenneth Tuck, who specializes in ophthalmology in Roanoke, and he has been followed by him.

Q. Dr. Tuck—Dr. Kang, excuse me. Could you give the

Jury your medical opinion concerning complete recovery and facial features of this young man in the future?

A. There will be a considerable permanent disfigurement in spite of putting such effort to rebuild as best you can.

Q. Now in your medical opinion, Doctor, when was this young man able to return to work?

A. Following the initial injury?

Q. Yes, sir, following the initial injury.

page 71 } A. I gave approximately six weeks from the date of the injury because as you put your face down (indicating), where it was injured you still have residual swelling and there will be throbbing to a certain extent, and there will be quite a discomfort.

Mr. Davis: Your witness.

Mr. Rogers: I have no questions.

The witness stands aside.

Mr. Davis: If Your Honor please, I know it's getting close to lunch time, but if we could get Dr. Tuck—

The Court: All right, let's continue until 1:00 o'clock.

Mr. Davis: Thank you, sir. Dr. Tuck.

DR. KENNETH TUCK called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:

Q. I believe you are Dr. Kenneth Tuck?

A. That's correct.

Q. And I believe you are from Roanoke, Dr. Tuck?

A. Yes.

Q. How long have you been in the practice of medicine?

page 72 } A. Since 1958.

Q. Would you give the Jury the benefit of your experience?

Mr. Rogers: If Your Honor please, again in the interest of saving time, I would be happy to waive his qualifications.

Mr. Davis: I prefer, Mr. Rogers, also in saving time, but I would like for the Jury to have the benefit of his knowledge.

The Witness: I graduated from the University School of

Medicine in 1958, completed a year of internship in the Cleveland Methodist Church in Cleveland, Ohio in 1959, and then had a residency at the Mayo Clinic in ophthalmology for three and a fourth years. From the years 1961 through '64.

Q. And when did you come to Roanoke, Doctor?
A. October of 1964.
Q. And you have been in practice there ever since?
A. That is correct.
Q. Who are you associated with in Roanoke?
A. With Dr. W. Conrad Stone.
Q. Now, do you know this young gentleman sitting beside me?
A. I do.

Q. When did you first have an opportunity to
page 73 } see him, Dr. Tuck?
A. He was first seen by me December 17th, 1966.

Q. And how did you happen to see him?
A. He was referred by Dr. Young Kang.
Q. The same gentleman that just is packing up his bag?
A. The same gentleman.
Q. Now, would you tell us, or give us the benefit of your first examination, Dr. Tuck, if you would, as to what you found?
A. At that time we found moderate redness of the left eye (indicating), associated with profuse tearing and with considerable pus between the lids of the left eye.
Q. In layman's language, could you say that the eye cried all the time?
A. That is correct.
Q. What was the cause of this, Doctor?
A. My tests indicated the cause to be a blockage in the tear ducts.
Q. Would you tell us what your tests were?
A. We have a test where we irrigate fluid through the tear duct and in the normal person the solution will go right on through the nose, into the nose and down the throat. In his case there was a reflux or back flow of the material, back up into the eye.

page 74 } Q. As I understand it, normally where it would go on through, it backed up in his case?

A. That's right, ahum.
Q. Now what did you prescribe with reference to treating this man?
A. I prescribed some topical eye drops, eye medications,

and at one point *pencillin,* and indicated that this would only be a temporary measure, that he would need surgery for a permanent cure.

Q. The only way, as I understand it, it could be cured from you is by surgery?

A. That is correct.

Q. Was that performed?

A. This surgery was performed.

Q. Now when did that occur?

A. This occurred on February 24th, 1967.

Q. Last week?

A. Last Friday, one week ago today.

Q. Now would you tell the Jury, Dr. Tuck, what you did in this operation?

A. The name of the procedure is "dacryocystorhinostomy" and I think I could better explain what was done if I could diagram this.

Q. All right, sir.

(Witness went to easle and drew diagram on large drawing paper.)

page 75 } The Witness: Large enough to be seen?
The Jury: Yes.

The Witness: This is the pupil (indicating); these are the lid margins here (indicating). Now we have—there is an opening into the tear ducts on the inner part of the upper lid (indicating) and the lower lid (indicating) that drain the tears from the eye. These follow the ducts down to a larger structure called "tear sac" (indicating), and then there is normally an opening from the tear sac into the nostril (indicating).

Just imagine this being inside of your nose here. The tears flow this way (indicating), down into the nose; and he had a blockage at this point from displaced boney fragments, scarring and so forth (indicating), and this was a permanent block.

Now the operation that was performed was to make an incision over the tear sac, which is between the inner corner of the eye and the nose (indicating), and expose this sac and then make an opening through the bone in the nose, right here (indicating), and make an opening in the sac here (indicating), so that you have created a new opening for the tears to flow through the sac into the nose.

Dr. Kenneth Tuck

Q. How was that opening made, Doctor?

page 76 } A. It is made with a drill.

Q. A regular drill, just drill the hole in the bone there?

A. Yes, sir, we make it in this particular case, it was about seven or eight millimeters, or about the size of a finger (indicating).

Q. Now that was done last Friday, Doctor?

A. That is correct.

Q. I believe you followed him as a patient in the hospital?

A. That's correct.

(At this point the witness returned to the witness stand.)

Q. When was he discharged? Do your records show that?

A. Yes. (Witness referred to notes.) Discharged on March 1st from the hospital.

Q. Now this operation, was it successful?

A. After he was discharged from the hospital I saw him in my office and I performed one of the original tests to see if this opening was functioning, and it was, so I would consider it a success at this point.

Q. You qualified it, "at this point". Do you expect to see him again?

A. Oh, yes, I expect to see him again.

page 77 } Q. Do you anticipate any additional surgery procedures?

A. I do not. However, there occasionally one does get a closure of these in about fifteen per cent of the cases, according to authoritative sources.

Q. But as far as you can tell, you did a pretty good job, is that right?

A. I think so.

Q. Now this trouble, or the constant tearing, do I understand, Doctor, that in human beings they pretty much cry all the time, except they cry inside rather than out?

A. Yes.

Q. And if you block up the passage, then there is no place else for it to go but outside?

A. That is correct.

Q. And that is what this boy's condition was?

A. That was one of his problems, yes.

Mr. Davis: Your witness.

