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211 VA 693

Record No. 7299

In the
Supreme Court of Appeals of Virginia
at Richmond

MICHAEL LEE MARSHALL

v.

MALCOLM J. CUNDIFF

FROM THE CIRCUIT COURT OF FRANKLIN COUNTY

RULE 5:12—BRIEFS

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HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7299

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1969.

MICHAEL LEE MARSHALL, Plaintiff in error,

against

MALCOLM J. CUNDIFF, Defendant in error.

From the Circuit Court of Franklin County
Langhorne Jones, Judge

Upon the petition of Michael Lee Marshall a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Franklin County on the 18th day of April, 1969, in a certain motion for judgment then therein depending, wherein Malcolm J. Cundiff was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of $20,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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page 1 }

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MOTION FOR JUDGMENT

The Plaintiff, Malcolm J. Cundiff, hereby moves the Circuit Court of Franklin County, Virginia, for a judgment against the Defendant, Michael Lee Marshall, in the sum of FORTY FIVE THOUSAND ($45,000.00) DOLLARS and the costs of these proceedings, all of which is due and owing from the Defendant unto the Plaintiff for the following wrongs, damages and injuries, to-wit:

1. That on or about the 4th day of September, 1964, the Plaintiff, Malcolm J. Cundiff, was operating a 1957 Chevrolet automobile in an easterly direction along Route 40 in the Town Limits of Rocky Mount, Virginia, in Franklin County;

2. That at approximately the same time and place the Defendant, Michael Lee Marshall, was operating a 1964 Oldsmobile automobile approaching in a westerly direction on Route 40 in the Town Limits of Rocky Mount, Franklin County, Virginia;

3. That the said Defendant, at the time and place aforesaid operated his vehicle in a reckless and negligent manner in that he failed to keep his vehicle under proper control, failed to keep a proper lookout for other vehicles lawfully travelling along the aforesaid Route 40, operated his vehicle at an excessive rate of speed for the conditions then and

page 2 } there pertaining, failed to observe the traffic laws and rules of the road as made and provided for in such cases, failed to yield the right of way to the vehicle operated by the Plaintiff, and did then and there while approaching from the opposite direction of State Route 40, make a left turn and crossed into the lane of traffic of the Plaintiff, running his vehicle into the left side of the vehicle operated by the Plaintiff;

4. That as a direct and proximate cause and result of the acts of negligence of the Defendant, Michael Lee Marshall, a violent collision resulted between the two vehicles, as a result of which the Plaintiff, Malcolm J. Cundiff was painfully, seriously and permanently injured and has suffered excruciating physical pain and mental anguish; and further that the Plaintiff has had to expend large sums of money for doctor's

bills and other medical treatment and will have to expend further sums of money for medical treatment in the future; and as a result of said injuries the Plaintiff has experienced loss of time and wages from his employment and will have to lose further time and wages in the future.

WHEREFORE, the Plaintiff moves the Court for a judment against the Defendant in the sum of $45,000.00 together with the costs of this action.

Respectfully,

Malcolm J. Cundiff

/s/ J. Albert Ellett
By Counsel

* * * * *

Filed in the Clerk's Office the 6 day of July, 1966

Teste:
Edwin Green, Clerk

* * * * *

page 4 }

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SPECIAL PLEA OF RELEASE AND GROUNDS OF DEFENSE

SPECIAL PLEA OF RELEASE

Comes now the defendant, Michael Lee Marshall, by his attorneys, and files this his special plea of release and says that this action cannot be maintained by the plaintiff because the plaintiff heretofore on September 15, 1964, for valuable consideration executed a general release, releasing and discharging the defendant from any and all actions, causes of actions, claims, demands and damages, and all consequential damage on account of, or in any way growing out of, any and all known and unknown personal injuries resulting from the accident which forms the basis of this action.

Wherefore, defendant respectfully moves the court to dismiss this action against him. Defendant further moves the court for a special and separate trial with respect to the said release.

GROUNDS OF DEFENSE

Comes now the defendant, Michael Lee Marshall, by his attorneys, and without waiving his special *please* of release, says for his grounds of defense that:

(1) Defendant states that this action cannot be maintained because the plaintiff has heretofore for valuable consideration executed a release, releasing all of plaintiff's claims against defendant on account of any and all known
page 5 } and unknown personal injuries arising out of the accident which forms the basis of this action.

(2) Defendant denies that he is liable to the plaintiff in any way.

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

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

(5) Defendant denies that the plaintiff sustained any injuries, damages or wrongs because of said accident.

(6) Defendant alleges that the plaintiff was guilty of negligence which was either the sole proximate cause of the said accident, or proximately contributed thereto.

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

Respectfully,

Michael Lee Marshall

By Robert J. Rogers
Of Counsel

Filed 6 Day of April 1967

Teste Edwin Green Clerk

* * * * *

page 7 }

* * * * *

ANSWER TO SPECIAL PLEA OF RELEASE

Now comes the Plaintiff, Malcolm J. Cundiff, by Counsel, and files his Answer to a Special Plea of Release and states as follows:

(1) The Plaintiff admits that he did sign a paper writing purporting to be a *gineral* release, however, at the time of the signing the release neither the Plaintiff nor the insurance company adjuster knew that the Plaintiff had received personal injuries as a result of the automobile accident on September 4, 1964; that there was no consideration for the release for personal injuries received by the Plaintiff, and that the purported release was based on the mutual mistake of fact and, therefore, invalid.

(2) The Plaintiff hereby reserves all other defenses to the release which may be available and not herein specifically set forth.

WHEREFORE, the Plaintiff moves that the purported release be declared and ruled invalid, and that this action may be submitted to a jury on its merits.

Respectfully,

Malcolm J. Cundiff

By J. Albert Ellett
Counsel

Filed 12-15-67 Alice S. Hall

* * * * *

page 9 } INSTRUCTION NO. 1

THE COURT INSTRUCTS THE JURY that if you believe from the evidence that at the time the release was executed on September 15, 1964, by Malcolm J. Cundiff, it was mutually agreed and understood that the compensation therein should apply to all present, as well as future injuries, even though it was unknown that any injuries existed but may have been discovered thereafter, then you should find your verdict in favor of Michael Lee Marshall.

If, however, you believe from a preponderance of the evidence that at the time the release was executed, injuries did, in fact, exist which were unknown to the parties and not discovered until after the signing of the release and such injuries were not taken into account between the parties in fixing the amount of compensation and it was not the mutual intention of the parties that the release should apply to such unknown but subsequently discovered injuries, then you shall find your verdict in favor of Malcolm J. Cundiff.

The Court further instructs the jury that the burden is on

Malcolm J. Cundiff to prove, by a preponderance of the evidence, that at the time the release was executed on September 15, 1964, that the amount of compensation in the release was not intended by the parties to cover and apply to unknown and subsequently discovered injuries.

page 10 } INSTRUCTION NO. 2

The Court instructs the jury that you cannot base a verdict in this case upon sympathy or speculation. Your verdict must rest entirely upon the evidence and the instructions of this court.

* * * * *

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* * * * *

Circuit Court for Franklin County February 8, 1968

* * * * *

This day came the plaintiff, Malcolm J. Cundiff, by Counsel, and also came Michael Lee Marshall, by counsel, on a motion for Judgment filed July 6, 1966, and a Special Plea of Release and Grounds of Defense filed April 6, 1967.

Then came a jury, to wit:

F. E. McNeil, Bentley T. Hodges, Charles W. Kennett, Howard Altice, G. T. Houston, Cecil D. Lynch and Fred Adams who after being duly selected were sworn to well and truly try the issue.

