Return to
FILE COPY
Clerk, Supreme Court of Appeals

210 VA 523

Record No. 7058

In the
Supreme Court of Appeals of Virginia
At Richmond

CATHERINE C. FISHER

v.

FRANCIS G. GORDON, III

FROM THE CIRCUIT COURT OF ALBEMARLE 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. 7058

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

CATHERINE C. FISHER, Plaintiff in error,

against

FRANCIS G. GORDON, III, Defendant in error.

From the Circuit Court of Albemarle County
Lyttelton Waddell, Judge

Upon the petition of Catherine C. Fisher a writ of error is awarded her to a judgment rendered by the Circuit Court of Albemarle County on the 19th day of April, 1968, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Francis G. Gordon, III, was defendant; upon the petitioner, or some one for her, 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 5 }

* * * * *

ORDER

* * * * *

This day came the plaintiff and defendant in person and by counsel prepared for trial of this cause upon the issues joined in the plaintiff's motion for judgment and the defendant's grounds of defense heretofore filed, and also came thirteen jurymen selected from the veniremen duly named and summoned for the April term of this Court, and said juryment, being duly sworn, gave answer to quesetions touching their qualifications propounded by the Court, and counsel for both parties having indicated their approval and having struck three members of the panel each, the remaining seven jurymen, namely, Wilmer Mowbray, J. Elwood Hall, Albert J. Lawson, John H. Davis, Winston Jones, J. L. Norford and John H. Barksdale, were sworn to well and truly try the issues in this case according to the evidence and instructions of the Court. And the Court Reporter was also sworn to report the proceedings accurately to the best of her ability.

page 6 } And the plaintiff and her other witnesses testified fully and the plaintiff rested her case, whereupon counsel for the defendant, out of the jury's presence, moved the Court to strike the plaintiff's evidence and to enter summary judgment in favor of the defendant pursuant to Rule 3:20 of the Rules of the Supreme Court of Appeals upon the grounds that the testimony of the plaintiff and her witnesses clearly showed as a matter of law that the plaintiff was guilty of negligence which was a proximate contributing cause of her injuries. Said motion was argued by counsel and the Court overruled the same and ordered the trial to proceed. The defendant excepted.

Whereupon the jury returned and the defendant testified and then rested his case. The jury again retired and counsel for the defendant renewed his motion to strike the plaintiff's evidence and to enter summary judgment for the defendant.

George W. Bailey

After hearing argument of counsel, the Court sustained the defendant's motion, to which ruling the plaintiff excepted. The Court thereupon recalled the jury and discharged them.

Accordingly it is hereby ADJUDGED and ORDERED that the plaintiff shall recover nothing of the defendant, and shall pay the costs of this action.

And the plaintiff again excepted to the rulings and judgment of the Court.

LYTTELTON WADDELL
Judge
April 19, 1968

* * * * *

page 7 }

ASSIGNMENT OF ERROR

The trial court erred in striking plaintiff's evidence and in rendering summary judgment in favor of defendant.

* * * * *

CATHERINE C. FISHER

By: James A. Eichner
Of Counsel

* * * * *

Filed this 30 day of May 1968.

SHELBY J. MARSHALL, Clerk.

* * * * *

page 1 } GEORGE W. BAILEY, called as a witness by and on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Branch:

Q. You are Chief Deputy Sheriff George Bailey?

A. Yes, sir.

George W. Bailey

Q. And you're with the Sheriff's Department for the County of Albemarle?

A. Yes, sir.

Q. Well, Sheriff Bailey, did you have occasion to investigate the accident you've heard us lawyers talking about that occurred on January 29th, 1966?

A. I made that investigation.

* * * * *

page 2 } Q. Well, would you first—without reference to the weather conditions existing on this day—would you describe generally Route 29 as it normally exists at the scene of this accident?

A. At the scene of the accident it is southbound—it happened in the southbound lane of traffic—it's a slight upgrade. You have come down a grade about 250 to 300 yards slight downgrade and then you start into a little upgrade. At the point of the accident it was on an upgrade.

Q. Back northwardly from the scene of the accident the road had come downgrade from a hill about 300 yards away?

A. I'd say 250 to 300 yards it was downgrade.

* * * * *

page 3 }

* * * * *

Q. Approximately how wide is that grass or the cutoff or the distance between the north and southbound lanes? Just approximately.

A. Twenty-five feet.

Q. So you have about a five foot drop within twenty-five feet of the cutoff?

A. Yes, sir.

Q. Can you tell us how wide the roadway of the southbound lanes are?

A. Yes, sir. Twenty-four feet three inches of hard surface road.

Q. And what sort of surface was there?

A. Blacktop surface.

Q. As the southbound motorist approaches and gets close to this particular cutoff, how would you describe the con-

dition or the terrain between the north and southbound lanes? Now, by that I—was there a shoulder to the left of the roadway for a southbound motorist?

A. Yes, it's a shoulder.

Q. And then what is the situation?

A. It goes into grass and grass running over to the northbound lanes. Of course, it's downgrade because the northbound lane is lower.

page 4 } Q. Well, is the land level between the north and southbound lanes level with the surfaced part of the cutoff or is there any depression in there?

A. There's a little depression to take the water off that runs back down into a drain.

Q. And do you have that depression or drainage both to the north and to the south of this cutoff?—if you remember?

A. I can't say. I believe it is. I'm not quite sure I get your question.

Q. Well, I only wonder is—I'm leading up to the point of where you found Mrs. Fisher's car—was there any depression in the grassy area between the north and the southbound lanes?

A. Yes, sir.

Q. Well, what were the weather conditions on this particular occasion on January 29th?

A. It was snowing hard at the time of the accident and it was snowing at the time that I arrived—quite hard.

* * * * *

Q. Well, how much snow and will you describe the general surface of the road in terms of how much snow that had accumulated?

A. I would say four to five inches of snow on the road at the time. The northbound lane had been pushed—the plows had come along but it was still accumulated again in the northbound lane and I don't believe the southbound lane had been pushed at all.

page 5 } Q. Well, you had four or five inches then on the southbound lane?

A. In the southbound lane it woulld be four to five inches of snow on the road.

Q. Was there any part of the southbound lanes apparently vehicles were traveling? What were the driving conditions on the southbound lane?

George W. Bailey

A. Driving conditions were very poor. Most of the traffic was using one lane, just going near the center of the road. It wasn't a heavy flow of traffic. All of them were using pretty well the same lane of traffic.

Q. At my request, have you made a sketch of this scene?

A. Just a rough sketch. I think that's what you said.

Q. Yes, sir. You don't intend it to be to scale, do you?

A. No, sir.

Q. I take it this is the cutoff we've been referring to? This is the northbound lane and this is the southbound lane? [Indicating on the sketch so that jury may see.]

A. Yes, sir.

Q. Will you take this pencil and draw a line showing the location of the tracks where traffic was traveling on this occasion? [Witness draws line on sketch.]

A. I would say they were traveling near the center of the road. It coulld have been just a little bit—it was slushed out back in here like this— same thing over here—but page 6 } most of the traffic was traveling right down the center. The snow was banking up from the center over this way over this side and this side. As a car would go down the road the snow would fall to the sides.

Q. I notice the left rear wheels of this car on your sketch would be partly in the passing lane.

A. Yes, sir. I'd say about in the center of the road where the traffic was traveling.

Q. Well, would you draw the location of Mrs. Fisher's car where you found it when you arrived? You might there draw also the location of Mr. Gordon's car. [Witness draws on sketch.]

A. Mrs. Fisher's car had traveled down here this way and the Gordon car had come to a stop over this way.

Q. Now, could you determine by any physical evidence at the scene the point of the collision—where the cars contacted each other?

A. The Fisher car was hit by the front of the Gordon car. Both cars had to be towed away with a wrecker. The Gordon car hit right in this part of the Fisher car, demolishing the front of the car—of the Gordon car—and the front and rear of this car.

Q. Let's see—Mrs. Fisher's car was a station wagon?

A. Yes, sir.

Q. Four doors?

A. Yes, sir.

George W. Bailey

page 7 } Q. What was the point of impact on her car with reference to her left doors—was it the front or the rear door?

A. The rear door. It might have been some damage on the front. Most of the damage seemed back towards the rear. I think I have it in my notes if I may refer to them.