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DONNY QUESENBERRY called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:
Q. You are Donny Quesenberry?
A. Yes, sir.
Q. I believe you were a passenger in this automobile on September 24th, when you had an accident?
A. Yes, sir.
Q. Where had you been that afternoon, Donny?
A. Playing football at the Elementary School building.
Q. And what time did you leave?

Mr. Rogers: Excuse me one second, Mr. Davis. Donny, I'm going to ask you the same thing I did Louis,
page 79 } would you mind looking at these people on the Jury and the Judge so I can hear you and they can hear you?
The Witness: Yes, sir.

By Mr. Davis:
Q. What time did you leave the Elementary School?
A. I don't know exactly; it was something around 5:00, something like that.
Q. And where were you going when you left there?
A. Home.
Q. Were you a passenger with Ancil—was Ancil driving his car?
A. Yes, sir.
Q. Where were you sitting in the car, Donny?
A. In the middle of the front seat.
Q. And who was on your right?
A. Louis.
Q. And who was in the back seat?
A. Gary and Roy Quesenberry.
Q. That is Gary Quesenberry?
A. Yes, sir.

Donny Quesenberry

Q. Now as you left the school, you went on, I believe it is south on 787, is that right?

A. Yes, sir.

Q. Do you recall what was being discussed or anything?

A. I don't know exactly. I think we was talking
page 80 } about playing football.

Q. Did the automobile stop anywhere?

A. Yes, at the Baptist Church.

Q. What did it stop for?

A. Ancil was chewing tobacco and he spit.

Q. He stopped the car to spit it out?

A. Yes, sir.

Q. And then what happened?

A. Well, he went on down the road and Louis offered Ancil a piece of candy bar, and Ancil said he would take it, and when he was handing it over I took it and put it in my mouth and Ancil tried to take it.

Q. Louis had a candy bar in his hand that he had bought previously in the afternoon, is that right?

A. Yes, sir.

Q. And he said—he asked Ancil if he'd like to have a piece?

A. Yes, sir.

Q. Did he ask you?

A. No (laughter).

Q. And he handed it over towards Ancil?

A. Yes, sir.

Q. And—

Mr. Rogers: Excuse me, Mr. Davis. Judge, I don't like to keep objecting, but he is leading the witness.
page 81 } The Court: You have been leading all the witnesses, please stop.

Mr. Davis: All right, sir, I will retract that. I was just going over his testimony.

The Court: Just ask him to tell what took place.

By Mr. Davis:

Q. All right, sir. What happened when the candy bar was reached from Ancil?

A. He was reaching it across and I reached out and got it and stuck it in my mouth.

Q. Did you get it all the way in your mouth?

A. Yes, sir (laughter).

Q. And what did Ancil do?

Donny Quesenberry

A. He must have thought I still had it and he reached over to get it, and when he looked off the road the next thing we knew we done hit the stump.

Q. He was reaching over in your direction to get the candy bar, is that right?

A. Yes, sir.

Q. Did he get it?

A. No.

Q. Now how long was this before the car went off the highway?

A. Just in a very few seconds.

page 82 } Q. When did you first realize that the car had gone off the highway?

A. When Louis hollered and tried to tell him to get back in the road.

Q. Did the car ever get back in the road?

A. No.

Q. Do you know what speed the car was going?

A. I don't know exactly; it was something around twenty-five or thirty miles an hour.

Q. Were the brakes ever applied?

A. Not as I can remember.

Q. Did the car swerve from one side to the other?

A. No.

Q. Went straight into the stump?

A. Yes, sir.

Q. How bad was Louis Hurt?

Mr. Rogers: If Your Honor please, I object to that.

The Court: I sustain the objection.

By Mr. Davis:

Q. Did you see Louis following the accident?

A. Yes.

Q. What was his condition?

A. He was bleeding a lot and his nose looked like it was turned up kind of (indicating), and his eye looked

page 83 } like it was sort of cut around it or something and bleeding a lot.

Q. Were you hurt, Donny?

A. Yes, I had two bones broke in my hand (indicating) and a few knots and bruises?

Q. How were they broken?

A. I think I hit them on the dash. I don't know, it happened so fast.

Donny Quesenberry

Mr. Davis: Your witness.

CROSS EXAMINATION

By Mr. Rogers:

Q. Donny, you have seen Louis since this accident, haven't you?

A. Yes, sir.

Q. And played basketball with him a number of times?

A. Yes, a few times.

Q. And he had been out to play all right, hasn't he?

A. Yes, but he gets tired real easy.

Q. But he plays pretty well, doesn't he?

A. Yes.

Q. All right. Now, Donny, you were riding in the middle between Louis and Ancil here, weren't you?

A. Yes, sir.

Q. And you all were all good friends, weren't you?

A. Yes, sir.

Q. And as I understand it, Louis was handing
page 84 } Ancil a piece of candy, and you were the culprit
and you reached in and grabbed it and put it in your mouth, isn't that what happened?

A. Yes.

Q. And you didn't actually see Louis reach, or see Ancil reach for the candy bar, did you?

A. Yes, sir.

Q. Did you see him reach for it?

A. Yes, sir.

Q. And all of this happened within one or two seconds, didn't it?

A. Yes, sir.

Q. In other words, Donny, Ancil didn't have his eyes, or take his eyes off the road for more than a second or two, did he?

A. No.

Q. And when the car went off the road, did you feel it go off the road?

A. Yes, it started to bumping and hitting bumps.

Q. Yes. The right front wheel went off the road first, didn't it?

A. Yes.

Q. And as soon as that car went off the road, Ancil was trying to get the car back on the road, wasn't he?

A. Yes, sir.

page 85 } Q. And he was fighting that steering wheel, trying to get the car on the road, right on up to the point where it hit the stump, wasn't he?

A. Yes, sir.

Q. I think that you indicated that after you all left the school you went a short distance and stopped there at the Church, didn't you, in front of the Church?

A. Yes, sir.

Q. And that is when Ancil stopped and spit out the tobacco?

A. Yes, sir.

Q. So you all had only gone a real short distance, hadn't you, before this car went off the road?

A. Yes.

Q. And it was at the point that Ancil reached for the candy bar, or looked over towards your direction, that the car went off the road, isn't that right?

A. Yes.

Q. Now prior to the time the car ran off the road, nobody had complained about Ancil's driving, had they?

A. No.

Q. And as far as you're concerned, he had been driving very safely and carefully, hadn't he?

A. Yes, sir.

Mr. Rogers: I believe that's all.