And thus after hearing the evidence the jury received instructions of the Court and heard the argument of counsel, retired to the jury room and after sometime returned into Court with the following verdict:

"We the Jury, find that the contract dated September 15, 1964, is a valid contract, and we find a verdict in favor of Michael Lee Marshall.

C. W. Kennett, Foreman"

And thereafter the jury was discharged, and counsel for the plaintiff moved the court to set aside the verdict on the grounds that the same was contrary to law and evidence, which motion the court doth take under advisement, and the plaintiff shall have 20 days to file authorities, and the defend-

ant is given 10 days after the plaintiff files to file authorities.

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MEMORANDUM OPINION

This originates as an action at law for personal injuries due to an automobile accident to which the defendant filed a Special Plea of Release, and to which the plaintiff alleges that the release was signed under a mutual mistake of fact. The issues were separated and the question of mutual mistake was tried before a jury, resulting in a verdict for the defendant. It is now on a motion to set aside the verdict and either enter a judgment for the plaintiff or grant a new trial.

The questions are:

First, whether under the facts of this case a release covering "known and unknown injuries" should be rescinded on the grounds of mutual mistake, when the injuries complained of were unknown to either the releasor or the releasee, at the time of the execution of the release;

Second, whether or not the Court erred in refusing to permit the plaintiff to show the amount of expenses incurred in treatment of the unknown injuries; and

Third, the refusal to grant certain instructions.

On September 4, 1964, plaintiff, Malcolm Cundiff, operating his automobile, accompanied by his wife and child, was involved in an accident with the defendant, Michael Lee Marshall. The two vehicles were not proceeding very fast and damages to them were not severe. As a matter of page 19 } precaution, the plaintiff's wife and child were examined at the hospital and released. The plaintiff remained at the scene, there being no indication he was injured. Several days afterwards, plaintiff contacted Mr. Algie Martin, adjuster for the defendant's insurer, Nationwide Mutual Insurance Company, by phone as to repairing his vehicle, was advised to secure estimates of repair, which he did, and on September 11, 1964, saw the adjuster in person. The estimates on repair to the vehicle were $272.12 and to which was added $7.50 for medical examination of the wife. The release prepared by the adjuster was for $279.62, the exact amount of the two bills above, which the plaintiff then signed but was advised his wife would also have to sign. Plaintiff took the release home for his wife's signa-

ture and retained the same overnight, returning it the next day and was paid $279.62. At the time of the negotiation for the release, the plaintiff had no indication he was injured, nothing was discussed about any injuries to the plaintiff either by the adjuster or the plaintiff.

The release, filed as an exhibit, was headed "Release of All Claims," is a general release for all claims including "any and all known and unknown personal injuries" . . . resulting from the accident. The plaintiff stated that he did not read the release carefully, though did casually look it over and realized it applied to personal injuries but not having any indication of any injuries to himself, did not bring up the question and it was in no way discussed during the negotiations.

About a week thereafter plaintiff felt some discomfort in his back and on September 28th, twenty-four days after the accident, contacted his family doctor, Dr. Clapsaddle of Salem, Virginia, but at that time did not relate the trouble
page 20 } to the accident or advise the doctor of the accident until the third visit for treatment on October 12, 1964, when questioned by the doctor as to a possible trauma, advised him of the accident. Thereafter the plaintiff was treated by his family doctor, Drs. Lewis and Ripley, orthopedic surgeons of Roanoke, Dr. Jesse Tucker, a general practitioner, and later operated on by Dr. Troland of Richmond for spinal injuries.

Both Drs. Clapsaddle and Tucker testified as to the injuries and from the history and observation related it directly to the accident and to the effect that such an injury may not manifest itself for from two to six weeks after the accident and such was not unusual. In the opinion of these doctors, there would be a permanent injury.

Plaintiff requested and the Court refused to admit evidence of medical expenses of some $2,600.00 spent by the plaintiff on these particular injuries and loss of wages of approximately $7,200.00, which amounts were stated to the Court in chambers. To this there was an exception. The defendant did not present any evidence after plaintiff rested its case.

The Court is of the opinion that the primary question is whether the verdict should be set aside and judgment entered for the plaintiff.

The Court is also well aware of the general rules as to the weight of a jury verdict, the sanctity of contracts and that the law favors compromises. However, it is also aware that while a release is a contract, it is subject to rescission for mutual mistake of fact, which is an exception to the parol evidence rule and must be shown by clear, unequivocal and convincing evidence. *Seaboard Ice Co. vs. Lee,* 199

page 21 } Va. 243, (251-252). Questions as to rescission of personal injury releases by reason of mutual mistake of fact, not induced by fraud or misrepresentation, has been given considerable consideration by the courts, so much so that there is quite a bit of comment in annotations and legal commentators. See among others, 48 A.L.R. 1462, 117 A.L.R. 1022, and 71 A.L.R. 82; also 44 Va. Law Rev. 116 and 44 Va. Law Rev. 1362. (The last two directed at the occasion of *Ice Co. vs. Lee, supra.*)

There are numerous cases of mutual mistake as to *consequences* of a known injury and mistake as to the *nature and extent of the injury.* Both are discussed in the annotations above cited, and see 48 A.L.R. 1464 through 1478. The greater weight of authorities supports the doctrine that release of a claim for personal injuries cannot be avoided merely because the injury has proven more serious than the releasor believed at the time of the execution of the release. 117 A.L.R. 1024. When the settlement is made and the release is given with reference to known injuries and it subsequently develops that a substantial injury existed which was unknown to the parties and not taken into consideration, the release may be avoided on the grounds of mutual mistake. 117 A.L.R. 1025. This also seems to be the law in Virginia as shown in *Ice Co. vs. Lee, supra.*

Here the question is as to injuries unknown at the time of the execution of the release to both the releasor and the releasee and this seems to give some difficulty.

Usually cases for rescission or avoidance of a contract are heard in equity. In fact, in discussing this particular case just prior to trial the Court suggested that it was an page 22 } equitable matter and not one of law, having in mind *Ice Co. vs. Lee* and the statement in 16 Mich. Jur. 60, Release, § 9. However, no definite decision was reached, agreement thereon, nor was the discussion made a part of the record. There is an annotation on the subject in 43 A.L.R. 2d 786, especially on page 809, as well as 96 A.L.R. 1144. In *Atlantic Greyhound Line vs. Metz,* (4ct) (Va.), 70 F. 2d 166, where an issue of mutual mistake was tried at law by a jury and thereafter the question of an equitable issue was raised, the Court said that the defendant, (the objecting party), had no grounds of complaint that what was an equitable issue was submitted to the jury and the case was fully developed on equitable issues and conclusions reached at law which should have been reached in equity. (Cases cited on page 169.) Most of the cases which have been reviewed by the Court and where distinctions are made between law and equity, mutual mistakes of fact were decided in equity. Gen-

erally, on the question of injuries existing which were unknown to either the releasor or the releasee at the time of the execution of the release and there is a specific recital in the release to such effect, the right to rescind seems to rest on the intention of the parties at the time of the execution of the release.

45 Am. Jur. 692, § 28, and 694, § 30, discusses these questions and in the 1967 Cumulative Supplement to Volume 45, § 30, there is cited the case of *Aronovich vs. Levy,* 238 Min. 237, 66 N.W. 2d 570, 34 A.L.R. 2d 1306, it states that "a release expressly covering unknown injuries is binding if the parties did in fact agree upon a settlement thereof but is not a bar to an action for unknown injuries if it can be shown that such unknown injuries were not within the contemplation of the parties when settlement was
page 23 } agreed upon." And again in the same citation in 1967 Supplement, cases are cited to the effect that a release does not apply to unknown claims in absence of a showing apart from the words of the release of the intent to include such claims.

