Return to
FILE COPY
Supreme Court of Appeals

210 VA 636

Record No. 7043

In the Supreme Court of Appeals of Virginia At Richmond

ELDON LESTER YATES

v.

ROBERT POTTS, SR.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7043

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 15th day of October, 1968.

ELDON LESTER YATES, Plaintiff in error,

against

ROBERT POTTS, SR., Defendant in error.

From the Circuit Court of Fairfax County
Albert V. Bryan, Jr., Judge

Upon the petition of Eldon Lester Yates a writ of error is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 8th day of April, 1968, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Robert Potts, Sr., 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 $300, with condition as the law directs.

RECORD

* * * * *

page 1 }

* * * * *

MOTION FOR JUDGMENT

Comes now the plaintiff, Eldon Lester Yates, and moves this Honorable Court for judgment against the defendant, Robert Potts, Sr., in the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), and for grounds therefor, states the following:

1. That on or about the 1st day of September, 1964, at approximately 10:20 a. m., on Route #123 in Fairfax County, Virginia, in the vicinity of the intersection with Route #641, the plaintiff, who is a Fairfax County police officer, was proceeding lawfully in the performance of his duties.

2. That at the same time and place the defendant had just passed the radar set-up in that area and was exceeding the speed limit.

3. The plaintiff, in the official performance of his duties, and while legally observing the requirements of an officer under the circumstances, proceeded after the defendant.

4. The defendant, while over a hillcrest, brought his car to a stop without making any signal to stop and/or turn and in an area where it was not visible to the plaintiff until it was too late, and defendant further stopped in violation of the State and County ordinances, and further, was operating a vehicle that was defective in that it had defective brake lights, and other acts of negligence, causing a collision thereby.

page 2 } 5. That as a direct and proximate result of defendants negligence, the plaintiff suffered injuries, requiring medical care and attention and hospitalization, and loss of time from work, and he will require future medical care and attention.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), together with costs and interest until paid.

ELDON LESTER YATES
Plaintiff
By counsel

VAROUTSOS, KOUTOULAKOS & ARTHUR

By Louis Koutoulakos
Counsel for Plaintiff
200 Southern Building
Arlington 1, Virginia

Filed in Circuit Court Clerk's Office Oct. 9, 1964

Thomas P. Chapman, Jr.

* * * * *

page 6 }

* * * * *

ANSWER AND GROUNDS OF DEFENSE

COMES NOW the defendant, Robert Potts, Sr., by Counsel, and files this his answer and grounds of defense to the motion for judgment filed herein.

1. The Defendant admits that at the time and place alleged the Plaintiff was employed as a Fairfax County police officer but denies each and every, all and singular, the remaining allegations contained in Paragraph 1.

2. The Defendant is without knowledge of the allegations contained in Paragraph 2 insofar as same refer to an alleged radar set-up in the area in question and being without knowledge thereof, denies said allegations and asks for proof. Answering further, the Defendant denies the remaining allegations contained in said Paragraph.

3. The Defendant is without knowledge of the allegations contained in Paragraph 3 insofar as same refer to the Plaintiff's performance of his duties and being without knowledge

thereof, denies said allegations and asks for proof. Answering further, the Defendant denies each and every, all and singular, the remaining allegations contained in said Paragraph.

4. The Defendant admits that he brought his vehicle to a stop preparatory to making a left turn on Route 641 but denies that he was in any way negligent in the operation of his said vehicle in the manner alleged or in any other manner.

5. The Defendant is without knowledge of the allegations contained in Paragraph 5 insofar as same refer to alleged injury, loss or damage sustained or suffered by the
page 7 } Plaintiff and being without knowledge thereof, denies said allegations and asks for proof. Answering further, the Defendant says that any such injury, loss or damage sustained or suffered by the Plaintiff was in nowise caused or contributed to by negligence on the part of this Defendant.

AFFIRMATIVE DEFENSE

Answering further and by way of affirmative defense, the Defendant says that he intends to rely upon the defense of contributory negligence.

WHEREFORE, having fully answered, the Defendant moves that the motion for judgment filed herein be dismissed and that he recover his costs in this behalf expended.

TRIAL BY JURY IS DEMANDED.

Robert Potts, Sr.
By Counsel

GARNETT, HUNTER & DIMOND

By Robert J. Dimond, Jr.
Counsel for Defendant
2000 N. 16th Street
Arlington, Va. 22216

* * * * *

Filed Nov. 3, 1964

Thomas P. Chapman, Jr.
Clerk of the Circuit Court of
Fairfax County, Va.

* * * * *

page 23 }

* * * * *

MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL

Comes now the plaintiff, Eldon Lester Yates, by counsel, and moves this Honorable Court to set aside its verdict in granting a motion for summary judgment based upon a motion to strike upon presentation of the plaintiff's case, and for the granting of a new trial, and further moves to suspend the entry of any final judgment in this cause until such time as this motion is heard and determined by this Court.

ELDON LESTER YATES, Plaintiff

By Louis Koutoulakos
Counsel

Filed Nov. 21, 1966.

Thomas P. Chapman, Jr.,
Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 27 }

* * * * *

ORDER

THIS ACTION came on to be heard on the 17th day of November, 1966 upon the motion for judgment filed herein by the Plaintiff and the answer and grounds of defense filed on behalf of the Defendant.

Whereupon, came the plaintiff, Eldon Lester Yates, and the defendant, Robert Potts, Sr., in person and by Counsel.