The witness stands aside.

page 86 } ROY LEE QUESENBERRY called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:

Q. You are Roy Lee Quesenberry?

A. Roy Stevens.

Q. Roy Stevens is it?

A. Yes, sir.

Q. And how old are you, Roy?

A. Fifteen.

Q. You were a passenger in this accident when it wrecked on September of last year?

A. Yes, sir.

Q. Where were you riding?

Roy Lee Quesenberry

A. In the back, on the left.
Q. Back, on the left?
A. Yes, behind the driver.
Q. Behind the driver?
A. Yes, sir.
Q. Now after you left the Elementary School, what happened then?
A. Well, we went on down, just about a car-length or two past the Church and he stopped and spit out some tobacco, and then he started off again. And I say he was
page 87 } doing about twenty-five or thirty, and then Louis started asking him if he wanted some candy and he said he did. And he reached it over that way (indicating) and then Donny got it, and Ancil looked off the road and just run off.
Q. Did you seen Ancil reach for it?
A. No.
Q. You were in the back seat?
A. Yes.
Q. Could you see what the speedometer was?
A. No.
Q. You were just estimating?
A. Yes.
Q. Now what happened when you say Ancil looked over there? What happened then?
A. Louis told him that he was running off the road and he tried to get it back on, but he couldn't.
Q. Eventually hit the stump?
A. Yes.
Q. Did you see Louis after the accident?
A. Yes, sir.
Q. What was his condition?
A. He was bleeding real bad and his nose was cut up pretty bad.

Mr. Davis: Your witness.

page 88 } CROSS EXAMINATION

By Mr. Rogers:
Q. Roy, after you all left the school there, you remember stopping there at the Church and Ancil spitting the tobacco out?
A. Yes, sir.
Q. And he brought the car to a complete stop, didn't he?

A. Yes, sir.
Q. I believe Louis bought that tobacco, hadn't he?
A. Yes, sir.
Q. Did he give you any?
A. No, I don't chew (laughter).
Q. Then he went a short distance, or you all just went a very short distance from the Church before the car went off the road, didn't you?
A. Yes, sir.
Q. And you indicated he was going about twenty-five or thirty miles an hour?
A. Yes.
Q. Now, as I understand it, from what you could see from where you were sitting in the back seat, Ancil took his eye off the road a second or two to look over at Louis?
A. Yes, sir.
Q. Louis had asked him about a candy bar and
page 89 } Ancil looked over to see where it was. Isn't that about what it amounted to?
A. Yes, sir.
Q. That didn't take—let's start that again. Ancil didn't take his eye off the road more than second or two, did he?
A. He was about two seconds I guess.
Q. About two seconds?

Mr. Davis: If Your Honor please, I have been sitting here, the same as Mr. Rogers has, and I'd like for Mr. Rogers to let the witness testify as to how long he had been looking off the road.
The Court: The only difference is that he is cross examining him and has a right to lead him on cross examination, and on your direct you do not.
Mr. Davis: I understand, sir.
The Court: And I overrule the objection. Go ahead.

By Mr. Rogers (continues examination):
Q. And, as I understand you further, Roy—I'm trying to finish up here—that about the time that Ancil took his eye off the road to look over at Louis, was when the car went off the road?
A. Yes, sir.
Q. And it is true too, isn't it, Roy, that when the
page 90 } car went off the road, Ancil was immediately fighting to get it back on the road?
A. Yes, sir.

Q. Could you see him fighting the steering wheel?
A. Yes.
Q. And you all went just a short distance before you hit the stump?
A. Yes, sir.
Q. Did it go off the road somewhere in the area of the mailboxes.
A. I think it was just a few feet past the mailbox.
Q. A few feet past them, all right, sir. Now prior to the time the car went off the road, nobody yelled or complained about Ancil's driving, did they?
A. No.
Q. And as far as you're concerned, he was driving carefully and safely, wasn't he?
A. Yes, sir.

Mr. Rogers: That's all the questions I have.

The witness stands aside.

GARY QUESENBERRY called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

page 91 } By Mr. Davis:
Q. Gary, I believe you were also in the back seat on this occasion, is that right?
A. Yes, sir.
Q. How old are you, Gary?
A. Thirteen.
Q. Now what happened after you left the Indian Valley School there, Gary?
A. We went down there and Ancil stopped and opened the door and spit out his tobacco, and we went on down the road and Louis asked Ancil if he wanted a piece of candy bar. And Ancil said, "Yes," and he started to reach over there that way (indicating) and Donny reached out and got it and stuck it in his mouth.
And Ancil was reaching over to get the candy bar back and saw that he was off the road, and Louis hollered and told him he was off the road, and he was fighting to get it back on the road and he hit the stump.

Mr. Davis: Your witness.

Mr. Rogers: I can't add anything further to that, Judge, that was a good summary.

The Court: Stand aside.

* * * * *

page 92 } MRS. EDNA *MALINDA* QUESENBERRY called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:

Q. You are Mrs. Edna Quesenberry?

A. That's right.

Q. And where do you live, Mrs. Quesenberry?

A. Indian Valley.

Q. Do you know this young man sitting beside me?

A. Yes, sir.

Q. Where does he live?

A. He lives with me; he is a welfare boy; I took him when he was eleven years old.

The Court: Just answer the questions, please, Mrs. Quesenberry, don't elaborate on them.

By Mr. Davis:

Q. How long has he lived with you, Mrs. Quesenberry?

A. About eight years.

Q. What type of boy is he?

A. Well, he's a good boy; he is good to help us and he's an active boy. I think a lot of him.

Q. Since this accident have you noticed any difference in his being able to do things?

A. He is not able to do anything hardly; can't
page 93 } stand work at all.

Q. How about the chores around the farm?

A. Well, he helps us, but he gets tired and he is easy to give out.

Q. Have you noticed any difference in his personality?

A. Yes, some. Just that he just don't feel good.

Q. How has he been getting along since the accident, Mrs. Quesenberry?

A. Well, very good I reckon.

Mr. Elmer Quesenberry

Mr. Davis: Your witness.
Mr. Rogers: I have no questions.
The Court: Stand aside, Mrs. Quesenberry.

The witness stands aside.