In comments on *Ice Co. vs. Lee, supra,* and the same subject matter in 44 Va. Law Rev. 119, it is stated, "But most courts maintain that, despite the expressed inclusion of the words 'known and unknown,' if the circumstances surrounding the release show that it was not actually intended to cover unknown injuries, the release is no bar to an action to recover for such injuries."

In *Ice Co. vs. Lee, supra,* there was clearly an ignorance of the true facts and extent of the injury as well as the cause thereof. Although the case was in equity and the court was upholding a finding by the Chancellor that there existed a mutual mistake, it was said at 199 Va. 253, "The material facts clearly and conclusively show the minds of the parties did not meet upon the understanding that the consideration mentioned in the release was intended to be a full settlement of the releasor's liability."

In *Atlantic Greyhound* vs. *Metz, supra,* where the release was in dispute and was submitted to the jury, it is stated at page 168, "The evidence clearly shows that at the time of the execution of the release, both plaintiff and the claim agent were entirely ignorant of the serious abdominal injuries which the plaintiff had sustained and that the settlement made was intended to cover only the damages to her clothing, with compensation for the delay in her journey." While the language of the release was general and broad enough to cover all injury sustained in the accident, it is well settled
page 24 } that in such cases equity would relieve against

such release on the grounds that it was executed as a result of mutual mistake. (Cases cited) As heretofore noted, *Atlantic Greyhound Line* was tried at law by a jury; however, the court said *that the judgment should not be reversed when the court had reached at law conclusions which should have been reached in equity.* Here, even with a jury, equitable principles were cited to sustain the verdict in favor of the releasor.

The defendant cites *Corbett* vs. *Bonney,* 202 Va. 933, as authority for sustaining the jury's verdict; however, it appears that the facts are entirely different. In *Corbett* the releasor knew of the injuries at the time the release was signed and that subsequent treatment was required. Also, the grounds were not only mutual mistake of fact but also fraud and misrepresentation. It will further be noted that a sum, though small, was included to cover additional medical expenses. There the plaintiff took the risk.

This Court was very much interested in the comments of Hon. Hardy C. Dillard, Dean of the University of Virginia Law School, on the *Ice Co.* case in 44 Va. Law Rev. 1361 (1363). He believed the decision in *Ice Co.* to be sound, then discussing other aspects and questions related, especially "mutual mistake of fact" and "mutual ignorance of fact," observes that the *Ice Co.* case was based on the assumption, indulged in by both parties, that the injuries were negligible and states, "A quite different result should follow and the release would be controlling if the parties bargained on the basis of ignorance. In other words, no mistake of fact exists if the fact is that both parties are not only ignorant of the facts, but they knew they were ignorant and bargained on that basis. Such a bargain involves pure assumption of risk." One answer to this is the statement in comments on the same case in 44 Va. Law Rev. 166 at 119, where the writer states that some argue that since a release is a contract, its express terms, if unambiguous, should be given the same weight as commercial contracts, and then says, "This argument, however, ignores the nature of the animal with which it deals," and then there is the commentary with this very petinent statement at page 120, "Whatever may be said, however, about the lack of the rule's logic or the inconsistency of its application, it can hardly be denied that simple justice is often its result."

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This Court does not feel that a broad and inflexible rule should be laid down in such cases but that in relating to the avoidance of a release for a claim of personal injuries on the grounds of mistake, when the injuries are unknown to both parties, each case must be determined under the particular

circumstances attending the formulation and execution of the release. *Ice Co.* vs. *Lee,* 199 Va. at page 251. There seems a general trend among the courts as is shown in the above *Ice Co.* case, in Virginia to view releases for personal injuries from a broader aspect than commercial contracts and this appears to be wise because there are so many factors present where personal injuries are involved, especially when there is also property damage.

With these somewhat prolonged statements, consideration will be given to the facts of the case at bar, a summary of the facts and which are not disputed, are as follows:

1st. The plaintiff was severely injured though no ill effects of the same were noted until about eighteen days after the accident and were not definitely related to the accident until some six weeks thereafter when diagnosed as such page 26 } by his doctor.

2nd. At the time of the execution of the release for damages and settlement, there was no mention of the injuries to the plaintiff, either known or unknown, though there was as to the wife, who had been examined immediately following the accident. According to the plaintiff, these injuries to him were unknown to the releasor and the releasee and not considered by either. (The agent for the releasor did not testify even after the plaintiff stated they were not mentioned or considered.)

3rd. The only matters discussed between the plaintiff and the defendant's agent were damages to the automobile and expenses for the wife's physical examination and the consideration paid was for exactly this amount, $272.12 covering property damages, and $7.50 for wife's examination, $279.62. Nothing was included as compensation for any injury to the plaintiff, known or unknown.

4th. The plaintiff did suffer severe injuries and they were definitely related to the accident.

The above is a fair summary of the negotiations between the parties. It will be noted that the plaintiff called the agent of the defendant's insurer for the purpose of having his automobile repaired and secured estimates thereof at the agent's suggestion. The agent was the one who asked about and included the wife's medical expense, according to the testimony of the plaintiff. It is true the plaintiff had possession of the release overnight and full opportunity to read the same, but since he had no knowledge of injuries existing and the wife's medical expenses were being paid, there was no reason for him to anticipate or even believe that the page 27 } release of "known or unknown injuries" were being considered as to himself. The defendant ar-

gues that the plaintiff should have called the insurance adjuster as a witness, and it might be as well argued that the defendant should have called this adjuster since definite statements were made by the plaintiff as to the negotiations.

On the undisputed facts and the plaintiff's evidence alone, this Court is of the opinion that only one conclusion could be reached by the jury and that the verdict should be set aside as contrary to the law and the evidence, and judgment rendered on this phase of the case in favor of the plaintiff, so that substantial justice may be done if decided in the personal injury action that the defendant is solely at fault in bringing on the accident.

The Court also feels that it was in error in not admitting evidence as to the amount expended by the plaintiff on his injuries. It will be noted that in the *Ice Co.* case, the Court said at 199 Va. 252, after discussing the facts, "The above facts were material as they clearly affected the extent and character of Lee's injuries, and correspondingly the amount of damage suffered by him, as well as the coverage included in the release. While not ordinarily in itself sufficient basis for cancellation of the contract, inadequacy is a proper element to be considered along with other circumstances." Not only is it so stated in the *Ice Co.* case, but in most all of the cases which are reviewed by the court where unknown injuries are involved.

Again, in passing, this Court cannot see the dis-
page 28 } tinction between a release where settlement is made and the release is given with reference to known injuries and it subsequently develops that a substantial injury existed which was unknown to the parties and not taken into consideration, that the release may be avoided, and this case where the injuries were unknown at the time of the signing of the release and was not considered by either of the parties, the releasor or the releasee.

In view of the above, there will be no necessity for the Court to pass upon the instructions which were refused and the Court thinks properly refused at the time, and in passing it might be proper to quote the instruction which was granted and which was not objected to by the defendant and is one consideration given by the Court in arriving at the conclusion above set out, which instruction is as follows:

"INSTRUCTION NO. 1

"THE COURT INSTRUCTS THE JURY that if you believe from the evidence that at the time the release was executed on September 15, 1964, by Malcolm J. Cundiff, it

was mutually agreed and understood that the compensation therein should apply to all present, as well as future injuries, even though it was unknown that any injuries existed but may have been discovered thereafter, then you should find your verdict in favor of Michael Lee Marshall.