Thereupon, a jury of thirteen veniremen were sworn and examined on their *voir dire* and found to be competent and qualified jurors; and from said panel of veniremen, seven persons were duly selected.

Thereupon, following opening statements of Counsel for the respective parties, witnesses for the Plaintiff were called and their evidence on behalf of the Plaintiff was presented to the

Court. Whereupon, at the close of the Plaintiff's case, the Defendant, by Counsel, moved to strike the Plaintiff's evidence and enter summary judgment for the defendant, Robert Potts, Sr., on the grounds of contributory negligence as a matter of law.

After hearing argument of Counsel, the Court, being of the opinion that said motion should be granted, entered summary judgment for the Defendant; to which action of the Court, the Plaintiff, by Counsel duly noted his objection and exception.

Thereafter, on the 27th day of December, 1966, Counsel for the Plaintiff moved the Court to set aside the verdict and grant the Plaintiff a new trial and to suspend the entry of the final judgment in this case until such time as said motion was heard and determined. Pursuant to said motion, on the 6th day of January, 1967, an order was entered herein suspending the entry of judgment in this action and

page 28 } said action was continued pending argument on Plaintiff's motion to set aside the verdict.

Whereupon, this action came on again to be heard on the 21st day of December, 1967 on the aforesaid motion of the Plaintiff and was argued by Counsel; and the Court, after considering the respective arguments of Counsel being of the opinion that said motion should be denied on the ground of contributory negligence and of § 46.1-226 not being complied with, IT IS THEREFORE, ADJUDGED and ORDERED that the motion to set aside the verdict filed herein on behalf of the Plaintiff be, and the same hereby is, denied and summary judgment be, and the same hereby is, entered in favor of the Defendant.

Whereupon, the Plaintiff having advised the Court of his exception and objection to the ruling of the Court and his intention of applying to the Supreme Court of Appeals of Virginia for a writ of error, moved the Court that bond for costs be set.

IT IS, THEREFORE, ADJUDGED and ORDERED that said motion be granted and bond for costs be, and the same hereby is, set at Five Hundred Dollars ($500.00), said bond to be posted within the time allowed by law.

Entered the 8th day of April, 1968.

A.V.B., Jr.
Judge

* * * * *

page 30 }

* * * * *

ASSIGNMENT OF ERROR

Plaintiff assigns the following errors:

1. The Circuit Court erred in striking the evidence at the close of the plaintiff's case and entering said summary judgment on behalf of the defendant on the grounds that the plaintiff, a police officer engaged in the apprehension of a law violator, was negligent as a matter of law.

Eldon Lester Yates, Plaintiff
By Counsel

Resubmitted 4-8-68

Filed Apr. 8, 1968

W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 34 }

* * * * *

NOTICE

TO: CLERK OF CIRCUIT COURT
Attention: Edward Young
Fairfax County Court House
Fairfax, Virginia 22030

Please consider this notice as a request to resubmit the Notice of Appeal and Assignment of Error which was filed on April 3, 1968, together with the Judgment Order. Inasmuch as the Final Order was signed on April 8, 1968, it is re-

quested that the same Notice of Appeal and Assignment of Error are hereby adopted and resubmitted.

VAROUTSOS, KOUTOULAKOS
& ARTHUR

By Louis Koutoulakos
Counsel for Plaintiff
2054 14th Street North
Arlington, Virginia 22201

Filed Apr. 26, 1968.

W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 1 }

* * * * *

Fairfax, Virginia
Thursday, November 17, 1966

The above-entitled cause came on to be heard before the Honorable Albert V. Bryan, Jr., Judge of the Circuit Court of Fairfax County, Virginia, and a jury, commencing at 10:00 o'clock, a. m.

PRESENT:

LOUIS KOUTOULAKOS, ESQ., on behalf of the Plaintiff;

ROBERT J. DIMOND, ESQ., and
PATRICK G. GERAGHTY, ESQ., on behalf of the Defendant.

* * * * *

Robert Potts, Sr.

page 4 }

* * * * *

ROBERT POTTS, SR., was called as a witness by counsel for Plaintiff and, having been first duly sworn, was examined and testified as follows:

CROSS EXAMINATION

By Mr. Koutoulakos:

* * * * *

page 5 }

* * * * *

Q. Calling your attention to the morning of September 1, 1964, were you driving a black 1959 Ford on that day?
A. Yes, sir.
Q. Did that car that you were driving ultimately get involved in an accident with the Plaintiff, the gentleman here, Mr. Yates?
A. Yes, sir.

* * * * *

page 6 } Q. You did not check your rear brake lights or your turn signals that morning when you left your house and went to Riner's, did you?
A. No, sir.
Q. So that morning you do not know what their operating condition was, do you?
A. No, sir, I do not.

* * * * *

page 12 }

* * * * *

Q. You never looked at your speedometer all the time you

were driving from the time you left Riner's gas station until the time of the accident?

A. No. I had my eye on the road.

Q. So you do not know how fast your speedometer said you were going?

A. No, sir.

* * * * *

page 13 }

* * * * *

By Mr. Koutoulakos:

Q. Did you ever look in your rear view mirror from the time you left that gas station up until the time you said you saw the officer coming over the hill?

A. I never looked in the mirror because I did not pass a car any place.

Q. I did not ask you whether you passed a car, page 14 } but in any event, you never did look?

A. Never did look until I got ready to turn.

Q. So you do not know whether the officer was behind you or not, do you?

A. No, sir. I never seen him.

* * * * *

page 17 }

* * * * *

Q. You pleaded guilty to doing 60 in a 45, not giving a left turn signal and no brake lights; isn't that correct, Mr. Potts?