Q. Yes, sir. Your Honor, I'd like to offer this as an exhibit. [Introduces sketch made by Officer Bailey.]

Marshall: No objection, Your Honor.

A. I have the left rear door and side of the Fisher car and the Gordon car had damage to the front, grille, hood and front bumper.

Q. What kind of car was Mr. Gordon driving?

A. '63 Plymouth.

Q. Was that a Valiant?

A. Valiant.

Q. That's a small car?

A. I don't believe it's a compact, but it is a small one of the Plymouths.

Q. Could you see in the snow from the rear of Mr. Gordon's car any tracks that would have told you the path he took up to where you found his car?

A. I couldn't connect the tracks up. It was too much snow there at the time and I was thirty-five minutes getting to the scene and I couldn't connect these tracks to the accident.

page 8 } Q. Somewhat along the same lines, so far as what you could see on the surface of the road, could you tell the point where the two cars came together—the point of collision?

A. It was in—I would say in the left lane—passing lane of 29 South.

Q. What was the evidence that you saw that—

A. The car was knocked sideways in the left—of course, when your car was sliding sideways you could see in the snow—that's where I would say—

Q. That's Mrs. Fisher's car?

A. That was the Fisher car.

Q. For what distance was Mrs. Fisher's car knocked sideways to that point where you found it?

A. Well, it was going along sideways and going forward at the same time.

Q. What was that distance—approximately?

George W. Bailey

A. It was about sixty-five feet.

Q. Did you notice how the two vehicles were equipped insofar as driving in snow is concerned?

A. Yes, sir. I have here—"the Fisher vehicle had chains on with snow tires." Number 1 was the Gordon car—"had snow tires on."

Q. Did you talk to Mr. Gordon at the scene?

A. Yes, I did. I talked to him at the scene.

Q. What did he have to tell you about the accident? Did he tell you how fast he was going?

page 9 } A. Mr. Gordon said he was doing thirty-five to forty-five—thirty-five to forty miles an hour.

Q. Did he say anything about whether or not he saw the signal light on Mrs. Fisher's car?

A. Yes.

Q. What did he say on that subject?

A. In his statement he said, "I saw the signal on her car, but when I did I was right up beside her and she came right out in front of me. I think I had my car under control." And I asked him the question, "Did you continue passing after you saw the signal?" His answer was, "I couldn't stop. I was too close when I saw the signal."

* * * * *

page 10 }

* * * * *

CROSS EXAMINATION

By Mr. Marshall:

Q. Mr. Bailey, I noticed you took your pencil and made some marks here and some marks here very lightly after drawing this in. What was the significance of that? [Showing witness Plaintiff's Exhibit #1.]

A. The snow from the cars traveling near the center was—slush was slushing over on each side. There's no way to tell exactly which lane these two cars were in at the

page 11 } time, but most of the traffic was traveling in the center.

Q. So you can't actually say whether Mrs. Fisher's car was straddling that line or not?

A. No, sir.

George W. Bailey

Q. The traffic had beat the snow away from the places where the cars' wheels were, isn't that what happened?

A. I say there was no way to tell where they were traveling at that time—just that most of the traffic was in the center or near the center of the road.

Q. Can you describe the character of the snow that was on the road? Was it fine and powdery or wet and slushy or what was it?

A. No, sir, I can't describe the character.

Q. When you arrived at the scene, was there any obstruction to travel in the left lane—left southbound lane?

A. The Gordon car—traffic continued to go on ahead—the Gordon car was off to the left there. The wrecker was quite a long time getting there because of the snow conditions.

Q. The highway was open, was it not?

A. Open highway—they had no trouble.

Q. I believe Mr. Gordon rode back to Charlottesville with you, did he not? Or do you recall?

A. He might have ridden back with me or the wrecker—one or the other—I don't recall.

page 12 } Q. Do you know whether or not—did you observe, in driving to the scene of this accident or after leaving it on that day, whether wheels of automobiles in the snow were kicking snow off behind them as they traveled down the road? Did you observe any of that at all?

A. Yes, sir. Mr. Gordon was with me, I believe, and I took him to some place in Charlottesville.

Q. You remember that now?

A. Yes, sir, I remember it.

Q. And you remember that the cars ahead of you all were throwing snow up in front of you?

A. Yes, sir.

Q. Did you observe whether or not that might have obstructed the view of a signal light on the back of a car ahead of you?

A. I don't know.

Q. You couldn't venture an opinion?

A. No, sir. It was snowing hard at the time. I do remember this and driving conditions were very poor.

Q. And getting worse all the time, were they not?

A. Yes, sir.

Q. And your arrival there was from 3:45 to 4:20?

A. Yes, sir.
Q. Over half an hour after the accident occurred?
A. Yes, sir.

* * * * *

page 13 }

* * * * *

Marshall: Did he tell you where he was when he saw the signal, Mr. Bailey?

A. Yes.
Q. Would you read that quotation, please?
A. Yes, sir. "I saw the signal on her car, but when I did I was right up beside her and she came right in front of me. I think I had my car under control." And then I asked him a question—"Did you continue passing after you saw the signal?" He said, "I couldn't stop. I was too close when I saw the signal."

* * * * *

page 14 } RAY FISHER, III, called as a witness by and on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Branch:

* * * * *

Q. Were you in the car driven by your mother?
A. Yes, I was.

* * * * *

page 15 }

* * * * *

Q. Can you tell us, going back some distance from where

the accident occurred, before you got close to the scene, can you tell us about how fast your mother was driving?

A. About twenty-five miles an hour.

Q. Can you tell us whether there was any change in that speed before the collision occurred?

A. We slowed down considerably, about fifteen miles an hour, and then slowed down enough to make the turn.

* * * * *

page 16 }

* * * * *

Q. When the collision occurred, can you tell us whether your mother's window beside her was up or down?

A. It was down.

Q. Do you know when she put that window down?

A. I'm not real sure, but it was down before the accident happened.

Q. Did you ever see the other car before the crash?

A. No, I didn't.

Q. Do you know approximately where your mother's car was at the time of the crash?

A. The front wheels were in the median to turn off.

Q. Well, let me direct your attention to what now we would say is the left edge of the roadway—not the cutoff—the left edge of the roadway. You understand what I'm saying?

A. Witness nods head yes.

Q. All right. With reference to the left edge of the roadway, was any part and, if so, how much of your mother's car was past the edge of the roadway into the cutoff at the time of the collision?

A. The front two wheels were past the edge of the road.

Q. Do you have an estimate of about how much or how far past the edge of the roadway the front wheels were?

A. Not more than a few feet.

Q. Were they a few feet past?

page 17 } A. I think so.

Q. Where on your car did this crash occur?

A. In the back left door.

Q. That's where you were seated?

A. Just between the two doors, I think.

Ray Fisher, III

Q. And what happened to your car as the result of that crash?

A. We were knocked to the side between Route 29 South and North, in the median, off on the grass.

Q. Did you notice whether or not the other car that hit the side of your car moved any further after this crash or did he stop there at the point of where the crash occurred?

A. I didn't notice it.

Q. Did you take notice of that other car after the accident while you were still at the scene?

A. Yes, I did.

Q. And where approximately was that car at that time when you did notice it after the accident?

A. It was on the left side of the road just before the turnoff.

Q. Where were the right wheels of that car as compared with the left edge of the roadway?

A. They were on the roadway.

Q. His car was on the roadway?

A. Well, his right wheel was.

page 18 } Q. His right wheels were. Where were his left wheels?

A. They were off the roadway.

Q. And where was the car with reference to the turnoff? Was that within the turnoff or before you got to that?

A. It was before you got to the turnoff.

Q. How deep would you say the snow was at the time of this crash?

A. Four or five inches.

* * * * *

page 19 } CROSS EXAMINATION

By Mr. Marshall:

* * * * *

Q. Did you hear any car coming up behind you—hear any noise made by any other car before the impact?

A. I did, but it was just a split second.

Q. Just a split second. Where was the car at that time—right beside you or where?

A. I couldn't see a thing.
Q. You couldn't tell?
A. No.
Q. Did it—I believe from the description we've had—the car struck your mother's car just about by the door you were sitting by, didn't it?
A. That's right.
Q. You were on the left rear seat?
A. That's right.
Q. And that door right by you was where it hit?
page 20 } A. [Witness nods head yes.]
Q. Did you ever see the Gordon car? Did you look over that way? Did you see it when it struck?
A. No, I didn't see a thing.
Q. Were you paying any particular attention to traffic on the road before the accident?
A. No, I wasn't. I was talking to my friend.