"If, however, you believe from a preponderance of the evidence that at the time the release was executed, injuries did, in fact, exist which were unknown to the parties and not discovered until after the signing of the release and such injuries were not taken into account between the parties in fixing the amount of compensation and it was not the mutual intention of the parties that the release should apply to such unknown but subsequently discovered injuries, then you shall find your verdict in favor of Malcolm J. Cundiff.

"The Court further instructs the jury that the burden is on Malcolm J. Cundiff to prove, by a preponderance of the evidence, that at the time the release was executed on September 15, 1964, that the amount of compensation in the release was not intended by the parties to cover and apply to unknown and subsequently discovered injuries."

page 29 } An order may be prepared in accordance with this opinion, making reference to the same and a time will be set for trial on the merits of the tort action.

5/6/67
L. Jones

Filed in the Clerk's Office of the Circuit Court of Franklin County the 7 day of May 1968.

Wm. J. Walker, Jr., Clerk

By Alice S. Hall Deputy Clerk.

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page 30 }

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ORDER

THIS CAUSE came on this day to be heard upon the motion of the plaintiff to set aside as contrary to the law and evidence the verdict of the jury rendered in the trial on February 8, 1968, involving the issue of the validity of the release pleaded by the defendant. The court having considered the

pleadings filed herein and having considered the evidence in the said trial and having considered argument of counsel and memoranda submitted by the parties in favor of and in opposition to the motion to set aside the verdict and being of the opinion that for reasons set forth in its memorandum opinion dated May 6, 1968, the plaintiff's motion should be granted, doth therefore ADJUDGE and ORDER that said motion to set aside the jury's verdict, be, and the same hereby is, granted and it is further ORDERED that at the proper time this case be scheduled for trial on the merits of the tort action.

To which action of the court defendant by counsel duly excepted and objected and fully assigned his reasons and grounds, including those stated in his memorandum in opposition to the motion to set the verdict aside heretofore filed with the trial court. The defendant further excepted to the action of the court in failing to strike the plaintiff's evidence and enter summary judgment as to the defendant with respect to the release issue, said motion having been made at the trial hereof as reflected in the transcript of evidence and incidents of trial of February 8, 1968, for the reasons and on the grounds stated both at the said trial and in his memorandum in opposition to set aside the verdict.

page 31 } In addition to the reasons stated at the trial on February 8, 1968, and those set forth in the memorandum in opposition to the motion to set aside the verdict, the defendant duly assigned as grounds for his objection and exception to the court's action in granting the plaintiff's motion to set the verdict aside the following:

(1) The trial court erred in denying the motion of the defendant to strike the evidence of the plaintiff made at the conclusion of such evidence and renewed at the conclusion of all the evidence and to enter summary judgment for the defendant with respect to the validity of the release, in that plaintiff as a matter of law failed to carry the burden of proving that said release was based on mutual mistake. No evidence was produced by the plaintiff to establish that the release was based on mistake by the insurance representative, who was not called to testify, hence there was no evidence that such mistake was mutual.

(2) The trial court erred in refusing admission in to evidence the testimony tendered by the defendant at the trial of Deputy Sheriff Amos.

(2) The trial court erred in setting aside the verdict in that the evidence presented a jury issue and the verdict was not contrary to the law and the evidence. The evidence, including the language of the release extending the terms to unknown

injury, presented a question of fact about which reasonable men could differ, to-wit, whether the plaintiff intended to release claims for unknown injury, and it was the jury's prerogative and duty to accept or reject the plaintiff's explanation as to his intentions in signing the release.

ENTER: 5-24-68

L. Jones
Judge

* * * * *

page 33 }

INSTRUCTION NO. D-1

The Court instructs the jury that it is the duty of the driver of a motor vehicle receiving a signal from another driver to exercise ordinary care to keep his vehicle under control and to be able to avoid an accident resulting from a misunderstanding of such signal.

And if you believe from the evidence that the defendant Michael Marshall gave a signal of his intention to turn and that the plaintiff Malcolm Cundiff received such signal, or in the exercise of ordinary care should have received it, and that the plaintiff Malcolm Cundiff thereafter failed to exercise ordinary care to keep his vehicle under control, then he was negligent.

And if you further believe from the evidence that any such negligence was the sole proximate cause of the collision or that it proximately contributed to cause the collision, then you must return your verdict in favor of the defendant Michael Marshall.

Refused L.J.

page 34 } INSTRUCTION NO. D-2

The Court instructs the jury that Virginia law recognizes that accidents may occur without negligence on the part of any party involved, and that persons may receive some injuries as a result thereof. Such accidents are known as unavoidable accidents.

The Court instructs you therefore that even if you believe from the evidence in this case that the plaintiff Malcolm J. Cundiff sustained injuries as the result of the accident, if

you further believe that the accident was unavoidable and without any negligence on the part of the defendant Michael Marshall, then you must return your verdict for the defendant Michael Marshall

Refused L.J.

page 35 } INSTRUCTION NO. 1

The Court instructs the jury that it was the duty of Marshall, upon receiving a signal from the police officer controlling traffic, to use reasonable care to understand said signal and act in accordance therewith.

And if you believe from a preponderance of the evidence that the defendant, Marshall, failed to use reasonable care to understand the signal given by the police officer controlling the traffic and failed to comply therewith, then he was negligent and if you further believe from the evidence that such negligence was the proximate cause of the collision and injuries to the plaintiff, and the plaintiff, Cundiff, was free of negligence which contributed to the accident, then you shall find your verdict in favor of the plaintiff, Cundiff.

Granted. L.J.

page 36 } INSTRUCTION NO. 2

The Court instructs the jury that if you believe from a preponderance of the evidence that the Police Officer controlling traffic gave a signal for the plaintiff, Cundiff, to proceed in the east bound lane of Highway 40, then under such circumstances he had the right of way and had the right to assume that his lane of traffic would be clear, but this did not relieve him of the duty to exercise ordinary care to keep a proper lookout.

Granted. L. J.

page 37 } INSTRUCTION NO. 3

The Court instructs the jury that if you believe from the evidence in this cause that before proceeding to make a left turn the defendant, Michael Marshall, acting as a reasonable prudent person under similar circumstances, believed that the signal given by Police Officer Amos was a direction for him to proceed to make his left turn, then he had a right to proceed, but in so doing he was required to exercise ordinary

care to keep a proper lookout in order to avoid a collision with other vehicles travelling on the highway.

Granted. L.J.

page 38 } INSTRUCTION NO. 4

The Court instructs the jury that as the plaintiff, Cundiff, proceeded along the east bound lane of Route 40, he had a right to assume that his lane of traffic would be clear, but this did not relieve him of the duty to exercise ordinary care to keep a proper lookout for vehicles entering his lane of traffic from the side thereof and to otherwise exercise ordinary care to avoid a collision.

And if you believe from a preponderance of the evidence that the said Cundiff failed to exercise ordinary care in the performance of the foregoing duty he was negligent, and if you further believe from the evidence that any such negligence was a proximate cause of the collision or that it concurred with any negligence of the operator of the automobile driven by the defendant, Marshall, then you shall find your verdict in favor of the defendant.

Granted. L.J.

page 39 } INSTRUCTION NO. 5

The Court instructs the jury that the plaintiff Malcolm Cundiff cannot recover from the defendant Michael Marshall if the plaintiff himself was negligent and such negligence proximately contributed to cause the accident, because the law of Virginia does not allow balancing of negligence of the parties in a case to determine who was most at fault.

Therefore, if you believe that the plaintiff Malcolm Cundiff was negligent, and such negligence proximately contributed to the accident, you must return your verdict for the defendant Michael Marshall, even though you may also believe that Michael Marshall was likewise negligent.