MR. ELMER QUESENBERRY called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Davis:
Q. Mr. Quesenberry, I believe you live in Indian Valley?
A. Yes, sir.
Q. Would you state your full name, please, sir?
A. Elmer Quesenberry.
page 94 } Q. I believe you are the husband of Mrs. Edna Quesenberry here?
A. Yes, sir.
Q. Louis, I assume, also lives in your home, is that right?
A. Yes, sir.
Q. What is your occupation, Mr. Quesenberry?
A. Well, I farm a little and run a little dairy.
Q. How long has Louis lived with you, Mr. Quesenberry?
A. I believe he come there in '59; I'm not positive. I think that's the year he come there, in about June of '59.
Q. Now while he's been with you, does he assist you on the farm?
A. Oh, he helps some. He helps me some, and when he worked away some, and he helped me some. He's helped a lot. He helps around the barn and he's helped out on the farm some, and he's worked away some.
Q. Is he living with you now?
A. Yes, sir.
Q. Have you noticed any difference in Louis since the accident?
A. Oh, yes, he don't sleep good; he snores and struggles of a night, and talks in his sleep. And he's been out helping me cut a little wood a few times and he's weak and nervous. And he is—I call him in a bad shape myself.
page 95 } Of course, he may get over it, but now at the present time—I'm talking about now—and he's lost weight and he sleeps awful bad. We hear him of a night asnoring and atalking in his sleep and coughing and he's up

Mr. Elmer Quesenberry

and down of a night, doctoring on his nose. He's in a bad shape.

Mr. Davis: Your witness.
Mr. Rogers: No questions.

* * * * *

page 98 }

* * * * *

Mr. Davis: All right, sir. Plaintiff rests.

Mr. Rogers: All right. At the conclusion of the Plaintiff's evidence in the suit of Louis Cox versus General Ancil Duncan the Defendant, General Ancil Duncan, by Counsel respectfully moves the Court to strike the evidence of the Plaintiff and to enter summary judgment in favor of the Defendant on the grounds that the evidence of the Plaintiff has failed to establish gross negligence, failed to establish that the Defendant was guilty of any gross negligence which proximately contributed to the injuries complained of in this lawsuit.

If Your Honor please, the Defendant would like to tender to the Court a sheet out of the Southeastern Reporter, 151 S.E. 2d 378, *Long* versus *Eanes*. This is a case decided by the Supreme Court on November 28th, 1966 and it is a gross negligence case in which the Court ruled as a matter of law that the Defendant was not guilty of gross negligence under the evidence in that case.

The Court: What Virginia citation is it?

Mr. Rogers: Judge, I'm sorry to say I don't have the Virginia citation. *Long* versus *Eanes*. Let me see if I can find it or identify it.

The Court: It would be in the Advance sheets, and I don't have the Advance sheets.

Mr. Rogers: It would be in 207 or 208. In that page 99 } case, Judge, this involves a situation similar to the case at Bar, in which the driver took his eyes off the road—took her eyes off the road to cover a baby with a shawl, to keep the sun out of the baby's eyes and lost control of the vehicle. The opinion cites several other cases which are similar to the case at Bar, in which the conclusion was reached by the Court of Appeals that as a matter of law the evidence of the Plaintiff had failed to show gross negligence.

(Sheets handed to the Court for inspection.)

Mr. Davis: Are you through?

Mr. Rogers: Yes. Excuse me, I wanted the Court to read that.

The Court: They go back to the *Finney* against *McDaniel* case, which is in 206 Virginia.

In the *McDaniel* case, that case happened in Lynchburg, and the driver looked down at the gear shift.

Mr. Rogers: Yes, sir.

The Court: All right, Mr. Davis, what about it?

Mr. Davis: If Your Honor please, I would like to comment on the case cited by Mr. Rogers in the *Long* case. In that case Justice Gordon goes to great lengths in his decision to state that the driver, after inadvertently looking down to cover the baby's eyes and going off the road, only had a distance of thirty-six feet in which to correct the situation.

page 100 } He stated that the automobile was being driven at approximately thirty miles an hour and that the reaction time before the driver realized it would have been thirty-three feet. He states that under these circumstances that the driver would only have had a three-foot leeway to have corrected the situation once she found out. Again this is the case of inadvertent looking off, this particular case in question, whether they lean down to shade the baby's eyes—I believe she put a shawl over the baby's eyes turning a curve, and she ran off the road. She only traveled thirty-six feet after going off the road at a speed of thirty miles an hour, and the Court held that—Justice Gordon states and reiterated three or four times in there that after she was aware of her situation she still had only three feet before she hit the telephone pole.

Now, in the *Chappel* versus *White,* 182 Va. 625, "the Defendant was driving her automobile at thirty-five to forty-five miles an hour, and inadvertently permitted her automobile to travel to the extreme left side of a three-lane highway and then, realizing her danger, grabbed the top of the steering wheel but permitted her automobile to travel with undiminished speed seventy-five to ninety feet diagonally across the left shoulder of the highway."

Those are the same distances that the Court has in this case, ninety feet in the present case that the Court has before it, that the car went off the highway at an un-

page 101 } diminished speed, as far as the evidence now is before the Court. And the brakes were never touched before he went into this stump.

The Court held that "the Defendant in this case did not attempt to turn her automobile nor apply brakes. The automobile turned over and the Court held that reasonable men could differ as to whether these facts and proper inferences therefrom proved gross negligence."

In the *Coughman* versus *Feinberg* case—it is a Massachusetts case that has been cited in the *Chappel* versus *White* case and the *McDowell* versus *Dye* case, which are recent Virginia cases. There "the Defendant over the Plaintiff's protests, removed a suitcase from the floor of the front of the automobile to the back of the automobile while traveling between thirty and thirty-five miles an hour. The car ran off the road and struck a tree, injuring Plaintiff. The Court in that case "held that one or more *indicia* of gross negligence is deliberate inattention to the operation of the automobile and that such inattention is evidence of want of even scant care. The Court held the Defendant was guilty of gross negligence."

In the cases that have been previously cited to this Court, that is *McDowell* versus *Dye*—there "the Defendant operated an automobile in a restricted speed zone of fifteen miles an hour at a speed of twnety-five to thirty-five miles per hour, deliberately diverted her attention from the highway in front of her and turned to the rear seat to secure a Coca-
page 102 } Cola, and the Court held 'Defendant, without slacking her speed, turned in her seat, reached for the Coca-Cola with one hand off the steering wheel and her eyes focused on the Coca-Cola instead of the road. In this situation her attention was diverted from the business of driving and an obvious risk was incurred' ". The Court further stated in the instant case that it was a Jury question as to whether or not the Defendant was guilty of gross negligence under the facts and circumstances proven.