* * * * *

page 36 } DAVID FISHER, called as a witness by and on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Branch:
Q. You are David Fisher?
A. Yes, sir.
Q. And Mrs. Fisher, the plaintiff here, is your mother?
A. Yes, sir.
Q. David, on the occasion of this accident, were you in the station wagon driven by your mother?
A. Yes, sir.
Q. And where were you seated?
A. In the front seat against the door.
Q. Now, David, was there anyone else on the front seat between you and your mother?
A. Yes, sir, my little brother.
Q. How old was he at the time?
A. Ten months.
Q. Well, as your mother was driving south on the highway approaching the scene of the collision, did you notice any change in her speed before the accident occurred?

David Fisher

A. Yes, sir.

Q. And what was that?

page 37 } A. Well, she was going around twenty-five and I think she was doing about fifteen when she slowed down to make the turn.

Q. She slowed down to make the turn?

A. Yes, sir.

Q. Were you looking ahead and can you tell us what the condition on the roadway was—where she was driving on the highway?

A. The snow was pretty deep. You had to go pretty slow.

Q. Well, were there any signs in the road or any—where other cars had gone?

A. Yes, sir.

Q. Were there any tracks?

A. Yes, sir.

Q. All right. Where was your mother driving then insofar as those tracks are concerned that had been made by other cars?

A. She was in the tracks.

Q. She was driving in the tracks?

A. Yes, sir.

Q. Did you take notice so that you can testify one way or the other on whether or not your mother gave any signal before the collision?

A. Yes, sir. I remember her turning on the blinker.

Q. You do remember that?

A. Yes, sir.

Q. How far away from the scene of the collision

page 38 } did she turn on the blinker?

A. I'm not sure.

Q. Do you remember the hill that you had come over back north some distance?

A. Yes, sir.

Q. Well, let me ask you then with reference to that hill—after she came over the hill, where was she when you noticed she'd turned on the blinker?

A. About a hundred yards from where the wreck occurred.

Q. Maybe I'm confused—did you notice just somewhere along the way the signal was on or did you notice her when she turned it on?

A. I noticed her when she turned it on.

Q. What was the condition of her windshield? Could you see out of that all right?

David Fisher

A. Yes, sir.
Q. She had on the defroster?
A. Yes, sir.
Q. Well, what was the condition of her side windows?
A. You couldn't see out of them.
Q. As she approached—got close to the scene, did you see her do anything with the side window beside her?
A. Yes, sir, it was down right after she put the blinker on.
Q. I didn't hear you.
page 39 } A. She put it down after she turned the blinker on.
Q. She did put it down?
A. Yes, sir.
Q. All right. Then, before the collision occurred, did you ever see the other car involved?
A. No, sir. Well, right as—you couldn't have done anything. I turned as soon as the car was in the curve and I just saw it right as it hit.
Q. Did you see that car long enough to form any estimate or judgment as to its speed?
A. No, sir.
Q. Did you hear any noise from that car—any horn signal or any other kind of unusual noise?
A. No, sir.
Q. If a horn had been sounded, would you have heard it with that window down?
A. I think so.
Q. Where approximately was your mother's car at the time of the collision by reference to the edge of the road before she was entering that cutoff? Can you approximately place the position of her car at the time it was hit?
A. It was at an angle in the curve. It was on the way in to the turnoff.
Q. When you refer to the curve, do you mean the turn into the turnoff?
page 40 } A. Yes, sir.
Q. All right. Then where approximately was, say the front end of her car, with reference to the turnoff or as compared with that edge of the roadway at the time you were hit?
A. The front end was sticking in the turnoff.
Q. The front end of the car was in the turnoff?
A. Yes, sir.

David Fisher

Q. What happened to your car as a result of or after this crash? Where did it go?

A. They towed it off. I don't know where they took it.

Q. Well, we understand it was knocked sideways and came to rest some ways down?

A. Yes, it was knocked off the road.

Q. After this crash and—you got out of your car, I take it?

A. Yes, sir.

Q. Did you notice where the other car was then? Where had it stopped?

A. It had stopped right before the turnoff or right even with the turnoff almost. I'm not real sure and it was sitting—I think the left front wheels were sitting off the road.

Q. May I ask you—I'll show you this sketch—Plaintiff's Exhibit #1. This is the southbound lane that you were in and this is a turnoff.

A. Yes, sir.

Q. And your mother's car was down here some.

page 41 } Where approximately would you put the other car where you saw it after it was all over?

A. I think it was right in here. It wasn't pointing downhill like that. [Indicating on sketch.]

Q. Well, this is the edge of the road. Was the car out here in the highway or was it up in the turnoff?

A. It was in the turnoff, but it was facing more south than it was east like this.

Q. All right. How about—with reference to that edge of the road—where were the right wheels of that car? Were they on the roadway or—

A. They were right in here. [Indicating on sketch.]

Q. Right here? And with reference to that edge of the road, where were the left wheels of that car?

A. In here—right along the edge. [Indicating.]

Q. David, did you notice whether there was any difference in the snow covering the area on the road as compared with the snow on the shoulder off the roadway?

A. No, I didn't.

Q. You didn't notice that?

A. No, sir.

Q. We have no other questions, Your Honor.

Catherine C. Fisher

CROSS EXAMINATION

By Mr. Marshall:

page 42 } Q. David, did you say you caught a glimpse of the other car just before the impact?

A. As soon as we were in the turn.

Q. You were in the turn?

A. Yes, sir.

Q. Just as your mother started to make the turn?

A. No, we were already in the turn.

Q. You were already in the turn. Where was that car when you caught that glimpse of him?

A. I wasn't real sure. It was just coming straight at us—that's all I could tell.

Q. Was it alongside of your car?

A. Yes, sir.

Q. You said, I believe, that it was too late for her to do anything then?

A. Yes, sir.

Q. It was probably too late for that man in the other car to do anything, too, wasn't it?

A. Yes, sir.

Q. The cars came together almost instantaneously after you saw them, right?

A. Yes, sir.

Q. And your mother's car was on an angle at that time?

A. Yes, sir.

page 43 } Q. Now, when you looked and saw that car, caught that glimpse of it, you must have been looking to your left—right?

A. Yes, sir.

Q. Were you looking out of the open window beside your mother?

A. Yes, sir.

Q. So that car was far enough up on your car that you could see it out of her window?

A. Yes, sir.

Q. All right.

CATHERINE C. FISHER, the plaintiff, having been duly sworn, testified as follows:

Catherine C. Fisher

DIRECT EXAMINATION

By Mr. Branch:

Q. Mrs. Fisher, would you state your full name, please?

A. Catherine C. Fisher. Catherine Carmichael Fisher.

Q. How old are you, Mrs. Fisher?

A. I'm thirty-nine.

Q. And where do you live?

A. I live at RFD 4, Proffit.

Q. Where is Proffit with reference to the scene of the accident?

A. It's east and north.

Q. About how far northwardly from the scene of
page 44 } the accident would you go before you would turn
to go to your home?

A. Maybe a mile or more.

Q. How long have you lived there?

A. About seven or eight years.

Q. Did you live before then anywhere near the scene of this accident?

A. No.

Q. Where did you live before then?

A. We lived in the City of Charlottesville and two years we lived in the State of Maryland right outside of Washington.

Q. How many children do you have?

A. I have five.

Q. Well, coming on then to the time of this accident, where had you left from and what was your intended destination?

A. I had left from home. Early in the morning I had left home to take these children skiing and found it snowing and turned around on the way up 29 and come back after I had chains put on. The child that was visiting us is an only son at home of older parents and I felt with the snow that they needed him at home and I was trying to get him there.

Q. So this trip was to take the boy home?

A. Was to take him home.

Q. Where did you change your mind—how far away from the scene of the accident did you change your mind about
taking him home?

page 45 } A. I had considered turning at the turnoff on the
hill and I just didn't feel it was safe and so I knew that I would be in open road down below so I put on my

blinker just about at the crest of that hill thinking that anybody behind me wouldn't run into the back of me.