A. That is what it says right there.

Mr. Koutoulakos: Your Honor, I would like to offer these.

The Court: They will be received as Plaintiff's Exhibits Nos. 5 and 6.

* * * * *

Robert Potts, Sr.

page 23 }

* * * * *

Q. You are familiar with that intersection?
A. Yes, sir.
Q. You have traveled it many times, isn't that correct?
A. Yes, sir.
page 24 } Q. You went down there to see your friend on many occasions, is that not right?
A. Yes, sir.
Q. So you knew if you stopped in that right-hand lane, if a car was coming over that hill, it is a blind intersection in there?
A. Yes, sir.
Q. You knew that, did you not?
A. Yes, sir.
Q. So if you slowed down there you knew if a car was coming behind you they would hit you?
A. Had to be moving, yes, sir.

* * * * *

page 28 }

* * * * *

Q.

* * * * *

Didn't you tell me when I was questioning you
page 29 } in your attorney's office, in effect, that you had not gone into your left turn, the reason you did not make your turn is because you saw the officer coming, is that not correct?
A. I wasn't making the turn at the time the officer came over the hill.

* * * * *

Robert Potts, Sr.

page 32 }

DIRECT EXAMINATION

By Mr. Dimond:

* * * * *

page 38 }

* * * * *

The Court: So it is understood in Defendant's Exhibit No. 3 the jury are to understand that the Plaintiff does not concede the sign is where it is shown there. Otherwise, the intersection is as shown in the photograph, is that right?

* * * * *

page 39 }

* * * * *

Q. Were you moving or stopped when the officer hit it?

A. I was just moving slow when Officer Yates bumped into this car. Now, he would assume that I was standing still, but as far as I can recall—it could have been standing still, sir, because I would have to cut around this post here—it had to be moving very slow, so I would assume that right there I was—at that particular point I probably could have been standing still because you had this post here that

page 40 } I had to swing around.

Q. How much time elapsed from the time you saw the officer coming over the hill until the accident occurred?

A. I don't know, sir, a very small amount of time.

Q. Were you aware that he was traveling fast?

A. He was traveling, yes, sir.

Q. Did he have any signal or any lights on?

A. He just had his red light on. That is how I seen him.

Q. Did any vehicles pass you—

A. I did not see any vehicles, sir.

Robert Potts, Sr.

Q. Let me finish the question—from the time you left Riner's until the time this accident occurred?

A. I do not recall any vehicles, sir, from the time I left Riner's until the scene of that accident.

Q. Mr. Potts, you say you did not look at your speedometer?

A. No, sir.

* * * * *

page 42 }

* * * * *

RECROSS EXAMINATION

By Mr. Koutoulakos:

* * * * *

page 44 }

* * * * *

A. According to my speedometer, I didn't know. I was just going fast. The radar, that is all I was going by.

Q. And you pled guilty to that charge?

A. Yes, sir.

page 53 }

* * * * *

A. That is the first time I saw Mr. Yates.

Q. He was over the hill at that time?

A. Yes.

Q. And I think you also told the jury you do not know whether you were stopped or moving at the time, isn't that also correct?

A. I don't recall just how—I could have been stopped.

* * * * *

Robert Potts, Sr.

page 55 }

* * * * *

Q. Getting back to where you made this left turn signal, you never did see the officer behind you at that time, did you?

A. I never seen Mr. Yates.

page 56 }

* * * * *

Q. Can you tell this jury why you could not see the officer if, in fact, you did look in your mirror when you put your left turn signal on?

A. I did not say that, sir. When I looked in the mirror I was making the turn.

Q. So you did not look in the mirror at the time you put your left turn signal on?

A. When I was making this turn, that is the only time I seen Officer Yates in my mirror, and I was making the turn at that time.

* * * * *

page 61 }

* * * * *

Q. Do you have any recollection of applying the brakes before the accident?

A. I beg pardon?

Q. Do you have any recollection of applying
page 62 } your brakes before the accident?

A. Yes, sir.

Q. When was that?

A. When I pulled up to slow down to make this turn.

Q. Is that the only time before the accident?

A. That is the only time before the accident, as far as I can recall.

Q. Do you want to turn to page 16, then, line 13?

"Q. Can you tell us exactly where it was you stopped your car before the accident happened?"

W. F. Lester, Sr.

See your answer: "My car was not completely stopped until I seen the officer come over that hill, and then I applied the brakes and stopped." Do you read that?

A. As I said, things happened so fast right there I really do not know what happened, but—

Q. You do remember the answer there?

A. Yes.

Q. You saw the officer and put your brakes on, is that correct? Is that not what you said here: "My car was not completely stopped until I seen the officer come over that hill, and then I applied the brakes and stopped"? Is that not what you told us in your lawyer's office when I was questioning you?

* * * * *

page 65 }

* * * * *

Thereupon, W. F. LESTER, SR., was called as a witness by counsel for Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Koutoulakos:

* * * * *

Q. What type of work do you do?

page 66 } A. Police Officer.

Q. For Fairfax County?

A. Fairfax County Police Officer.

Q. Were you a police officer in September of 1964, and specifically, September 1, 1964?

A. Yes, sir.

Q. How long have you been on the Fairfax County Police Force, Officer Lester?

A. I have been here since 1959.

Q. Pursuant to your official duties, did you have to respond to a call and investigate an accident involving a fellow officer and the Defendant here, Mr. Potts, Sr.?