The Court went on to say that "there are many cases which hold that the deliberate inattention to the operation of an automobile constitutes important evidence of gross negligence". It cites the three Massachusetts cases that are cited in the *McDowell* case and they say "said cases are readily distinguishable from the holding that momentarily turning of the eyes from the road is not of itself gross negligence".

The *McDaniel* versus *Wren* case is another case in point: "The host driver momentarily looked from the road to gear shift in an effort to change gears moments before crashing into tree, injuring guest passenger." That is similar to the case the Court just referred to from Lynchburg. They held in this case, and they said "that the present case is readily distinguishable from the *McDowell* versus *Dye* case upon

which the Plaintiff relies, in that case the driver, proceeding in excess of the speed limit, deliberately took his eyes off the road and attempted to accept a drink from the passenger in the rear seat. In so doing she lost control of
page 103 } the car, crashed into a utility pole injuring a passenger." There the driver was deliberately inattentive to the operation of the car. In the present case the driver momentarily took his eyes from the street and failed to observe the direction in which the vehicle was going. His conduct amounted to no more than inadvertence or lack of ordinary care.

In the most recent case of *Smith* versus *Prater*: "One of the more common *indicia* of gross negligence is deliberate inattention to the operation of an automobile. If it is shown that the conduct of the Defendant was deliberate, that fact constitutes important evidence on the question of gross negligence." It goes on to say "gross negligence, like all other kinds of negligence, is ordinarily a question of fact for the Jury and only becomes a question of law for the Court when, under the applicable rules of negligence, reasonable men should not differ as to the proper conclusions to be drawn from the evidence".

Now, if Your Honor please, the evidence before this Court —all the evidence before this Court, from the passengers and from the Plaintiff himself, is that the driver of this automobile, traveling at thirty miles an hour, did deliberately take his eyes off the highway and endeavored to secure a piece of candy that was already in the mouth of a passenger. The passenger from whom he was trying to secure this candy said "he reached over to get it".

The Plaintiff said "he reached over to get it",
page 104 } and the two boys in the back seat—one of them said "he reached over to get it" and the other one said "I didn't see it". But he has deliberately taken his eyes off the highway, he has conducted himself in such a complete disregard of the safety of the passengers in that automobile, and it has certainly created a Jury question as to whether he is guilty *or* gross negligence or not.

The Court: I overrule the motion.

Mr. Rogers: If Your Honor please—you overrule the motion?

The Court: Yes. It is on a motion to strike. Now viewing it in the light most favorable to the Plaintiff, I think reasonable men could differ as to whether it was inattention or whether it was negligence; and if so whether it was negligence so culpable as to bring it within the guest doctrine.

Mr. Rogers: Well, if Your Honor please, we'd like to note

our exception to the Court's ruling on the basis of the three most recent cases in the Court of Appeals and, of course, on the grounds that the two cases cited by the Plaintiff are distinguishable, specifically the *Chappel* case.

And the Court of Appeals in the *Long* case very carefully noted that in that case the Defendant just a moment permitted her vehicle to travel at undiminished speed of seventy-five to ninety feet, diagonally across the left shoulder of the road and made no attempt to turn her automobile
page 105 } toward the center of the highway. And of course, in the case at Bar all the evidence is the Defendant was fighting to get the car back on the road.

The Court: Off the record.

(Discussion off the record.)

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

(Instruction No. 1 was then offered by the Plaintiff.)

Mr. Rogers: Now, if Your Honor please, Defendant objects to Instruction No. 1 on the following grounds—I assume you're calling this instruction No. 1?

The Court: Yes.

Mr. Rogers: —on the following ground: First, the Defendant—and if I may do so, I will do it at this time—objects to all instructions or any instructions being given for the Plaintiff on the basis of the motion made by the Defendant previously to strike the Plaintiff's evidence. And that I may assume that we can take exception to the Court's ruling against this in that regard.

Secondly, the Defendant objects to this instruction No. 1 on the grounds there is no evidence of improper lookout or improper speed in this case. If there is anything here, it could only be control I believe, and so we would object to it.

Defendant further objects to the instruction be-
page 106 } cause it improperly defines the duties on the driver with respect to gross negligence. The words "reasonable care" are used twice in the instruction, suggesting that the Plaintiff need show only a failure on the part of the Defendant to exercise reasonable care, and the Defendant therefore objects to the instruction as not properly outlining the duties of the Defendant with respect to a guest passenger.

The Court: Well, I will agree with you on speed. I will

disagree with you on the lookout; I think he is entitled to an instruction on lookout and also on control, there being no evidence of speed.

As to reasonable care, the Court of Appeals in the last two cases, doing away with the slight care rule, has this to say: This is in the case of *Barham* against *Virginia National Bank,* and so forth, 206 Virginia 153—and where that old slight care instruction was given, which had been given for years, and they said it was wrong. And said "that the instruction is misleading and prejudicially erroneous. It told the Jury that it was the duty of the Defendant Barham to exercise slight care as to the four duties enumerated, and that if she failed to exercise slight care in any one or more of the duties she was grossly negligent. The four duties enumerated in the instructions indicate to the average person those duties necessary to be performed in the exercise of ordinary care."

It goes on to say "the Defendant's general
page 107 } duty was to exercise reasonable care; but she
was liable to her guest passenger only if she was grossly negligent in failing to do so. Gross negligence is "that degree of negligence which shows an utter disregard of prudence amounting to the complete neglect of the safety of another' ". Since the instruction failed to clearly define the difference between ordinary and gross negligence, it was misleading and confusing."

Then again in the case of *Wallower* against *Linda Falwell Martin,* and so forth, 206 Virginia 493, they reiterated the same thing. Now this instruction of Mr. Davis which he has offered is one given by me after working about thirty minutes with Senator Tuck, and I have given it considerable thought since and I think the last paragraph should be amended somewhat to give the definition of gross negligence at that point rather than to referring to it as being given in another instruction. With those corrections, I think that the instruction would be all right.

Mr. Davis: Let me get my exception in.