Q. All right. How would you describe the conditions existing on the roadway—the snow?

A. It was snowing quite heavily at the time and there was snow on the road.

Q. All right. About how much snow was on the road?

A. Four to five inches.

Q. And where were you driving—were there any markings on the road?

A. There was a car maybe two or three hundred yards in front of me and I followed his tracks, but they had covered. I saw him go over the hill in front of me out of sight and I was—you mean where on the road?

Q. Yeah, where on the road were those tracks?

A. Right in the center. I was straddling the line.

Q. All right. At the scene of the accident or that area just immediately north from the crossover, was there any difference in the level of the snow on the roadway that you said was four or five inches and the height of the snow off the roadway on the shoulders?

page 46 } A. The way I recall, there had been snow, a great deal of snow, and it was piled up by the scrapers and then we had this additional snow and it was going to the side of the road. It was the day before the big blow here where the snow blew all over everything.

Q. Well, how high was that snow piled up off the edge of the road approximately?

A. You mean from the previous one?

Q. Yes.

A. Oh, I would say in some places a matter of two or three feet.

Q. Now, where was that snow piled up with reference to the edge of the road? How close to the roadway itself?

A. I think it was quite close.

Q. As you were driving approaching the place where you intended to turn, and you were about in the middle of the southbound lane, how much space was there between the left side of your car and this piled up snow off the road?

A. I just cannot believe there was enough room for a car to come around me. It never occurred to me that anybody would try to go around me. My only concern was someone running into the back of me.

Catherine C. Fisher

Q. You say the left side of your car—

A. I don't think there was more than about five feet.

Q. And this piled up snow at the place just before you got to the scene of the accident, can you say whether page 47 } a car could have driven through that? Was it piled up?

A. Yes, it was piled up on my left and my right.

Q. What I'm asking you is how high it was piled up in terms of whether a car could drive through it or not.

A. Well, if I could explain—my car—a bank of snow stopped my car from going all the way across 29 and it was as high as almost the front of my car, so I think it was at least three feet high.

Q. All right. Now, in addition to turning on your blinker light back there at the crest of the hill, did you make any other type of signal before the crash?

A. Well, I rolled my window down to look and I could not see out of my rear view mirror because a station wagon in back collects the snow and it was covered and I rolled my window beside me to look in that mirror and I looked backwards and I saw nothing. I gave a signal and then I looked forward to look in this turn to see if it was clear.

Q. What other kind of signal—you say you rolled your window down and you gave—

A. I gave a hand signal and then I looked forward to see this turn—to see if it was clear or if the snow had been piled so I could not turn.

Q. Now, you've told us about that piled up snow. What kind of traffic did you have in mind when you were giving these signals? Were you expecting anything to pass?

A. I was hoping that anybody in a half a mile page 48 } of me would see me and would slow down so they would not run in the back of me.

Q. How far approximately from the place where you turned were you when you looked in your side view mirror?

A. Well, I rolled my window down about a hundred and fifty feet, I guess, or so from the turnoff and then after I rolled my window down I looked into the rear and then forward.

Q. What was the position of your car with reference to this turnover at the time of the crash?

A. My car?

Q. Yes.

Catherine C. Fisher

A. At the time he hit me?

Q. At the time he hit you, how would you describe the position of your car?

A. My car went from the center and I turned—it was quite a big turn because I had a very large car that I knew would swing around if I did this quickly—and my front wheels or I—I think I was sitting myself about where the road and the crossover joined.

Q. To you in the driver's seat were about at the edge of the roadway?

A. Uh huh.

Q. You've told us about this snow that had been piled up on the edge of the road. How would you describe the condition of the crossover itself?

A. The crossover—there were no tracks at all
page 49 } in it. The entire day's snow was in the—

Q. Well, was there any mounded up snow in the crossover?

A. On either side—on either side of the crossover it was piled up, but in the roadway itself it was just the snow that had fallen that day.

Q. Well, let me ask you this. Had that crossover been plowed at the time the roadway had been plowed with the former snow?

A. Yes.

Q. In other words, the cross over was about the same as the roadway?

A. That's right.

Q. About what was your speed at the point you started to turn?

A. When I started to turn, it was about fifteen miles an hour.

Q. About what had your speed been as you drove toward the scene of the accident before you started turning?

A. I think it was about twenty-five. It was a very bad day.

Q. Did you ever see the other man's car before the crash?

A. No, I did not see him.

Q. Did you hear any warning or signal by his horn?

A. No.

Q. You say you had the window down?

A. Yes.

page 50 } Q. Would you have heard such a signal had it been given?

Catherine C. Fisher

A. Oh, I'm sure. I heard—just as he came upon us—I heard this terrific roar just before he hit us.

Q. But did you actually see him before he hit you?

A. No, I never saw him.

Q. And what happened to your car as a result of that crash?

A. It went sidewards south down the road. I don't know whether we went over the poles or not that were there. We went up into the air and then came back down facing Andy's Restaurant into where the grass would have been. There was snow very deep in there.

Q. After the crash, while there at the scene,—[Strike that question, please]—what happened to you in terms of your body in your car after this crash before it came to rest?

A. Well, we were thrown around. I was thrown up and down several times and my head kept going up to the top and hitting. I was generally just thrown around.

Q. Any other part of your body hit any hard object in the car?

A. Well, my knee hit the dash and I could not move my leg to get it down. The only thought I had was if I could get my feet down, I could put on the brake, I could stop when we were—seemed to be going through the air.

Q. While there at the scene while the officers investigated, before you left the scene, what was the subject of

page 51 } your most immediate concern?

A. Six baby children. My thought was now how was I gonna get 'em home and get 'em out of this traffic and weather and everything.

Q. Were you then conscious or aware of having been hurt?

A. No.

Q. Well, when you left the scene later that day and went home or at some other time, did you notice anything about the way you felt that to you was unusual?

A. Well, I was terribly upset and my head had a row of knots all the way down this side and my knee hurt a little, but not a great deal. My head hurt more than my leg at that time.

Q. What did you do about that head hurting you?

A. Well, I kept taking aspirin and tried to be as quiet as possible.

Q. And what did you do in terms of keeping quiet? How did you keep quiet?

Catherine C. Fisher

A. Well, I just stayed in bed as much as I could.

Q. Well, while you were staying in bed and taking aspirin, were you conscious of any problem in your knee of any importance?

A. There was a pain, but nothing that I—as bad as my head at that point.

Q. All right. Did there come a time when your headaches cleared up?

A. Yes.

page 52 } Q. About how long?

A. Oh, about two weeks. My head was better, but my knee was worse.

Q. And how would you describe the condition of the knee as it affected you over that period of time after the headaches cleared up. You say your knee had gotten worse. How was that affecting you?

A. Well, it would swell, get quite large and become stiff. I had to wear slacks any time I went outdoors because the pain was so severe with the cold weather.

Q. Well, was this a constant condition or was it a variable condition?

A. No, it would come and stay maybe three days and go away and come back. Sometimes I could do just as well as anyone else.

Q. When it would go away, how long would it stay all right before it would get to recurring? About how often were you experiencing these recurrences?

A. Maybe six—

Q. —approximately.

A. —six to ten days.

Q. Did there come a time that you sought any medical help for that condition and when was that?

A. There came a day when there was pain to the point that I could not—I did not want to step on it at all or put any weight on it at all. My husband had to carry

page 53 } me, so the next day I called Dr. Allan's office.

Q. Who did you speak to when you called his office?

A. I spoke to a secretary.

Q. What did you tell her you wanted?

A. I told her I wanted my knee checked.

Q. And when did she give you an appointment?

A. In April—the 22nd.

Catherine C. Fisher

Q. Did you think there was anything unusual about her giving you an appointment so long after?

A. No.

Q. Do you know of any reason why she had to go that far ahead?

A. No, I think at the time that Dr.—I was under the impression or I recall that she said that Dr. Allan was taking all the calls, that Dr. Frankel was in Japan or someplace at the time. I would have seen either one.

Q. At any rate, during that period of time up to when you did see Dr. Allan, was there any change in this condition of the knee?

