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Record No. 6849

In the Supreme Court of Appeals of Virginia at Richmond

JETHRO KING

v.

FRANK EDWARD ECCLES

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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. 6849

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 4th day of December, 1967.

JETHRO KING, Plaintiff in error,

against

FRANK EDWARD ECCLES, Defendant in error.

From the Circuit Court of the City of Portsmouth
Henry W. MacKenzie, Jr., Judge

Upon the petition of Jethro King a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Portsmouth on the 31st day of May, 1967, in a certain motion for judgment then therein depending, wherein Frank Edward Eccles was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $4,200, with condition as the law directs.

RECORD

* * * * *

page 18 } INSTRUCTION NO. C-1

The Court instructs the Jury:

When two motor vehicles approach or enter an intersection at approximately the same time, the driver on the left shall yield the right of way to the driver on the right.

If you believe from the evidence that the two vehicles involved herein approached or entered the intersection at approximately the same time, or that the defendant approached or entered the intersection before the plaintiff did so, then it was the duty of the plaintiff to yield the right of way to the defendant.

And if you believe from the evidence that the plaintiff violated the foregoing duty, then he was negligent; and if you further believe from the evidence that any such negligence was the sole proximate cause of the accident, or that it proximately contributed to cause it, then you shall find your verdict in favor of the defendant.

Refused
2/23/67
H.W.M.

page 19 } INSTRUCTION NO. C-2

The Court instructs the Jury:

When two motor vehicles approach or enter an intersection at approximately the same time, the driver on the left shall yield the right of way to the driver on the right.

If you believe from the evidence that the two vehicles involved herein approached or entered the intersection at approximately the same time, then it was the duty of the plaintiff to yield the right of way to the defendant.

And if you believe from the evidence that the plaintiff violated the foregoing duty, then he was negligent; and if you further believe from the evidence that any such negligence was the sole proximate cause of the accident, or that it proximately contributed to cause it, then you shall find your verdict in favor of the defendant.

Refused
2/23/67
H.W.M.

page 20 } INSTRUCTION NO. C-3

The Court instructs the Jury:

That if you believe from the evidence that the defendant stopped his car prior to entering the intersection this would not forfeit any right of way you may find he was entitled to as set forth in other instructions of the Court.

Refused
2/23/67
H.W.M.

page 21 } INSTRUCTION NO. C-4

The Court instructs the Jury:

That the plaintiff was not entitled to any right of way as he approached and entered the intersection in question, nor was he entitled to assume that any vehicle approaching on Dahlia Street would grant him the right of way.

Refused
2/23/67
H.W.M.

* * * * *

page 23 } INSTRUCTION NO. D-1

The Court instructs the Jury:

That the plaintiff was not entitled to any right of way as he approached and entered the intersection in question.

Refused
2/23/67
H.W.M.

* * * * *

page 31 }

* * * * *

MEMORANDUM
May 31, 1967

This case is now up for consideration on the defendant's motion to set aside a verdict of Thirty-seven Hundred Fifty

($3,750.00) Dollars rendered by the jury in favor of the plaintiff in an action brought by him for personal injuries as the result of a collision which occurred at the intersection of Portsmouth Boulevard and Dahlia Street in the City of Portsmouth at approximately 10:30 p.m., on September 24, 1966. Plaintiff was operating his car eastwardly on Portsmouth Boulevard and the defendant was proceeding northwardly on Dahlia Street when they met in the intersection.

The single issue in the case is the refusal of the Court to grant Instruction C-1 tendered by the defendant which would have told the jury that if they believe that the two vehicles approached or entered the intersection at approximately the same time, that it was the duty of the plaintiff (who was on the left) to yield the right-of-way to the defendant.

The evidence discloses that Portsmouth Boulevard is a fifty to sixty foot wide four-lane paved street divided in the center by a series of concrete curbs, with two lanes of travel in each direction divided by white lines. It is a heavily traveled boulevard, carrying among other things the bus
page 32 } line from downtown to Cavalier Manor, with traffic lights at main intersecting corners and stop signs facing travelers on substantially all of the lesser intersecting streets. Dahlia Street is a two-lane intersecting residential street which had no stop or yield sign facing the defendant at the time this accident occurred. Whether such a sign had ever been on this corner is not disclosed by the testimony.

What the evidence does not show, but is well-known to local residents and would undoubtedly be established on a re-trial, is that Portsmouth Boulevard is one of the main east-west arteries of traffic in the City of Portsmouth, originating at the main gate of the Norfolk Naval Shipyard and extending westerly beyond the city limits of Portsmouth, and carrying much of the traffic from the Norfolk-Portsmouth tunnel through the City of Portsmouth to Suffolk and beyond, as well as a great portion of the daily traffic to and from the shipyard. It extends some four or five miles through the City of Portsmouth and, except on the main corners where traffic movement is governed by the familiar light signals, is protected throughout its entire length by stop signs on the cross streets with one or two exceptions. The speed limit is thirty-five miles per hour.

The defendant's position is simple and direct. There being no traffic control signal facing the defendant on Dahlia Street, he, being on the right, is given the right-of-way by Code Section 46.1-221 and was entitled to have the jury so told. He asserts that the plaintiff's failure to yield under such condi-

tions violated the statute and constituted negligence *per se.*

The failure of a motorist to stop in obedience to a sign is negligence of itself, but failure to yield the right-
page 33 } of-way is negligence only when committed with a lack of ordinary care. *Oliver* vs. *Forsyth,* 190 Va. 710, *Farmer* vs. *Marine Center, Inc.,* 206 Va. 737. Yet in either case the violation of a positive statutory duty is involved. *Code Sections* 46.1-173 *and* 46.1-221. Where there is some room for discretion on the part of the driver under the practicalities of the situation reached by the statute, the driver is held not to be an insurer, but his conduct is measured by that of the reasonably prudent man.

By Code Section 49.1-221 the right-of-way granted the driver on the right is not absolute; on the contrary, the obligations of the drivers are reversed when a "yield" sign is properly posted facing traffic on the one street or the other. A throughfare or arterial highway is created by the favoring of one street at all its intersections, and this is a familiar pattern in all the cities of this Commonwealth. Indeed, if movement were not so regulated, vehicular traffic in all of our cities would be hopelessly snarled.

The motoring public is accustomed to this method of regulation and it is upon this point that the Court declined to give the questioned instruction in this case. [The precise issue is whether a motorist entering a main thoroughfare from a side street which is not at the moment guarded by a stop or yield sign can demand an instruction that he is entitled to the right-of-way over traffic coming from his left on the more important street.]

Looking at the situation from the standpoint of the driver on Portsmouth Boulevard, he has become accustomed to the fact that throughout his course of travel on that street he has become aware that stop signs steadily have protected him from inflowing traffic. By previous experience
page 34 } he is aware of the character of the road upon which he is proceeding. He has been encouraged to aid the faster flow of traffic by the posted speed limit signs of thirty-five miles per hour, ten miles in excess of what he knows to be the limit upon normal residential and business streets. He cannot tell as he approaches any given intersection whether there will be the familiar stop or yield sign facing side traffic which his previous experience has led him to expect until he actually reaches the corner. Any reasonable driver would be lulled into a sense of expectancy by this combination of factors and regulators all pointing in one direction. The only alternative is to charge him at

his peril with anticipating what confronts the other driver to his right and so operating his vehicle that he can under all conditions slow or stop at every corner if it should develop that the other driver is entitled to the right-of-way.

The only reason that the violation of a statutory duty is deemed negligence *per se* is that the conduct required of the driver declared necessary for public protection is perfectly obvious to him and he must be so governed. It is ordinarily plain that the conduct demanded by the statute is nothing more than that required of an ordinary and prudent person. In the case at bar there is little question what the assumption of an ordinarily prudent driver on Portsmouth Boulevard would be under these conditions, and it would astonish the average motorist and offend his sense of justice if he, being in the position of this plaintiff on Portsmouth Boulevard, heard the Court charge the jury that he was violating the law and failing to exercise reasonable care in not yielding the right-of-way to anyone appearing from an intersecting street on his right under these conditions.

page 35 } On the other hand, looking at the situation from the viewpoint of the defendant, King, approaching Portsmouth Boulevard from Dahlia Street, we find nothing in the factual condition that would encourage him to believe he enjoyed any right-of-way over this plaintiff. By his own testimony he stopped when he reached the intersection which, together with the fact that his home is on Grant Street about one-half mile away and one-half a block from Portsmouth Boulevard, is indicative of his knowledge of the character of Portsmouth Boulevard, and that he expected traffic moving thereon not to extend deference to his emergence from Dahlia Street. He moved into Portsmouth Boulevard because he was not aware that the plaintiff was aproaching. Indeed, it may well be surmised that his first consciousness of his right-of-way over the plaintiff arose with the filing of his defensive pleading to this action.

As may be expected, many cases have arisen presenting factual situations comparable to that of the case at bar. These are collected in an annotation in 74 *ALR* (2d) 242. While local variation in statutory provision and phraseology has had a bearing upon many of these decisions, the problem is essentially the same in all jurisdictions. It cannot be denied that many, if not a majority, of the decided cases adhered to a literal interpretation of the statute — namely, that the driver on the right has the right-of-way unless some statutory variation is brought into play regardless of the character of the roadway and familiarity of the drivers with the particular condition.

Many courts, however, have eschewed the easy pat application of the literal construction of the statute in favor of one more compatible with the current facts of motor-
page 36 } ing life. When the choice confronting the court has been between the driver on a street deemed arterial either by statutory definition or general usage and the unfamiliar driver on the side street where the stop sign has been defaced or removed, there is an understandable reluctance to arbitrarily apply the statute giving the right-of-way to the driver on the right. *Haagenson* vs. *Matanuska Valley Lines, Inc.* (Alaska 1952) 103 Fed. Supp. 579; *Bell* vs. *Crook* (Neb. 1959) 97 NW (2d) 352; 74 ALR (2d) 223. Perhaps the most succinct summary of the preferred rule was applied by the Supreme Court of South Carolina in the case of *Eberhardt* vs. *Forrester* (1962) 128 SE(2d) 687, under a state of facts strikingly similar to that in the case at bar. The only factual variations were that a stop sign had once stood at the intersection but was missing at the time of the accident, and the defendant was not familiar with the area. South Carolina also has a statute which confers a preferred status on through streets which have been designated and the appropriate stop signs have been erected. The court concluded that the true rule from the decisions of other jurisdictions was that once a through street had been designated and appropriate signs erected its preferred status was not lost *becuase* a sign was removed or became obliterated; that the motorist on the preferred highway was entitled to assume that a vehicle on a secondary highway will stop; that the motorist on the secondary highway is required to stop if he has knowledge of the preferred highway even though the sign is absent; and that such motorist is not required to stop in the absence of the sign and no knowledge of its previous existence but may still be liable if he were negligent under all circumstances. In applying this rule, the court reversed the judgment of the trial court which instructed
page 37 } the jury that under these conditions the driver on the right had the right-of-way.

The Supreme Court of North Carolina had practically the same factual situation as *Eberhardt* before it in *Kelly* vs. *Ashburn* (1962) 123 SE (2d) 775. The following language from that opinion expresses what to this Court is the wise and sensible approach:

"By the terms of the statute the erection of stop signs on an intersecting highway or street is a method of giving the public notice that traffic on the one is favored and that a

motorist facing a stop sign must yield . . .

'The evidence is sufficient to present the question whether as to the intersection on the occasion of the accident the plaintiff had the right to assume that traffic from the east on Hughes Street would yield. The plaintiff's conduct is to be judged by the rule of the prudent man . . .

'The defendant was not familiar with the intersection. He was on the plaintiff's right and was not confronted by a stop sign notice that Woodland Avenue was the preferred street. His conduct must likewise be judged by the rule of the prudent man . . .

'A collision at an intersection where a stop sign has been erected and then removed or defaced may result from the negligence of one party or both, or neither. The court's charge in this case was a preemptory instruction to find that the plaintiff was negligent by reason of his failure to yield to the defendant on his right . . .

'In the case before us the evidence was sufficient to present the question whether the plaintiff under the circumstances that confronted him was warranted in assuming that he had the right-of-way through the intersection."

This Court is satisfied that to have instructed the jury as requested by the defendant that the defendant, King, was entitled to the right-of-way over the plaintiff, Eccles, as a matter of law because he happened to be on the right would propound a legal standard for appraising the conduct of the respective drivers which was not only at variance with that of any reasonable and prudent motorist under page 38 } the same or similar circumstances, but at variance with the appraisal of their respective rights by the parties themselves at the time the accident occurred.

The motion of the defendant for a new trial is, therefore, overruled and judgment is being entered on the verdict. A bond of Forty-two Hundred ($4,200.00) Dollars will be required for a stay of execution.

H. W. MacKENZIE, JR.

* * * * *

page 39 }

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At this day came again the parties by their Attorneys and thereupon, the Court having fully heard the motion of the defendant heretofore entered herein to set aside the verdict

of the jury heretofore rendered herein on the ground that the said verdict is contrary to the law and evidence, and to enter judgment for the defendant or in the alternative to grant a new trial for errors in granting and refusing certain instructions and rulings on matters during the trial, and on the grounds that the said verdict is excessive, doth overrule the same, to which action of the Court, the defendant, by counsel, excepted; it is therefore considered by the Court that the plaintiff recover of the defendant the sum of Three Thousand Seven Hunderd and Fifty Dollars ($3,750.00) with interest thereon to be computed at the rate of Six per cent per annum from the 23rd day of February, 1967, till paid, and his costs by him about his suit in this behalf expended.

And the said defendant in Mercy, &c.

But at the instance of the defendant, who desires to present a petition for a writ of error and *supersedeas* to the judgment entered in this case, execution hereof is suspended for a period of Sixty (60) days from the date of judgment, when the said defendant or someone for him, shall give bond before the Clerk of this Court, with surety approved by said Clerk, in the penalty of Four Thousand Two Hundred Dollars ($4,200.00) payable to the plaintiff in this case, with a condition reciting said judgment and the intention of the said defendant to present such petition and providing for the payment of all such damages as any person may sustain by reason of such suspension in case a *supersedeas* to such judgment should not be allowed and be effectual within the time above specified.

Entered
5/31/67
D.V.M.

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page 43 }

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NOTICE OF APPEAL

Jethro King, defendant, is aggrieved by a certain judgment of the Circuit Court of the City of Portsmouth, Virginia, entered on May 31, 1967, in the above-entitled action at law, and hereby files his Notice of Appeal and intention to apply to the Supreme Court of the State of Virginia for a Writ of Error.

ASSIGNMENTS OF ERROR

Defendant, Jethro King, assigns the following error:

1. The Court erred in overruling the defendant's motion, at the conclusion of the plaintiff's evidence, that the plaintiff's evidence be struck.

2. The Court erred in overruling the defendant's motion, at the conclusion of all of the evidence, that the evidence be struck on the grounds that it was insufficient at law to support a verdict in favor of the plaintiff.

3. The Court erred in refusing to grant defendant Instruction numbered C-1.

4. The Court erred in refusing to grant defendant Instruction numbered C-2.

5. The Court erred in refusing to grant defend-
page 44 } ant Instruction numbered C-3.

6. The Court erred in refusing to grant defendant Instruction numbered C-4.

7. The Court erred in refusing to grant defendant Instruction numbered D-1.

8. The Court erred in overruling defendant's motion to set aside the verdict of the jury as being contrary to the law and the evidence and to enter up judgment for this defendant, or, in the alternative, to grant the defendant a new trial.

JETHRO KING

By E. PAGE PRESTON
Of Counsel

* * * * *

I certify that a true copy of the foregoing pleading was mailed to Mr. Norman Olitsky, Attorney for Plaintiff, 600 Court Street, Portsmouth, Virginia, this 14th day of July, 1967.

E. PAGE PRESTON

Filed Jul 14, 1967 Circuit Court, Portsmouth, Va.

K.L.D., Clerk

By L.K.B., D.C.

* * * * *

page 4 } J. C. HAMILTON, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Olitsky:

Q. Would you state your name, please, sir?

A. Officer J. C. Hamilton, Portsmouth Police Department.

Q. And, Mr. Hamilton, how long have you been on the Portsmouth Police Department, sir?

A. Well, approximately seven years now.

Q. All right, sir. And at the time of this accident on September 24, 1966, what were your duties?

A. I was on patrol duty in a radio car.

Q. All right, sir. Would you state to the court and the jury whether or not you received any calls as to an accident on Portsmouth Boulevard on the evening of September 24, 1966?

A. Yes, I did.

Q. Approximately what time did you receive a call, sir?

A. Approximately eleven minutes after ten.

page 5 } Q. All right, sir. And where did you then proceed to?

A. To the intersection of Portsmouth and Dahlia.

Q. Approximately what time was it, if your records reflect, that you arrived at the scene of the accident?

A. One minute later, at ten minutes—10:12.

Q. All right, sir. Now, when you arrived on the scene would you please tell the court and jury what you observed, sir?

A. Upon arriving I found two automobiles, one a '59 Chevrolet, setting in the intersection—excuse me. The '59 Chevrolet was setting off to the right corner—it would be the south—the northeast corner of Portsmouth and Dahlia—next to the curb, and the '55 Chevrolet was sitting directly in the intersection of Portsmouth Boulevard.

Q. Do you have that—did you make a diagram as to the positions of the automobiles?

A. Yes, sir.

Q. Would you be kind enough, if you would, to show that diagram to the jury, please, so maybe they could get a better idea?

Mr. Preston: Wait just a minute. Let me take a look at it.

J. C. Hamilton

page 6 } A. This would be Mr. Eccles's car and this is Mr. Jethro's car.

By Mr. Olitsky:

Q. Does that depict the exact location of the cars when you arrived on the scene?

A. Yeah.

Mr. Preston: That's all right with me. I won't object.

A. It is not to scale or anything, it is just—

Mr. Olitsky: You have no objections?

Mr. Preston: No, I won't object to it.

A. This is Mr. King's automobile. This would be Dahlia Street; this would be Portsmouth Boulevard. This is Mr. Eccles's car, his mode of travel as he was heading east on Portsmouth. And Mr. King's car was going north on Dahlia.

By Mr. Olitsky:

Q. Just show the positions of the cars. You can't tell us what they were doing unless you know of your own knowledge.

A. This is the mode of travel afterwards. The car was here when I got here and this vehicle one was sitting there.

page 7 } Q. Would you show that to these jurors down here, please, sir? Just show them the position of the automobiles. Point out Mr. King's car and Mr. Eccles's car.

A. This is Mr. King's car and this is Mr. Eccles's car when I arrived.

Q. Have your seat now, Mr. Hamilton.

A. (Did so)

Q. From your investigation could you ascertain where the point of impact was as to these two motor vehicles?

A. Right at the intersection, right in the middle of the intersection.

Q. Could you tell from your examination at the scene where in the intersection—in which lane of traffic the accident occurred, the point of impact?