Mr. Rogers: Let me make the suggestion, Dick, if I may, because both of us are going to make exceptions. The Judge is going to dictate a new one; I think it would be better for both of us to find out what we've got.

The Court: So I will refuse No. 1 as offered and give it as dictated.

Mr. Rogers: May we hold out objections until
page 108 } we see it when it is typed?

The Court: Yes.

(Instruction No. 2 offered by the Plaintiff.)

The Court: I will give Instruction No. 2.

Mr. Rogers: Defendant objects to Instruction No. 2 on the grounds that the instruction does not properly set forth the law as applicable to the case at Bar; on the further ground that the instruction defines simple negligence when we are dealing with gross negligence.

The Court: I think that that is primarily for your benefit. Actually I think the Jury has to be given the definition of the two. One, simple negligence; the other, negligence, in order to see the distinction between the two.

Mr. Rogers: I appreciate that, Your Honor. I would just rather do it myself (laughter).

The Court: You can do it.

Mr. Rogers: We note an exception to the Court's ruling.

(Instruction No. 3 offered by the Plaintiff.)

Mr. Rogers: With respect to Instruction 2, the definitions as contained therein are further objectionable on the grounds that in the setting in which they are contained it is confusing to the Jury. There are just four or five definitions
page 109 } set forth without any particular explanation or logical setting for them, and we think they would be confusing to the Jury and while we intend to offer instructions on the definitions, we intend to explain them in the instruction or their relation to the case. And we think Instruction 2 is confusing to the Jury.

The Court: I don't think it is confusing, but let your objection show.

Mr. Rogers: And note the exception also.

Mr. Davis: Instruction No. 3, Your Honor, only stated that until it became clear—

The Court: But it hasn't been any question raised about it.

Mr. Davis: No, sir, but I don't think I want the Jury to think that maybe this boy shouldn't have handed any candy over, or even offered any candy; I think that we are entitled to the instruction that he was under no duty to direct or control the operation.

The Court: I think you are just throwing road blocks in your own way, and what I'm trying to do is get as few instructions as I can to this Jury because I know these Floyd County juries, the fewer you have the better off you are. And there is nothing in there for this.

In other words, there's been no contention made and no evidence of the fact that he should have been directing it. You are not raising any such question, are you?

page 110 } Mr. Rogers: No, sir, we object to Instruction 3 on the grounds that it is inappropriate under the evidence in the case; it is improper under the evidence.

The Court: I think it is. Do you want to withdraw it?

Mr. Davis: No, sir.

The Court: All right, I'll mark it refused.

Mr. Davis: Counsel wants to except to the refusal but I guess we're going to do that at one time. But I do want to get it in.

I want to introduce the table of speed and reaction time; nothing else, no stopping distance, no breaking distance, no nothing, just the speed and the reaction time for which there should be no evidence.

The Court: Well, refused. I will refuse it as offered. Well, I can't give it as offered.

Mr. Davis: The only thing we're offering, Judge, is for the speed and the reaction time of the driver.

The Court: Well, in the first place the table, as set out in the Code, the Court of Appeals has said if you give any of it you give it all, and further that in order to give it you must have evidence showing that your vehicle was equipped with four-wheel brakes, empty except for the driver, on a level road, free of loose materials, dry and so forth.

page 111 } And there is no evidence that such a situation existed. And the instruction will be of no benefit to the Jury, and for that reason I am refusing Instruction No. 4.

Mr. Davis: All right, Plaintiff excepts to the ruling of the Court in refusing Instruction No. 3—

The Court: No. 4.

Mr. Davis: —No. 4, excuse me. And in that there is evidence as to the speed of the automobile and the distance that it traveled, and on the recent case of *Lang* versus *Eanes*, Justice Gordon went into great lengths as to the reaction time of the driver. The speed is the same as in the *Lang* case, except the distance is approximately three times the amount as in the *Lang* case.

The Court: There is no reaction time involved here because the evidence is that there were no brakes ever applied.

Mr. Davis: That's right, sir, but the reaction time is when he became aware of his circumstances so that he could correct it. I do except to the Court's ruling and refusal to give Instruction No. 4.

(Instruction No. 5 offered by the Plaintiff.)

Mr. Davis: If Your Honor please, we'd also like to offer an instruction that—

Mr. Rogers: Shouldn't that be "preponderance of the evidence", Judge, Instruction No. 5?

page 112 } Mr. Davis: That was copied *verbatim* out of the Doubles. Have you got the Doubles, Judge?

Mr. Rogers: I'm just wondering, normally we add "preponderance" in there and make it "preponderance of the evidence".

The Court: Yes, "preponderance of the evidence".

Mr. Davis: That's in your last paragraph.

The Court: First paragraph.

Mr. Rogers: And change it in the others, particularly in the first paragraph.

(Instruction No. 6 offered by the Plaintiff.)

Mr. Davis: Now, if Your Honor please, we have—let's see, this is Quesenberry's life expectancy. Mrs. Quesenberry's life expectancy. I want to offer life expectancy.

The Court: Well, you already have stipulated that.

Mr. Davis: Yes, sir, I haven't gotten to the Jury yet. I'd like for it to be an instruction, and if the Court refuses it, that will be fine.

The Court: Yes, refused.

Mr. Davis: I want to except to the Court's refusing Instruction No. 6. And the last instruction we'd like to offer, that I did not have prepared, but that I will prepare immediately, is that "since the Defendant did not testify, it is assumed that any testimony he would make be-

page 113 } fore the Court would be adverse to his interest".

The Court: I don't think that is the law.

Mr. Rogers: No, sir, we object strenuously to that.

The Court: I think it is the law where you have a witness who has been summonsed and not used, that the presumption is that his evidence would be adverse; but where you have a Defendant, that is not the same thing.

Mr. Davis: Well, if Your Honor please, we would like to offer an instruction to that effect, and I understand that the offering of that instruction would be refused, which will be Instruction No. 7.

The Court: That's right.

Mr. Davis: That the failure of the Defendant to testify in his own behalf as to the facts and allegations set forth in the Motion for Judgment and the evidence before the Court at the present time, his failure would create a presumption that his testimony would be adverse to his cause. We would like to offer that.

The Court: All right, I refuse it.

(Instruction A offered by the Defendant.)