A. No. It was just continual.

Q. Coming and going as you described?

A. Uh huh.

Q. After you saw Dr. Allan, how did your knee get along then over that period of two years up to the time recently when you were in the hospital?

page 54 } A. It got steadily worse. The symptoms were worse and when they would come they were worse. I became so restricted the last year that I had to spend about four hours a day in bed. I'd go to bed every day at noon and would get up at four.

Q. Now, we've heard that somewhere along the way you saw Dr. Frankel.

A. Yes.

Q. How did you happen to see him?

A. Well, I was trying to do some decorating—refinishing furniture—and I made the mistake of just sitting on the floor and my knee became swollen almost instantly and so I got to the hospital and Dr. Frankel was the only doctor in the hospital and he saw me then.

Q. Who took you to the hospital on that occasion?

A. I don't remember.

Q. And we've heard that you saw Dr. Butterworth.

A. Yes, sir.

Q. Who asked you to see him?

A. The law firm of Allen, Allen, Allen & Allen.

Q. My law firm?

A. Yes, that's right.

Q. Mrs. Fisher, would you tell the members of the jury very briefly something about your way of life, your normal sort of activities that you were engaging in before this acci-

dent and what effect this knee condition has had
page 55 } upon you doing those normal things?

A. I keep quite a large house with five children and I had gotten so I couldn't get a pan out of the cabinet, I couldn't pick up anything off the floor, carrying anything, including the baby, or laundry upstairs. I became much weaker. We ride horses and I cannot ride anymore. We used to ride bicycles. In fact, I rode for Dr. Allan, thinking it would be better. I can no longer do that or I cannot go bowling. I cannat go to the movies, I cannot go to a concert because my knee—if I sit a long time I'm just as bad as if I had done something very active.

Q. Now, for the record, you're referring to the condition of your knee before he operated?

A. That's right. Yes.

Q. Before the accident, did you teach any particular sport?

A. Yes, I've taught swimming in this area for twenty years and I've had—the first summer I tried and last summer I couldn't attempt because I cannot kick my knee down, or I could not kick my knee down.

Q. Well, you say that trying to do these things you couldn't do them. What would happen when you tried to do them?

A. Well, there was pain and swelling and discomfort and it was easier not to do it than to have my leg swollen.

Q. Well, if you had that trouble—say with your household duties—what did you do about taking care of your house during all this time—these two years?

page 56 } A. Well, I have tried to do the cooking and my children—four of them—have done the vacuuming and the window washing and the picking up and cleaning and carrying laundry down and that kind of thing and we've just survived.

Q. What arragements did you make about the care of your children and the house when you went in the hospital?

A. Well, I found a woman to come work for $35.00 a week.

Q. And when did you employ her?

A. The day I went into the hospital—on the—I guess the 7th of March.

Q. She started as of the day you went in?

A. Uh huh.

Q. Had you ever had a maid before? Before the accident, did you have a maid?

A. Many—several times when I was employed I had a housekeeper, but when I was not working I didn't, no.

Catherine C. Fisher

Q. Well, I'm talking about just before this accident.
A. Just before, no.
Q. How long do you intend to keep this maid?
A. As long as—until I can do the work.
Q. Are you taking this therapy that Dr. Allan says you need?
A. Yes, sir.
Q. Can you tell us what that costs?
A. I asked Mr. Crabelda and he said it would be
page 57 } $6.00 a visit.
Q. You say you had put chains on earlier that morning? Did I understand you to say that?
A. Yes.
Q. What kind of station wagon was it?
A. It was a Mercury Colony Park.
Q. What model?
A. '61.
Q. When you take this therapy, how does that feel to you?
A. I really think it helps . . . not when I'm doing it, but when I get home I think I'm better.
Q. Well, what happens to you while he's doing it?
A. Well, I have—they put sandbags and weights across my ankle and I have to lift them so many times and then rest and lift 'em again and then they have a stationary bicycle that I'm supposed to be able to ride.
Q. When was this occasion Dr. Allan told us about that you got some therapy that was kind of rough?
A. Oh, that was a deep sonic ray treatment at the University Hospital and this was—they rubbed a machine into my kneecap that I thought was quite painful.
Q. You say you rode horses? Do you have horses?
A. Yes.
Q. Horses that you own—or you and your husband?
A. Yes.
page 58 } Q. Do you have any other horses on your place?
A. Well, we keep some of the polo horses from the University of Virginia.

The Court: What's the relevance of that, Mr. Branch?
Branch: Well, I understood from Dr. Allan that there are some activities—
The Court: Well, I know, but—all right. Go ahead.
Branch: That's all I was going to ask on that subject.

Catherine C. Fisher

The Court: All right. Go ahead.

Branch: Your Honor, I have the bills in one group. Do you think we could introduce that as one exhibit?

The Court: Has Mr. Marshall seen them?

Marshall: Yes, sir.

The Court: All right.

Branch: I offer these as Plaintiff's Exhibit #2.

The Court: All right.

CROSS EXAMINATION

By Mr. Marshall:

Q. I believe you told Mr. Branch that you never saw the Gordon vehicle—this man's car—until the collision?

A. I never saw it until I turned around after the accident and looked up on the road.

Q. So you didn't see it behind you at any time as you approached this place?

page 59 } A. No, I did not see him.

Q. Now, you've testified that you turned on your left turn blinker light, that you could not see out of the back window because of the snow that had accumulated on that window so your mirror over your windshield was no good to you because of snow on the back of your car?

A. That's right.

Q. So you cranked down your window and you looked in your side mirror, right?

A. That's right.

Q. Was the side mirror clear?

A. I think so.

Q. Did you see any cars behind you when you looked in the side mirror?

A. No, I did not see any.

Q. Do you know whether the thing was adjusted so that you could see behind you?

A. Yes.

Q. You could? You think you could see behind you?

A. Yes, I could see along beside me.

Q. And you saw nothing coming?

A. No, I did not.

Q. —behind you?

A. No.

Q. Did you, after that view in the side view

Catherine C. Fisher

page 60 } mirror—did you look any more in the side view mirror or out the window at all?

A. Well, I looked to the back and then I looked to the front where I was go turn.

Q. Well, I don't reckon you have any idea where he was when you looked, do you?

A. [Witness nods head "no."]

Q. When you heard this roar that you described, the terrific roar just before the impact, did you get any impression of what was causing that roar?

A. Well, I was shocked to see his car. I thought it was a trailer truck.

Q. Oh, you did see it?

A. No. It was over—when I saw the size of his car I was shocked. It was a sound like a train—this instant.

Q. I believe he struck the left side of your car?

A. That's right.

Q. Do you know about where in relation to the doors the first impact was made?

A. Well, the back left door was bent in quite a good ways and the post between the front and back door made it impossible for my door to open and the back glass was broken and because of the window being down I was not showered with glass like the little children were.

Q. But you—so you surmise he struck you some-
page 61 } where about the middle of your car?

A. Uh huh.

Q. On the left hand side?

A. In the door.

Q. Now, do you remember the character of that snow—whether or not it was dry and powdery and blowing or whether it was more wet and slushy?

A. No, I just don't know. The next day it blew.

Q. Do you remember whether cars as they went down the road were throwing the snow out?

A. I think to the sides, where your wheels would hit the pavement.

Q. Well, then more than likely that makes it a little slushy and wet?

A. I don't know anything about it.

Q. It's your impression that there was no clear space on the left of your car through which a car could have gone without getting into those piles of snow?

Catherine C. Fisher

A. I think it would almost be impossible for anyone to have passed me on either side. I had quite a large car and I feel I was taking the entire road.

Q. Do you know how wide your car is?

A. No, I do not.

Q. Did you call the Sheriff or do you know who did?

A. Yes, I did.

page 62 } Q. You did?

A. Yes.

Q. From Andy's place?

A. That's right.

Q. I have no other questions.

REDIRECT EXAMINATION

By Mr. Branch:

Q. Mrs. Fisher, what did you mean when you said you were taking the entire road? Was that before you started turning or—

A. Well, I feel that I was in the center of the road—of the two lanes, I was straddling the white dotted line.

Q. You were in the tracks made by other cars?

A. Yes, and that was just about in the center of the road.

Q. And there was some distance between the left side of your car and this piled up snow?

A. Oh, yes, yes, on either side, there was the same distance I'm sure.

Q. But was there enough distance for another car to get through?

A. No.

Q. All right. That's all.

Marshall: Just one question. Mrs. Fisher, could you see the white line in the center of the road for the snow?