A. In the inside lane of the eastbound traffic.

Q. Inside lane of eastbound—

A. Of Portsmouth Boulevard.

Q. All right, sir. Now, approximately how far from the point of impact was—did the car of Mr. Eccles—where was

that stopped at? How far was it from the point of impact, approximately?

page 8 } A. Well, it appeared to be stopped right at the point of impact. I mean it was—

Q. Where was it sitting?

A. Right in the inside—in the inside eastbound lane of Portsmouth Boulevard.

Q. All right, sir. Were there any skid marks?

A. If so, I didn't see any, sir.

Q. And approximately how far from the point of impact was the car driven by the defendant, Mr. King, if you know?

A. From where it was setting when I arrived?

Q. Yes, sir.

A. Approximately two lanes of traffic. It had crossed into the inside and outside lane of the westbound traffic and was setting sort of up against the curb.

Q. On Portsmouth Boulevard?

A. On Portsmouth Boulevard, yes, sir.

Q. Where were the damages to the Eccles car?

A. The front end. The front end of his automobile.

Q. And where were the damages to the car driven by the defendant, Jethro King?

A. The left side.

Q. Where on the left side?

page 9 } A. Right at the door, the side by the door, from there back.

Q. What were the weather conditions that night, sir?

A. It was clear. And—

Q. What were the conditions of the roads?

A. The roads were dry. It was a straight road, level road.

Q. At the point of the collision would you describe the general characteristics of Portsmouth Boulevard to the court and jury, please? How many lanes were there?

A. It is a four-lane blacktop surface road. It's marked by white lines. It has the dividing lines.

Q. What's the speed limit?

A. Thirty-five miles an hour.

Q. And how many lanes go east and how many go west?

A. Two east and two west.

Q. Now, would you describe, if you know, Dahlia Street to the court and jury, please?

A. Dahlia Street is a—which would be a two-lane. It is not marked by any white lines whatsoever. It is in a resi-

dential section, and it runs north and south across Portsmouth Boulevard.

page 10 } Q. How wide is it? Do your records reflect that?

A. No, sir. It is I would say approximately twenty foot wide, twenty to thirty foot wide.

Q. At the time that you arrived at the scene of the accident were there any traffic controls of any kind there, sir?

A. No, sir.

Q. Did you speak to both Mr. Eccles and to Mr. King?

A. Yes, sir.

Q. Did you speak to them in the presence of one another?

A. Yes, sir.

Q. Would you tell us what was the general condition of Mr. Eccles and Mr. King when you were speaking to them?

A. Mr.—well, both seemed rather upset about the accident. I mean Mr. King had a slight laceration on his arm, I believe, on his right arm, and they were questioned in regards to the accident. Mr. King had a slight odor of alcohol about his breath and he was questioned about that and he admitted he had had a drink.

page 11 } Q. All right, sir. Now, you say that both parties were in front of you and in each other's presence when you were speaking with them?

A. Yes, sir, when they give statements in regards to the accident.

Q. All right, sir. Would you tell the court and jury, please, what statement was made, if any, by Mr. Eccles to you in the presence of Mr. King?

A. Mr. Eccles stated that he was driving east on Portsmouth Boulevard. He stated as he approached the intersection of Dahlia and Portsmouth vehicle two, which was driven by Mr. King, pulled into the path of his vehicle. He states he applied his brakes in an effort to avoid collision, but was unable to do so.

Q. All right, sir. And what, if anything was said to you by Mr. King?

A. Mr. King, who was the driver of vehicle number two, stated he was headed north on Dahlia Street and had stopped at Portsmouth Boulevard. He stated he looked in both directions and saw nothing coming, so started to proceed on. He stated as he got into the intersection he saw vehicle one, which was Mr. Eccles's car, to his left with no lights on and was struck by same.

Mr. Olitsky: All right, sir. I have no further questions.

J. C. Hamilton

page 12 } CROSS-EXAMINATION

By Mr. Preston:

Q. Officer Hamilton, you are an officer of the City of Portsmouth. Is that right?

A. Yes, sir.

Q. The City of Portsmouth is an incorporated city, is it not, officer?

A. Yes, it is.

Q. When you were talking with Mr. King you had an opportunity to observe him and talk with him some time, did you not?

A. Yes, I did.

Q. And—may I take a look at your notes there? You have made a report to the—

A. Yes, sir.

Q. You have made out an additional report to the City of Portsmouth and to the Division of Motor Vehicles?

A. I don't file the report with the division. The traffic bureau does that. It is not filed by the officer.

Q. You have done that in addition to this?

A. It is according to this report here.

page 13 } Mr. Preston: Your Honor, if you would bear with me I would like to look at a couple things on this report. I haven't seen it.

By Mr. Preston:

Q. In this report that you have here, Mr. King is designated as the driver of car number two in your report, is he not?

A. Yes, sir, I believe—yes, sir, he is.

Q. And there is a place on that report for you to check with reference to anybody that was drinking in that accident, is there not?

A. Yes, sir.

Q. You checked on that report his ability was not impaired?

A. I felt his ability was not impaired, he hadn't had enough to drink.

Q. But in your opinion—

A. This is the reason for this.

Q. But in your opinion his ability to drive the automobile wasn't impaired by any drinking on his part?

A. He didn't seem to have that much to drink, no, sir.

J. C. Hamilton

Q. Now, with reference to the location of the vehicles at the time that you arrived—let me see that
page 14 } diagram again, please.

A. (Did so)

Q. Now, I hand you—there may be some logical explanation for this, but I would like to know what it is?

A. All right, sir.

Q. I hand you a report form and ask if that's your signature on that report form?

A. No, it is not.

Q. That's not your signature?

A. No, sir.

Q. Did you file this report at all?

A. No, sir.

Q. Who filed that report?

A. These are reports that are filed through the traffic division. I imagine the girl in the office in the traffic division made this report.

Q. Is your name Officer J. C. Hamilton?

A. It certainly is.

Q. Who signed the Officer J. C. Hamilton on there?

A. I would like to know.

Q. You don't know?

A. No, sir, I don't.

Q. You see this is sent by Captain Kelly of the
page 15 } Portsmouth police?

A. Yes, sir.

Q. But that is not your report?

A. That's not my report, no, sir. I know it is a copy of my report. They take and copy the information off of this card and put it on a state report, and who signs my name to it I don't know. We don't file a state report, the officer himself does not.

Q. And you don't file one with the city either then, do you?

A. Yes, sir, this is the city report here.

Q. That, but you don't ever make out one of these things?

A. No, sir, not unless I am involved personally.

Q. Now, with reference to the statement that was made to you by Mr. Eccles in the presence of Mr. King following this accident, I believe you said that Mr. Eccles had said that he had applied his brakes in an effort to avoid the accident?

A. Yes, sir.

Q. Did he not also tell you that he swerved to the left in an effort to avoid the accident?

A. Yes, he did; yes, he did.

Q. So that he told you that he was driving down Portsmouth Boulevard in the inside lane and then
page 16 } swerved to his left when he saw this automobile coming from his right out of Dahlia Road. Isn't that correct?

A. That is right.

Q. No question about that, he swerved to his left?

A. That was his statement to me.

Q. That was his statement to you, and that is right after this accident occurred?

A. Shortly afterwards.

Q. Did Mr. Eccles appear to you to be hurt in any way or in any way injured so that he did not have full possession of his faculties to talk to you at that time?

A. No, sir.

Q. He talked normally and naturally?

A. Well, he was quite upset I mean about the accident.

Q. Well, naturally a little nervous and so forth?

A. Yes, sir.

Q. There was no report made to you of any injury by Mr. Eccles at the time of your investigation, was there, officer Hamilton?

A. No, sir.

Q. Did Mr. Eccles in any way indicate to you
page 17 } that Mr. King shot out from Dahlia Street at a high rate of speed?

A. No, sir, not at a high rate of speed.

Q. What would you estimate the width of one lane of traffic on Portsmouth Boulevard to be? Is each lane of approximately the same width?

A. Same width, yes, sir.

Q. What would you estimate the width of each of those lanes to be?

A. I would say ten to fifteen feet.

Q. Ten to fifteen feet?

A. Each lane.

Q. Each lane?

A. Yes, sir.

Q. Now, where Mr.—so that with Mr. King's car being knocked over to that far corner he would have been knocked at least twenty to thirty feet—

A. Approximately, yes, sir.

Q. —over from the point of impact to get there. Is that correct?

A. Yes, sir.

Q. And you say you saw no skid marks at the scene?

A. I didn't observe any, no, sir.

Q. Did you look for any?

page 18 } A. To be frank with you, no. No, sir, I didn't.

Q. Didn't look. When you arrived at the scene where were Mr. Eccles and Mr. King located?

A. They were standing outside their automobiles. Exactly where I couldn't tell you. It was on Saturday night and it was quite a bit of traffic and we was trying to get the intersection cleared and to get what had just happened, too, also together.

Q. Didn't appear to be a serious accident with reference to the injuries and so forth, did it?

A. Well, I couldn't say. I mean the cars were both tore up right bad, I mean—and—

Q. Well, did people gather around or had they gathered around when you were there?

A. There was quite a few people there, yes, sir.

Q. Did you learn the names of any witnesses?

A. Yes, sir, I did. I have the name of two witnesses. Would you like the names?

Q. Yes, Mr. Person and Mrs. Askew?

A. Alfred Person, which was a passenger in Mr. Eccles's car, and a Mrs. Askew of 2523 Portsmouth Boulevard.

Q. Were there any other witnesses to this accident that you know of?

page 19 } A. They are the only ones that came forth and gave their names.

Mr. Preston: I have no further questions.

REDIRECT EXAMINATION

By Mr. Olitsky:

Q. Let me ask you this, Officer Hamilton, is there a designation as far as whether there is a US number on this Portsmouth Boulevard as far as the highway system is concerned?

A. I can't answer that.

Mr. Olitsky: All right, sir. I have no further questions.

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page 27 }

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ROSA ASKEW, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Olitsky:

Q. Would you state your name, please?

A. Mrs. Rosa Askew.

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

A. 2523 Portsmouth Boulevard.

Q. In Portsmouth, Virginia?

A. Yes, sir.

Q. Now, where were you on the evening of September 24, 1966?

A. I was standing on my front porch.

page 28 } Q. At approximately what time was this that you were standing on your front porch?

A. Around 10:30.

Q. Now, your front porch is where in relation to Dahlia Street and Portsmouth Boulevard?

A. It is on the right-hand side coming from the Giant Open Air Market.

Q. Where?

A. On the corner of Dahlia and Portsmouth Boulevard.

Q. Now, where were you standing at that time?

A. On the front porch.

Q. Is your front porch open or screened?

A. Open.

Q. What were the weather conditions?

A. It was fair.

Q. And why were you standing on your front porch, Mrs. Askew?

A. I were waiting to catch a bus to go to the Giant.

Q. Which bus were you waiting for?

A. Downtown bus, Cavalier Manor.

Rosa Askew

Q. Did anything unusual happen while you were waiting for the bus?

A. Well, I saw the accident that happened.

page 29 } Q. All right. Now, did you know Mr. Eccles or Mr. King before this accident?

A. No, sir.

Q. You didn't know either one of them?

A. No, sir.

Q. When—if you did, when did you see Mr. Eccles's automobile?

A. Maybe when—I saw the light before I did the car.

Q. Um-hum.

A. And when the car—you know, when it was approaching.

Q. Yes, ma'am. Which lane was he approaching in.

A. He was in the center lane.

Q. The inside lane?

A. Yes, sir.

Q. Do you drive?

A. No, sir.

Q. I see. And as he was approaching then what happened?

A. Then this black Chevrolet came up and darted into Portsmouth Boulevard from the side of me which was to my left side, and—

page 30 } Q. How close were you to this car that came out of Dahlia?

A. It was right there, because the house is right on the corner.

Q. Well, could you give the jury and the court an estimate of how close you were to the car?

A. Close maybe—closer than from here to the back of that, you know, because it is right to the street.

Q. Well, would you tell us—do you know whether or not if the car driven by Mr. King stopped?

A. No, he didn't stop.

Q. How do you know it didn't stop?

A. It just kept going into the street.

Q. All right. And then what happened?

A. That's when this car hit him.

Q. Which car?

A. Mr.—Mr. Eccles's car.

Q. Where did the collision take place, Mrs. Askew?

A. Right in the center of Dahlia and Portsmouth Boulevard.

Q. Did you hear any horns or anything?

Rosa Askew

A. Yeah, I heard the horn before I saw the car. See, I heard the horn then I saw the light before I could see the car.

page 31 } Q. Whose horn did you hear, if you know?

A. The one that come down Portsmouth Boulevard, Mr. Eccles.

Q. What then happened after you heard the horn blow of Mr. Eccles?

A. Then this car was coming, you know, this way.

Q. Which car?

A. From the—the Chevrolet, the black Chevrolet.

Q. On what street?

A. On Dahlia Street. It had came into Portsmouth Boulevard, then that's when they had the accident.

Q. Did the car being driven by Mr. King ever stop as it was crossing Portsmouth Boulevard?

A. Not until after he got hit and knocked to the side.

Q. I see. And the car of Mr. Eccles, what happened to his car after you said you heard the horn blow?

A. It put on brakes.

Q. How do you know the brakes were put on?

A. Well, I could hear it, you know, the tires on the car.

page 32 } Q. And then what happened to the car being driven by Mr. Eccles at that time?

A. You know, when he put them on he pulled to my right, like he was going to try to duck the other car.

Q. What were the traffic conditions that night?

A. They was the only two cars on Portsmouth Boulevard.

Q. Were the lights on both vehicles?

A. Yes, sir.

Mr. Olitsky: Your witness.

CROSS-EXAMINATION

By Mr. Preston:

Q. Mrs. Askew, where do you live? You are on the corner house or second house?

A. It is the first house on the corner of Dahlia. It is on the right-hand side from the Giant. The first house.

Q. All right. And that is—that house is on the west side of Dahlia? It is away from town, in other words?

A. What you mean, the west side? If you are coming from Giant Open Air coming downtown it is on the right-

Rosa Askew

page 33 } hand side of the street of Dahlia Street. See, Dahlia run this way cross Portsmouth Boulevard and my house is sitting right here and this is Portsmouth Boulevard.

Q. Right, your house is farther away from town?

A. From downtown.

Q. On the other side of Dahlia Street if you are leaving here. Is that the idea?

A. Yes, sir.

Q. If you are leaving town you go down Portsmouth Boulevard your house would be—you would pass Dahlia Avenue just before you got to your house, right, Dahlia Street?

A. No, you pass my house before you get to Dahlia. I am on this side.

Q. That's what I am trying to find out now.

A. Yes, sir.

Q. Do you know the direction that Dahlia Street runs, whether it runs north and south or east and west?

A. North and south.

Q. North and south. And do you know the direction—then do you know the direction that Portsmouth Boulevard runs?

A. Yes, sir.

page 34 } Q. East and west, right?

A. Yes, sir.

Q. And which direction was the car driven by Mr. King going? north or south?

A. It was going south.

Q. He was going south?

A. Yes, sir.

Q. Headed south?

A. He was headed out this way from Dahlia, you know, into the intersection.

Q. You see, we don't know which way this way is when you are using your hands that way, that's why I am trying to establish directions. If you know which direction Dahlia Street is.

A. Well, say if this is east this way and this is south.

Q. Which way is downtown Portsmouth from your house? Is that east, north, south, or west?

A. North I would think; it is back down this way.

Q. Downtown's north. Well—

Mr. Olitsky: Your Honor—

Rosa Askew

Mr. Preston: We have a problem with the directions. Could you possibly draw a little picture?

page 35 } The Witness: If you draw the picture then give it to me.

By Mr. Preston:

Q. I am not allowed to do that, so I can't draw a picture and give it to you. Could you draw a little picture of the intersecting streets and show where your house is and so forth?

A. Yes, I could do that.

Q. And show where the cars were coming and so forth. Take your time. It doesn't have to be absolutely accurate, but just to show the general location.

A. (Witness drawing) And then this is my house. This is Portsmouth Boulevard going this way in front of me.

Q. All right.

A. This is my house here and this is Dahlia coming cross Portsmouth Boulevard.

Q. All right. Would you put a D along Dahlia, right by Dahlia. That looks like a P. Because we will have to use a P for Portsmouth.

A. (Did so)

Q. All right. Now, would you put a P on Portsmouth Boulevard?

A. (Did so)

page 36 } Q. And put an arrow to the street that you think—you have designated that's Portsmouth Boulevard. Run an arrow, you know, run a little line over and put an arrow on it showing what you are talking about.

A. To Portsmouth Boulevard?

Q. From the P.

A. What you say?

Q. Where you have the P located in it out in the center, you can't see what street you are locating.

A. What did you say?

Mr. Olitsky: Why don't you put it down there for her, Mr. Preston? It is perfectly all right with me.

By Mr. Preston:

Q. Is this the street you are calling Portsmouth Boulevard?

A. Yes, this is Portsmouth.

Rosa Askew

Q. I am going to draw a little arrow pointing to Portsmouth to show that's what you mean when you put the P there. The D is right beside this one that is Dahlia Street.
A. Yes, sir.
Q. Which way is town on that diagram?
A. Back down this way.
page 37 } Q. The city of Portsmouth is back down this way?
A. Yes, sir.

Mr. Preston: All right to put an arrow on there and point to Portsmouth?
Mr. Olitsky: Certainly, certainly.
Mr. Preston: Put downtown Portsmouth then.
Mr. Olitsky: You can put the Giant over here.
Mr. Preston: I don't think you-all can see this. I thought we would pass this around after we get it done and you can tell what's being done from that I hope.

By Mr. Preston:
Q. This is Dahlia going cross this way. This is Portsmouth going across this way and this is your house on this corner right here. Is that the idea?
A. Yes, sir.
Q. Which way was Mr. King driving his automobile?
A. He was going cross.
Q. From this direction across that way. Is that right?
A. Yes, sir.
Q. All right. And Mr. Eccles also was coming from what way? this way?
A. Yes, sir.
page 38 } Q. Down this way. And Portsmouth is downtown in that direction?
A. Coming down Portsmouth Boulevard.
Q. Coming down Portsmouth Boulevard?
A. Yes, sir.

Mr. Preston: Your Honor, I guess I should offer that as Defendant's Exhibit No. 1.

(So marked by the court.)

Mr. Preston: Will you give me a minute to try to digest this information. I don't get it clear in my mind.

Rosa Askew

By Mr. Preston:

Q. Mrs. Askew, were you standing on the porch alone?

A. Yes, sir.

Q. And where is that porch located? right on the front of your house?

A. Yes, sir.

Q. And how long had you been standing there?

A. Maybe five minutes.

Q. About five minutes?

A. Yes, sir.

Q. And you say you were waiting for a bus?

A. Yes, sir.

page 39 } Q. What were you waiting for, Portsmouth city bus?