A. I was with Sergeant Burke and Officer Yates. We were

working radar on 123 just south of the railroad bridge just south of Fairfax.

On this particular day Mr. Potts came through. I sent Officer Yates after—

Q. When you say Mr. Potts came through, you saw a car come through, is that correct?

A. I know Mr. Potts. I lived down in that area all my life.

Q. Then you did know it was he?

A. I knew his face when I seen him.

Q. All right. Go ahead.

* * * * *

page 68 }

* * * * *

Q. On this particular morning, this vehicle that you say Mr. Potts was in went through the radar, what kind of a car was it, do you recall?

A. It was a 1959 Ford.

Q. Was there anybody else in the car?

A. There was a fellow sitting on the front seat. I know him when I see him.

Q. Then what happened? This car went through the radar and what was the speed registered on the radar?

A. 60 miles an hour.

Q. Where was Officer Yates at that time?

A. He was sitting on the motorcycle. It was his turn up. We take turns chasing as they come through. It is a turn system.

* * * * *

page 70 }

* * * * *

Q. When you got to the accident, just tell us what you saw.

A. I came over the hill and saw the motorcycle setting on the side and the 1959 Ford sitting part way in the
page 71 } middle of the road and Officer Yates lying in the road.

Dr. Alfred Edison Jackson

* * * * *

page 72 }

* * * * *

A. At the scene I talked to Mr. Potts and issued him a summons for the speeding violation.

At the time when he was signing the summons and everything I detected an odor of alcohol upon his person.

* * * * *

page 76 }

* * * * *

Thereupon, DR. ALFRED EDISON JACKSON, was called as a witness by counsel for Plaintiff and, having been first duly sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

By Mr. Koutoulakos:

* * * * *

page 91 }

* * * * *

Q. Doctor, you know the occupation of this man; he was a policeman?

A. Yes, sir.

Q. Do you know that he has been retired from the police department?

A. Yes, sir.

Q. Do you know the reason for his retirement?

A. Well, as far as I know, it is because of his wrist.

Q. This wrist?

A. Yes, sir.

Q. Would you say as a doctor that that would be reasonably necessary in view of the type of job he has?

A. Yes. He cannot go back to duty in his present condition, no, sir.

* * * * *

page 95 }

* * * * *

Thereupon, W. F. LESTER, SR., was recalled as a witness and was further examined and testified as follows:

CROSS EXAMINATION

By Mr. Dimond:

* * * * *

page 102 }

* * * * *

Q. Officer, that is not what I asked you, sir. You say when that automobile passed that intersection at 60 miles an hour you recognized the face of the passenger, of the driver, is that correct?

A. Yes, sir.

Q. All right. Did Mr. Yates then start his cycle?

A. Yes, sir.

page 103 }

* * * * *

Q. Did you hear his siren go on as he started out on 123?

A. He turned his siren when he first went—before he hit the road. As he hit the road, he went down the road, I don't know what happened, but there was a siren as he approached 123 from the Old 123.

* * * * *

W. F. Lester, Sr.

page 105 }

* * * * *

Q. When you come out of that curve at the bottom of the hill just before you get to Pohick Road, do you have any idea as to how far it is from that curve when you first
page 106 } come around it to the crest of the hill?
A. About 125 to 150 yards.

Q. And at the top of the crest of the hill can you give us an estimate as to how far it is from the crest of the hill when you can first see down to this intersection of Pohick Road?

A. Where you can first see the intersection?

Q. Yes.

A. You mean as you come over the hill?

Q. When you come over the hill and can see who is going in and out of that intersection.

A. Roughly about 125 feet.

Q. Who was investigating this accident, in charge of the investigation?

A. Officer Miller was the accident investigator.

Q. Have you ever seen his reports?

A. No, sir, I have not.

Q. You observed the skid marks here, did you not, this one skid mark going down the middle of the highway?

A. Yes, sir.

Q. You say you do not know what laid that down?

A. No, I do not, because there is some over on this side, also.

* * * * *

page 109 }

* * * * *

REDIRECT EXAMINATION

By Mr. Koutoulakos:

* * * * *

page 111 }

* * * * *

Q. You are familiar with that location, are you not, Officer?
A. Yes, sir.
Q. I believe you told us from the top of the crest down to the point of the intersection would be about 125 feet, is that correct?
A. 125 feet either way.

* * * * *

Thereupon, JULIAN W. BURKE was called
page 114 } as a witness by counsel for Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Koutoulakos:

* * * * *

Q. Were you on duty in the vicinity of Route 123? Were you on radar that was set up?
A. I was.
Q. Were you the officer in charge at the time?
A. That is right.
Q. Who were the other officers with you, Ser-
page 115 } geant?
A. It was Officer Lester, Officer Yates, and I believe Officer Parrish and Officer Buckley.
Q. What were Officer Yates' duties at the time, if you recall?
A. He was one of the chase vehicles.
Q. What does that mean?
A. That means that he works from the set and chases the cars. I was the operator of the radar set.
Q. When you say he chases a car, is that any car that happens to come by?
A. No. That is a violator.

Julian W. Burke

* * * * *

page 116 } Q. I am concerned with this car. There came a time when a car came and he went through the radar, is that correct?