Mr. Rogers: Judge, probably we ought to put in there his loss of wages. Unfortunately, there is some evidence in there. I wonder if I might comment that that is—

page 114 } The Court: You just comment that that is in the other case too.

Mr. Rogers: All right, sir.

Mr. Davis: If the Court please, Counsel for the Plaintiff is going to object to Instruction No. A in that the medical bills and testimony as stipulated by the Defendant should be admissible and should be commented on by the Plaintiff, not only—not for the fact of showing that the medical bills, but of showing the severity of the injury and the amount of damage done to this young man. For that reason we object to the giving of Instruction A.

The Court: All right. I think they are recoverable in the other case, if there is liability therein.

(Instruction B offered by the Defendant.)

(Instruction B was given by the Court without objection.)

(Instruction C offered by the Defendant.)

(Instruction C given by the Court without objection.)

(Instruction D offered by the Defendant.)

Mr. Davis: If Your Honor please, I think Mr. Rogers' instructions—I want to state it right now, before we get into any more of them—not only A, B, C, but D, are all redundant in that they all set out gross negligence. I think

page 115 } he's defining gross negligence one or more times in the other instructions, and I'm going to object to the continually repeating himself in subsequent instructions.

The Court: Well, Paragraph A of—I mean the first paragraph of Instruction D is a duplication of Instruction C. I think he is entitled to the definition of ordinary negligence and of gross negligence.

Mr. Davis: Instruction C and D, if your Honor please, are almost identical; he is just stating the thing in a different manner and as well as B.

The Court: I believe it is, Bob.

Mr. Rogers: If Your Honor please, I certainly didn't intend for it to be. What I was trying to do—

The Court: First and last paragraphs are, and the middle paragraph. Now you haven't got the middle paragraph covered in the other instructions, but the first and last paragraph you gave.

Mr. Rogers: Well, if Your Honor please, what we might do is withdraw Instruction B, but I want that first paragraph in Instruction B on conjecture and so forth. I think I'm clearly entitled to that.

The Court: Well, you are.

Mr. Rogers: Perhaps we could put it on top of Instruction C. Would that cure it?

The Court: All right, you can take B and put

page 116 } the first paragraph of B and the second paragraph of B, and then the middle paragraph of D. Well, I think B is all right; I see nothing wrong with B.

Mr. Davis: C and D cover each other.

The Court: C and D are the ones.

Mr. Rogers: I wonder if we can put the first paragraph of C and exchange it for D. Put the first paragraph of C in place of the first paragraph of D, and just delete the second paragraph of C.

The Court: That would be all right. In other words, you put this (indicating) and then this (indicating) and this and this (indicating).

Mr. Rogers: Yes, sir.

The Court: All right.

(Instruction C and D were combined to make one Instruction C.)

Mr. Davis: The Plaintiff objects and excepts to the refusal of the Court to grant paragraph 1 of Instruction 1, concerning the speed of the automobile, and that it must be operated in such a manner and under such circumstances as to have reasonable control, to be able to slow down and stop regardless of the posted speed limit. It further objects and excepts to the deletion of a sentence in Paragraph 2 of Instruction 1; the instruction as offered states that to keep his vehicle under

proper control at all times, and the Court has

page 117 } deleted "at all times".

Plaintiff objects and excepts to that.

And in Instruction No. 2 was given.

The Court: Instruction No. 3 was refused.

Mr. Davis: And it is the contention of the Plaintiff that the Jury may or may not believe that there was some duty

on the passenger not to offer the driver of the vehicle a candy bar, or to even talk with him while said vehicle is in operation. It is the contention of the Plaintiff that the Plaintiff's Counsel—that the Plaintiff was entitled to that instruction, stating that there is no duty on him to control or direct the operation of that automobile until it became clear, or in the exercise of ordinary care under the circumstances should have become clear, that said trust was misplaced.

Instruction No. 4, dealing with the speed and the reaction time of the driver, which was refused by the Court and excepted to by the Plaintiff, was based on the recent cases handed down by the Supreme Court of *Lang* versus *Eanes,* 151 S.E. 2d 378.

In that case Justice Gordon went to great lengths and extent to justify this young lady who was operating at a speed of thirty miles an hour when she struck a telephone pole thirty-six feet from the place where she went off the road. Justice Gordon said that she would only have three feet and in which time to act if she were an ordinary per-
page 118 } son. Under the present circumstances of this case, the driver had ninety feet in which to act, at approximately the same speed of twenty-five to thirty miles an hour. On the basis of that, Plaintiff objects and excepts to the refusal of giving that instruction.

No. 5 is all right. If the Court please, the Plaintiff objects and excepts to the refusal of the Court in granting Instruction No. 6—in refusing Instruction No. 6, wherein it has been stipulated by Counsel that the life expectancy of the Plaintiff is 52.2 years, and the Court has refused to grant that instruction, and we note an exception.

Do you want me to take yours? And the Plaintiff objects and excepts to the instructions as offered by the Defendant and they have been objected to by the Plaintiff's Counsel. Instruction A, Instruction No. B, C, and D, taken as a whole, are a complete reiteration of the term of gross negligency and would be confusing to the Jury, not only because it is redundant, repeated throughout all the instructions, and the instruction—now you haven't got the new one, have you?

Mr. Rogers: No, that's it. I don't think I have to repeat it for the record.

Judge, you have Instruction 1-A over there, don't you?

The Court: Yes.

Mr. Rogers: The Defendant respectfully objects to the granting of Instruction 1-A on the grounds as-
page 119 } signed for his objections to Instruction 1, which are contained already in the transcript. Defendant further objects to Instruction 1-A on the grounds that it

amounts to a *fining* instruction, and that it does not clearly define for the Jury either gross negligence or the duties imposed upon the Defendant in this case.

I think the Defendant did in fact object to Instruction No. 2 for the reasons previously assigned, and the Defendant—

The Court: I think this ought to go in right here, Bob, "as distinguished from ordinary negligence as defined in other instructions".

Mr. Rogers: All right, sir.

The Court: Don't you think it should?

Mr. Rogers: Yes, sir. I was stating my objection to Instruction No. 5 on the grounds that the Defendant had previously made a motion to strike the Plaintiff's evidence and therefore objects to any instructions for the Plaintiff. The Court having overruled that motion and the Defendant having taken exception to the Court's ruling, I except to the Court's ruling in offering my objections to Instruction No. 5.