A. Yes, sir.

Q. Do those buses come by on a schedule out there?

A. On the hour and half hour.

Q. On the hour and half hour?

A. Yes, sir.

Q. And were you waiting—were you trying to catch the 10:30 bus?

A. Yes, sir.

Q. Is that the one you were waiting to catch?

A. Yes, sir.

Q. And you had been there about five minutes?

A. Yes, sir.

Q. You ever see the bus coming?

A. After the wreck I forgot about the bus.

Q. Did you see the bus coming before the wreck?

A. No, it won't coming. Nothing was coming.

Q. Were you looking for the bus?

A. Yes, I was waiting on the bus.

Q. Were you looking for it?

A. Yes, I was standing looking for the bus.

page 40 } Q. Well, in other words, you think it was about twenty-five minutes after ten when you were out there standing there?

A. Maybe around—maybe a little bit before then, twenty-five minutes past ten.

Q. As much as eleven minutes after ten or before then?

A. It wasn't that early, no.

Q. It wasn't that early?

A. I think it was about twenty-five minutes past or maybe a

Rosa Askew

little bit before 10:30 I left the house, left out the door. I was just on the porch.

Q. Well, as you were standing there what were you doing?

A. I was just waiting.

Q. Just waiting?

A. Yes, sir.

Q. You figured—how long did you figure it was going to be before the bus came by?

A. Maybe five or ten more minutes.

Q. Maybe five or ten more minutes?

A. You never can tell about the buses. I'd rather be early than be late, really.

Q. Now, you didn't see anything prior to the time that the accident occurred to indicate to you that there was

page 41 } going to be an accident? You didn't know an accident was going to occur when you were standing there, did you?

A. No.

Q. And I take it you weren't paying—watching all the traffic that came from all directions carefully to see what they were doing as you were standing there?

A. Well, at the time, I mean, you are standing and when cars do go to and forth you watch each car and I noticed this car was coming down Portsmouth Boulevard.

Q. Noticed that car coming down Portsmouth?

A. Yes, I could see the light from it.

Q. What color was that car?

A. It was gray.

Q. Gray. And were there any other cars came down from Portsmouth Boulevard just before he did?

A. No.

Q. Any cars came down just after he did that you noticed?

A. After the wreck I really couldn't tell you, because it was so much—

Q. But there weren't any cars came down there just before he did?

A. No, sir.

Q. And you noticed that car coming then, I take it?

page 42 } A. Yes, sir.

Q. That's the first thing you noticed is that car?

A. Yes, sir.

Q. The car on Portsmouth Boulevard, and that turned out to be Mr. Eccles's car?

Rosa Askew

A. Yes, sir.

Q. And you saw that car. And what called your attention to that car was you heard the horn blow. Is that correct?

A. When I heard the horn blow that's when this car was, you know, on the side of my house coming up into Portsmouth Boulevard on Dahlia Street.

Q. But what I am asking you is I understood you to testify when you were asked by Mr. Olitsky that you heard the horn blow on Mr. Eccles's car before you saw his car. Is that correct?

A. Yeah, because the light from the car, which at night you can't see, you know, a car; you can see the light before you can the car.

Q. I see. Did you hear the horn blow on his car before you saw the lights from his car?

A. No, sir, I saw the lights first.

Q. All right. Where were the lights from his car when you first saw them? How far down the street

page 43 } were they?

A. I'd say about three or four cars maybe.

Q. Three or four cars?

A. Three or four cars, yes, sir.

A. Three or four cars, yes, sir.

Q. Three or four car lengths you mean?

A. Yes, sir, down the highway, yes, sir.

Q. Three or four car lengths. How far would you estimate a car to be?

A. Sir?

Q. How many feet would you estimate a car to be in length?

A. I don't know much about feets and things. I mean I can look and tell you, but I just can't, you know—

Q. So his car was about three or four car lengths down when you first saw it?

A. Yes, sir.

Q. And your vision was—down that direction was blocked by some shrubs down there to some extent?

A. That's when I noticed, see. From my house to that bush is about three or four car lengths, you know, and I could see the car light before it got to that bush.

Q. All right. Now, about where was it with relation to that bush when you first saw the car light?

page 44 } A. What you mean? behind the bush?

Q. Where was it, yes.

Rosa Askew

A. I couldn't tell you because I couldn't see. I could see the light from it.

Q. How far was the bush, you say, from where you were?

A. Maybe about three car lengths.

Q. About three car lengths. So when the car came from that bush you saw the car. Is that correct?

A. I saw the whole car, yes, sir.

Q. Now, at that time where was Mr. Eccles's—excuse me, Mr. King's car? When that car was at that bush where was Mr. King's car?

A. He was going into the street.

Q. Going into the street, wasn't he?

A. Yes, sir.

Q. Is that when you heard the horn blow?

A. No, I heard the horn blow before then.

Q. Heard the horn blow before then?

A. Yes, sir.

Q. Where was Mr. Eccles's car when you heard the horn?

A. Past the bush. Just when I told you I could see the light. I could hear the horn, but I couldn't see the car.

page 45 } Q. You heard the horn before you could see the car, because the bush blocked your vision?

A. Of seeing the car, yes, sir.

Q. So you heard the horn blowing from Mr. Eccles's car before you could see the car?

A. Yes, sir.

Q. Because your vision was blocked by those shrubs?

A. Yes, sir.

Q. Did he blow it loud and long?

A. Well, an ordinary blow, you know, for a car when you are going down the street when you see another car. I imagine it was an ordinary blow.

Q. Did he give a long loud blast or just tap?

A. He blew.

Q. He blew?

A. Yes, sir.

Q. Blew it good. Now, did he—how fast would you estimate he was driving his car when you saw it come from that bush?

A. I couldn't tell you.

Q. You could not estimate his speed?

A. No, sir.

Q. Well, you saw his car, didn't you?

A. I saw the car, yes, sir, but I couldn't say how

page 46 } fast he was going.

Rosa Askew

Q. Well, now, you know—I am not asking—no one—no one can look at the speedometer in someone else's car when it is being driven, and I am not asking you to say exactly what it was being driven by the speedometer, but you saw it. You saw it come right on down the street up until the time of the accident, didn't you?

A. I saw the car, yes, sir.

Q. It was coming fast, wasn't it, Mrs. Askew?

A. I couldn't say how fast.

Q. But it was coming fast, wasn't it?

A. I couldn't say how fast. It was ordinarily coming down Portsmouth Boulevard.

Q. And you wouldn't want to estimate his speed?

A. Well, I can't, because I really don't know.

Q. What about Mr. King's car? Was he going fast or was he going slow?

A. He was driving ordinary for to come down a street like that I would say.

Q. When you saw his car first how fast would you estimate it was being driven?

A. I couldn't tell you about his'n neither. All I know he just drove up. He didn't never stop; he just drove page 47 } on up into the street.

Q. Which car did you see first, Mr. King's car or Mr. Eccles's car?

A. I saw Mr. Eccles's—this man here's car first.

Q. Mr. King's car first?

A. Yes, sir.

Q. And then you saw Mr. Eccles's car?

A. After he blowed the horn. See, this car was right here at me almost.

Q. He was right at you?

A. Yes, sir.

Q. And when you first saw this car it was right at you and it was moving into the intersection?

A. Yes, sir, that's right.

Q. It was right there at you and it was moving into the intersection?

A. It was going into the street, yes, sir.

Q. You couldn't estimate whether it was going slow, fast, or what, but it was there and it was going into the intersection?

A. Yes, sir.

Q. That was when you first saw the car at that time you

Rosa Askew

saw the other car and the horn blew. Is that correct?

page 48 } A. No.

Q. At that time you heard the horn blow on the other car?

A. Yeah, and at that time the car was getting close enough to hit him before he could get across the street.

Q. And you saw the two cars collide, didn't you?

A. Yes, sir.

Q. Did you hear it?

A. Yes, sir.

Q. Loud noise, wasn't it?

A. Well, I guess it would make you excited to see a wreck. I never seen one before.

Q. When Mr. Eccles was coming down there you said you saw him put—you heard the tires from the brakes being applied?

A. Yes, sir.

Q. No question about that?

A. He was trying not to hit this man's car.

Q. He put his brakes on, didn't he?

A. Yes, sir.

Q. Did he swerve to his right?

A. Yes, he was trying to get across to go like you go into Dahlia Street.

page 49 } Q. In other words, he tried to get into the street Mr. King just came out. Right?

A. Yes, sir.

Q. So he cut his car to the right?

A. To my right, yes, sir.

Q. Didn't swerve to the left?

A. No, sir.

Mr. Preston: I have no further questions.

RE-DIRECT EXAMINATION

By Mr. Olitsky:

Q. Let me just ask you this: Do you drive?

A. No, sir.

Mr. Olitsky: I have no further questions, Your Honor.

The Court: You can step down.

We will take a short recess before we call the next witness.

Alfred Henry Person, Jr.

(The court recessed at 11:20 A.M., February 23, 1967, and reconvened at 11:45 A.M., February 23, 1967.)

page 50 } ALFRED HENRY PERSON, JR., called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Olitsky:

Q. State your full name, please?
A. Alfred Henry Person, Jr.
Q. How old are you, Mr. Person?
A. Eighteen.
Q. And where do you live?
A. Do you want my home address or my ship?
Q. Well, what is your home—is your home here?
A. Yes.
Q. What's your home address?
A. 1332 Green Street.
Q. Speak up now so everybody can hear you.
A. 1332 Green Street.
Q. Is that in the City of Portsmouth?
A. Yes, it is.
Q. Where are you stationed?
A. USS WALDO COUNTY (LST-1163), Little Creek.

Q. Speak up now so everybody can hear you.
page 51 } How old did you say you were?
A. Eighteen.

Q. All right. Now, Mr. Person, were you involved in the accident on the night of September 24, 1966?
A. Yes, sir.
Q. When did you—were you with Mr. Eccles?
A. Yes, sir.
Q. Who was driving the automobile?
A. Mr. Eccles.
Q. And who else besides Mr. Eccles was in the car?
A. Myself, that's all.
Q. And where were you sitting?
A. On the right-hand side.
Q. I can't hear you?
A. On the right-hand side in the front.
Q. Mr. Person, where were you-all coming from?
A. Portsmouth Boulevard Esso.

Alfred Henry Person, Jr.

Q. And where were you going?
A. Well, he was going home and I was going home.
Q. Well, was he taking you home?
A. Yes, he was taking me home.

Q. All right, sir. How long have you known
page 52 } Mr. Eccles?

A. Probably a little over a year.
Q. All right, sir. Are you-all neighbors?
A. Friends.
Q. All right, sir. Now, Mr. Eccles, on this night in question would you tell the court and jury, please, what were the weather conditions?
A. Well, it was a nice night, it was clear.
Q. All right. Do you recall how many lanes of traffic there were on Portsmouth Boulevard?
A. There wasn't any traffic.
Q. How many lanes? How many lanes did you have on Portsmouth Boulevard?
A. It was four lanes.
Q. Four lanes. All right, sir. And which lane were you and Mr. Eccles going in as you were going down Portsmouth Boulevard?
A. Inside lane.
Q. All right, sir. Do you drive?
A. Yes, I drive.
Q. What was the speed, if you know, of Mr. Eccles's motor vehicle?
A. It was somewhere between probably thirty, thirty-five.

Q. All right, sir. Now, do you recall whether
page 53 } or not if the radio was on or off in his car?

A. I think—I don't remember.
Q. All right, sir. Now, right before—would you tell the court and jury did you see the car driven by Mr. King?
A. Yes, I saw it.
Q. When did you first see it?
A. Well, it was about, say, somewhere forty or fifty feet off. About forty or fifty feet off.
Q. Yes.
A. He was coming up.
Q. Where was he coming from?
A. The side street, Dahl—I can't think of the name of it right now, but he was coming out.
Q. Was it to your right or to your left?
A. To my right.

Alfred Henry Person, Jr.

Q. All right, sir. And when you saw him do you know whether or not he had stopped?

A. No, he didn't stop. He just kept on coming.

Q. All right, sir. Now, could you estimate his speed at the time, if you know?

A. Well, he could have been doing about twenty.

Q. All right, sir. Then what happened?

page 54 } A. Well, after Frank noticed him—Mr. Eccles, rather, noticed him he blew his horn, but he kept on coming. Then he hit the brakes, I mean he tried—

Q. Who hit the brakes?

A. Mr. Eccles, he tried to avoid him and he hit the brakes.

Q. And then what happened?

A. Then we had the impact and that's all I remember.

Q. All right. Which part of Mr. Eccles's car struck the car of Mr. King?

A. The left bumper.

Q. The left side of Mr. King's car was struck?

A. Yes, sir.

Q. Do you know whether or not Mr. Eccles had his lights on or off on his motor vehicle as he was going down Portsmouth Boulevard?

A. We had lights on, yeah.

Q. Do you recall approximately what the time was, if you know?

A. Somewhere in between quarter after ten and quarter to eleven, somewhere like that. I mean quarter to eleven.

Q. From quarter after ten to quarter to eleven.

page 55 } Is that what you say?

A. Somewhere between in there.

Q. Somewhere in there. Do you recall where the car of Mr. Eccles came to a stop after the impact? Where did you-all finally come to a rest?

A. About right at the intersection, right where he was coming out at.

Q. What lane did the impact take place in? the one next to the curb or the center lane?

A. The center lane.

Q. And where was Mr. Eccles's car immediately after impact? in the lane next to the curb or the center lane?

A. Center lane.

Q. Stayed right in the center. And where did the car come to rest of Mr. King's?

A. Right off to our left a little.

Alfred Henry Person, Jr.

Q. When you say to your left do you mean the traffic lanes going in the opposite direction?
A. Yes, sir.
Q. Did you have occasion to talk to Mr. King?
A. No, sir.
Q. When you say you first saw Mr. King's car, how far back off of Portsmouth Boulevard was he, if you know?
page 56 } A. Well, about ten or fifteen feet from Portsmouth Boulevard I reckon.
Q. Could you see him?
A. Yes, I could see him.
Q. What were the traffic conditions at that time?
A. There wasn't any traffic.

Mr. Olitsky: Your witness.

CROSS EXAMINATION

By Mr. Preston:
Q. Mr. Person, it wasn't quite clear to me where you and Mr. Eccles had been? Where were you coming from?
A. Was coming from Portsmouth Boulevard Esso.
Q. Portsmouth Boulevard Esso?
A. Yeah.
Q. Had you been up there all evening?
A. Myself?
Q. Yes.
A. No, I had—I went up there about 9:30, I guess.
Q. Up there about 9:30?
A. Yes.
page 57 } Q. You didn't go up there with Mr. Eccles?
A. No.
Q. You saw him up there?
A. Yes.
Q. Was he up there when you got there?
A. I don't recall if he was in there or not.
Q. What was he doing in there?
A. Well, his brother runs the place.
Q. His brother runs the Esso station?
A. Yeah.
Q. What was Mr. Eccles doing?
A. He works up there some nights with his brother.
Q. I see. Was he working up there then?

Alfred Henry Person, Jr.

A. I couldn't say if he was working or what. He was there when I got there.

Q. Beg pardon?

A. I can't place if he was there when I first got there or not, because I didn't go inside.

Q. Did you know him prior to that time?

A. Yeah.

Q. You know him that night when you went up there?

A. Yes.

Q. You-all were friends?

page 58 } A. Yes.

Q. How old is Mr. Eccles?

A. I can't tell you.

Q. How old are you?

A. Eighteen.

Q. Had you-all been close friends?

A. Not real close friends, but we are friends.

Q. Go out together and so forth?

A. We have never gone out together.

Q. How did you happen to be going home with him?

A. Well, like I said, some nights I be out—my grandmother live in Douglas Park and I have quite a few friends out that way, so if I go up there and he be up there, I say, "You going up the way, up toward Effingham Street?" He give me a ride up that way.

Q. I am sorry, I don't believe the ladies and gentlemen of the jury can hear what you are saying, and I know I can't, so if you'd speak a little louder I'd appreciate it.

A. Douglas Park that's part of Portsmouth, a section. My grandmother lives out there and I have friends out there, so whenever I am out that way if I see him he'd give me a ride home.

Q. How did you get out there? Where did you

page 59 } come from to get out—

A. Where did I come from?

Q. Yeah—your grandmother's house?

A. Yes.

Q. In other words, you walked over from your grandmother's house to the Esso station?

A. Yes.

Q. Where were you going to? Where do you live?

A. I catch the bus right in front of the Esso station too.

Q. Where were you going?

A. Green Street, 1332. That's where my mother lives.

Alfred Henry Person, Jr.

Q. Is that where you were going?
A. Yes.
Q. Where was that with relation to where Mr. Eccles lives?
A. Well, he could turn off right before you get to Effingham Street.
Q. How close is it? How close did you-all live together?
A. It is not too close.
Q. Not too close?
A. No.
Q. You have to go by his house to get to your
page 60 } house or go by your house to get to his house?
A. Well, like I said, he could turn at the street right before you get to Effingham, Chestnut Street, and going on out like you go back out to his house. I get off there.
Q. What kind of car did he have?
A. '55 Chevrolet.
Q. Had you ever driven that car?
A. No.
Q. Know anything about that car?
A. No.
Q. Know anything about the engine in that car?
A. No.
Q. He worked up there at the service station some. You know that?
A. Yeah.
Q. Engine sound like a powerful engine to you?
A. Well, to me an engine is an engine. I don't know too much about engines.
Q. You don't know much about engines?
A. No.
Q. From the time he left the Portsmouth Boulevard Esso station, that's on down past Douglas Park, isn't it?
A. No, it is not past Douglas Park.
page 61 } Q. I mean going the other way?
A. It is right before you get to Rodman Avenue.
Q. Yeah. From the time you left there?
A. Yeah.
Q. Down to where the accident happened—excuse me, did I ask you what color car this was?
A. You asked me what kind of car was it.
Q. Yeah, what color was this car?
A. Gray.
Q. Gray color. And you say there was no other traffic in front of you?

A. No traffic.
Q. Wasn't any traffic in front of you, was it?
A. No.
Q. Didn't see any up ahead of you anywhere, did you?
A. No, except where he came out of the street. That's the only car.
Q. I mean on Portsmouth Boulevard.
A. Yes.
Q. It was sometime after ten at night?
A. Yeah, sometime after ten.
Q. And you remember whether there was any shrubs as you-all approached Dahlia Street over on the right-hand side that would block anyone—you-all's vision as you
page 62 } approached this street?
A. There was a few trees all up and down Portsmouth Boulevard.
Q. Beg pardon?
A. There is a few trees all up and down Portsmouth Boulevard.
Q. What about shrubbery, hedge-like shrubbery?
A. It is some setting back off there; about ten or fifteen feet from Portsmouth Boulevard it is as you come off Portsmouth Boulevard. I guess, I am not sure.
Q. As you-all were driving down the direction you-all were going that night over on your right-hand side as you were coming up towards Dahlia were there any shrubs or bushes over the right-hand side?
A. Yes, there are some on the right-hand side.
Q. There are some on the right-hand side. Do you remember seeing those as you were driving along?
A. I mean they are at all up and down Portsmouth Boulevard. If you come down there you see them, you know they are there.
Q. You know they are there. Did you notice them there that night?
A. Yeah, but like I say, they sit back off the highway.
page 63 } Q. How far back from Dahlia Street—the direction in which you were going, how far back from Dahlia Street do they go? Right up to the corner, stop before you get to the corner—
A. Stop before they get to the corner.
Q. About how far from the corner do they stop?
A. Maybe about ten feet, ten or fifteen feet.