A. Yes, sir.

Q. Did you see the needle register at all for that car?

A. 60 miles an hour.

Q. How much is the speed limit in that zone?

A. 45.

Q. Did you see the automobile itself?

A. Yes.

Q. Can you describe it to the jury?

A. It was a 1959 Ford sedan and that is all I have. It has been so long I have forgotten the color of the automobile.

* * * * *

page 118 } Q. So any car going through there at a high rate of speed, you would pick it up?

A. That is right.

Q. And the radar would take the speed coming off the bridge?

A. That is right, going south.

Q. So this 1959 Ford would have to be doing 60 miles an hour just as he got off the bridge?

A. That is right.

Q. And the railroad is right under the bridge?

A. That is right.

Q. Tell us what happened then with respect to Mr. Yates.

A. Yates gives chase. It wasn't long before somebody stopped by and said the officer had been involved in an accident.

* * * * *

page 120 } A. It is a pretty curvey road along through there. It is perfectly all right at 60 except for this curve.

Q. I want to show you these pictures and ask you if these photographs were photographs of the scene as you got there.

A. Yes, sir.

Q. They truly represent what you saw when you got there, Sergeant?

A. That is correct.

Julian W. Burke

Q. This vehicle that is in the picture, that is the vehicle operated by the Defendant, is that correct?

A. That is correct.

* * * * *

page 122 }

* * * * *

Q. Did you have an opportunity to talk to Mr. Potts, the Defendant in this case, about what he was doing prior to the accident?

A. Yes. I investigated the accident. I asked him several questions pertaining to the accident. I asked him if he gave a turn signal. He said no, he did not, did not have time.

I also checked his brake lights, had Officer Lester get in the car, put his foot on the brake, and there was not any brake lights whatsoever.

Q. So he told you he did not give a turn signal because he did not have time, and you checked his brake lights and he had none?

A. His brakes were all right but he did not have any brake lights.

Q. Is there any doubt about that, Officer?

A. There is no doubt about that.

* * * * *

page 123 }

* * * * *

Q. How about the turn signal? Other than what you have told us, was there any other discussion about that?

A. No. He said he did not have time to give a turn signal so I did not question him any more and he was given a summons for those two violations.

Q. You are the one that charged him with those two violations?

A. That is correct.

Q. That is after a test on the brakes and talking to him on the turn signals?

A. That is right.

Julian W. Burke

* * * * *

page 124 }

* * * * *

Q.

* * * * *

Anyhow, what I am referring to, do you see the debris that is in the right-hand lane there?

A. That is correct.

Q. Can you establish the point of impact of this accident by looking at this picture, looking at the debris?

A. The debris is the point of impact. That is where it fell on the road.

Q. And that is all completely in the right-hand
page 125 } lane, is that correct?

* * * * *

Q. What is the speed limit through there from the point where you folks had your radar set up to the point where the accident happened? If there are varying speed limits, I wish you would give them.

A. 45.

Q. All the way through, is that right?

A. Yes.

* * * * *

page 126 }

* * * * *

CROSS EXAMINATION

By Mr. Dimond:

* * * * *

Eldon Lester Yates

page 130 }

* * * * *

Q. With respect to the intersection of—what is it, Pohick Road and 123?

A. 641; I believe that is correct.

Q. To your knowledge, has that intersection changed at all from the time this accident happened, aside from putting up the new street sign which says Pohick Road?

A. I believe the stop sign has been moved.

Q. Where was it prior to its being moved with relation to the intersection?

A. I believe it has been moved down the hill, moved south several feet.

* * * * *

page 135 }

* * * * *

Thereupon, ELDON LESTER YATES was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Koutoulakos:

Q. Mr. Yates, do you want to state your full name, please?

A. My name is Eldon Lester Yates.

Q. Where do you live?

A. My home is in Luray, Virginia.

Q. How old are you, Mr. Yates?

A. Thirty-five.

Q. At the present time, what is your occupation?

A. I am not doing anything; unemployed.

Q. When was it that you quit working or were retired?

A. October 1 was the effective date.

Q. What was the reason for that?

A. For my disability to my wrist.

page 136 } Q. That is to your wrist?

A. Yes.

Eldon Lester Yates

Q. Officer Yates, getting back to September 1, 1964, at that time you were employed by the Fairfax Police?

A. Yes, sir, I was.

Q. How long had you been working for them?

A. Since January 1, 1959.

Q. On this occasion, what were you doing that morning between 10:00 and 10:30?

A. We were working radar south of Fairfax on Route 123.

Q. Were the other gentlemen whose names have been given to the Court with you, Sergeant Burke—

A. Yes, sir.

Q. Did there come a time when you went after an automobile that was triggered off by what the radar meter showed?

A. Yes, sir, I did.

Q. Where were you at that time with relation to the radar meter itself?

A. The radar meter was sitting on the fender of a cruiser, police cruiser, and I was directly beside the fender observing the meter.

Q. You could see the meter?

page 137 } A. Yes, sir. It was on my left.

Q. With reference to the Defendant, Mr. Potts, did there come a time when you saw his car?

A. Yes, sir.

Q. What kind of a car was it?

A. It was a black 1959 Ford.

Q. When you first saw it, how fast was it going?

A. Well, the radar indicated 60.

Q. Where was this car when you first saw it from where you were at the radar box?

A. I saw it as it cleared the bushes, sort of bush, like, along the road, as it cleared that. I saw it in the open space.