Granted. L.J.

page 40 } INSTRUCTION NO. 6

Where the defendant, Michael Lee Marshall, relies upon contributory negligence of the plaintiff, Malcolm J. Cundiff, as a defense, such contributory negligence is not presumed but the burden is upon the defendant, Michael Lee Marshall,

to prove by a preponderance of the evidence that the plaintiff, Malcolm J. Cundiff, was guilty of such negligence and that any such negligence proximately contributed to cause the collision; and unless the defendant, Michael Lee Marshall, thus proves the existence of such negligence or unless any such negligence appears from the plaintiff's, Malcolm J. Cundiff, own evidence or can be fairly inferred from all the circumstances of the case, then you cannot find the plaintiff, Malcolm J. Cundiff, guilty of contributory negligence.

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

Granted. L.J.

page 41 } INSTRUCTION NO. 7

The Court instructs the jury that the law does not require a person to know that he is absolutely safe before taking a given course of action. He is only required to exercise ordinary care—such care as a reasonably prudent person would exercise under the circumstances.

page 42 } INSTRUCTION NO. 8

The Court instructs the jury that the mere fact that there has been an accident and that as a result thereof the plaintiff may have been injured does not of itself entitle the plaintiff to recover. On the contrary, in order to recover against the defendant, the burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of negligence and that such negligence was the sole proximate cause of the collision involved.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendant was not guilty of negligence which was the sole proximate cause of the accident as it is that he was, then you shall return your verdict in favor of the defendant Michael Marshall.

Granted. L.J.

page 43 } INSTRUCTION NO. 9

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

Granted. L.J.

page 44 } INSTRUCTION NO. 10

If from the evidence and the other instructions of the Court you find your verdict in favor of the plaintiff, Malcolm J. Cundiff, then in assessing the damages to which he is entitled you may take into consideration any of the following which you believe from the evidence to have resulted from the collision:

1. Any bodily injuries sustained and the extent and duration thereof;
2. Any effect of any such injuries upon his health according to its degree and probable duration;
3. Any physical pain and mental anguish suffered by him in the past, and any which may be reasonably expected to be suffered by him in the *futre;*
4. Any disfigurement of deformity resulting to him and any humiliation or embarrassment associated therewith;
5. Any inconvenience and discomfort caused in the past and any which will probably be caused in the future;
6. Any doctors, hospital, nursing and medical expenses incurred in the past and any that may reasonably be expected to occur in the future;
7. Any loss of earnings in the past by reason of being unable to work at his calling;
8. Any loss of earnings and/or lessening of earning capacity he may reasonably be expected to sustain in the future;

page 45 } and from these as proven by the evidence your verdict should be for such sum as will fully and fairly compensate the plaintiff, Malcolm J. Cundiff, for the damages sustained by him as a result of the collision, not to exceed the sum sued for in the Motion for Judgment.

Granted. L.J.

* * * * *

page 47 }

* * * * *

This day came the attorney for Malcolm J. Cundiff and his attorney, J. Albert Ellett, and Michael Lee Marshall and his attorney, Robert J. Rogers, on a Motion for Judgment filed July 6, 1966.

The attorney for the defendant moved the Court to reconsider the Original Memorandum Opinion which set aside the verdict of February 8, 1968 and re-instate the jury verdict of February 8, 1968, which motion the court overruled and the defendant by counsel excepted.

And thereupon came a jury, to wit:
Mrs. Edith Sigmon, Bennie Angell, William Parcell, David Bussey, Tommy Robertson, Billy Shepherd, Mrs. Padgett Dillon, who were duly elected sworn the truth of and upon the premises to speak and the jury proceeded to hear the evidence of the plaintiff, and at the conclusion of the plaintiff's evidence the defendant made a motion to strike the evidence as being contrary to law and evidence which motion the court overruled and the defendant by counsel excepted, and the jury proceeded to hear the evidence of the defendant and at the conclusion of the defendant's evidence the attorney for the plaintiff made a motion to strike the evidence and enter summary judgment for plaintiff which motion the court overruled and the attorney for the plaintiff excepted to the ruling, and the attorney for the defendant re-newed his motion to strike plaintiff's evidence as being contrary to law and evidence which motion the court overruled and the defendant by counsel excepted to the ruling, and the jury received the instructions of the court and the argument of counsel and retired to their room and after sometime returned with the following verdict, to wit:

We, the Jury, find a verdict in favor of the plaintiff, Malcolm J. Cundiff and fix his damages at $17,000.00.

Wm. M. Parcell, Foreman

page 48 } And, the Defendant, by counsel, having indicated his intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* to the judgment of this Court, it is ordered that execution on the judgment herein above rendered be, and the same hereby is, suspended for a period of four months from the date hereof; and, if the defendant duly files a petition for Writ of Error and *Supersedeas* in the Supreme Court of Appeals of

Virginia, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon said petition; and if a Writ of Error is granted in this case, it is ordered that execution on the judgment be suspended until an opinion has been rendered by the said Supreme Court of Appeals of Virginia; all of which is conditioned upon the Defendant, or someone for him, giving or filing a bond with *cooporate* surety, in this Court within 21 days from the date of this order in the penalty of $20,000 conditioned according to law.

Enter: 4/18/69 L. Jones

* * * * *

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* * * * *

BOND

Know all men by these presents that we, Robert J. Rogers for and on behalf of Michael Lee Marshall, and Fidelity and Deposit Company of Maryland, surety, are held and firmly bound unto the Commonwealth of Virginia, in the just and full sum of TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS; to the payment whereof, well and truly to be made to the said Commonwealth of Virginia, we bind ourselves and each of us, our heirs, executors, and administrators and assigns jointly and severally, firmly by these presents. And, as to this bond, we hereby severally waive our Homestead Exemption and any claim, right or privilege to discharge any liability arising thereunder, or by virtue of said office or trust for which said bond is given with coupons detached from bonds of this state. Sealed with our seals, and dated this 2nd day of May, 1969.

The condition of the above obligation is such, that whereas the said Michael Lee Marshall, having indicated his intention to apply to the Supreme Court of Appeals of Virginia for Writ of Error and *Supersedeas* to the final judgment order of the Circuit Court of Franklin County, Virginia, entered on the 18th day of April, 1969, entered in favor of the plaintiff Malcolm J. Cundiff against the defendant Michael Lee Marshall in the sum of SEVENTEEN THOUSAND AND NO/100 ($17,000.00) DOLLARS, which order accordingly suspends execution on the judgment therein rendered for a period of four months from date; and provides that if the defendant duly files Petition for Writ of Error in the Supreme Court

of Appeals of Virginia, execution of the judgment is suspended until the Supreme Court of Appeals has
page 50 } acted upon said Petition; that if a Writ of Error is granted, execution on the judgment is suspended until an opinion has been rendered by the said Supreme Court of Appeals of Virginia, all conditioned upon the defendant, or someone for him, giving or filing a bond, with corporate surety, in this court within twenty-one (21) days from the date of the order in the penalty of $20,000.00, conditioned according to law.

NOW, THEREFORE, if the said Michael Lee Marshall shall pay all actual damages as may accrue to any person by reason of such suspension, in case a Writ of Error and *Supersedeas* to the final judgment order shall not be petitioned for within the four month period, or if petitioned for, shall not be granted; or, if a Writ of Error and *Supersedeas* be granted or awarded and said Writ of Error shall subsequently be dismissed, or the final judgment affirmed, and the said Michael Lee Marshall shall duly satisfy the said judgment and pay all damages, costs and fees which may be awarded against him or incurred by him as Appellant or Petitioner in the Supreme Court of Appeals and all actual damages incurred in consequence of the *Supersedeas,* then this obligation shall be void; otherwise, it shall remain in full force and effect.