Alfred Henry Person, Jr.

Q. They go up to within ten or fifteen feet of the corner?
A. Yeah.
Q. Shrubs do?
A. There are shrubs all the way up and down Dahlia Street, there's a few trees, like I said, and then up and down Portsmouth Boulevard and trees all up and down there.
Q. Do these shrubs that are there, do they stop—sort of a line of them and do they stop before you get to Dahlia Street?
A. Yeah, they stop before you get there.
Q. All right. Now, where was Mr.—and you know where the last one of those shrubs is located before you get to Dahlia Street, about ten or fifteen feet you say before you get to Dahlia Street?
A. I mean—no, let's see, coming down Portsmouth Boulevard maybe about ten feet it has a tree in front
page 64 } of this house right there.
Q. Um-hum.
A. Right there on the corner there is a tree, and then on Dahlia Street itself there is some shrubs coming up.
Q. How close do they come to the corner? That is the question I am asking.
A. Maybe about the same, about ten or fifteen feet.
Q. They were high enough to block vision, weren't they?
A. No, because I could see him from about thirty feet back.
Q. About thirty feet back?
A. About thirty or forty feet back, so couldn't block it.
Q. I see. Mr. Eccles's car was thirty or forty feet from the intersection when you saw Mr. King's car. Is that right?
A. Yeah, somewhere like that.
Q. That your best estimate?
A. Yeah, that's the best I can come.
Q. Your best estimate that Mr. Eccles's car was thirty or forty feet from the intersection when you first saw Mr. King's car?
page 65 } A. It might have been—was more than thirty. I say somewhere forty, about forty.
Q. Okay, about forty then. About forty feet back when you first saw Mr. King's car?
A. Yeah.
Q. From where you hit him. Right?
A. Yeah.
Q. About forty feet back from where you hit him, and at that time you saw Mr. King's car?

A. Yes.

Q. And at that time Mr.—you estimate that Mr. Eccles was driving thirty to thirty-five miles per hour?

A. Yeah.

Q. Could he have been doing forty?

A. Well, I couldn't really say, but going somewhere between thirty and thirty-five, because I know when you get up above forty you can tell, but—

Q. Well—

A. My estimation he was doing thirty, thirty-five.

Q. Your estimate is he was doing thirty to thirty-five. You can't tell between thirty and thirty-five, can you?

A. Yes, sir, if you are used to driving a car.

page 66 } Q. All right. Then which is the closest, thirty or thirty-five?

A. That he was doing?

Q. That he was driving.

A. What's the closest?

Q. Which one you say he was doing—which would you say was the closest he was doing? If you can estimate—in other words, if you can tell the difference between what thirty-five and forty is, then I assume you can tell the difference between thirty and thirty-five. Which would you say is closest?

A. I say he was going between thirty and thirty-five.

Q. Between thirty and thirty-five?

A. Yes.

Q. I see. You estimate he was halfway in between that?

A. He could have been over halfway or he could have been just about thirty.

Q. Could he have been doing as much as forty or forty-five?

A. I don't think so.

Q. Don't think so. Did you look at the speedometer?

A. No. Where I was sitting at I had to lean

page 67 } over some to look at the speedometer.

Q. You weren't looking at the speedometer, were you?

A. No.

Q. So that's what I am saying—

A. Estimating.

Q. —you were just estimating the speed?

A. Yeah.

Q. He was doing that speed between thirty and thirty-five

when you saw the car, when you saw Mr. King's car. Is that correct?

A. Yeah, when I saw it.

Q. When you saw Mr. King's car Mr. Eccles was driving what you estimate between thirty and thirty-five miles per hour?

A. Yeah.

Q. About forty feet from where you hit Mr. King's car?

A. Yeah. Might have been over forty.

Q. Now you say maybe over forty?

A. I told you first, could have been somewhere over forty feet.

Q. I am just trying to get what your estimate is. When Mr. Olitsky asked you you estimated that you were—I am sorry, you said forty to fifty feet off, I believe.

page 68 } A. Yeah, somewhere like that.

Q. I got the wrong figures. It was forty to fifty feet. Would that be correct?

A. I can't say exactly how many feet away. It would be somewhere over forty because—

Q. We don't expect you—I mean everybody knows you didnt' go out and take a tape and measure the thing, but all we are asking for you witnesses to give is the best estimate of how far you were away. I believe your best estimate was forty or fifty. Is that correct?

A. Yeah, somewhere like that.

Q. Somewhere between forty and fifty. And at that time he was going between thirty and thirty-five miles per hour?

A. Yeah.

Q. I understood you to say Mr. Eccles blew his horn?

A. Yes.

Q. Is that correct? Blew his horn, and that's when you first saw Mr. King's car was that first time he blew his horn, or did he wait a minute?

A. I might have seen him a little before he blew his horn.

Q. Saw Mr. King a little before Mr. Eccles

page 69 } blew his horn?

A. Yes.

Q. And did Mr. Eccles apply his brakes? You say he hit his brakes?

A. He blew his horn first.

Q. Blew his horn first?

A. Yes.

Q. All right.

Alfred Henry Person, Jr.

A. Then he kind of tried to avoid him and then he hit his brakes and he just kept on coming on out.

Q. I see. He blew his horn first?

A. Yes.

Q. Then he tried to avoid him. Now, how did he try to avoid him?

A. Went off to—just a little to the left—to the right, but after he seen that he was keeping on coming out— I mean to the right—wait a minute, he went off to the left a little, and after he seen he was keeping on coming wasn't anything to do then but hit his brakes.

Q. Let's get this straight now which way he swerved. Did Mr. Eccles swerve to his left, which would be to your left, or to his right, which would also be to your right?

page 70 } A. Let me see, he went off to the—I can't say now, I am kind of confused about it now. It is kind —let's see. I say he went off to his right just a little, not much.

Q. Swerved off to his right?

A. Yes.

Q. This was the direction in which he swerved?

A. Yeah.

Q. You-all had been in the inside lane?

A. Yes.

Q. You are sure of that? I am not trying to—

A. Yeah, I am sure of that.

Q. If you are unsure I want to know. If you have any question in your mind about it, why, say so, but I would like to know, if you remember just what you have testified to. You say he swerved to his right?

A. Yes.

Q. All right. Where was Mr. King's car when it was struck by Mr. Eccles's car? It had come all the way out into the intersection, hadn't it?

A. He was all the way into the intersection right before.

Q. And he crossed the—he had crossed the inside lane for the direction that you were going, hadn't he?

page 71 } A. He hadn't quite crossed the inside lane.

Q. He had not quite crossed the inside lane?

A. No.

Q. The front of his car hadn't crossed the inside lane?

A. No.

Q. No part of his car had gotten—

A. No.

Alfred Henry Person, Jr.

Q. —into the inside lane?
A. No.
Q. You are sure of that?
A. I am almost sure.
Q. What part of his vehicle—Mr. King's vehicle was struck by Mr. Eccles's car?
A. The left-hand side of it, the door.
Q. Right in the door, wasn't it?
A. Yes.
Q. Right in the left door?
A. Yes.
Q. In what lane was Mr. Eccles's car at that time?
A. Inside lane.
Q. In what?
A. Inside lane, center lane.

page 72 } Q. In the center lane, inside lane, all the way?
A. Was our car, the car he was driving?
Q. Um-hum.

A. Yes.
Q. And yet the front of Mr. King's car hadn't gotten across the center line?
A. No.
Q. Had not?
A. Well, maybe part of it, but he hadn't—not even enough to really say he was over in it.
Q. He may have been over in it then. Is that correct?
A. Maybe a few fractions of an inch, that's all.
Q. Maybe a few feet too?
A. I don't think it was a few feet.
Q. Don't think it was a few feet. Now, was there any other traffic coming in the opposite direction on Portsmouth Boulevard?
A. No.
Q. Any other traffic coming from Dahlia Street on the other side?
A. No.
Q. Would you say that you saw Mr. King's car just as soon as you had an opportunity to see it after he passed those shrubs?

page 73 } A. What you mean after we passed the shrubs? If you pass the shrubs you are going on past the street, period, then.

Q. What did you see then? Did you see lights?

Alfred Henry Person, Jr.

A. I could see his lights. By his car being a dark car you could see lights before you could see the car.

Q. Couldn't see the car?

A. Unless your lights was on his car. First I seen his lights coming from back.

Q. First thing you saw was his lights?

A. Yes.

Q. You couldn't see his car?

A. I saw his car right after about a couple seconds after I seen his lights.

Q. Where was his car when you first saw him?

A. It was the car on Dahlia Street.

Q. Was it entering the intersection?

A. Coming towards the intersection.

Q. Coming towards the intersection?

A. Yeah.

Q. And where were his lights when you first saw the lights?

A. Well, they were coming towards the intersection.

page 74 } Q. How far back were the lights when you first saw them?

A. I can't say.

Q. Can't say. Don't know how far back they were?

A. No.

Q. Did you see them through the bushes or did you see him around the bushes?

A. It would be kind of hard to see a car through bushes.

Q. Beg pardon?

A. It would be kind of hard to see a car through bushes.

Q. So you didn't see him through the bushes?

A. No.

Q. Saw him around the bushes?

A. You can't see around the bushes.

Q. I mean when you got to the point where the bushes didn't block your vision that's when you saw him?

A. Yes.

Mr. Preston: I have no further questions.

page 75 } A Juror: Could I ask a question, please? The distance from the Esso station to Dahlia Avenue that they travel.

The Court: That's a proper question. Can you answer that? Do you know how far it is from the Esso station to Dahlia Avenue?

The Witness: About maybe a mile, little over a mile.

The Court: Little over a mile.

Alfred Henry Person, Jr.

RE-DIRECT EXAMINATION

By Mr. Olitsky:
Q. Let me ask you this—

Mr. Olitsky: Are you finished, ma'am?
A Juror: Yes, thank you.

By Mr. Olitsky:
Q. Let me ask you this: Dahlia is how many blocks before you get to Deep Creek Boulevard intersection?
A. That is—
Q. After Dahlia is what?
A. —the last block. There is no other block.
Q. After Dahlia what is the next intersection?
A. Deep Creek Boulevard.

page 76 } Q. When you were driving from the Portsmouth —what did you call it, Portsmouth Boulevard Esso? What lane did you-all proceed in?

A. I wasn't driving. He was driving.
Q. I understand that, but what lane were you-all proceeding in?
A. Inside lane.
Q. Inside lane. And Douglas Park is where in relationship to the Portsmouth Boulevard Esso?
A. Right across—it is facing it across Portsmouth Boulevard.
Q. Right across the street?
A. Yeah.
Q. And you started off from Portsmouth Boulevard Esso?
A. Yes.
Q. And how many blocks down do these apartments extend that are Douglas Park? Where does that end; if you know?
A. Well, Grant Street is the street coming right out from Portsmouth Boulevard. That's the last street at Douglas Park.
Q. And that's across the street from the Esso station?
A. No.

page 77 } Q. How far is the Esso station from there?
A. About four blocks.

Mr. Olitsky: All right, sir. I have no further questions.

Alfred Henry Person, Jr.

RE-CROSS EXAMINATION

By Mr. Preston:

Q. I will ask this: You say Grant Street is about how far from where the accident happened?

A. Maybe half a mile.

Q. Half a mile?

A. Yeah.

Q. And how far is it in miles or half a miles and so forth from Grant Street back to the Esso station?

A. Well, we had the accident somewhere between a mile, might have been maybe a little over a mile.

Q. A little over a mile the total distance you are talking about?

A. So I say a little over a quarter mile, approximately.

Q. There are no stoplights between the Esso station and Dahlia Street all the way down Portsmouth Boulevard, are there?

A. No, until you get to Deep Creek Boulevard.

page 78 } Q. Until you get to Deep Creek. That's after you pass Dahlia the way you-all were going. Right?

A. Yes. There is one right before.

Mr. Olitsky: Are there any stop signs as you are going—have you finished?

RE-DIRECT EXAMINATION

By Mr. Olitsky:

Q. Are there any stop signs as you go down Portsmouth?

A. Truxton Avenue's a stop sign, Wall Street's a stop sign, Noble Street's a stop sign, all side streets's stop signs.

RE-CROSS EXAMINATION

By Mr. Preston:

Q. Side streets have stop signs protecting Portsmouth Boulevard. Is that what you are talking about?

A. Right.

Q. No reason to stop on Portsmouth Boulevard?

A. No.

Q. Dahlia Street didn't have a stop sign, did

page 79 } it?

A. I can't—I didn't get out and go there look for them.

Mr. Preston: You don't know. That's all.
Mr. Olitsky: Mr. Eccles.

FRANK EDWARD ECCLES, plaintiff, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Olitsky:
Q. Would you state your name, please, sir?
A. Frank Edward Eccles.
Q. And, Mr. Eccles, where do you live, sir?
A. 703 Ontario Street, Chesapeake.
Q. What is your age?
A. Twenty-six.
Q. Are you married or single?
A. Single.
Q. Where are you employed, Mr. Eccles?
A. Right now at Hurdle Line-up Service, In-
page 80 } corporated.
Q. Now, Hurdle Line-up Service where is that business address?
A. 636 West 25th Street, Norfolk.
Q. And what type of work do you do, sir?
A. I am a front end and frame straightener man.
Q. When you say front end and frames is that for automobiles?
A. Automobiles.
Q. I see. How long have you been there?
A. Approximately about four years now.
Q. Now, Mr. Eccles, on the night of September 24, 1966, were you driving your automobile?
A. Yes, sir.
Q. And where were you coming from?
A. Portsmouth Boulevard Esso.
Q. What had you been doing at Portsmouth Boulevard Esso?
A. Well, I went over—I goes over there evenings and help my brother, then I fill up full of gas and was on my way back home.

Frank Edward Eccles

Q. All right, sir. What kind of car were you driving?
A. A '55 Chevrolet.
page 81 } Q. Is that a two-door or four-door?
A. Four-door.
Q. Do you recall approximately what time it was that you left the Portsmouth Boulevard Esso Station?
A. I say round about between—round ten, 10:30, something like that.
Q. And where were you going to?
A. I was on my way home.
Q. And where were you taking Mr. Person?
A. He asked me could he get a ride downtown?
Q. All right, sir. Would you describe Portsmouth Boulevard for the ladies and gentlemen of the jury, please?
A. Portsmouth Boulevard is a four-lane highway and I was going downtown and I go down to Elm Avenue. That's where I make a right to go home.
Q. All right, sir. Now, are there any markings on Portsmouth Boulevard on the street?
A. Yes, sir, you have small cement squares in the middle of the road and then you have a white dotted line before—between it dividing the highway.
Q. All right. How many lanes going east and how many going west?
A. You have two going each way.
Q. You have two going each way?
page 82 } A. That's right.
Q. Do you know at what speed you were traveling before you approached Dahlia Street?
A. I estimate my speed between thirty and thirty-five.
Q. And what lane were you in at that time?
A. I was in the center lane.
Q. Did you ever see the car being driven by Jethro King?
A. Right as he approached Portsmouth Boulevard.
Q. Where were you when you first saw the car being driven by Mr. King?
A. I say anywhere from three to four cars back.
Q. And where was his car?
A. His car was right at the corner.
Q. Was it moving or stopped?
A. Moving.
Q. Were your lights on or off?
A. They was on.
Q. Were his lights on or off?

Frank Edward Eccles

A. They was on.
Q. Had you had anything to drink?
A. No, sir.
Q. And when you say he—how close was he to the intersection when you saw him?
page 83 } A. I estimate—
Q. If you know.
A. About three feet back.
Q. All right, sir. Was the car moving or stopped?
A. Moving.
Q. Did you have an opportunity—did you have an opportunity to get an estimate as to his speed?
A. I say anywhere between about five or eight miles an hour.
Q. All right, sir. And then what happened?
A. As he approached the boulevard he started out on the boulevard and I saw that he wasn't going to stop and then I kind of hit my—start blowing my horn and as he come on Portsmouth Boulevard and I saw that he was going *to* keep going I cut to my right and tried to miss Mr.—his car.
Q. All right, sir. Did he—do you know whether or not Mr. King applied any brakes?
A. No, sir.
Q. Did you see Mr. King in the car?
A. Yes, sir, you could see him.
Q. Which way was he looking? Which way was his head?
A. It was kind of facing towards me.
page 84 } Q. Facing towards you?
A. Yes, sir.
Q. All right, sir. And did you have your radio on or off in the automobile?
A. I couldn't tell you.
Q. When you applied your brakes how close were you to that intersection, if you know?
A. I say about three-quarters of a car.
Q. Did the car being driven by Mr. King, did it ever stop as it was crossing Portsmouth Boulevard?
A. No, sir.
Q. And where was your car and his car at the time of impact, in which—where were you?
A. Well, I was right—my right wheel was, oh, just about two wheels past the white line in the center of the road and his car was almost up against the curb on the other side.

Frank Edward Eccles

Q. I know, but when you both—which part of your car struck his car?

A. My left front fender.

Q. All right. Where was his car when you struck his car? Where was his car?

A. Over in the center lane.

Q. When you say center lane, which lane is that in relationship to the sidewalk?

page 85 } A. It would be the—

Q. First or second lane?

A. Second lane.

Q. All right, sir. Which portion of his car was in that second lane away from the curb?

A. His whole—the whole car.

Q. And where was your—when your car struck his where was your car?

A. You mean after it come to a stop?

A. No, when you struck him where was your car?

A. I was in the center lane angled towards Dahlia Street. Looked like I was going in where he was coming out.

Q. Were you turning right or left?

A. I was going straight and when he pulled out I cut to my right and was trying to miss him.

Q. All right, sir. Now, what happened to you immediately after the impact? Were you hurt?

A. Right then I couldn't tell.

Q. All right, sir. What did you then do?

A. Well, I got out my car, then I went over to Mr. King and asked him was he hurt and I saw one of his arms was hurt and so then I told him to stay here and I'd get a lady to call the police and carry him to the hospital.

page 86 } Q. All right, sir. Did you go to the hospital—

A. Yes, sir.

Q. —for treatment?

A. No, sir.

Q. All right. Did you go to work the next day?

A. Yes, sir, because that was Sunday and I come back up to the filling station.

Q. Did you go to work the next day?

A. Yes, sir.

Q. Were you feeling all right?

A. No, sir.

Q. All right. How long did you work?

Frank Edward Eccles

A. About an hour, because I was—before I left home I was telling my daddy I had the headache and I was dizzy.

Q. Don't tell us what you told anybody, just tell us how you were feeling?

A. I had the headache and I was dizzy.

Q. All right, sir. So after you left work what did you do after that hour?

A. Then I went to Dr. Jennings's office.

Q. All right. How were you feeling when you got to Dr. Jennings's office?

page 87 } A. That's when I come in with the headache, and then I was hurting around in my back and my neck was hurting.