A. No, sir.

page 63 } Marshall: Thank you.

Branch: Plaintiff rests, Your Honor.

The Court: All right.

[Jury retired.]

Marshall: I'd like to move to strike the plaintiff's evidence and enter summary judgment in favor of the defendant on

the grounds that the physical evidence and Mrs. Fisher's own testimony and of the other occupants of the car make it clear that she is bound to have turned or undertaken to turn left at a time when the Gordon vehicle was at or practically at her left rear door—broadside of her—where any lookout—if she —any proper lookout would have revealed the presence of a vehicle attempting to pass so it's our contention that with the testimony of David Fisher—he said he got a glimpse of the car just before the impact, that he could see it out of his mother's window—the evidence agrees that the impact took place almost instantaneously after she began the turn and that the impact took place about the middle of the car on the left side. So it seems clear that Mrs. Fisher did in fact start the left turn at a time when the Gordon car was broadside which would be contributory negligence, if nothing else. For the purpose of this argument, we can grant that Mr. Gordon failed to see the turn indicator and he was—there's no evidence of that—but still I think Mrs. Fisher is convicted without question of failing to keep a lookout and failure to see him out of her window when she should have page 64 } seen him and there can be no question but what that failure was the proximate cause of this collision. She turned from the direct line in which she'd been traveling without first seeing if such movement could be made in safety and, of course, that was actually not the case. She described in detail what she did to keep a lookout. She cranked down her window and looked in her rear view mirror and yet she never saw him. All indications were she —whatever steps she may have taken to keep a proper lookout, she did not see what she should have seen in the exercise of ordinary care.

The Court: It seems to me that there's another item of contributory negligence involved, too. She didn't comply with the statute about making left turns.

Marshall: Yes, sir, I think that's true. She didn't approach the intersection as required by 46.1-215(c).

The Court: Mr. Branch, what do you have to say about that?

Branch: Your Honor, you're referring to the statute about turning—if so, then you should pass to the left?

The Court: Yes, sir.

Branch: Well, Your Honor, this is not an intersection. I wanted it to be an intersection because then the defendant is negligent as a matter of law in passing at intersections.

Marshall: This is the (c) section for the crossovers on

divided highways—paragraph (c) of 46.1-215—it covers crossovers specifically.

The Court: "And at any crossover from one
page 65 } roadway of a divided highway to another roadway . . . shall aproach the intersection or crossover in the extreme left hand lane lawfully available to traffic moving in the direction of travel . . ."

Branch: I presume that was the section—I thought you were talking about the general left turn section.

The Court: Well, it's the same thing.

Branch: But, Your Honor, this statute has reference to normal conditions and here you have an abnormal condition prevailing whereby one would have to be—on the evidence in a light that's favorable to the plaintiff—she's got tracks of the cars when she gets to the point where she turns—

The Court: That's right, but is there anything to keep her from getting out of those tracks?

Branch: Well, normally you do not unless you do like the defendant did.

The Court: Well, normally you do make a left turn that way, don't you?

Branch: Not if you have to leave broken tracks and go through four or five inches of snow, I don't think so.

The Court: Maybe she had a right to violate the statute for that reason. I don't know that you do.

Branch: Well, I would say that on this occasion, viewing the evidence in a light most favorable to the plaintiff—

The Court: She failed to go out in the left hand lane,
didn't she, and there was no showing of impossi-
page 66 } bility of getting in there.

Branch: Well, she was in the area where cars were traveling where the snow was broken and if she would get in the left lane she would have to leave that broken track and go into an unbroken snow, getting close to the snowbank that had been piled up—

The Court: Well, is there any reason why she shouldn't do that?

Branch: Well, I think—

The Court: She might not prefer to do it, but there's no impossibility, is there? I'm sure Mrs. Fisher normally makes a left turn that way.

Branch: Well, I think if the road was clear so she could see the white lines and the edge of the road and all that, I think perhaps she would, but I say this, Your Honor—if I had been driving in her position I'd have driven just as she did.

The Court: Well, I think I'd find you guilty of negligence.

Branch: But I don't believe that you can rule negligence as a matter of law under that statute, but you can—

The Court: All right. Maybe I can't but I'm going to do it. I'll let the case go on to trial but I'm going to set any verdict for the plaintiff aside so let's go ahead. I overrule your motion, Mr. Marshall, but you may renew it—

Marshall: We except to the Court's ruling in overruling our motion for summary judgment.

page 67 } The Court: I may set it aside—and maybe sustain it at the end of the defendant's evidence but I certainly can't sustain a verdict in this case. The case will be fully tried and if there is a verdict for the plaintiff it can go to the Court of Appeals in one jump. Go ahead.

[Jury returned.]

FRANCIS G. GORDON, the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Marshall:

Q. Will you state your name, please, for the record?

A. Francis G. Gordon.

Q. How old are you, Mr. Gordon?

A. I'm twenty-two.

Q. What is your occupation?

A. I'm now in the Law School at the University of Virginia.

Q. Were you the driver of a vehicle which was in a collision with Mrs. Catherine Fisher's car on the 29th of January, 1966?

A. Yes, sir, I was.

* * * * *

page 68 }

* * * * *

Q. By the time you got north of Charlottesville in the

vicinity of where this collision took place, can you describe the condition of the road with regard to the snow accumulation?

page 69 } A. Yes, there was a section of more use than another. It seemed to me on the right hand—the general right hand side of the road—there had been more use and there were—it was clear to see—occasionally you could see the road when you were right behind a car that had thrown the snow up as they drove over it and then further to the left it became a little heavier so that you probably couldn't see the blacktop.

Q. Could you see the painted stripe down the middle of the southbound lanes?

A. I'm almost sure you couldn't see the stripes, no.

Q. This area that you described where the cars would throw the snow off and you could occasionally see the road, can you locate that with respect to the middle of the southbound lanes?

A. My feeling was that most of the traffic was heading in generally the right hand lane and from testimony today apparently it was toward the—I would say toward the left hand part of the right hand lane—that is to say, the left wheel would edge close to the center line which was my recollection of it. I recall seeing cars more towards the right as a rule.

Q. As you came on down before you reached the scene of this accident, did you observe other traffic on the road?

A. Yes, it wasn't heavy at all, but there was other traffic.

Q. Did you have occasion to go into the left lane yourself at all?

page 70 } A. Yes. Occasionally it would happen that on an upgrade I would see a car slow in front of me and realizing that it would be easier for me to pass that car rather than having to lose my momentum and kind of grind up the hill, I would move out into the left hand lane, pass and then go back.

Q. At what speed were you driving after the snow?

A. As a rule twenty, twenty-five, thirty and then if I would see—I would occasionally speed up in order to make a pass.

Q. When did you first notice the Fisher vehicle? How far away from it would you—

A. My recollection is that I saw it—I would guess about a hundred yards in front—visibility being what it is, I'm not sure that that means a whole lot, my recollection of it now. I place it about a hundred yards as I think back on it.

Francis G. Gordon

Q. Could you see it plainly when you first saw it?

A. I could definitely see that there was a car there. I couldn't—you know, I couldn't tell you if it was dark or light or if—you know, much about it, but I could see there was a car moving slowly in front of me in my lane.

Q. What did you do when you first saw it?

A. I estimated its speed and decided that again it would be a case of going slowly up the hill and that I would be wiser to pass it rather than lose my momentum so I signalled and pulled into the left hand lane.

Q. How far behind it were you when you swung
page 71 } into the left hand lane?

A. About four to five car lengths by the time I went into the left hand lane—by the time I was safely into it.

Q. At that time did you see any signal being given of that car's intention to turn?

A. I did not see a signal at that time, no.

Q. Could you see the car clearly?

A. Oh, again, the visibility—of course, between the snow and it was a dark day, foggy—again there was a question of recognizing yes, there is definitely a car there, but as to say "clearly" I couldn't say.