It is the intention of the parties signatory to this Bond to give a Bond containing all of the conditions prescribed in Section 8-477 of the Code of Virginia, in lieu of a Suspending Bond is provided for in Section 8-465.

Robert J. Rogers (SEAL)
Robert J. Rogers

FIDELITY & DEPOSIT COMPANY OF MARYLAND

By .....
Its Attorney-In-Fact

ATTEST:

.....
Attorney-In-Fact for Fidelity &
Deposit Company of Maryland

page 51 } CERTIFICATE OF BOND—$20,000

In the Clerk's Office for the Circuit Court for Franklin County, Virginia, this 2nd day of May, 1969.

This Bond was executed and acknowledged by the Obligors and ordered to be recorded, the Bond being in the penalty of $20,000, and containing all the conditions prescribed in Section 8-477 of the Code of Virginia.

Wm. J. Walker, Jr.
Clerk

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page 1 }

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APPEARANCES: J. Albert Ellett, Esq. (Copenhaver, Ellett & Lawrence), of Counsel for the Plaintiff; and Robert J. Rogers, Esq. (Woods, Rogers, Muse, Walker & Thornton), and B. A. Davis, III, Esq. (Davis, Davis & Davis), of Counsel for the Defendant.

Stenographic report of all the testimony, together with the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, the objections and exceptions to instructions, and other incidents of the trial of the case of *Malcolm J. Cundiff* versus *Michael Lee Marshall,* tried at Rocky Mount, Virginia, on February 8, 1968, before Honorable Langhorne Jones and Jury, in the Circuit Court of Franklin County, Virginia.

* * * * *

page 3 } February 8, 1968.
9:20 o'clock A.M.

(The Reporter was sworn.)

(A Jury of seven men was duly impaneled and sworn.)

(The witnesses were called forward and sworn.)

(Mr. Rogers opened to the Jury in behalf of the Defendant.)

(Mr. Ellett opened to the Jury in behalf of the Plaintiff.)

The Court: All right, gentlemen, proceed.

Mr. Rogers: If Your Honor please, the Defendant calls the Plaintiff Malcolm J. Cundiff as an adverse witness—as

an adverse party for the purpose of introducing the release into evidence.

The Court: Any dispute as to the release?

Mr. Rogers: I thought I would ask him just a question—

Mr. Ellett: Not as to the release. There is some dispute as to the execution.

The Court: Well, he is introducing that. Do you want to call him around and prove it?

Mr. Rogers: Sir?

2/8/68 page 4 } The Court: Do you want to call him around and prove it?

Mr. Rogers: I was just going to introduce it through him and show that he signed it, and introduce it.

The Court: All right.

Mr. Rogers: Mr. Ellett, do you have a copy of this release?

Mr. Ellett: Yes. I would like to see the original.

Mr. Rogers: Here (release handed to Mr. Ellett for inspection which had been marked "Defendant's Exhibit A for identification", and then returned to Mr. Rogers).

MR. MALCOLM J. CUNDIFF the Plaintiff, called as an adverse party, having been duly sworn, testified as follows:

CROSS EXAMINATION

By Mr. Rogers:

Q. Now, Mr. Cundiff,—excuse me. You are Mr. Malcolm J. Cundiff, are you not, sir?

A. Yes, sir.

Q. And you are the Plaintiff in a lawsuit brought against Michael Lee Marshall as a result of an accident which occurred on September 4th, 1964?

A. Yes, sir.

2/8/68 page 5 } Q. Now, Mr. Cundiff, I hand you Defendant's Exhibit No. A (indicating) on the top of which is noted "release of all claims". Do you recognize any signatures on that release?

A. Yes, sir.

Q. And whose signatures do you see?

A. My own and my wife's.

Q. All right, sir. And what is the date of that release?

A. September the 15th, 1964.

Q. Did you execute this release, sir—

A. Yes, sir.

Malcolm J. Cundiff

Q. —on the date that is indicated, on September 15th, 1964?

A. That's right.

Q. Did your wife also execute the release?

A. Yes, sir.

Q. Where did your wife execute the release?

A. At home.

Q. How did she happen to execute it at home?

A. The insurance adjustor asked me to carry it home and get my wife to sign it; said, "He couldn't pay me for the damages to the automobile until we signed the release".

Q. And you did sign the release and you took it home with you and brought it back the next day, did you not, sir?

A. That's right.

Q. You had an opportunity to read it then? Did you not, sir?

2/8/68 page 6 }

A. Well, I just kind of glanced over it.

Mr. Rogers: All right, sir.

Now if Your Honor please, we would like to introduce into evidence at this time the Defendant's Exhibit No. A.

(The release referred to above dated September 15, 1964, was received in evidence and marked "DEFENDANT'S EXHIBIT A".)

Mr. Rogers: I don't know whether the Court would like for me to read the release at this time.

The Court: Well, use your discretion.

Mr. Rogers: With Mr. Ellett's indulgence, I will just read the release unless you would like to have your own client read it.

Mr. Ellett: You don't have to indulge me. You can read it.

The Court: That is a matter of your discretion.

Mr. Rogers: All right, sir, I would like to read it.

"For and in consideration of the payment to us of the sum of $279.62, and other good and valuable consideration, we, being of lawful age have released and discharge and by these presents do for ourselves, our heirs, executors, administrators, assigns, release, acquit, and forever discharge Michael Lee Marshall and all other persons, firms and corporations, whether hereinafter named or referred to or not, of and from any and all actions, causes, actionable claims, demands, damages, costs, loss of earnings, expenses, compensation and all conscionable damage on account of or in any way growing out of any and all

2/8/68 page 7 }

known and unknown personal injuries, and death, and property damage resulting or to result from the accident that occurred on or about the 4th day of September, 1964, at or near Rocky Mount, Virginia.

"We declare and represent that the injuries sustained may be permanent and progressive, and that recovery therefrom is uncertain and indefinite, and in making this release and in agreement it is understood and agreed that we rely wholly upon our own judgment, belief and knowledge of the nature, extent and duration of said injuries, and that we have not been influenced to any extent whatever in making this release by any representations or statements regarding said injuries, or regarding any other matters made by the persons, firms or corporations who are hereby released, or by any
2/8/68 person or persons representing him or them, or by
page 8 } any physician or surgeon by him or them employed.
We understand that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons, firms or corporations hereby released by whom liability is expressly denied.

"This release contains the entire agreement between the parties and the terms of this release are contractual and are not a mere recital. We further state that we have carefully read the foregoing release and know the contents thereof, and we sign the same as our own free action."

Then they have "witnesses, hand and seals this 15th day of September, 1964". And it is signed by "Malcolm J. Cundiff and Julie Cundiff" and witnesses by Margaret F. Williams of Roanoke, Virginia and Malcolm J. Cundiff of Hardie, Virginia.

Judge, I don't know if it is necessary to pass this to the Jury.

The Court: No, it is not.

Mr. Rogers: If Your Honor please, with the introduction of that release, the Defendant, insofar as the release is concerned—the general and special plea of release—now rests its case.

2/8/68 By The Court (interposing):
page 9 } Q. Yes. Let me ask you a question. You said you signed this release, the date of the 15th. Didn't you sign it at your home, or did you sign it when you brought it back to the insurance agent?

Malcolm J. Cundiff

A. I signed it in the insurance agent's office, and the lady witnessed it. And he told me to carry it home and get my wife to sign it, and me witness her signature and return it to him as soon as possible; that he couldn't pay me for the damage to the automobile until I returned the release.

Mr. Rogers: If Your Honor please, I object to any further—I don't want him testifying about that.
The Court: Well, he took it to his home.