Q. All right, sir. Now, in visiting Dr. Jennings did he give you any medicine?

A. Yes, sir.

Q. Did you take these medicines?

A. Yes, sir.

Q. Did they help you?

A. Yes, sir.

Q. Did your neck and back pains finally leave you?

A. Yes, sir.

Q. When did they leave you?

A. I say approximately about two weeks later.

Q. All right, sir. When did you return to work?

A. Three weeks later.

Q. Why did you stay out the third week?

A. Well, that's when I was going back to the doctor and then I asked him about going back to work and he said you have to let it work its way out—

Q. All right, sir.

A. —the pains.

Q. Work—where work out, Mr. Eccles, which part of your body?

page 88 } A. This right around in here and right in through here. (Indicating)

Q. What was wrong with you in the front part of your body?

A. It would just ache and have pains, severe pains. You lay down you couldn't get up. You had to get up real slow. You'd be real dizzy.

Q. How much do you earn a week at Hurdle's frame and line-up?

A. $70.00 a week.

Frank Edward Eccles

Q. And how many weeks work did you lose?
A. Three.
Q. All right, sir. Now, what was your general condition, physical condition, before the accident?
A. I'd say fine.
Q. What was—would you tell the ladies and gentlemen of the jury how you feel as of right now?
A. Well, right now I still hurt right in my stomach right through in here.
Q. Well, did you hit anything with that part of your body?
A. Evidently I hit the steering wheel.
Q. Now, when does this bother you, Mr. Eccles?
A. Well, when I work I have to work over
page 89 } fenders and when I lean on the fenders they have a tendency to hurt me then.
Q. Why do you have to lean over fenders? What do you do?
A. You have what you call shims on the inside of the car to catch the camrod on cars. You have to lean over the fender to change those around.
Q. But your neck and back are all right now?
A. Yes, sir, I say they are.
Q. Is your stomach better now than what it was before?
A. Yes, sir, long as you don't put no pressure on it. But soon as you apply pressure you are hurt.
Q. You have to apply pressure to it?
A. Yes, sir, when I am working.

Mr. Olitsky: I have no further questions.

CROSS EXAMINATION

By Mr. Preston:
Q. Mr. Eccles, the last time you saw Dr. Jennings was on November 11, 1966, wasn't it?
A. I think so.
Q. You haven't been back to see him since, have you?
page 90 } A. No, sir.
Q. And you haven't seen any other doctor since then, have you?
A. No, sir.
Q. And you say you missed three weeks from work over at Hurdle Line-up. Is that the name of it?

Frank Edward Eccles

A. Yes, sir.
Q. That was right after the accident, wasn't it?
A. Yes, sir.
Q. You haven't missed any work over there since the accident, have you? since that time, since that three weeks?
A. No, sir.
Q. You say you worked with your brother some over at his filling station?
A. Yes, sir.
Q. You work there any during that three weeks when you were away from Hurdle?
A. No, sir.
Q. Didn't go over there and help him in any way?
A. No more than just that following day.
Q. And during that three weeks did you go over there at all during that time?
A. No.
page 91 } Q. Go over to see your brother, go over in any way?
A. No, sir.
Q. Now, you say you saw Mr. King's car and it was about three feet from the—from Portsmouth Boulevard when you first saw it?
A. That's right.
Q. And it was moving very slowly at that time, wasn't it?
A. I say approximately about five to eight miles per hour.
Q. About five to eight miles an hour. And that was when you first saw his car, wasn't it?
A. That's right.
Q. Now, you say at that time you were about three to four car lengths back from the intersection?
A. That's right.
Q. What's your estimate of the length of a car in feet?
A. That would be round about forty, about forty or forty-five feet, somewhere about forty or fifty feet back. Generally approximately a car is about anywhere from ten to fifteen feet long.
Q. Ten to fifteen feet long. Do you know whether it is closer to ten or fifteen? Do you know? You work
page 92 } on cars, don't you?
A. Yes, sir.
Q. Do you know whether it would be closer to ten or closer to fifteen?
A. I'd estimate it about forty-five to fifty feet.

Frank Edward Eccles

Q. I was asking you about the length of an automobile there?

A. Oh, automobile run you round anywhere from about eighteen to twenty.

Q. An automobile runs eighteen to twenty feet long, isn't it?

A. Yes, sir, normal automobile.

Q. Was that the type of automobile you were talking about when you were talking about three to four car lengths?

A. Yes, sir.

Q. Would be a normal automobile?

A. That's right.

Q. That length would be somewhere from eighteen to twenty feet, wouldn't it?

A. That's right.

Q. And so that if you estimate three to four car lengths, then it would be somewhere around about three times eighteen to twenty or four times eighteen to twenty feet

page 93 } back?

A. Uh-huh.

Q. That you were back. Right?

A. Yes, sir.

Q. So somewhere from fifty-four to sixty or seventy-two to eighty feet back?

A. That's right around there.

Q. That's about how far you were back when you saw Mr.—

A. Yes, sir.

Q. —Mr. King's automobile. Is that right?

A. That's right.

Q. All right, sir. And at that time his car was moving into the intersection, wasn't it?

A. Yes, sir, he had started to move.

Q. You saw it was moving?

A. Yes, sir.

Q. Slow?

A. That's right.

Q. And you blew your horn at him. Is that what you did?

A. Not right—yes, sir. Not right at that moment, but I blew my horn as I come closer.

Q. When you first saw him—then you did not blow your horn at him when you first saw him?

page 94 } A. No, sir.

Q. How long would you say—how far would you say you traveled before you blew your horn?

Frank Edward Eccles

A. I say approximately about thirty to thirty-five feet.

Q. And he had continued coming into the intersection, I guess, during that time, had he not?

A. That's right.

Q. And then you blew your horn was your next action. Is that correct?

A. That's right.

Q. Didn't apply your brakes at the same time you blew your horn, did you?

A. Well, I had my—I say I had my foot on the brakes, yes, sir. But say full pressure on the brakes, no, sir.

Q. As I understand you to say, you put your brakes on when you were three-quarters of a car length away from him? Is that correct?

A. That's right.

Q. All right, you traveled thirty-five feet before you blew your horn. You hadn't gotten that close to him yet, had you? You hadn't gotten up to three-quarters of a car length from?

page 95 } A. Well, yes, sir, I say as he come on Portsmouth Boulevard his whole—say the front wheel was already on Portsmouth Boulevard, then I started blowing my horn.

Q. That's the first thing you did?

A. That's right.

Q. Next thing you did was swerve your car. Is that right?

A. As I saw he was already—wasn't going to stop I say within about—about five or ten feet that's when I started to curve, I started cutting to my right.

Q. I am trying to get the sequence of what you did. You blew your horn after you had traveled about thirty-five feet when you saw him coming?

A. That is right.

Q. Then you tried to swerve your car to the right. Is that what you did?

A. No, I was closer. I was closer. I would say I was about anywhere from five to ten feet before I started to cutting.

Q. About five to ten feet before you started to cutting?

A. That's right.

Q. Well, did you start to cutting before you put on your brakes or after you put on your brakes?

page 96 } A. I would say—it is hard to remember right at that moment.

Q. About the same time?

Frank Edward Eccles

A. I would think so.
Q. About the same time?
A. That's right.
Q. Then you say you—you had your foot on your brakes, but you weren't applying them fully as you were going down?
A. That is right.
Q. When you were about three-quarters of a car then you applied your brakes and about the same time you tried to swerve. Is that right?
A. That is right.
Q. That's what happened?
A. Yes, sir.
Q. Well, now, you say you cut to the right. Did your vehicle actually travel to the right at all?
A. Yes, sir.
Q. It did?
A. Yes, sir.
Q. Well, now, you had been in the inside lane. Where did it travel to?
A. I say approximately about one foot. I say approximately about one foot past the center lane. That's where it was when it came to—
page 97 } Q. I don't know what you mean by the center line?
A. The white line dividing both lanes.
Q. The two lanes?
A. That's right.
Q. So you went over that lane to the right a little bit, about one foot?
A. Yes, sir, I would say so.
Q. And that's where your car was when the impact occurred?
A. No, when I was setting still.
Q. What about—I am trying to figure how far you got over to your right before the impact occurred? Do you know?
A. No, sir, I wouldn't know.
Q. Do you know whether you cut to the right at all?
A. Yes, sir, I cut to the right.
Q. Didn't cut to the left?
A. No, sir.
Q. Do you recall telling the police officer that you cut to the left?
A. Yes, sir.
Q. You do recall telling him that?

Frank Edward Eccles

A. I think so.

page 98 } Q. But you say you cut it to the right now?

A. No, I say I cut to my right.

Q. Did you tell the police officer you cut to your right or your left?

A. No, I told him I cut to my right.

Q. You told him you cut to your right?

A. Yes, sir.

Q. You sure of that?

A. Yes, sir.

Q. Where was Mr. King's car? It had gotten all the way across both lanes and part of his car was over in the other lanes when you hit him, wasn't it?

A. No, his car—when I hit him his car traveled from my—from in the front of me right over to just about almost on the side of the curb.

Q. I understand that. That's where the car ended up?

A. That's right.

Q. But I mean when you actually hit him at the time you hit him his car had come across both lanes and the front of his car had gotten over into the other oncoming lane when you hit?

A. No, sir.

Q. Had it—

A. It was just about in the center lane almost.

page 99 } Q. In the center lane. And do you know where your car was at that time? Was it in the center of the lane that you had been driving in or was it over towards the other lane?

A. It was in the center lane.

Q. You hadn't cut to the right then, I take it?

A. Yes, sir.

Q. Had you been driving in the—had you been driving in the center of the inside lane as you were driving down the inside lane?

A. Yes, I was in the center lane.

Q. Were you in the center of that center lane as you were driving down, right where cars are supposed to drive?

A. Yes, sir.

Q. And you cut to the right?

A. That is right.

Q. Before you hit him?

A. That's right.

Frank Edward Eccles

Q. And your car was still in the center of the center lane when you hit him?

A. No, I said my right wheel was cross the center—the white line that goes dividing the highway.

Q. The impact did not occur in the inside lane then fully; it was partially over in the other lane?

page 100 } A. That's right, I say partially.

Mr. Preston: I have no further questions.

Mr. Olitsky: That's our case, Your Honor.

Mr. Preston: I would like to take the matter up with the court, if Your Honor please.

The Court: All right. We will take a short recess.

(The court recessed at 12:30 P.M., February 23, 1967, at which time the court and counsel for both sides retired to chambers and the following occurred:)

Mr. Preston: Your Honor, the reason—

The Court: You have a motion?

Mr. Preston: That's what I am doing, Your Honor, is moving to strike the plaintiff's evidence at the conclusion of the plaintiff's evidence. I think Mr. Eccles has convicted himself of negligence in the operation of his automobile. He saw this car, he says, when it was three feet from this intersection and it was moving into the intersection. And what did he do? He said he blew his horn and he continued thirty-five feet before he did anything. I mean he didn't immediately do anything. He continued thirty-five feet from a

page 101 } distance of anywhere from what his estimate is from three to four car lengths and from eighteen to twenty feet makes it anywhere from fifty-four to eighty feet back would be the distances that could be arrived at from his testimony, going thirty to thirty-five miles per hour, and at eighty feet back—that was the maximum he could say he was back—he continued on another thirty-five feet without taking any action whatsoever.

The Court: In the sum total of one second.

Mr. Preston: Sir?

The Court: In the sum total of one second.

Mr. Preston: But he didn't attempt to take any action, and he blew his horn when he took his action instead of attempting to apply his brakes and he didn't get his brakes applied, of course, until he got up to within—he said he had his foot

on the brake and didn't apply it until he got three-quarters of a car length from the point of impact. He's driven this car at a speed of thirty to thirty-five miles an hour. According to the intersection he has no right to assume that anybody's going to accord him any right-of-way at that point. There is no stop sign at that point and when he sees a
page 102 } car coming at him from this intersection he just continues on apparently in the assumption that blowing his horn is going to clear the issue for him. I think he was guilty of contributory negligence as a matter of law.

The Court: No, sir. No, I can't go along with you on that.

Mr. Preston: I note my exception to the ruling of the court in overruling my motion.

I don't know what the record reflects, but I want to state my motion carefully. I would like to get my motion in the record that my motion was to strike the plaintiff's evidence at the conclusion of the plaintiff's evidence on the grounds that it is insufficient at law to support a verdict. And the record should reveal that that was overruled and that I noted an exception for the defendant.

(At 12:38 P.M., February 23, 1967, the court and counsel returned to the courtroom.)

The Court: Ladies and gentlemen, this looks like a proper place to take a break for lunch. So we will adjourn now until two o'clock—yeah, two o'clock. And, ladies and gentlemen, don't discuss the case with anyone on the
page 103 } outside or allow anybody to discuss it in your presence, and when you get back from lunch use the jury room so that you won't be circulating here in the hall and in the courtroom with the people that are interested in the case. So we will take up again at two o'clock and I will see the lawyers before then.

(The court recessed for lunch at 12:40 P.M., February 23, 1967, and at 1:38 P.M., February 23, 1967, the court and counsel for both sides reconvened in chambers, at which time the following occurred:)

Mr. Preston: I don't know how to fit this in, Your Honor. I just want to make sure the record shows ultimately, properly, because I'm going to renew my motion to strike all the evidence at the end of the evidence and I don't want that to come after the instructions have been argued in the record and so forth.

The Court: We will just see how far we can go with these instructions.

Mr. Preston: Then we can take them up later.

The Court: We could very easily have some that wouldn't be appropriate.

page 104 } Mr. Olitsky: I wanted to cut something out of this, judge. I noticed it after my girl typed it. After the word "then" three lines from the bottom, "unless the plaintiff was guilty of negligence," would you accept that without that in it? Would it still be proper?

The Court: Yes, you don't need both of them.

Mr. Olitsky: Of course, I'm saying it was his sole—if we so proved it was the sole proximate cause of the collision, so I wanted to cut out "unless the plaintiff was guilty of negligence that proximately contributed to cause the collision." I don't want to offer it with that in there.

Mr. Preston: Have you got it written up another way?

Mr. Olitsky: I am going to X it out. Then you can offer any objections you see fit, or the court may not want to accept it.

Mr. Preston: I was just—

The Court: You want to strike out the clause beginning with "then" and running through "collision." Is that—

Mr. Olitsky: Yes, sir.

page 105 } The Court: Strike it out.

Mr. Olitsky: Because the girl typed these out using a form and I just noticed that when I was sitting here.

Mr. Preston: Now, I object to the instruction which has not yet been numbered—what is the number?

The Court: This would be 1.

Mr. Preston: Little Roman numeral 1 or—

The Court: Just a plain 1.

Mr. Preston: —just plain 1, which was offered by the plaintiff, on the grounds that in this case there is no evidence from which a jury should be allowed to find the defendant guilty of negligence in operating his vehicle at an unreasonable speed under the circumstances and traffic conditions then and there existing. This isn't a speed case on his part in any sense of the word. With reference to in excess of the speed limit, well, he hasn't done that or with regard to excess of that which was reasonable. The plaintiff himself says that the defendant was driving five to eight miles an hour. Now I don't think the court can say that any speed was

page 106 } unreasonable under the circumstances of the case and that makes the instruction in it more proper, because that then has to do with lookout, really, which he's already got an instruction upon.

The Court: What do you want to do about that?

Mr. Olitsky: Well, Your Honor, actually, although he said he was going five to eight miles an hour and then I think the other boy that was in the car said fifteen to twenty, he shouldn't have been moving at all as far as reasonable speed is concerned, and I submit to the court the jury could think any speed he was going could properly be unreasonable as to where this accident occurred.

The Court: Well, that wouldn't be speed; that would be movement.

Mr. Olitsky: Yes, sir. Well, that's true too. Well, you can X it out. It's all right with me.

The Court: Well, that will take that—I don't think you have any speed issue in this case.

Mr. Olitsky: No. It will be perfectly all right.

page 107 } Mr. Preston: May I see the original instruction number 1, Your Honor, as it now reads? What I am concerned about is I don't—this X'ing out of the part about "then unless the plaintiff was guilty of negligence which proximately contributed to cause the collision," if the jury could happen to read that they would think that the fact that it was X'ed out would mean that contributory negligence would be no defense in the case.

The Court: I don't think you can read it.

Mr. Preston: I think they might be able to read part of it by looking at the back. If you would make it a little stronger, the black marking over. I don't think they would be that curious, but I would just like to be ultracautious.

The Court: If they can read it they deserve to.

Mr. Preston: Now, I of course object to the granting of any instructions, including instruction number 1, on the grounds that the plaintiff's evidence convicts him of negligence and that the motion of the defendant to strike the evidence should be sustained.

The Court: All right.

page 108 } Mr. Olitsky: This is just an explanation of negligence instruction.

Mr. Preston: This is number 2 or you are not going to number it yet or what?

The Court: How about it? Anything in there—

Mr. Preston: Yes, sir, I object to it on two grounds: First, I think the instruction as it is written if applicable with reference to other instructions of the court might be all right except for one thing. I think the last sentence of it is incorrectly stated—"Said 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 have done." I think he meant to type in there "or doing what such a person would not have done under the existing circumstances," so I think the instruction, first, is incorrectly stated, and—see what I mean?

The Court: Yes.

Mr. Preston: It is supposed to be omission and commission. The omission is the first part and the commission is supposed to have been the second part.

page 109 } The Court: What a person would not have done.

Mr. Preston: But aside from that, the only instruction we have so far is number 1 in which it states exactly what the duties of this man were and defines them and says if he was negligent in that respect and they find it was the sole proximate cause of the accident then they should find the verdict in favor of the plaintiff. I don't see where this instruction adds a thing in the world to that instruction and can do anything but confuse. Now, if you have an instruction which says if the jury could believe the plaintiff was guilty of negligence which was the sole proximate cause of the accident and then he starts defining what negligence is, then I think

The Court: Have you got anything else this ties into?

Mr. Olitsky: On a lookout instruction. I got another instruction we can—

The Court: Let's hold onto it.

Mr. Olitsky: You can hold off. I don't have that many. Of course, the defendant hasn't testified yet, but—

page 110 } Mr. Preston: I tell you what I am going to do. I don't want to take a chance. This thing doesn't bother me. I won't object to this second one, other than the word "not." I don't want to take any chances. That would be number 2, I take it, with the word "not" inserted. Except on the same grounds that all of them should not be granted.