Q. Then what did you do?

A. I immediately took off after them.

Q. You have heard testimony your motorcycle was on or off; will you tell the jury your recollection?

A. It was on.

Q. Do you recall whether or not you had your light or siren on at that time?

A. I had my light on the entire way to the collision and I had my siren on part of the way.

Q. What did you do with reference to this 1959

page 138 } black Ford that you saw and took up the chase?

Eldon Lester Yates

A. As the Ford went by immediately I took off after it and I entered Route 123.

I didn't stop. As I entered Route 123 I kind of went in on an angle and I accelerated very heavily and I had my siren on until I cleared the school zone. There is a school area there, Fairview School.

Q. Why did you turn your siren off there?

A. After I cleared the school zone we went into some curves and to operate the siren you have to take your foot off the clutch of the motorcycle and put it back about a shoe length, and there is a button there you push—correction —a little pedal you push and it puts the siren against the wheel and the rear wheel moves the siren, turns it, and therefore it makes the sound.

Q. Then did you pick up your siren again after that, after these curves?

A. No, sir. I never did have time to get back to it.

Q. Tell these folks what happened. You were following this gentleman. How fast was he going? How fast were you going?

A. I probably got up to 90 miles per hour, I would say, in order to close the gap between Mr. Potts and my-
page 139 } self.

Q. Up to what point was that when you reached the speed of up to 90? Where would that take us to?

A. I was just about approaching the curve at that time. So then I maintained about a 100-yard distance with him and we were going in the curves and he was on the wrong side of the road. He straightened the curves out. He did not go around the curves. He just cut them right through, and I also went right through.

And then we got to the real sharp curve to the right and it is almost impossible to make it over 40, and we both slowed down to go through there and then he was approaching the hill. As I came out of the curve he was approaching that hill-crest and—

Q. At that time had he slowed down to indicate he had seen you behind him?

A. No, sir. He never did slow down.

Q. At any time did he ever slow down when you were behind him?

A. He slowed down for this last curve.

Q. That was all?

Eldon Lester Yates

A. Yes, sir.

Q. At what speed would you estimate that he slowed down for this last curve?

page 140 } A. I would say you couldn't make it over 40.

Q. All right. What happened then?

A. He went over the hillcrest and I accelerated and I did not know the exact speed I went over, but it was between 40 and 50, I would estimate, and as I popped over the hill he was right in front of me in the right lane and I had nothing to do but I hit my brake.

The motorcycle has a front brake and a rear brake, and I hit the rear brake, which is a foot pedal.

The front brake is operated by hand and I did not hit that brake.

Q. Was there any place you could go when you were confronted with this vehicle right in front of you?

A. No, sir. I did not have time.

Q. Was there anything to do to avoid this accident?

A. No, sir.

Mr. Dimond: Objection, if your Honor please.

The Court: Objection sustained.

By Mr. Koutoulakos:

Q. Was that a narrow road or a wide road at this point where the accident occurred, if you recall?

A. It is an average road.

Q. Just like the pictures show, with the hill on

page 141 } the side?

A. Yes, sir.

Q. And then that represents pretty much what the road was like, is that correct?

A. Yes, sir.

Q. This vehicle that was operated by the Defendant, it is your testimony he was right in your lane, is that correct, when you came over that hill?

A. Yes, sir, when I topped it.

Q. Did you see any brake lights or any turn signals of any kind?

A. No, sir. There was never a brake light or a turn signal. The only turn signal I saw I figured was after the accident. I was lying behind the car and he got out. Mr. Potts got out and another gentleman with him and they grabbed me, one on

each side of me, trying to drag me out of the road, and I told them to leave me lay.

Then Mr. Potts went back to the car and he turned on the left turn signal and I told him, "It is no use to turn it on now," to leave it off, and he left it off.

Q. So he did then turn it on after the accident?

A. Yes, sir. He definitely did.

page 142 } Q. What injuries did you receive as a result of this accident, Mr. Yates?

A. Well, I was bruised up, skinned up, and both my legs were badly bruised. They were almost as blue as my suit for a couple of weeks, and the blood finally went down underneath, or something, but the black went down underneath my leg and then it disappeared after a couple of weeks and I was just bruised up and stiff, and my wrist got about three times its normal size, but the doctors told me it wasn't broken at the time, and after it got—I kept it in a brace—I had a steel brace which was wrapped up, and I kept it that way and I came back to work and I rode with another officer for about a week or two and then I got to riding by myself.

Q. You tried to go back to work again?

A. I did go back to work.

Q. They treated this as a sprain?

A. Yes. They treated it as a sprain for a couple of months, I believe, Dr. Cooper.

Q. And the xray showed the break after that, is that correct?

A. Yes, sir.

Q. As I understand your testimony, when you went over this hill you were going between 45 and 50?

A. I would estimate that.

page 143 } Q. The speed limit there is 45?

A. The speed limit all the way is 45. There is a safe speed zone along the way and that is in the real sharp curve.

* * * * *

CROSS EXAMINATION

By Mr. Dimond:

* * * * *

Eldon Lester Yates

page 151 } Q. So this is the reason it is placed right there, so that you can keep this on so that while you are driving—isn't that as the law requires?

A. It is placed there to blow when you can. It is a lot of circumstances you cannot maneuver your motorcycle and blow it.

* * * * *

Q. I say, there was nothing to prohibit you from operating that siren going down that road?

page 152 } A. Well, sir, to move your foot—I don't know if you ever rode a motorcycle, but when you go into curves you got to kind of keep your balance to keep the motorcycle up, and when you move your foot it throws you a little bit off, and besides that, if you have to gear down or something, you need the clutch and it is dangerous to ride with your foot off the clutch.