Q. But you signed it and took it home with you, and your wife signed it, and then you brought it back the next day?
A. Yes, sir.

Mr. Rogers: Judge, may I ask one more question, which I should have?

Q. When you brought the release back, didn't the same adjustor deliver to you Nationwide's insurance company draft in the amount of the release, did he not?
A. Yes, sir.
Q. And that was payable to you and your wife, was it not?
A. Yes, sir.
2/8/68 page 10 } Q. And then you subsequently cashed that draft, did you not, sir?
A. I deposited it in the bank.

Mr. Rogers: All right, sir, that's all I have, and we release, insofar as the special plea is concerned.
Mr. Ellett: All right. I would like to ask Mr. Cundiff several questions with reference to the execution of the release, and then I would like to have him step aside, and then I want to recall him.
The Court: Let me see you gentlemen in Chambers.

IN CHAMBERS AT 10:07 o'clock A.M.

(Out of the presence of the Jury.)

The Court: If I understand the procedure properly, you may question him on any cross—you may cross question him on any matter which Mr. Rogers has questioned him on. Now, after you finish that, of course he is your witness. He is more or less of an adverse witness for Mr. Rogers, but anything that you bring out now goes to your defense and I

don't know if there is any objection as to Mr. Rogers. Mr. Rogers seems however to be objecting—

Mr. Rogers: I don't know what he's asking. I don't see how he can ask anything on the cross examination at this stage relevant to the point I have just rested on.

2/8/68 page 11 } The Court: Anything else would go to him, and what I'm saying is: Do you object to questioning him on part of his testimony now, and then put him back on for more.

Mr. Rogers: I do, if Your Honor please, and I point out—

The Court: That's what I wanted you to point out.

Mr. Rogers: I point out the fact that after the Pleadings do admit the validity of the release.

The Court: He admitted the validity of it?

Mr. Rogers: So the only reason I make that observation and it may not even have been necessary to put it on, but I thought from the Jury viewpoint it would be better.

Mr. Ellett: The Plaintiff does not admit the validity it admits the execution.

The Court: He admits the execution. That's all he's done. If you want to ask him anything about the execution of the release—

Mr. Ellett: That's what I thought I could ask him about, the execution of the release on cross examination, and then when we start out our evidence in chief I can call him back.

The Court: Well, it must be confined—

Mr. Rogers: Judge, unless he's going to deny that, everything he's already signed, I think anything else would go beyond the scope of the examination.

2/8/68 page 12 } Mr. Ellett: I mean you put out when it was executed and how, and I certainly have got a right to question him about it.

The Court: Well, he asked him this, if I recall: —I think I've got it straight now—he asked him his name, he asked him if he signed that release and if his wife signed that release, he asked him if he went to the insurance agent and took it to his home and brought it back the next morning signed and witnessed, he asked him that, and that's all he asked him with relation to the release.

Then I asked him whether he signed the release, when he took it away from the insurance office, and when his wife signed it, if she signed it at home and whether he brought it back the next morning. I think that's the way it's gone.

Mr. Rogers: Yes, sir. All I was trying to show, Judge, was the fact that the release was signed.

The Court: Now the signing of it, I think that would probably be in response to you, whether it is a denial.

Mr. Rogers: Yes, sir, I think the circumstances of his execution of it and how he came to execute it would be part of the defense part of Mr. Ellett's case, as to taking—

The Court: Yes, I think it would be too. I think from this point on, unless you say "well, he didn't sign it in the insurance agent's office and didn't take it home," I think that would be possibly in response to you. But when you go into the fact that, or go into the facts with regard to the defense part of it, or of any evidence which would raise to its defense,

2/8/68 page 13 } I don't think you ought to be able to put on your witness, to put him on and off and then on and off, that's what I'm trying to get at.

Prove part of your case now and then prove part of your case later, that's not right.

Mr. Ellett: Well, that's not the point, Your Honor. The point is I want to cross examine him as to the execution of the release and the circumstances surrounding it, and nothing else. This is what Mr. Rogers brought out on direct.

Now I think I've got a right to cross examine him as to those matters which were brought out in chief, and I expect to be able to show the circumstances under which the release was executed.

Mr. Rogers: All of which is a part of your case. I did not go into the circumstances of it and I purposely avoided it.

Mr. Ellett: I think you opened it up when you proved the execution of it.

Mr. Rogers: No, sir. All I did was prove that it was executed, which is—

The Court: Now it might be—let's see about this. Suppose he asked him the question along this line: "Did you go to the insurance agent's office or did the insurance agent ask you to come, or did you or did he seek you out or you seek him out?"

2/8/68 page 14 } Mr. Rogers: Yes, sir.

The Court: Now, that would be relevant as to the signing of it, very relevant.

Mr. Rogers: Well, I purposely avoided that question.

Mr. Ellett: I notice you argued it in your opening statement.

Mr. Rogers: That doesn't make any difference. You made—

The Court: I think I almost called him down for argument in his opening statement. You didn't object and I didn't want to inject myself into the case, but I frequently do call

lawyers down. I almost called Mr. Rogers down because he argued the same point about four times.

Mr. Davis: Let me see. There is one question that bothered me from the beginning. As I understand the situation, Mr. Cundiff, when he executed this release, as far as he was concerned, he was not injured at that time at all. No injury at all.

The Court: Yes.

Mr. Davis: All right. So the thing that is bothering me is not the extent of his injuries, if he says "all right, I had one broken rib and I knew about the one broken rib, and I was releasing one broken rib," and it turns out he had some more—

2/8/68 page 15 } but when a man comes along and executes the release on the fact, "I was not injured at all," I don't think Mr. Ellett asking or going into this $10,000 transaction to show that it was inadequate.

The Court: But he can argue it, but that is not the proof.

Mr. Rogers: We will object to any such testimony.

Mr. Davis: It is not inadequacy, because he said, "I was not hurt at all".

The Court: Well, he hasn't said that yet.

Mr. Davis: All right.

Mr. Rogers: Well, Mr. Davis is anticipating.

The Court: I don't know that it makes too much difference, but these are objections on procedure.

Mr. Ellett: That's right.

The Court: And if you want to go on and take him on, or have him stand aside and put him back on—now you haven't objected to him putting the Doctor on.

Mr. Rogers: Well, I do object to the Doctor for the reason Mr. Davis has said, that it isn't a matter of his not realizing the extent of his injury.

Mr. Davis: He just wasn't injured.

The Court: As far as the evidence as this case goes, all we have at the present time as to this man is that he signed a release for an accident which happened on September the 4th, or whatever day it was.

2/8/68 page 16 } Mr. Rogers: The 4th.

The *Couet*: That's all we have in evidence.

Mr. Rogers: Yes, sir.

The Court: Now if he wants to go in, or you want to go in and show that he wasn't injured at that time, that's a different thing. Now, when he goes into it he's going into it for the purpose of showing—he's going into for the purpose of showing there was not a meeting of the minds. That is the gist of it.

Mr. Rogers: Yes, sir.

The Court: That it was mutually a mistake, or a mutual mistake and there was no meeting of the minds as to the injury to him.

Mr. Davis: I don't think he has a right to go into the extent of his injuries.

The Court: Well, I think he has.

Mr. Davis: When there is no injury as far as he was to begin with. Now if he said, "I had a broken arm" and it turned out he had two broken, then I agree.

The Court: Well, all the cases I read, they go into it and show the extent of the injuries afterwards. He's got to connect this up to the accident too, and that's another thing.

Mr. Rogers: Judge, may we show, along Mr. Davis' thinking, rather than having to keep up—rather than
2/8/68 have to stand up and make objections, may we
page 17 } just show a general objection here to the medical testimony, particularly as it relates to the extent of the injury?