Q. All right, sir. What speed were you traveling at this point?

A. I would imagine by now I would be trying to get up speed and between thirty and thirty-five.

Q. And then what happened?

A. As I approached to make my pass, as I got up even with her, checking the side to make sure that I had plenty of room to make the pass, as I check over all of a sudden there I saw the red blinker.

Q. You did see the red blinker?

A. When I got beside the car—when my body was beside where the blinker would be on the car I noticed it. At that point I realized that she was about to make a turn and it couldn't have been a split second before she did make the turn and struck.

page 72 } Q. What part of your car struck what part of her car?

A. The right fender bumper of my car struck about the middle of hers—maybe a little beyond the center of her car—towards the back and center of the car.

Q. At any time as you were approaching this car, did you see any hand signal given by the driver?

A. I certainly didn't see a hand signal, no.

Q. When you moved over to drive in the left lane—I believe you said you were four or five car lengths behind her—

A. Probably by the time I was into it, yes.

Q. Did you have any difficulty moving into the left lane because of the snow?

A. No, this is—as I said—the second time since we'd been in the four-lane section I'd moved into it and neither time had I had any noticeable difficulty maneuvering in the left hand lane.

Q. Was there anything—any piles of snow or anything else obstructing the left lane ahead of you?

A. Not obstructing it, no. There was snow covering it, but it certainly was no obstruction.

Q. Could you tell for the snow whether you were on the hard surface of the road or whether you were on the shoulder?

A. I suppose not visually, but certainly I would think I would be able to feel my left wheel on the shoulder.

Q. Did you feel any such thing?

page 73 } A. No, I felt nothing like that.

Q. When you realized that Mrs. Fisher was starting to turn, what did you do?

A. I'm sure that I must have applied my brakes. There was that split second in there between signal, I see she's going to turn, impact, and it was all right there almost at once—kind of a horrifying recognition of all three terrible things at once. I'm sure I hit the brakes, but that was about all I had time to do.

Q. What did your car do after the collision?

A. My car stopped awfully quickly as I recall it and came to rest slightly off the left hand side of the road. As she struck me it moved off to the left.

Q. Do you remember where your car was with relation to the crossover that goes into Andy's Restaurant?

A. I would say possibly the front of my car had begun to enter the crossover area. That is to say, if you were to make a definite straight line as to what would be considered crossover, the front of my car might have been conceivably slightly into that area.

Q. You think most of your car was short of it?

A. Most of the car was definitely short of it.

Q. How about her car? Where did it wind up with respect to yours?

Francis G. Gordon

A. As I recall it, it was over practically into the
page 74 } —what would have been the grass part of the median. Of course, it was all snow covered but it seemed as if it had gone just about across the full length of the strip there—the crossover.

Q. Was it on the hard surface of the road or—

A. I was under the impression that it was. Of course, again it was hard to say. I would say that it was.

Q. Do you know how far away from your car it was?

A. Since that time I have paced it. I call it twelve paces from my car.

Q. Did you feel any heavy impact when the cars collided?

A. The impact didn't feel particularly heavy to me. I wasn't bounched much and I'm sure I must have hit my chin—I must have hit my chin on the steering wheel which isn't a very—as I think about it—not a very great impact, but I certainly didn't feel very hurt at the time.

Q. Mr. Bailey has testified that after he got there and he talked to you, you told him that you saw the blinker light just as you got beside the car. Do you remember making that statement to him?

A. As I recall it, I made statements in reference to that at two times. Once I merely—you know, as soon as he got there I merely said "Yes, I did see it" and then thinking it over as he asked me again, I made the statement that he quoted to you here about I saw it as I was beside it.

Q. Did you ever see the blinker light at any time
page 75 } until you got beside her?

A. No, not until I got beside her.

Q. Did you see anything at that time that might have obscured your vision of the blinker light?

A. Well, my feeling is that there was snow being pushed out from behind the car and, of course, remember—I had turned into the left hand lane some distance behind her and, of course, if it were coming out from the sides it would certainly be between me and her blinker light.

Q. Can you describe the character of the snow—whether it was dry and powdery or wet and slushy or—

A. My recollection of it is as slushy—slightly slushy.

Q. Do you remember whether it was real cold or not?

A. I don't think it was real cold. I remember as we stood around I don't think there was any great desperation to get outside the cold.

Francis G. Gordon

* * * * *

page 76 }

* * * * *

CROSS EXAMINATION

By Mr. Branch:

Q. Mr. Gordon, you keep referring to right lane and left lane. The fact is you couldn't see the markings on the road that told you where either lane was, could you?

A. That's true, that's true.

Q. And you don't deny, do you, that Mrs. Fisher was driving down the road so that part of her car was in the left lane all the time, do you?

A. Well, of course, as you say, there is no way of knowing exactly what the—you know, the mathematical center of the road was. It appeared to me as I approached here that she was certainly more toward the right than I was.

Q. And yet she was in these tracks that had been left by other cars, right?

A. I would say so, yes, probably.

Q. And those tracks are partly in the left lane and partly in the right lane. That's true, isn't it?

A. Well, again, without knowing exactly where the center line was, it appeared to me that they were more towards the right.

page 7 } Q. Well, do I understand then, if it is true the marks were partly in the left lane and partly in the right and you did not know where the lanes were, you were passing with no knowledge of where your car was going with reference to the edge of the road?

A. Well, I was passing with the knowledge of it as I felt the car and as I sort of eye-balled it in.

Q. Are you saying then that you passed at a point where you would wait until you could feel that you were on the shoulder? For all you knew when you pulled out to pass you'd be driving onto the shoulder.

A. No.

Q. Why did you think you were on the road?

A. Well, as I say, as I looked at the road and observed it and knowing—you know, I've driven this road several times—

that was my third year at the University and knew generally the width of it and I felt very safe in the knowledge that that was a fully blacktopped road.

Q. Uh huh. But, you just felt that. You didn't really know one way or the other?

A. Well, I felt very strongly, very safely about it.

Q. Did you see the piled up snow that had been piled up from the previous snows?

A. That is a memory that doesn't come to mind. It doesn't stick out as I picture the scene. Back in my mind I don't recall there was a mound but it seems logical that page 78 } it would be since there had been a heavy snow fairly close to the time.

Q. So you would be steering your car between that mounded up snow and the left side of Mrs. Fisher's car. That's what you were doing, isn't it?

A. Well, certainly that piled up snow would have been to my left, but I wouldn't say that I was guided by the snow.

Q. What were you guided by?

A. I was guided by the feel of the car and my memory of the width of the road.

Q. Now, you said that after you pulled out to pass you accelerated your speed?

A. Yes, as we were coming to a hill and I didn't want to lose momentum for fear of not being able to make the hill.

Q. And you told Mr. Marshall that after you pulled out to pass you accelerated to—say thirty to thirty-five?

A. Starting possibly on the way to forty. I recall—I use forty as an upper bound because that is the officer's testimony from the scene, what I told him there, and my memory certainly would have been fresher, so I use—

Q. You could have been going forty? That's what you told the officer?

A. It could have been. It could be.

Q. Could it have been that you were going thirty to thirty-five after you were in the passing lane for a while and then you were going forty as you started by her? You page 79 } were still accelerating as you were going by her?

A. It seems possible that it could be I'd reached forty and then slowed up. I don't remember the working of my foot on the accelerator at the time.

Q. Well, as you were trying and you'd reached the rear end of her car you were driving on by—where did you have your eyes directed?

Francis G. Gordon

A. First I was watching the road ahead and then I was keeping a close lookout on the right to see—to judge the distance between her car and mine.

Q. If I understood the statement you made to the officer, you saw her signal light when you were alongside of her.

A. As I got beside her, right.

Q. That would have your head turned directed at right angles to your car.

A. As I was judging the distance to her car I'm certain that the light would have been within my peripheral vision.

Q. Peripheral vision. Wouldn't you be more concerned with steering your car on the roadway? Here you've got a car you're passing, you've got mounded up snow on your left, you've got a hill you're approaching.

A. Well, I was worried about all three. One of the problems with a snow condition is that you have to be aware of a lot more things and I was trying to be aware of the—a safe pass.

* * * * *

page 80 }

* * * * *

Branch: I'm sorry. Was the snow being thrown up in a spray form from the wheels of Mrs. Fisher's car?