* * * * *

page 154 }

* * * * *

Q. At what speed were you traveling—I believe you testified that you came out of the last curve and started up this hill; you were going 60, is that correct?

A. I think I said between 40 and 50.

* * * * *

page 161 }

* * * * *

Q. Officer Yates, when you went over the hill, as I understand you to say, you were going approximately 50?

A. Approximately, yes, sir.

Q. Where was the Potts vehicle then?

A. It was either moving slowly or stopped—I could not tell you which—in my lane.

Q. Prior to your going over the top of the hill, cresting

Eldon Lester Yates

this hill, where was it the last time that you observed the Potts vehicle?

A. I observed it—it went like that, just like that.

* * * * *

page 162 }

* * * * *

Q. Did you see him as he was going up the hill?

A. Yes, sir.

Q. Did he slacken his speed any as he went up the hill?

A. It did not appear to me, no, sir.

* * * * *

page 166 }

* * * * *

Q. And the question was, you knew that if another vehicle was coming out of that intersection you would have to hit it, isn't that correct?

A. No, sir, it is not.

Q. You did not know that?

A. No, sir.

Q. Tell me this, Officer. After you go over the crest of this hill the road straightens out, does it not?

A. It is downgrade and it straightens out and

page 167 } it goes up.

Q. For some distance?

A. Yes, sir.

* * * * *

page 169 }

* * * * *

By Mr. Koutoulakos:

* * * * *

Robert Potts, Sr.

page 170 }

* * * * *

A. Well, I believe that I saw the vehicle before I actually got on the real top of the crest because I was sitting up and I had more chance to see it than I would have if I had been in a car because my head would have been about roof level.

I wouldn't know. I have not measured it. I couldn't tell you exactly how far it is. I would estimate approximately 100 feet.

* * * * *

page 172 }

* * * * *

Q. The siren was on from what point to what point, Officer?

A. The siren was off and on from the time we left the radar set until I started into the curves, and from then on it was never on.

Q. And the reason for that was why?

A. Because of maneuvering the vehicle.

Q. With respect to your light, how long was it on?

A. That is a physical switch and that was on page 173 } the entire way.

* * * * *

Thereupon, ROBERT POTTS, SR., was recalled as a witness and was further examined and testified as follows:

FURTHER RECROSS EXAMINATION

By Mr. Koutoulakos:

Q. Mr. Potts, I forgot to ask you this, but at the time that you said you stopped, you know, preparatory to making a left turn, at that time there were no cars coming in the other lane toward you, were there?

A. No, sir. I did not see—there was no car close.

* * * * *

page 174 }

* * * * *

Q. And there was nothing that would have prevented you from continuing on by way of an automobile or obstruction?

A. That was the purpose of turning slow around that stop sign. I had to slow up to make that turn at the same time.

* * * * *

page 177 } (The jury was retired from the Courtroom, following which a recess was taken.)

Mr. Dimond: If your Honor please, at this time I would move the Court to strike the evidence of the Plaintiff and enter summary judgment in favor of the Defendant, and this is based on the testimony of the Plaintiff to the effect as he approached the scene of this accident he was not complying with the law of Virginia, specifically, 46.1-226, which requires that in the apprehension of law violators the Officer must conform and abide by the traffic regulations of the State of Virginia unless he comes within one of the exemptions, the exemptions being that they shall apply only when the operator of such vehicle displays a flashing, blinking or alternating red light and sounds a siren, bell or exhaust whistle, and goes on to provide that such exemptions shall not, however, protect the operator of any such vehicle from criminal prosecution for conduct constituting reckless disregard of the safety of persons and property.

So far as I know, there are only two cases in Virginia respecting this, and the first is 204 Va. 418, and that involved a question of a police officer, even though he had page 178 } the siren and the light on, ran a red traffic light, and the Court at that time pointed out that, "Our next inquiry is whether there are any provisions in the Code dealing with traffic lights which make a special exemption, and the answer is there is not." Traffic stops as the light turns red, the traffic then moving shall stop and remain stopped as long as the red signal is showing.

They go on even to point out that in the exemption providing for emergency vehicles it did not give the right to run through a traffic light even though they had their signals on, and in that case found negligence as a matter of law.

The most recent case, I believe, is *White* v. *John Doe*. In that case the traffic officer was chasing a speeder and he was pulling up alongside him with his light on but no siren, and they were crossing an intersection and the Court—

The Court: Is there any contention by the Plaintiff that he is exempt under the Statute there?

Mr. Koutoulakos: There sure is. 46.199 lays it out. I do not think there is any question he is exempt. He is reading the wrong statute, and I have got *White* v. *Doe* right here, if you want to see it.

Mr. Dimond: If your Honor please, 46.199 is
page 179 } the exemption they are resorting to in 46.1-226, which says, "These exemptions hereinbefore granted to such moving vehicles applies only when he flashes the light and sounds the siren," and there is an exemption for a police officer chasing a speeder if he meets these two requirements.

In this case it is undisputed he did not meet at least the one, and in the Doe case they pointed out that the law is that he cannot pass at an intersection, and according to the Plaintiff's testimony in this case he was drawing abreast of that car and he said he definitely violated that statute, and in violation of the statute, without having complying with the requirement of sounding the siren, he was the same as anybody else and, therefore, not entitled to the exemption. He was negligent as a matter of law.