If Your Honor is ready to hear from me on this other one, I have a couple comments I would like to make on it.

The Court: All right.

Mr. Preston: I object to this one, because this instruction, which is apparently number 3 in the line, says that the duty to exercise ordinary care to keep a proper lookout requires not only the physical act of looking with ordinary care but reasonably prudent action to avoid the danger which a proper lookout would disclose. If a person looks and doesn't see what an ordinarily prudent person would have seen under the circumstances in time to take the necessary precautions to avoid danger he is as guilty of negligence as if he failed to maintain a lookout. Now, that last portion of that in-

struction I think would be in error to grant,
page 111 } because it implies that there would be a necessity
for Mr. King to have taken necessary precautions to avoid danger, even though he did not—might not have seen the automobile or even though if he had seen it an ordinarily prudent person would have still taken the action which he took, so it ends up in saying in effect that he would be guilty of negligence as a matter of law in entering the intersection because he didn't take the necessary precautions to avoid danger.

Now, that's not the law. If he looks and looks for a reasonable distance down the street and doesn't see anything coming, the mere fact that the jury might think that he might have seen a car, no matter how far it was down the street, shouldn't allow them to find against him on the grounds he should have stayed where he was. He had the right to go forward if an ordinarily prudent person would have done so. I think that would correctly state that law to the jury.

The Court: If you took out that phrase "in time to take the necessary precautions to avoid danger," isn't that what your complaint is—

Mr. Preston: That's part of the complaint.

The Court: —that "in time to take—"

page 112 } Mr. Preston: That's certainly part of the complaint. I'd have to look at it to see what's left. You see, this is not a finding instruction.

The Court: "If a person looks and does not see what an ordinarily prudent person should have seen under the circumstances he is as guilty of negligence as if he failed to maintain a lookout." I think that's so.

Mr. Preston: If his failure to see it was a proximate cause of the collision that would be true. I mean you can say—

The Court: That's not involved here. This is talking about his obligation of a lookout. He is obligated to see what a reasonable person would have seen under the same circumstances.

Mr. Preston: All right, but the point I am making is that if a car was a mile down the road they might say a reasonable person might have seen it a mile down the road and the fact he didn't see it made him negligent. I mean there's no distances proved in that thing, and it should be certainly a proximate cause.

The Court: It is not a finding instruction. I think your
point is well taken with that phrase "in time to
page 113 } take the necessary precautions to avoid danger."

Mr. Preston: Yes. I think that the—

The Court: That leaves out consideration entirely any exercise of judgment.

Mr. Preston: Right.

The Court: I go along with you on that. But a man is certainly charged with the duty of seeing what an ordinary prudent person would have seen.

Mr. Preston: I agree with that. I just am a little concerned about the fact there is nothing about proximate cause in there, because—

The Court: Well, this is not a finding instruction.

Mr. Preston: If he sees him—if he doesn't see—

The Court: If he doesn't see what he should have seen he is negligent—

Mr. Preston: —what he should have seen then he was negligent.

The Court: —period.

Mr. Preston: Right.

Mr. Olitsky: Well, Your Honor, I have no objections to taking out that phrase then.

page 114 } Mr. Preston: Well, I object to it. I don't know what his other instructions are going to be, but I object to it on that ground that there ought to be something about—

The Court: Well, it is already tied in with instruction number 1.

Mr. Olitsky: Now, you are taking it out from "in time to take the necessary precautions to avoid danger." Is that correct, judge?

The Court: Yes.

Mr. Olitsky: All right, sir.

Mr. Preston: And I take exception.

Mr. Olitsky: For right now this is my last one. I don't know what Mr. Preston's going to do.

Mr. Preston: I take exception to the granting of number 1 also.

The Court: Well, nobody's precluded at this stage from putting in any other, because we are not through with the evidence, but I just wanted to get by what we could.

Mr. Olitsky: Well, I see she's got nursing and hospital. That's got to come out. Scratch those out in 5, judge, that hospital and nursing. Knock out that hospital and nursing.

page 115 } The Court: You haven't proved anything in the future either. Take out everything after "incurred."

Mr. Preston: I would like to object to a couple of them here—

The Court: All right.

Mr. Preston: —on the ground that in number 2 of the elements that there is no evidence that there has been any effect of his injuries upon his health.

The Court: Sure it has.

Mr. Olitsky: Well, what is an injury?

Mr. Preston: That's what number 1 is, bodily injuries, and there's been no evidence that the bodily injuries which he sustained, which you refer to in number 2, had any effect on his health.

Mr. Olitsky: He says he is not in the same health now as he was before the accident.

Mr. Preston: In other words, my point is the only thing involved is they are one and the same, whatever bodily injuries he had is the same as however his health was affected. It didn't affect him by causing him to have a disease or some other problem with his health other than the in-
page 116 } juries which were described. That's my ground, and whether it is valid or not, I wish to forward it.

The Court: You will have to convince the Court of Appeals on that.

Mr. Preston: All right, sir. And number 3 of that same instruction, "any physical pain and mental anguish suffered by him in the past and any which may be reasonable expected to be suffered by him in the future." I submit that there is no evidence from which the jury could conclude—

The Court: He still hurts. Have you read the advance sheet?

Mr. Preston: Well, any mental anguish, I don't think there is any evidence of past or future mental anguish, and I don't think there is any evidence from which the jury could properly conclude and come to any reasonable degree of decision as to any physical pain which may be reasonably expected to be suffered by him in the future, so I object to number 3 on those grounds.

The Court: I think that's pretty clear. As long as he's hurting he's entitled to have that go to the jury.

page 117 } Mr. Preston: That will about make it on my objections, and I take exception to instruction 4—what is it? 4? —on the grounds stated.

Is that all? You want to go forward?

The Court: I think we might as well pick up, if the jury are all back here now—it is two o'clock—and we can resume that when we get through.

Ina Britt

(At 2:00 P.M., February 23, 1967, the court and counsel for both sides returned to the courtroom and the trial proceeded as follows:)

Mr. Preston: Call Mrs. Britt, please.

INA BRITT, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Preston:
Q. Would you state your name, please?
A. Ina Britt.
Q. And where do you live, Mrs. Britt?
A. I lives 52 Grant Street.
page 118 } Q. Now, I would ask you, please, if you can, to speak loudly and clearly so that the jury may hear, and the court may hear what you have to say. Where did you say that was, 52?
A. 62.
Q. 62 Grant Street?
A. Um-hum.
Q. Where is that located with reference to Portsmouth Boulevard?
A. It is right on the corner from across Noble Street Church on Portsmouth Boulevard.
Q. Is it on the corner of Portsmouth Boulevard and Grant Street?
A. Yeah, the opposite corner.
Q. In other words, if you are going out of town on Portsmouth Boulevard it is on the right. Is that the idea?
A. Yeah, if you are going out of town.
Q. And what type of—and it is on the far corner, if you were going out of town, the far right corner?
A. Um-hum.
Q. What type of house do you live in?
A. An apartment house, two-building apartment house.
Q. Two-family?
page 119 } A. Um-hum.
Q. Is it a duplex house?
A. Yes.

Ina Britt

Q. And which street does your door face—your front door face upon?

A. My front door faces Grant Street.

Q. And which street does the front door of the other one in that building face upon?

A. Grant Street.

Q. And is that closer—that door closer to Portsmouth Boulevard than your door?

A. Yes.

Q. About how far apart are they?

A. (No reply)

Q. Do you see anywhere in this courtroom that's about right?

A. About like the building.

Q. About the width of this courtroom?

A. Yes, sir.

Mr. Preston: Your Honor, you have any idea what the width—I think maybe if we can know what the width of this courtroom is we might be able to stipulate it.

page 120 } The Court: I don't know, about the width—I have got it back there somewhere.

Mr. Preston: Well, I don't think it is that important. I won't—

By Mr. Preston:

Q. And do you know where the Portsmouth Esso Station is?

A. Yes, sir.

Q. Do you know where that is?

A. Yes, sir.

Q. Do you know where Dahlia Street is?

A. Yes, sir.

Q. Which is closer to Dahlia Street, your house or the Portsmouth Esso Station?

A. I would say the Esso station.

Q. Is closer?

A. Yes.

Q. To the intersection?

A. Yes.

Q. To Dahlia Street?

A. Yes, than my house. Dahlia Street is three blocks from my house.

Q. Dahlia Street is three blocks from your house?

A. Uh-huh.

page 121 } Q. How far is the Portsmouth Esso Station, so far as you know?

A. Well, so far as I could count, between the—the distance is three streets—let me see, Truxton Avenue and then that. It is two streets from my house.

Q. What is?

A. The Esso station.

Q. Toward Dahlia Street or away from Dahlia Street?

A. From my house to the Esso station is about two blocks.

Q. Which direction, toward Dahlia or away from Dahlia?

A. Away from Dahlia.

Q. So your house is about three blocks from Dahlia and the Esso station is about two blocks on farther away from Dahlia?

A. Yes.

Q. Do you remember the evening that Mr. King here was involved in an accident?

A. Yes, I do.

Q. It was at nighttime, wasn't it?

A. Yes, sir.

Q. Where were you a short time prior—did you hear the accident?

page 122 } A. Yes, I heard it.

Q. Where were you a short time just prior to the time you heard the accident?

A. Well, when I came out my door and to walk down my walk to the street to go over to the next door, well—

Q. What next door were you going to? the lady's house—

A. Yeah, next door to me.

Q. One lived right in the same duplex as you did?

A. Yes.

Q. You say you did walk out your door to go down there?

A. Yes, I walked out my door.

Q. Why did you go to do that?

A. I walked over to visit a sick lady to see how she was getting along, watching—I was looking after her.

Q. Let me ask you this, Mrs. Britt, do you have any physical problems yourself?

A. Yes, I do. What you mean, sickness?

Q. I mean are you sick in any way?

A. Yes, I am.

Q. What's the matter with you?

page 123 } A. High blood pressure and heart condition.

Ina Britt

Q. Now, when you were walking—when you walked out of your door and started over toward the house next door would you tell the jury what you saw?

A. Well, when I came out of the house and walked down my walk to turn to go to the next walk I saw this car come by and it was running real fast, and by the time I walked from my walk in the front of my house, like the street passing the house, and walk out in the street and from the time I got to the next walk, which was next lady, that the lady's house I was going to, I heard this noise.

Q. What did that noise sound like?

A. It sound like something had hit together.

Q. Like two cars had hit?

A. Uh-huh.

Q. The car that you saw go by, was it going—what street was it on?

A. On Portsmouth Boulevard.

Q. Was it going towards Portsmouth or was it going away from Portsmouth?

A. Going towards Portsmouth.

Q. In other words, it was going down towards Dahlia Street?

A. Yes.

page 124 } Q. And what—did you notice what color that car was?

A. No. It was under the light. The only thing I could tell it was gray, a grayish looking car.

Q. Grayish looking car?

A. Uh-huh.

Q. Were you able to tell what kind of a car that was?

A. No, I don't know the make of no cars.

Q. Um-hum.

A. But I know it was—the color, it was gray. See, it was under the lights.

Q. Um-hum. Was there any other traffic on Portsmouth Boulevard going that direction?

A. No.

Q. Any car that went out that you saw just prior to that car?

A. No.

Q. Anyone just after that car?

A. No.

Q. And what would be your best estimate of the speed of that car as it went by on Portsmouth Boulevard?

Ina Britt

Mr. Olitsky: Your Honor, I am going to object
page 125 } to this unless she shows that she drives an automobile or has some knowledge in order to give her opinion.

The Court: Overrule the objection.

Mr. Olitsky: All right, sir.

By Mr. Preston:

Q. What would be the best estimate of the speed?

A. So far as from what I could tell the way it went by so fast, it was between fifty and sixty miles an hour.

Q. That's your best estimate of the speed?

A. That's my best—

Q. Of course, you weren't able to see the speedometer or anything?

A. No, I wasn't able to see it.

Q. And before you got up to that door you heard the crash down there?

A. Before I could go up her walk I heard the crash.

Q. Now, did you know Mr. King here before this accident?

A. Yes, I know him.

Q. Did you know his wife?

A. Yes.

page 126 } Q. Did you go down to the scene of the accident where the accident occurred?

A. No, I didn't.

Q. Did you later learn from Mr. King that he had been the one involved in the accident down there?

A. Yes, sir.

Q. Did you volunteer the information to him or did he ask you whether or not you had been a witness or what?

A. No, he just said that he was in an accident.

Mr. Olitsky: Now, Your Honor, I'm going to object to what he said to her.

Mr. Preston: I think that's proper.

By Mr. Preston:

Q. I don't think you can say what Mr. King said to you. I just asked you whether or not you told him you had seen the accident or whether—

A. Yeah, I told him I heard it.

Q. Told him you heard it?

A. Um-hum.

Mr. Preston: All right. I have no further questions.

Ina Britt

page 127 } CROSS-EXAMINATION

By Mr. Olitsky:

Q. Which accident did you hear, Mrs. Britt?

A. I presume from what I was told it was that accident that Mr. King had. I didn't go down there.

Q. So you don't know—you don't know what accident you heard, do you?

A. Yes, I heard that one.

Q. Did you hear any—but you don't know which one that was, do you?

A. I don't say I know that it was that accident or nare another or who car it was, but I know it was that car that passed at the time that I walked out the door and I heard the accident—I heard the noise. I couldn't swear it was that car, because I didn't go down there.

Q. All right. Do you drive?

A. No, I don't.

Q. And how old are you?

A. I am fifty-six.

Q. And you have never driven an automobile, have you?

A. No, I haven't.

Q. All right. How long have you known Mr. and
page 128 } Mrs. King?

A. I have been knowing them for years.

Q. How many years?

A. For years. I didn't say how many.

Q. Ten? Fifteen? Twenty?

A. His wife—me and his wife used to work together. We used to work at the laundry together.

Q. How long ago has that been?

A. That's been about fifteen years ago.

Q. Do you recall whether this grayish looking car had two doors or four doors to it?

A. No.

Q. You don't know who was driving it?

A. No.

Q. You don't even know which lane it was proceeding in, do you?

A. No, I don't.

Q. Do you have any idea what time it was?

A. Around ten minutes past ten when I walked—

Q. Ten minutes after ten. What did you do, look at your clock when you walked over the apartment?

A. Yes. I was supposed to go over there a certain time and

Ina Britt

I was a little late going over there at that time at ten o'clock.

Q. You were going to visit somebody sick?

page 129 } A. Yes, I was.

Q. And they were waiting for you?

A. Yes.

Q. And as you were walking you were facing Portsmouth Boulevard?

A. Yes, when I came out.

Q. Do you know whether the lights were on or off on the gray car?

A. I couldn't tell. See, it was going under the lights there by that store where was down there and it was a bus stop.

Q. How far away was this car from where you were?

A. Well, from what I would judge—now, for me I can't go—about as far as from here to the back side of this building where you come up the steps.

Q. Well, I believe you said that the Portsmouth Boulevard Esso Station is two blocks from where you live. Is that right?

A. Yes. Portsmouth—yes, I did say two blocks.

Q. All right. Now, and the Portsmouth Boulevard Esso is closer to Dahlia Street than your house, isn't it?

A. No, the Esso station is beyond my house,

page 130 } but it is—if you leave my house going to the Esso station you could go to my house and the Esso station before you go from my house to Dahlia Street. That's what I meant by that.

Q. You don't know who was driving this gray car?

A. No, I don't.

Q. You don't know what kind of car it was?

A. No, I don't know no make of no cars.

Q. You don't know whether it was a light gray or a dark gray?

A. I know it was—I know that. I know it was light gray.

Q. You know it was a light gray?

A. Yes.

Q. I believe you said as the car was proceeding down the street then you continued walking over to your neighbor's house?

A. Yes.

Q. Did you go into your neighbor's house?

A. Yes, I went in there.

Q. And then you heard the crash before you walked in?

A. Before I walked—started walking up her walk I heard the crash.

Ina Britt

page 131 } Q. And then you walked into the house?
A. Yes, I went in her house.
Q. So you don't know where the crash came from?
A. No, I know it came from down that way.
Q. But you don't know where in that general direction. Is that right?
A. No, I didn't know before I was told—was told that that's—heard that's where the wreck was at.
Q. You mean Mr. King told you about it?
A. Yes, he told me.
Q. How many weeks was it when he told you?
A. He told me that night when he came from the hospital.
Q. He told you that night?
A. Yes, I was still over there at the house and he came by there.
Q. He came over to see you at that sick lady's?
A. He didn't come to see me.
Q. He came to see the sick lady?
A. Yes.
Q. What time was this? Eleven or twelve o'clock at night?
page 132 } A. It was round a few minutes after eleven when he got there.
Q. Could you tell whether he had been drinking or not?
A. No, he couldn't been drinking. From what I could understand or what I could see he didn't act like he was drinking.

Mr. Olitsky: I have no further questions, Your Honor.

RE-DIRECT EXAMINATION

By Mr. Preston:
Q. Mrs. Britt, you have ridden in automobiles during your lifetime, have you not?
A. That is right.
Q. That's the way you get around, in automobiles, isn't it?
A. Yes, I have rid in them and after.

Mr. Preston: I have no further questions, Your Honor.
Your Honor, if Mr. Olitsky has no further questions—
Mr. Olitsky: I have no further questions.
page 133 } Mr. Preston: I don't know—do you have any way to get home?

Jethro King

The Witness: No.

Mr. Preston: You want to leave or want to stay?

The Witness: I want to wait for him if it don't be too long. It is too cold out there.

Mr. Preston: As far as Mrs. Askew is concerned too, as far as we are concerned—I don't know whether she's been notified or not.

Mr. Olitsky: Yes, she has.

JETHRO KING, defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Preston:

Q. Your name is Jethro King, Mr. Jethro King. Is that right?

A. That is right.

Q. I guess you have heard us tell everybody on the stand to talk loud enough so the jury can hear
page 134 } you and so forth. Be sure and do so, will you please?

Where do you live?

A. 49 Grant Street, Douglas Park.

Q. Now, is that Grant Street the same Grant Street that Mrs. Britt lives on?

A. That's right.

Q. And about how far do you live from there?

A. About two—about three-quarters of a block.

Q. Do you know the people that live in the place next door to Mrs. Britt there?

A. Yes, I do.

Q. Who are those people?

A. Mr. James Champlin.

Q. Someone sick in that house?

A. Yes, sir.

Q. Was there at that time? How long have you lived in the City of Portsmouth, Mr. King?

A. Well, about twenty-four years.

Q. When did you move to the City of Portsmouth?

A. 1941.

Q. 1941?

A. Yes, sir.

Jethro King

Q. And where did you come from when you came up here to Portsmouth?

page 135 } A. When I came to Portsmouth?