Mr. Davis: In regard to the refusal of the Court to grant Plaintiff's Instruction No. 6 concerning the—No. 7 rather—concerning the refusal and failure of the Defendant to testify, Plaintiff by Counsel would like to except to the ruling of the Court in failing to give an instruction, and would
page 120 } like to cite the case of *Barner* versus *Whitehead* in 204 Virginia, and aiso the case of *Robbins* versus *Old Dominion Power* in 204 Virginia.

And in the *Barner* case the Court held that failure of a seven year old Plaintiff to testify in a personal injury action raises a presumption that his testimony would have been adverse to the contention of his case; also in the *Robbins* versus *Old Dominion* case the Court held that "failure to call an available witness possessing peculiar knowledge of the facts essential to the parties' case . . . . . and as to facts covered by his special knowledge, especially if the witness be favorable to the parties' contention . . . . . gives rise to an inference that the testimony of such witness would not sustain the contention of the party".

It is the position of the Plaintiff that the Defendant, being the operator of this motor vehicle, knows best as to what occurred, what he did and what took place out there on the highway that caused him to wreck.

On the *Barner* case and on the *Robbins* case I would like to ask the Court to reconsider in granting that instruction that the failure of the Defendant to testify would raise the presumption that his testimony would be adverse to his cause.

The Court: Well, in the two cases you cited, in one the witness in question was the Plaintiff and the other it was a witness; this case is distinguished in that the person in

question is the Defendant. Now he does not have
page 121 } to testify; he could have been made to testify
either as an adverse witness for the Plaintiff, or if Counsel had seen fit to put him on in his own defense, but he doesn't raise any presumption one way or the other by not testifying.

Mr. Davis: All right, sir. If Your Honor please, we'd like to object to that first sentence "under Virginia law". I don't think that the Court instructs the Jury that under the law—just leave out "under Virginia law" altogether, that a *guess* passenger may not recover.

The Court: I think that's all right.

Mr. Davis: We object and except to the giving of Instruction No. C in that it doesn't directly correct the previous instruction at all; that it is redundant, it is not a complete statement of the law, that it is confusing to the Jury and that the instruction has been given previously.

The Court: For redundancy, see the objection stated by Counsel for the Plaintiff (laughter).

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(At 5:10 o'clock P.M. the Jury returned to the Courtroom with the following verdict:)

page 126 } (Paper was then handed to the Court for his perusal.)

The Court: I think I should ask the Jury to go back because you have a word in here, in your verdict, that is "claiming damages for", and I want to be sure before I announce the verdict that it is your verdict, and be sure that you mean that you are awarding him that much money. Is that right? Is that what you intended?

A Juror: That's what it was, wasn't it?

The Remainder of The Jury: Yes.

The Court: All right, read the verdict, Mr. Spencer. Who was your Foreman?

A Juror: The lady.

The Court: All right. Will you sign it and right after your name will you write "Foreman"?

(Mrs. Goff was the Foreman and she thereupon signed the

verdict and it was then handed to the Court, who then handed the Clerk the verdict for reading.)

The Court: All right, Mr. Clerk, read it.

The Clerk of The Court: (reading): "We, the Jury, upon the issues joined, find in favor of the Plaintiff, Louis Howard Cox, claiming damages for his personal injuries to the amount of $35,000 due to the gross negligence of the De-
page 127 } fendant, General Ancil Duncan." Signed "Mrs. Ray G. Goff, Foreman."

Mr. Rogers: If Your Honor please, may I have the Jury polled?

The Court: Yes, sir, I want to amend this word "claiming", if I am correct, and then I will poll them after I have amended it. And I will have your verdict to read this way:

"We, the Jury, upon the issues joined, find in favor of the Plaintiff, Louis Howard Cox, and award him damages for his personal injuries in the amount of $35,000 due to the gross negligence of the Defendant, General Ancil Duncan." Mrs. Ray Goff, Foreman.

Will you call the Jurors name by name and ask them if this is their verdict?

The Clerk has lost the Jury list; we will find it in a minute.

The Clerk: It is here.

The Court: Each of you stand as your name is called and advise me whether or not this is your verdict, please.

(The Jury was polled and all replied in the affirmative when questioned whether the above was their verdict.)

The Court: Thank you, lady and gentlemen, for
page 128 } your attendance today, and you are excused until the 9th. We have a misdemeanor case to try on the 9th. You can be excused now.

(The Jury then left the Courtroom.)

The Court: That one word (indicating) was bothering me.

Mr. Rogers: Yes, sir. I'm not sure—was that right? Did they write that (indicating)?

The Court: Yes, they wrote that. I wrote this down to here (indicating), down to "in favor of", and they wrote the rest of it. That "claiming" is what was throwing me.

Mr. Rogers: Well, if Your Honor please, the Defendant respectfully moves the Court to set the verdict aside on the grounds it is contrary to the law and the evidence in the case, and excessive as a matter of law; and on the grounds that

of error of the Court previously assigned, that we have objected to, and to which exception was made. Specifically, the Defendant reiterates the position that the Plaintiff completely failed to show any gross negligence in this case, and again moves the Court to set this verdict aside and enter final judgment in favor of the Defendant.

page 129 } The Court: I am ready to overrule you on everything except the excessiveness. I am inclined to put you on terms—

Mr. Davis: If Your Honor please, under the evidence as presented on the medical and the permanent disability there is a recent case of the Supreme Court on excessiveness of $8,000 for a whiplash, and the Supreme Court held—

The Court: I read it.

Mr. Davis: —and the Supreme Court held that it wasn't. You have excessive hospitalization and continual hospitalization.

The Court: That is another matter.

Mr. Davis: I am talking about the pain and suffering this young man's got to go through and permanent disfigurement of his face, and his excessive—

The Court: Well, gentlemen, knowing the Floyd County Juries to be one of the most conservative Juries that you can find in the State of Virginia, and although the Court may think that it would not have awarded a verdict in that amount, yet, as the most recent Virginia Supreme Court case points out, it is not for the Court to say; and I therefore overrule the motion to set the verdict aside and enter final judgment in favor of the Plaintiff in the amount of $35,000.

page 130 } Mr. Rogers: Well, now, if Your Honor please, we are going to note an appeal to the Court of Appeals, and may I prepare the order? Now that raises the point about bond.

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A Copy—Teste:

Howard G. Turner, Clerk.

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