We have the same thing in this case. We have a police officer admittedly traveling in excess of the speed limit and, being in excess of the speed limit in going over this hill, he is subject to the rules and regulations of any other motorist.

On the second ground, if your Honor please, I would say in any event the Plaintiff is negligent as a matter of law, contributorily negligent.

page 180 } We have a situation here where, as he approached this hill—and he knows that 90 feet on the other side of that hill is an intersection; he knows that he cannot stop his vehicle in order to avoid any vehicle that may be in that intersection.

Nonetheless, having this knowledge, he goes over and puts himself in a position of danger.

This could have been a car pulling out of a side street. It could have been a child in the road. It could have been a stalled car in the road, and this man was just exposing himself to a hazard. He was gambling that there was nothing there.

There is no question about this. He indicates this man was traveling at 40 miles per hour when he topped the crest of the hill, while this car in 90 feet stops without leaving any skid marks.

I submit, your Honor, that is an impossibility. You cannot stop an automobile in 90 feet at 40 miles an hour.

I submit under the evidence as presented to the Court at this time the Officer was guilty of negligence and that he was exceeding the speed limit and he was not entitled to the exemption granted under the Code and, further, that

page 181 } in any event, knowing the condition and situation that existed, he exposed himself to the danger and is not entitled to recover.

Mr. Koutoulakos: Your Honor, first, so far as the exemptions are concerned, 46.1-199 says this: "The speed limitations set forth in this Chapter shall not apply to vehicles when operated without due regard for the safety under the direction of the police in the chase or apprehension of violators of the law, of persons charged with or suspected of any such violations, or in testing the accuracy of the radio microwave or other electrical devices," et cetera.

"These exemptions hereinbefore granted to such a moving vehicle shall apply only when the operator of such vehicle displays a flashing, blinking or alternating red light and sounds a siren, bell or exhaust whistle as may be reasonably necessary."

I think that is the language he left out, which I think is the significant language in this case.

The officer specifically told your Honor and the jury that the siren was not sounded at all times; he sounded it when he could. However, due to the road situation

page 182 } and the attempt to get the vehicle under control, his motorcycle under control, it was not possible for him to do it at all times.

I think he certainly complied with the Statute, if your Honor please, and in the subsequent paragraph I see no change at all, and 226 in effect says the same thing, that when reasonably necessary. The language is in there; yes, "As may be reasonably necessary," so I think, very frankly, this is a jury question.

No. 2, I am very familiar with the case of *White* v. *Doe* and read it at length and read it with interest. I think it was Mr. Justice Carrico. In that case we have a completely different situation. We have an Officer on the wrong side of the road and there was no evidence he was in the apprehen-

sion of anyone because he did not come within the exclusions, and I think those were the words that Mr. Justice Carrico was concerned about, so the case certainly is not at all involved in the facts that we have here.

We have here—and the facts are clear and they are not even in dispute, even by the Defendant's own testimony, he was speeding, he was picked up on a radar trap; page 183 } the Officer pulls out, sounds his siren, his light is on at all times, and then when they get into this dangerous curvature of the road, in order for the Officer to manipulate his clutching apparatus so that he can keep the vehicle under control, sometimes the siren is not on. However, I think that meets with the "as reasonably necessary" part of the Statute.

So far as contributory negligence as a matter of law, if there ever was a case that should go to the jury, if your Honor please, I think this is it.

The Court: The motion to strike will be granted. I think that the Plaintiff is guilty of contributory negligence as a matter of law in going over a hill, being familiar with what was on the other side and knowing that he could not stop his vehicle at the speed he was going.

Summary judgment will be in favor of the Defendant.

Mr. Koutoulakos: May I take an exception?

Mr. Dimond: If your Honor please, shall I draw the Order?

The Court: Yes, but let me get the jury down.

(The jury was returned to the Courtroom.)

The Court: Members of the jury, it will not be necessary for you to render a decision in the case. The page 184 } Court has determined that even accepting in the Plaintiff's case as true, it still does not raise an issue of liability in favor of the Plaintiff that could be submitted to you for a decision. You therefore are released and discharged. You are excused. Summary judgment will be entered in favor of the Defendant.

Reserve Mr. Koutoulakos' exception.

Mr. Dimond, do you know who summonsed the records from the hospital?

Mr. Dimond: Mr. Koutoulakos summonsed the records from Arlington and we summonsed them from Fairfax.

The Court: Will you see that they get back?

Mr. Dimond: Yes, sir.

(Whereupon, at 3:55 o'clock, p. m., this hearing was concluded.)

April 19, 1968

Tendered 19 April 1968
Walter G. Plunious

Signed the 19th day of April, 1968, A. V. B., Judge.

Seen
Robert Dimond, Att. for the Defendant.

Testimony of Dr. Casabona not included in tendered transcript.

Louis Koutoulakos

Received and filed this 19 day of April 1968, Edward E. Young, Deputy Clerk, Circuit Court.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Motion for Judgment	2
Answer and Grounds of Defense	3
Affirmative Defense	4
Motion to Set Aside the Verdict and for a New Trial	5
Judgment—April 8, 1968	5
Assignment of Error	7
Notice	7
Witnesses:	
Robert Potts, Sr.	9, 31
W. F. Lester, Sr.	15, 18
Dr. Alfred Edison Jackson	17
Julian W. Burke	20
Eldon Lester Yates	24
Proceedings	32