Q. Yes.

A. From Berkley, Norfolk.

Q. And is that where you lived before you came here?

A. Before I came to Portsmouth, yes.

Q. What about before—where did you come from originally?

A. Warrenton, North Carolina.

Q. And you came over to Portsmouth in 1941?

A. That's right.

Q. Where do you work?

A. Norfolk Naval Shipyard.

Q. How long have you worked over there?

A. Twenty-four years.

Q. The whole time you lived in Portsmouth?

A. Yes, sir.

Q. So that would be since 1941?

A. That's right.

Q. Have you worked there continuously since 1941?

A. Except my Army time. I went to the service.

Q. And when did you go into the service?

A. In February of '42.

Q. How long were you in the service?

page 136 } A. Three years, eight months, and twenty-eight days.

Q. And were you overseas during any of that time?

A. Yes, sir.

Q. What outfit were you with?

Mr. Olitsky: Your Honor, I am very interested in this in a way, but I would like to interpose an objection as to his life history before we get on with the case. I don't see where there is any materiality as to whether he was in the service or not as to what that has to do with the accident.

Mr. Preston: Your Honor, I think the jury's entitled to know something about Mr. King's background. He is going to testify about the facts in this case and I want them to know what kind of man he is.

The Court: Go ahead.

By Mr. Preston:

Q. You say you served in the Army for about three years approximately?

Jethro King

A. Yes, sir.

Q. You get an honorable discharge from the
page 137 } Army?

A. Yes, sir.

Q. And other than that you have continuously been with the Norfolk Naval Shipyard. Is that correct?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Now, Mr. King, you were driving a Chevrolet automobile on the evening that this accident occurred, were you not?

A. That's right.

Q. And how did you happen to be out around ten o'clock on the evening of this particular day?

A. Well, I had taken my wife to the market and when she came from the market I wanted to make a phone call to Norfolk, and I left the house to go to Hardie's Service Station to make—

Q. Why didn't you make the telephone call from your house?

A. I don't have a phone.

Q. I see. Go ahead.

A. I was going to the nearest pay phone, which is Hardie's Service Station. When I got there someone was in there, so

I kept on down to Food Town Market on Deep
page 138 } Creek Boulevard, and on my way back out I came
out Dahlia Street to Portsmouth Boulevard.

Q. Is that the proper way to get home from where you had made the telephone call?

A. Yes, sir.

Q. There's been some talk here something about your drinking. Mr. Olitsky asked Mrs. Britt about that. Had you had anything to drink during that day?

A. No, I drank a can of beer that evening about four o'clock, but not anything after then.

Q. Nothing after that?

A. No, sir.

Q. You were in full possession of your faculties?

A. Yes, sir.

Q. As you were driving your automobile?

A. Yes, sir.

Q. And what kind of a car did you have?

A. '59 Chevrolet four-door.

Q. Now, were you familiar with this scene of this accident? Have you driven that way before?

A. Yes, sir, many a time.

Q. Which direction were you driving? What street were you on? On Dahlia Street?

A. I was on Dahlia Street.

Q. Which direction were you traveling in?

page 139 } North, south, east—

A. I was going north.

Q. Going north on Dahlia Street, and of course Portsmouth Boulevard runs east and west?

A. That's right.

Mr. Preston: You object to them?

Mr. Olitsky: Go ahead.

By Mr. Preston:

Q. Mr. King, I show you a Polaroid snapshot and ask you if that accurately shows—although it is a daylight picture, not at nighttime when this accident occurred, other than that does it accurately show the part of Dahlia Street where you approached Portsmouth Boulevard down to your left at this intersection and the various physical—

A. That's Portsmouth Boulevard facing west and this is Dahlia right here coming out into Portsmouth Boulevard.

Q. That's Dahlia.

Mr. Preston: Let's—well, Your Honor, first I would like to offer that as Defendant's Exhibit No. 2, I believe it is.

(So marked by the court.)

page 140 } By Mr. Preston:

Q. Now, hold it so that if anybody can see that far, which I doubt, at least we will try. Which is Dahlia Street? You will have to hold it so you can point. Point to it and show which is Dahlia Street.

A. This is Dahlia Street right here.

Q. In other words, the street coming in from the left side of the photograph is Dahlia?

A. That's right.

Q. That is the street you were on?

A. That's right.

Q. Portsmouth coming the other way. You are looking west, so a car coming east would be coming down toward Dahlia Street?

A. That's right.
Q. And that's the way that intersection looked at that time, is it?
A. That's right.
Q. Mr. King, I hand you a snapshot which is a side picture of an automobile and ask you if you recognize that automobile?
A. Yes, I do.

Mr. Preston: Excuse me, let's wait just a minute. That's all right. I thought you-all were finished looking at it.

page 141 } By Mr. Preston:
Q. I was asking about this Polaroid snapshot here. Do you recognize that automobile, Mr. King?
A. Yes, I do.
Q. Whose automobile is that?
A. That is my automobile.
Q. Does that picture show the damage that was done to the left side of your automobile?
A. That's right.
Q. Is that the damage that was done to your automobile in this accident?
A. That's right.

Mr. Preston: Your Honor, I offer that as Defendant's Exhibit No. 3.
The Court: Exhibit 3.

(So marked by the court.)

By Mr. Preston:
Q. Mr. King, I would like for you to tell the court and the jury what you did as you approached the intersection of Portsmouth Boulevard in your automobile on that evening as you were driving on Dahlia Street. In the first place, what lane were you driving in?
A. What, on Dahlia Street?
page 142 } Q. Yes, on Dahlia Street.
A. Well, Dahlia Street is just wide enough for two cars to slide by, it is not a wide street, so I'd say almost center, because it is a narrow street.
Q. All right, sir. Now, tell the court and jury what you did as you approached this—

Jethro King

A. Well, as I approached Portsmouth Boulevard I stopped and I looked to my right and to my left. The street was clear, and to my right toward Deep Creek Boulevard where the red light is it was clear and to my left you have to observe an automobile at night by the headlights through those hedges alongside the street, which those shrubberies is between the sidewalk and the curb, and I—

Q. Excuse me just a minute. Those shrubberies you are referring to, do they show in this Polaroid, exhibit No. 2?

A. Yes, sir, when you come out here to the corner you is in line with those shrubberies here.

Q. Point those shrubberies out you are referring to. They are the ones you see with Portsmouth Boulevard to the left that are closest to Portsmouth Boulevard. Is that right?

A. That's right. So you have to look for the headlights through those shrubberies the only way to tell

page 143 } a car's coming. Well, I didn't see any lights coming through those shrubberies and so I proceeded on in the street.

Q. Were there any lights between the shrubberies and you on Dahlia Street?

A. On Dahlia Street?

Q. In other words, before you saw—in other words, how far down would you say—

A. Well, you can't see a hundred fifty foot down that street —I mean down Portsmouth Boulevard looking west, so if it is a car coming from west going east on Portsmouth Boulevard you have to see the lights flashing through those shrubberies.

Q. All right, sir. Where was it that you stopped your automobile?

A. Just at the intersection of Portsmouth Boulevard and Dahlia Street.

Q. Where was the front of your automobile stopped?

A. Well, I wasn't far enough out in the street for, you know, to block traffic. I'd say just to the curb.

Q. To the curb?

A. That's right.

Q. All right, sir. And you say you looked to

page 144 } your right first?

A. I looked both ways. I looked to my right first and then I had to concentrate on the left because that was the blind corner.

Q. All right. When you looked to your left was there any

car or any headlights within your vision anywhere down Portsmouth Boulevard?

A. No, it wasn't any lights whatsoever in that direction.

Q. As far as you could see down to the left?

A. As far as I could see down the street.

Q. All right. What was your intention? How were you going to proceed in order to get home from there?

A. Well, I was going to proceed on out into the south lane of Portsmouth Boulevard and make my left turn and go back left to Douglas Park.

Q. Is Dahlia Street a T-intersection or straight across?

A. Straight across.

Q. It is not a T-intersection, is it? It goes straight across?

A. It goes straight across.

Q. When you looked and didn't see anything coming from your left what did you do next?

page 145 } A. Well, after I didn't see anything coming, I didn't see any lights coming through those shrubberies, so I just proceeded on out into the street.

Q. All right. Did you ever see Mr. Eccles's car coming towards you?

A. Not until I had pulled out into the street.

Q. About how far had the front of your car gotten out into the street when you saw his car?

A. Well, just far enough for me to see out the side door. I say the length of the front of the car to the inside where I was sitting.

Q. About how far would you estimate that to be?

A. What, out in the street?

Q. In feet?

A. I'd say about—I reckon about ten feet.

Q. Is the front of your car ten feet long?

A. I'd say—when you pull far enough out in Portsmouth Boulevard in order to see a car approaching down the street half of your car is in the street.

Q. Half of your car is in the street?

A. That's right.

Q. Where would you personally have been as a driver located when you saw his car with relation to the curbline?

A. When I saw his car?

page 146 } Q. Yes.

A. Well, I'd say his car was about a hundred and fifty feet down the road.

Q. I understand. Well, I didn't ask you that question. I

said about how far with relation to the Portsmouth Boulevard curbline. As you were going out about where were you personally? even with the curb or before you got to the curbline or after?

A. You mean how far would I be in the street?

Q. Yes, I am talking about right where you were sitting in the driver's seat?

A. I'd be about—just about two-thirds cross the lane of the street.

Q. That's where you were when you saw him?

A. That's where I was, yes.

Q. Where were you looking as you started out to make your turn?

A. Well, after I saw this car coming—

Q. No, I am talking about when you started forward from the stopped position where did you look?

A. I continued to look to my left.

Q. Why did you do that?

A. To see was anything coming, but when I got out there I couldn't stop, because I was in the lane that he was in. If I'd stopped I would have been—

page 147 } Q. All right. You say you did see his car then. Where was his car? You say his car was about a hundred fifty feet back?

A. That is right.

Q. Is that your best estimate of how far that car was?

A. About a hundred fifty feet back.

Q. Was it up to that line of shrubs, the last one of those shrubs in the line in that picture?

A. No, he hadn't got that close.

Q. Hadn't gotten that close. Was this intersection—did it have any lighting of any kind?

A. No, not there.

Q. Beg pardon?

A. You mean the street lights?

Q. Yes.

A. It is street lights, yes.

Q. Was it well lit or dark?

A. Portsmouth Boulevard's well lit.

Q. Well lit. And when you saw his car coming you had just started up, I take it?

A. I had just started up cross the street.

Q. About what speed would you say you were driving?

A. Well, to kick off from a standstill I was

page 148 } doing about five miles an hour I guess.

Jethro King.

Q. Now, could you — did you follow his car from the time you saw it right up until the time it hit you?

A. Yeah, I kept my eyes on it.

Q. In what lane was he driving his car when you first saw it?

A. He was driving in the outside lane next to the curb.

Q. Next to the curb?

A. That's right.

Q. Was that where it was when you first saw it?

A. That's right.

Q. Did his car ever move into the inside lane?

A. His car moved in the inside lane as I was in the process of making my left turn across the center line on Portsmouth Boulevard.

Q. And where was his car when it struck your car?

A. His car was in the inside lane, and it struck my car behind in the rear door.

Q. Where it shows in that picture there?

A. That's right.

Q. Could you estimate the speed of that automobile as you saw it bearing down on you coming from your

page 149 } left there?

A. Well, I'd estimate his speed from the distance I saw him it was not under fifty miles an hour.

Q. Where had the front of your car gotten when it was—when you were struck by Mr. Eccles's car?

A. Well, the front part of my car was cross the center line. I was—in other words, I had turned at an angle to make my left turn. In other words, I'd say the front wheels and the front part of my car was cross in the lane where I was going to make my turn.

Q. In other words, you had gotten beyond the center line—

A. That's right.

Q. —dividing the two eastbound and two westbound lanes on Portsmouth Boulevard?

A. That's right.

Q. You say your car was angled at that time?

A. It was angled, that's right.

Q. You had partially started your turn?

A. That's right.

Q. Did you hear any horn blow or any screeching of tires or anything of that nature?

A. No, I didn't.

Q. Did his car appear to diminish in speed at all before it hit your car or what?

Jethro King

page 150 } A. Well, it seemed to me—when he left the outside lane and came in the inside lane it seemed like he hit his brakes and the car swiveled and it come over in the left lane.

Q. And it struck the left side of your car then in the intersection. Is that right?

A. The left front of his car struck my rear door on the rear of my car.

Q. Did you—you talked to Mr. Eccles after this accident at the scene?

A. No, I haven't.

Q. You did not?

A. No.

Q. Did you talk to him at the hospital or did you see him at the hospital?

A. Yeah, he came to the hospital when the officer came to pick me up.

Q. Where did the officer talk to you and Mr. Eccles? at the hospital or at the scene or where?

A. The only talking I heard the officers do was when they came up to the accident he asked who was hurt and how bad was they hurt, and he taken me to the hospital. See, I were knocked out of the car into the street.

Q. Where were you lying in the street?

page 151 } A. I was lying in the center where those dividing blocks is in the center of the street.

Q. Do you know how you got where you went when you went out of that car?

A. I don't know how I got out there. I know when I found myself I was getting up out of the street.

Q. You wear glasses. Did you have your glasses on at the time of the accident before this accident happened?

A. I had them on, but I lost them when I were knocked out of the car.

Q. Did you find them later?

A. I found the frame later.

Q. Where was it lying?

A. They was lying in the center of the street about three foot from where I was laying at.

Q. Did Mr. Eccles ever complain of being injured in any way as far as you heard that evening?

A. No, nothing at all.

Mr. Preston: I have no further questions.

Jethro King

CROSS EXAMINATION

By Mr. Olitsky:

Q. Mr. King, you say that you went to Food
page 152 } Town Supermarket. Is that right?

A. That's right.

Q. And that's on what? Deep Creek Boulevard and Elliott Avenue?

A. That's right.

Q. Well, wouldn't you normally go from Food Town right up Deep Creek Boulevard to the intersection of Deep Creek Boulevard and Portsmouth Boulevard?

A. Well, you can do that.

Q. Why did you take the back streets?

A. Well, that's the street I been using all of the time because of habit I guess.

Q. You have been using Dahlia Street all that time?

A. That's right.

Q. How often do you go up Dahlia Street?

A. I guess I go to Food Town sometimes twice a week, sometimes three times a week.

Q. This is a picture you say was Dahlia Street at the intersection of Portsmouth Boulevard. Is that correct?

A. That's correct.

Q. How far up Portsmouth Boulevard can you see from that picture, approximately? half a mile?

A. From this corner?

page 153 } Q. Yes, sir.

A. From this corner if you drive up to—

Q. Looking at that picture how far can you see?

Mr. Preston: Let him answer your question. He has a right to answer.

Mr. Olitsky: We are going to let him answer all the questions.

Mr. Preston: You don't like the way he starts it so you stop him.

A. If you drive up to the corner of this street you cannot see fifty foot down that street before you'd be behind those hedges.

By Mr. Olitsky:

Q. All right, sir. Now, how far do you see from where that

picture was? How much of the street do you see there, Portsmouth Boulevard?

A. Well, on the north side—

Mr. Preston: Your Honor, I object to that question. That's self-evident from the picture and it has nothing to do with this.

Mr. Olitsky: The picture's been introduced. He is on cross-examination.

The Court: Overrule the objection.

page 154 } Mr. Preston: All right, sir.

By Mr. Olitsky:

Q. How far up Portsmouth Boulevard do you see from that corner?

A. On the north side of Portsmouth Boulevard I can see quite a distance.

Q. Sir?

A. On the north side of Portsmouth Boulevard I can see quite a distance.

Q. All right. Now, what is the north side?

A. Across—

Q. Over here?

A. No, sir, across the street.

Q. How about on the south side, how far do you see up there in that picture?

A. You can't see fifty, seventy-five feet from that corner up there.

Q. This is only fifty or seventy-five feet?

A. I mean from the corner to those shrubberies.

Q. All right, how about past the shrubberies?

A. Past the shrubberies you can't see an automobile.

Q. Can't see any—

A. Any automobile coming down Portsmouth

page 155 } Boulevard.

Q. All right, sir. Isn't Portsmouth Boulevard a straight boulevard, sir?

A. That's right.

Q. And four lanes wide?

A. Four lanes wide.

Q. And it is light, isn't it?

A. That's right.

Q. And you are fifty feet away from the shrubs when you come to the intersection. Is that right?

Jethro King

A. I'd say, yeah, you are fifty feet from the shrub.
Q. Is it more?
A. No.
Q. All right, sir. Now, the shrubs, how tall are they?
A. Well, you cannot see an automobile over those shrubs.
Q. How tall are they, sir?
A. Well, I couldn't say. They varies in height. Some is taller than the others, some larger.
Q. And you say you can see on which side of the boulevard half a mile? Which side is it you can see the farthest?
A. You can see the farthest on the other side
page 156 } of cars going west.
Q. Going west, but coming east you can't see over the shrubs?
A. No, sir. No, sir.
Q. How tall are they?
A. They varies in height.
Q. Well, how tall are the shrubs that you say block you from seeing?
A. Well, when you get in line with those shrubberies you are blocked for as far as you can see almost down that street.
Q. Well, those shrubs are on the sidewalk, aren't they?
A. No, sir, they are between the sidewalk and the curb.
Q. Between the sidewalk and curb?
A. That is right.
Q. When you get right on line with the shrubberies what is stopping you from seeing all the way down Portsmouth Boulevard?
A. Those shrubberies.
Q. If you are right in line with those shrubs right on the corner and look left what is stopping you from seeing anything on Portsmouth Boulevard? It is a straight street, isn't it?
page 157 } A. But you are not that far up there. Whenever you can see straight down Portsmouth Boulevard you have to be out in the street.
Q. All right, sir. If you are right at the intersection itself and the shrubs are back off of the curb—aren't they? They are not right on the curb?
A. They are almost.
Q. But how far off the curb are they?
A. I'd say about two foot.
Q. Well, if they are two foot back from the curb and you

pass the shrub line and you come right up to the intersection how far can you see down Portsmouth Boulevard then, sir?

A. You still can't see over fifty feet. When you come up to the intersection and you look west on Portsmouth Boulevard you can look down the sidewalk but not the street.

Q. All right, sir. But you said the shrubs were two feet off of the curb. Is that right?

A. Yeah.

Q. So I am asking you if you passed the shrubs and go that extra two feet and come right up to the line of Dahlia and Portsmouth Boulevard what's stopping you from seeing all the way down Portsmouth Boulevard to the overpass?

page 158 } A. Those shrubberies. You cannot drive up there to that corner and see down Portsmouth Boulevard.

Q. Didn't you say the shrubberies were two feet back?

A. That's right, but you say in line with those shrubberies.

Q. All right, sir. But as you drive up to the corner aren't the shrubs to your left and two feet in back of your line of vision?

A. They is off from the curb, but you still cannot see down Portsmouth Boulevard from that corner.

Q. All right, sir. So, in other words, that's the street that you like to take, the one that you can't see down Portsmouth Boulevard, Dahlia Street?

A. No, just like I say, it is a habit I guess.

Q. You had been drinking, hadn't you?

A. No, sir.

Q. You heard the police officer testify he smelled the odor of alcohol. Had you had something—

Mr. Preston: Slight odor.