A. I would assume so. I can't say definitely there was snow coming up, but as the officer and I rode back in I observed snow being thrown from the cars in front of me.

Q. Do you have a recollection of driving your car through such snow being thrown up?

A. That's possible. Again, it's not one that I'd say "Yes, I went through a lot of snow being thrown up" but that seems possible.

Q. I said do you have a recollection of that?

A. It's not a definite recollection as such.

Q. What I wonder is would you tell us what it was that caused you to direct your attention and take your eyes so that you could see the signal light when alongside the car?

A. Well, again it was trying to judge the distance between the cars. As I think—even in safe—you know, in good condi-

page 81 } tions as you drive I recall making sure that your pass is nice and clear on your right, make sure that there's no unorthodox behavior on the part of the car on your right.

Q. As you were overtaking that car, did you look at her signal light? You said you didn't see one, but I'm asking—

A. As I was overtaking?

Q. Uh huh.

A. Again I'm sure I was aware as much as I could be, owing to the conditions, of what I thought was important about her car. I would think that I would have been looking in that direction, certainly looking for a signal.

Q. I'm asking what you recall. Do you recall specifically looking for a signal or are you telling us only that you did not notice a signal?

A. Well, I can't say definitely that I was specifically looking—is there a signal on that car—but I was trying to assess the car's behavior in general and certainly a signal is one thing you look for. You know, you try to see if there's a signal on the car ahead.

Q. Did the fact that the car was going so slow and the fact that it was approaching a crossover tell you in your assessment that she might be getting to turn?

A. No, it didn't.

Q. That didn't occur to you?

A. No, it didn't seem so. There had been other cars going—

page 82 } as you remember—when I first saw her she was moving up the hill and it occurred to me that she was having trouble with the hill and that I might have it as well unless I were able to keep my momentum and pass her.

Q. You overtook her when about a hundred yards away?

A. I believe I began my—or I was aware of her then. I probably didn't move into the lane until quite a bit later.

Q. Well, did you notice her car when it started slowing down? Did you notice the speed—the change of speed?

A. I would say no. I didn't notice the actual slowing in speed. I was just aware that she was going slower than I at most times . . . certainly, I would imagine, at all times in the past.

Q. When you first overtook her to the point where she came into your view, that's about a hundred yards away you say?

A. From the time I first saw her, yes, I would say.

Q. And she then was several car lengths in front of you?

A. Well, yes, she would have been. If it was a hundred yards she would have been several car lengths ahead.

Q. Well, what I'm asking you is did you notice her car thereafter slowing down?

A As I say, I just—I was aware of the slowness in relation to mine. Certainly under the conditions it was difficult for me to judge the actual different gradations of speed of her car. It was clear to me at all times that I was going to overtake her.

Q. I think you said you were going twenty-five to thirty. That was before you pulled out to pass?

page 83 } A. Yes, I would say so, right.

Q. And we've heard that before she slowed down she was going twenty-five.

A. Yes, uh huh.

Q. Now, what I'm asking you is had she already slowed to her speed of fifteen when you overtook her or did she slow down after you overtook her?

A. Oh, by overtaking you mean actually move my car beside hers or do you mean—

Q. No, at that point where you came up behind her so that you were aware of her in front.

A. As I was aware of her in front?

Q. Uh huh.

A. It seems from her testimony—I would say that it seems as if she was probably going about twenty-five by then by trying to space my mind where she—her speed as she described it to us.

Q. And you do not tell us, do you, that she tried to turn at twenty-five?

A. No.

Q. She did slow?

A. I assume so by her testimony here.

Q. Well, I wonder why you didn't see her car when it started slowing down, whether or not you saw a signal?

A. Well, I wonder—I did see the car. I'm not sure—you mean why I didn't actually perceive the slowing to

page 84 } ten miles an hour?

Q. Yes.

A. Well, I can't explain it. It's a difficult judgment to make, to me.

Q. All right. Now, on the subject of your anticipating

whether or not she anticipated she was going to turn—did you sound your horn?

A. Again, as I say, I saw the signal, saw the turn almost instantaneously—

The Court: Just answer the question. Did you sound your horn?

A. Oh no, I didn't.

The Court: All right. That's all that's necessary for you to answer the question.

* * * * *

page 87 }

* * * * *

Marshall: Your Honor, under the motion as previously stated before, the plaintiff, Mrs. Fisher, clearly, as a matter of law, violated 46.1-215(c) in the manner in which she approached the crossover preparatory to making a left turn and further that she violated 46.1-206(b) in that she did not drive in a single lane and when she undertook to move from this lane she did so without ascertaining it could be made in safety—the movement could be made in safety. 46.1-216 is the signalling section required for backing, starting, stopping and turning but the first requirement for turning from a direct line is to see if the movement can be made in safety. The last two Code sections, of course, tie in with the question of lookout which I mentioned in my prior argument. It is our position that Mrs. Fisher approached that intersection improperly in violation of law and failed to keep a proper lookout as clearly provided in these sections for an effective lookout. Therefore, she is guilty of negligence as a matter of law which contributed to cause this collision and therefore we ask for summary judgment for the defendant.

Branch: If Your Honor please, I confess I did not come prepared with authorities on this precise point, but as I recall the left turn statutes they say wherever practical

page 88 } you should make your approach to turn in a certain manner.

The Court: I don't think that's what it says.

Branch: Well, I'm not sure, but just like the other statute

that wherever the Supreme Court has read such reasonable language into it the statute says you must see your way clear before turning.

The Court: What is the statute?

Branch: The Supreme Court says you do not—

Marshall: Section 46.1-215(c) is the approach to a left turn on other than two-way roadways. 216 is the turning from a direct line, 205(b) is the third one that I cited.

The Court: "... the lane lawfully available to traffic moving in the direction of travel of such vehicle ..."

Branch: But then, Your Honor, like I was going to point out—the other statute about turning—

The Court: I'll be glad to consider any authority you have.

Branch: Well, I have to confess that I did not anticipate this point under the weather conditions prevailing at this time. I didn't come with any authorities, but I can give you authorities very quickly on the seeing your way clear to turn with safety—the Court of Appeals said that that means only in the exercise of ordinary care and there are other cases where there's been a violation of a statute on a technical basis that the Court of Appeals has said nevertheless proximate cause is always for a jury and that's the case where the soldier was walking on the roadway with his back to traffic and the trial judge there did tell the jury that by
page 89 } that violation he was technically guilty of negligence and yet the issue of proximate cause was properly submitted to the jury and the Court of Appeals affirmed the trial judge on this. I do sincerely believe, Your Honor, that—

The Court: I don't see how it could be any question of proximate cause there 'cause that accident just couldn't have happened if she had made the turn in a proper manner. In addition to that, I think the evidence shows clearly that the car was right at her when she made her left turn and she ought to have, in the exercise of reasonable care. It's a matter of law on the evidence. There's no contradiction of defendant's testimony. If anything, it appears from the other testimony—in fact, it's confirmed by plaintiff's evidence. I'm not going to waste the time of the jury. Frequently when I think there's any doubt in my mind about whether I should sustain a motion I let it go on and then set the verdict aside, so it can go to the Court of Appeals.

Branch: Well, may I ask, Your Honor—

The Court: Just a minute, now, I've ruled and I'm going to sustain the motion and set the verdict aside—I mean and

enter summary judgment for the defendant. I would have to set it aside if it went so—

Branch: I was going to ask you to do that.

The Court: I will not in this case. I sometimes do—frequently do because I think—I'm so sure in this case I'm right —I may be wrong, of course, I frequently am, but page 90 } I'm so sure in this case that I'm right that I'm not going to take the time of the jury going through the form of entering a verdict which I would have to set aside if they should. I've done it in the past—have occasionally set it aside and I don't think I've been reversed yet when I did.

Branch: Well, Justice Eggleston did say in a case that if it's one that might go to the Court of Appeals, if you were put in the status—

The Court: Any case might go to the Court of Appeals, Mr. Branch, but I've ruled and I don't care for any further argument.

Branch: All right, sir. Now, we respectfully except, if Your Honor please.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Judgment	2
Assignment of Error	3
Witnesses:	
George W. Bailey	3
Ray Fisher, III	10
David Fisher	13
Catherine C. Fisher	17
Francis G. Gordon	32
Proceedings	29, 42