Mr. Olitsky: Slight or not.

Mr. Preston: If you are going to quote the police officer, Mr. Olitsky, I ask you quote him correctly.

page 159 } By Mr. Olitsky:

Q. Also use the words slight odor of alcohol, how about that?

A. He might have smelled it on somebody else, because I hadn't drinked any.

Q. You didn't even have a slight odor?

A. That's what he said. But I had not been drinking. Like I said, I drinked the beer about four o'clock.

Jethro King

Q. All right, sir. Now, what time did you leave the hospital?

A. I don't know exactly, but I guess it was about little after 10:30.

Q. After 10:30. And where did you go then? When did you get to see your friend what's-her-name, Mrs. Britt?

A. I didn't go to see her.

Q. Sir?

A. I didn't go to see her.

Q. Where did you go?

A. When the police officer brought me and put me down in front of my door I felt myself getting sore, so rather than lay down I walked up to this house and she was there.

Q. You walked up to the lady's house?

page 160 } A. The lady where was sick, and the man was sick there too. Not to her house.

Q. You went to visit them?

A. That's right.

Q. I see. Where was your wife? She was at home, wasn't she?

A. I guess she was.

Q. So you didn't tell your wife about the accident; you went up to the friend's house. Is that it?

A. She knew about it.

Q. Sir?

A. She knew about it.

Q. When did you tell her?

A. I told her when I got there.

Q. I thought you said you went to the friend's house first?

A. I did, but he put me out at home first.

Q. Did you go in there?

A. Yes, sir.

Q. Then you left your house and went down the street?

A. That's right.

Q. That's when you saw Mrs. Britt?

A. She was at the house I went to.

Q. How long have you known Mrs. Britt?

page 161 } A. I have been knowing her quite a while.

Q. How long is quite a while?

A. Well, I'd say about twenty years I guess.

Q. No question in your mind then, Mr. King, that you did see the automobile being driven by Mr. Eccles in the inside lane. Is that right?

A. Mr. Eccles was driving in the outside lane when I first saw him.

Jethro King

Q. When you first saw him?

A. And when he changed his mind, ever who was driving, and he come in the inside lane as I was making my turn crossways the boulevard.

Q. All right, sir. Now, you said he was going about fifty or sixty miles an hour?

A. I'd say about fifty.

Q. Where did his car stop after it hit yours?

A. When I was picking myself up out of the street Mr. Eccles and Mr. Persons was coming across the street.

Q. You heard the police officer testify, didn't you?

A. And they asked me how bad was I hurt and—

Q. No, sir, that wasn't my question. I say where was Mr. Eccles's car when you got up and saw it? Where was it standing? Where was it sitting?

page 162 } A. On the opposite side of the street.

Q. On the opposite side from you?

A. That's right.

Q. Wasn't it right where it had struck your car in the lane?

A. Absolutely not.

Q. How far was it from the point of impact Mr. Eccles's car came to a stop?

A. Well, just I say in the center of the intersection.

Q. So it would at most two or three feet. Is that right?

A. On the opposite side and my car was turned on the opposite side.

Q. Well, I know, but it is two or three feet from where the accident took place is where Mr. Eccles's car came to a stop. Isn't that correct?

A. It was more than two or three feet.

Q. Well, how many feet was it?

A. I'd say the width of the lane of the street.

Q. Well, was his car in the outside lane completely?

A. His car was in the lane—in the north lane facing back west.

Q. He was facing west?

page 163 } A. That's right.

Q. And which lane was that? the curb lane or the inside lane?

A. Well, all I know it was on that side. I didn't pay too much attention was it on the outside or middleway, but it was on the opposite lane.

Q. Opposite lane from you?

Jethro King

A. Opposite side of the street.

Q. All right, but the car itself was still sitting in the same lane where the accident had taken place?

A. No, sir; no.

Q. What lane was it in?

A. It was in the lane on the other side the street.

Q. Now, there are two lanes?

A. That is right.

Q. Is it the lane next to the sidewalk or lane next to the middle of the street?

A. It wasn't exactly in one. It was just on that side of the street.

Q. Which one was it in?

A. I'd say the outside lane.

Q. It was on the outside lane. And so how many feet separate the outside lane from the inside lane

page 164 } from where the impact took place?

A. From the center of the street.

Q. Well, how many feet would that be?

A. That's about fifteen feet I guess.

Q. So you are estimating that his car ended up about fifteen feet from where the impact took place?

A. That's across the street.

Q. I say from where the impact took place.

A. That's right.

Q. Did you—when you got out did you see anybody around there?

A. I didn't get out. I were knocked out.

Q. All right, sir. Well, after you got knocked out did you see anybody around there?

A. No, it wasn't anybody around but myself and Mr. Eccles.

Q. Nobody came over to you?

A. Mr. Eccles and Mr. Person.

Q. Were there any people around there?

A. Not at the beginning, no, sir. Some come after.

Q. Some came over afterwards?

A. That's right.

Q. Was there a stop sign at Dahlia Street?

A. No, sir.

page 165 } Q. A yield sign?

A. No, sir.

Q. What's the speed limit on Dahlia Street?

Jethro King

A. Well, actually it is no speed limit on there, because it is just a short street.

Q. You can go at any speed you want?

A. That's up to the person, but as far as a sign saying speed limits it is not on there.

Q. You don't know what the speed limit is?

A. No, from Portsmouth Boulevard to the dead end, no, I don't.

Q. In other words, Dahlia is a one-block, dead-end street?

A. No, it is not. It is not one block on the south side of Portsmouth Boulevard.

Q. That's the side you were approaching on, right?

A. That's right.

Q. It is just a block long before you get to Portsmouth?

A. No, it is two blocks long.

Q. It is two blocks. I believe you said it was just barely possible for two cars to drive on. Is that right?

A. That's right.

page 166 } Q. Then on the sides it is all these deep dirt shoulders where cars park on the side. Is that correct?

A. In some parts where you can park at.

Q. And when you come up to the intersection of Dahlia and Portsmouth Boulevard the shoulder goes just about right up to the sidewalk, doesn't it, the dirt shoulder?

A. Just about.

Q. Is that true?

A. It is mostly dirt in there.

Q. The weather conditions were all right that night, were they not?

A. That's right.

Q. Now, sir, you say you looked and didn't see anything?

A. I didn't see any vehicles on Portsmouth Boulevard.

Q. And then you came out when you didn't see anything?

A. That's right.

Q. And then after you came out that's when you saw Mr. Eccles's car?

A. That's when I saw his car.

page 167 } Q. And when you saw Mr. Eccles's car you were what? still in the first lane?

A. I was crossing the first lane and I was over in the second lane and—

Q. No, but when you first saw him what lane were you in?

A. I was in the first lane.

Jethro King

Q. First lane. Why didn't you stop?
A. If I'd stopped I would have been right in his traffic?
Q. Sir?
A. I would have been in his traffic if I had stopped, because that's the lane he was in.
Q. Did you hear his horn blow?
A. No, I didn't.
Q. And you didn't hear the brakes?
A. No, I didn't hear any brakes either.

Mr. Olitsky: I have no further questions, Your Honor.

RE-DIRECT EXAMINATION

By Mr. Preston:
Q. Mr. King, I will ask you this: Approximately how far is it from Dahlia Street to the Portsmouth Esso Station?
page 168 } A. About three-quarters of a mile or either about five blocks.
Q. The blocks, are they regular blocks in that area or are they long blocks and short blocks?
A. They varies.
Q. They vary?
A. Some short and some long.
Q. About how far is it from Grant Street down to the Portsmouth Esso Station?
A. Well, it is—
Q. How far with reference to—
A. With reference to my—
Q. To Dahlia Street would Grant Street be? About halfway between the Esso station or what?
A. Well, from the Esso station to Dahlia Street it would be just about half.
Q. Okay. Now, when Mr. Olitsky was questioning you about what you could see from the corner down there you were talking about what you could see from where you would be stopped when you were driving an automobile, were you not?
A. That's right.

Mr. Preston: Okay. I have no further questions.
The Court: You can stand down.

page 169 } Mr. Preston: The defense rests, Your Honor.
The Court: Do you have anything else?
Mr. Olitsky: No, sir, Your Honor.
The Court: All right. We will take a recess while we complete the instructions.

(At 2:52 P.M., February 23, 1967, the court and counsel for both sides retired to chambers, at which time the following occurred:)

Mr. Preston: Your Honor, let me get my motion over with, if you will, please, sir.
The Court: Go ahead.
Mr. Preston: At the conclusion of all of the evidence the defendant moves the court to strike the evidence on the grounds that it is insufficient at law to support a verdict in favor of the plaintiff.
The Court: All right. Motion is overruled.
Mr. Preston: And note my exception.
Will it be noted in the record, please, that my objections and exceptions to instructions 1 through 4, which were made during a recess prior to the conclusion of the case, be noted as having been made at this time also, and I object to any instructions being granted to the plaintiff on the
page 170 } grounds that our motion to strike the evidence should have been sustained.
Okay, what was number 1—I mean what number was the first one?
The Court: A was the first one. This one's B.
Mr. Olitsky: Judge, I'm going to object to this one.
The Court: I'm going to refuse it too.
Mr. Preston: This is what instruction? What number is this, Your Honor?
The Court: This is C-1.
Mr. Preston: C little 1. All right, sir, I would like to state my ground for wanting this instruction to the court. C-1's a right-of-way instruction involving a vehicle being on the right of an intersection or having the right-of-way over one who is approaching an uncontrolled intersection from the left where there are no traffic controls at the intersection. Mr. King, the defendant, was on the right of this intersection, there were no traffic controls at this intersection, there was absolutely no evidence of speed in excess of the speed limit on the part of Mr. King, so that any for-
page 171 } feiture of right-of-way would not be involved, as provided for by the statute. And it is the posi-

tion of this defendant that under the code sections, Code Section 46.1-221 of the Code of Virginia grants the right-of-way in such a situation. That code section is duplicated in the city of Portsmouth, although there have been no ordinances introduced into evidence here, so I assume the court would not take into consideration any city ordinances of the City of Portsmouth.

The definition of an intersection is set forth in 46.1-2 of the code, and its definition encompasses what these two streets are here. They are both streets and they do form an intersection, and the testimony is that they form a right-angle intersection at this particular place. There is no statute anywhere that I know of that alters this situation, and I assume that Your Honor's ruling is made on the basis that Portsmouth Boulevard is a four-lane street and Dahlia Street is not a four-lane street but a two-lane street, and there isn't any evidence nor any law that I know of that should make this a different situation, and I would like to know why Your Honor rules I am not entitled to the instruction.

page 172 } The Court: It's been the law of this court for the past eleven years to my knowledge. I have this same thing advanced by people coming out of one-block streets on High Street and on Portsmouth Boulevard and other places, from little over-grown alleys, and until the Court of Appeals shoves it down my throat I am never going to give this kind of instruction in that situation. A person who is driving on a through street that is to all obvious traffic the street with the right-of-way over the other is not charged with any duty of anticipating or knowing what sort of traffic control signs are on these little entryways or alleyways that come into it. And that's the practicalities of the situation, and that's the law of this court until it is changed by something higher than I am.

Mr. Preston: Well, now, Your Honor, you are not stating that Dahlia Street is a private way or an alleyway?

The Court: No, it is not a private way, but it is an inconsequential—

Mr. Preston: It is a smaller street.

page 173 } The Court: It is an inconsequential street coming into a thoroughfare which any driver has got the right to assume that the smaller street will yield to it in the absence of some cautionary signal facing him, and if it were otherwise there would never be any equity in a motor vehicle accident case, and that's the law of this court. I know exactly what you are talking about, but there she stands.

Mr. Preston: Well, I just wanted to make my position clear and have Your Honor's position clear, because—is there any statute or any case or anything upon which this is predicated?

The Court: No, but I have had at least two cases in which this has been—where this specific thing has arisen that writs have been turned down on. But I would not charge any motorist on a through street of the character of Portsmouth Boulevard with knowledge of the signs or lack of signs on a street such as Dahlia.

Mr. Preston: In other words, he has the right to assume there is a stop sign there—

The Court: He's got the right—

Mr. Preston: —when there is none there?

The Court: He's got the right to assume that traffic is not going to come out in front of him asserting
page 174 } the right-of-way—I will tell you that; that's what I am ruling—because he happens to be on the right.

Mr. Preston: Because of traffic on the right?

The Court: Particularly on a thirty-five-mile-an-hour-speed-limit street.

Mr. Preston: All right, sir. Well, I note my exception to the refusal to grant instruction C-1.

The Court: Okay.

Mr. Preston: I don't know of any statute or any law that says that, and I have looked.

This is another one on the same point, because I—this is in the words of the code. I added something to the other one which I think is proper, but I want to preserve the point as carefully as I can. I assume this would be C-2.

Mr. Olitsky: I object to this one, judge.

Mr. Preston: And the defendant notes his exception to the refusal to grant C-2 on the same grounds for the same reasons stated with reference to C-1, and takes exception to the refusal to grant.

I am offering this instruction, Your Honor,
page 175 } and quote the case of *Bolinaga* vs *Savage,* 206 Virginia 336.

The Court: This is the same thing, right-of-way.

Mr. Olitsky: Note an exception and objection to that, judge.

Mr. Preston: This is C-3, and I am offering it as instruction C-3 quoting *Bolinaga* vs *Savage,* 206 Virginia 336. I take it Your Honor refused it on the same grounds C-1 and C-2 were refused.

The Court: That's right.

Mr. Preston: I take exception to that. I also recall to Your Honor on the refusal of it I would also—the same law would be applicable to the others if it is made on the same grounds.

That's not the same thing, Your Honor.

The Court: Yes, it is.

Mr. Preston: That's not the same thing. I would like to argue this again.

The Court: All right.

Mr. Preston: The instruction says the plaintiff was not entitled to any right-of-way as he approached and entered the intersection in question, nor was he entitled to assume

page 176 } any vehicle approaching on Dahlia Street has the right-of-way. Your Honor, where is the statute that says this man has the right-of-way?

The Court: There isn't any statute.

Mr. Preston: Where is the law?

The Court: This is on the general law of negligence and on the factual situation that any driver of a car is confronted with anytime that he goes on the street. Just what I have said to you a while ago, on a street with a divided highway with a thirty-five-mile-an-hour speed limit.

Mr. Preston: First you rule that my man was not entitled to the right-of-way. And this says the other man was not entitled to the right-of-way. Doesn't right-of-way—

The Court: You are telling the jury as a matter of law that the man on the main drag had no right to assume that a vehicle approaching on this small street would grant him the right-of-way, and I take just the opposite position.

Mr. Preston: All right.

The Court: I think he is entitled to assume just that.

Mr. Preston: All right. Note my exception to number C-4.

page 177 } May I ask Your Honor one question, and I don't mean this to be impertinent in any way, but I am curious to know for future cases in your court how do you determine which street you are going to decide this upon, depending on the width—the relative width of the street or what?

The Court: Depending on the character of the street, yes.

Mr. Preston: If I come in here in a case and one street has three lanes and the speed limit is thirty-five miles an hour and the other has two lanes and the speed limit is twenty-five miles an hour that's going to be the same situation?

The Court: I don't know, but I am telling you I am ruling that way in this case, and I have ruled that way on High

Street. Now, where it would go from there I have no way of determining. I think the governing factor from a practical standpoint is the character of the street and what is held out to a motorist when he is on that street by way of speed limit, construction, width of the street, the signaling system, and all that sort of thing.

page 178 } Mr. Preston: Well, the custom and usage. There may be streets that are just used more frequently than others. Would that change it? I don't see where the line is drawn.

The Court: It would have to be something in the inherent nature of the setup that holds itself out to the fact that here is an arterial road, and once that's present—

Mr. Preston: There isn't any evidence in this case that this is any—

The Court: There is evidence in this case this is a four-lane divided highway on which the speed limit is thirty-five miles per hour. If you are going to charge a man who is permitted by law to go thirty-five miles an hour on this street with anticipating a car coming out from every street that comes up to it on the right, you are talking about an utterly impractical situation.

Mr. Preston: Well, I can only say this, and I am sure you have heard it before, but the City of Portsmouth is empowered under the statutes to designate streets as a through street and put up signs and protect it the way it so considered; if it doesn't it must indicate they don't consider it

page 179 } The Court: I am viewing this on the standpoint of the reasonable and prudent man. Deficiencies of the City of Portsmouth and the traffic and police department are something that I haven't got anything to do with.

Mr. Dietrick: Page, that last instruction was C-4, not C, C-4.

Mr. Preston: Thank you. That was C-4.

Mr. Olitsky: Your Honor, keeping a proper lookout and proper control I have no objections, but then in the beginning paragraph it says "taking in consideration the fact that he was approaching the intersection of streets."

The Court: I agree with you. I don't think you ought to single out any particular thing of that kind.

Mr. Preston: Well, Your Honor, the law, as I have always understood it, is that a man has a greater duty as he approaches intersections than he does when he is not approaching intersections, and that is circumstances that should be considered by drivers.

The Court: Taking into account the weather or taking into account the speed limit and taking into account
page 180 } the shrubbery or the trees or whatever it is on the side of it, I don't think you have any right to pick out any one thing like this. I mean that's emphasizing it too much for the jury. I think his point is well taken.

Mr. Preston: All right, sir. Well, I do want to offer the instruction in that form, but I will—

The Court: Give me a copy of it and I will refuse it as it is written.

Mr. Preston: That's the way I would like to have it done. I would like to have it refused as written. That will be C-5, and I note exception. Then I offer it—then I would offer it as Your Honor suggested it should be changed, because I think I have got to have the rest of the instruction.

The Court: Yes, "taking into consideration all the circumstances and conditions then existing."

Mr. Preston: Start from "the fact" on the second line and go down to "all the circumstances."

The Court: No, just take out all of that, "take into consideration all" up through "and."

page 181 } Mr. Preston: I see. Okay. That's better. By offering it as changed I do not intend to waive my exception on C-5.

That would be what? That would be C?

The Court: This will be C. You haven't anything else on this?

Mr. Preston: No, sir.

Mr. Olitsky: You are getting right-of-way in here.

Mr. Preston: I thought you ought to leave the assuming part out one time. It will be D-1.

Mr. Olitsky: Judge, he is back on this right-of-way again.

Mr. Preston: I am offering instruction number D-1, and His Honor has indicated he refuses that instruction. I assume that's on the same ground as with reference to the C instructions which were not allowed. And I note my exception.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Instructions—Refused	2
Memorandum Opinion—May 31, 1967	3
Judgment—May 31, 1967	8
Notice of Appeal	9
Assignments of Error	10
Witnesses:	
J. C. Hamilton	11
Rosa Askew	19
Alfred Henry Person, Jr.	31
Frank Edward Eccles	46
Ina Britt	65
Jethro King	73
Proceedings	57, 92