The Court: Yes, sir, you may object to that here.

Mr. Rogers: Rather than having to keep objecting at the time.

The Court: You have no objection to that?

Mr. Ellett: No, sir.

The Court: All right, the general objection to the Doctor's testimony goes as to the extent of the injuries.

Mr. Rogers: Yes, sir. We think it would be prejudicial to us from the Jury's viewpoint, as to loss of income also.

The Court: Well, I don't know. You can show the amount —you are talking about out-of-pocket money.

Mr. Rogers: Well, he mentioned it in his opening statement. I don't know that we're concerned with the amount of damages, but what we're concerned with is the extent of the injuries and not the value of the injuries so much, and as we are to the extent. That would come in when you're trying to get your damages.

Mr. Ellett: I think that is true. I still think we have a right—this all goes to linking the question of how much was paid in medical and goes to the extent of the man's injuries.

(Discussion off the record.)

2/8/68
page 18 } The Court: I'm going to rule this way, right or wrong: I'm going to hold that you can show the

extent of his injuries, but that the amount that he paid to relieve those injuries is not proper in this case. I'm going that far for this reason: That as a matter of damages—and you can show the amount of treatment that he received, the doctors that he went to, the type of injury he has, that he couldn't work for a certain length of time, and those things can be shown; but as to what he paid his doctor or how much he didn't collect from his employer, are matters they are not prepared to meet and which they are not prepared to meet because he may have been receiving compensation all the time from his employer. And that would go or that might go into a long phase that has nothing to do with this contract.

Now, when you come to the question of damages that a doctor—that you may receive because of this, or that this man was at fault, then you have got an entirely different case or situation, because there you go into your damages. Here we are not trying this case on damages, we are purely trying it on a matter of whether or not there was a mutual mistake as to whether or not this man was injured at the time and the extent of his injuries—not the money damages—but the extent of his injury. So that is what I'm going to hold in this case.

Mr. Ellett: All right. Just—

2/8/68 page 19 } The Court: I can tell you furthermore, anybody with two grains of sense—and a Jury is not a fool or are not fools—know that if he had to go to see the doctor, he had to pay the doctor, and he knows that the doctor charges pretty doggone dear, because I expect everyone on the Jury, including the Judge, has had to pay doctor bills.

Mr. Ellett: Well, Judge, I'm going to object to that and save the exception on the grounds as referring to the *Ice Company versus Lee* case where the Supreme Court says, "The above facts were material as they clearly affect the extent and character of Lee's injuries, and correspondingly the amount of damages suffered by him, as well as the coverage included in the release, while not ordinarily in itself sufficient basis for clarification of the contract, inadequacy is a proper element to be considered along with the other circumstances".

I think under that holding and the other holdings in Virginia—

The Court: At the present time I'm certainly going to rule that way.

Mr. Ellett: We will save the exception, and that is in 199 Virginia 293.

Mr. Rogers: Let us save our exception also to the ruling

of the Court in allowing medical—allowing testimony as to the extent of the injury.

Mr. Ellett: Judge, they might as well discuss
2/8/68 the question of liability too, as to how far I am to
page 20 } be permitted to go into the question of liability,
because Mr. Rogers has brought up the question of this release being a compromise without admitting liability. And I think that is a factor liability, or is a factor as well as consideration in determining whether or not—

The Court: The liability part will be tried in another case if—if the contract is set aside, then we are as if there were never any contract. Then we go into the question of liability. I would have to rule that way.

Mr. Ellett: Well, I object and save the exception on the grounds stated. I think it is proper to go into the question of liability, particularly when the release does not admit liability and on its face shows it to be a compromise. The Jury might get the impression—

The Court: We haven't reached that stage yet.

Mr. Ellett: —that my man was not completely at fault.

The Court: If it was set aside, that might be a motion afterwards for a summary judgment, but—

Mr. Ellett: Well, I save the exception on it. Judge, I intend to go generally into the liability question and ask the Officer if he investigated and if his report shows that my client was injured.

Mr. Rogers: Well, I will object to that.

2/8/68 The Court: You are admitting he was injured
page 21 } in the accident, aren't you?

Mr. Rogers: I don't know whether he was or not, Judge.

Mr. Ellett: He's admitting it.

Mr. Rogers: But I would certainly object to his asking the Officer whether his report shows—

The Court: No, that would clearly not be admissible, what his report shows; you can't even do that in a damage suit.

Mr. Ellett: Well, I can ask him if anything was said about injuries.

The Court: Well, you can ask him if anything was said about it, and so can you, Mr. Rogers.

(Thereupon, Court and Counsel returned to the Courtroom at 10:30 o'clock A.M., where the following occurred before the Jury;)

Trooper D. L. Riddle

The Court: You may proceed.
Mr. Ellett: All right, Mr. Cundiff, come back here, please.

The witness stands aside.

TROOPER D. L. RIDDLE called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

2/8/68 By Mr. Ellett:
page 22 } Q. For the record, would you give us your name, please?
A. D. L. Riddle, State Trooper, assigned to Rocky Mount, Virginia.
Q. Mr. Riddle, in the course of your duties as a State Trooper, did you investigate an accident on September 4th, 1964 at the intersection of Route 40 and Perdue Lane?
A. Yes, sir, I did.
Q. Mr. Riddle, without going into details about the accident, would you tell the Jury just generally what happened, the best you can recall?
A. This was an accident which occurred when three police officers, including myself, were assisting people coming out of Perdue Lane, or the parking area behind the high school, and letting them out into Route 40. Deputy Amos was working the intersection right at Perdue Lane on the double solid line in the center of the highway, and Deputy Hodges was in the westbound lane of Route 40, holding traffic at that point, watching the traffic on Route 40 headed west.
I was at what is known as Tannier Road, which is a distance of approximately 100 yards west of this intersection where the accident occurred. And I was holding traffic, or controling traffic at that point; and Mr. Malcolm Cundiff
2/8/68 was operating his vehicle headed east on Route
page 23 } 40 and had passed my location, and I can't—I don't know exactly what occurred down at the intersection. I know that we don't allow left turns off of Route 40 coming west into the high school—

Mr. Rogers: Now, if Your Honor please, I object to that because he doesn't know what happened, and I'm sure—
The Court: That is objectionable. We are not going into the factual situation about this accident and we're not concerned about this accident, gentlemen. We are concerned with this release.

Trooper D. L. Riddle

The Witness: Well, I know nothing about any release.

By Mr. Ellett:
Q. All right. Did your investigation generally indicate that the Marshall boy had made a left turn?
A. Yes, sir. His vehicle was headed—

Mr. Davis: If Your Honor please, we are going to object to it.
The Court: That's objected to by Mr. Davis. We're not going into the facts of the accident. We are going into the facts of this release, and that's all we are concerned with here.

By Mr. Ellett:
2/8/68 page 24 } Q. All right, Trooper Riddle, do you recall from what you observed, did Mr. Cundiff receive any apparent injuries in this accident?
A. I asked all parties involved in the accident if they were injured, and I did not list him. I cannot specifically say whether he did or did not at that time complain of any injury at all; I know that his wife and daughter—I asked all of them—and they were listed on my accident report as injured.
Q. And you listed—

Mr. Rogers: Now, if Your Honor please, I object to that. Mr. Ellett knows that he can't ask a question about the report.
Mr. Ellett: I'm not putting the report in evidence.
The Court: The question was: Did they, or any of them report any injuries to him, or did he see any injuries? Is that right?
Mr. Ellett: That's right.
The Court: All right. Now you can answer that. Answer that if you can.
The Witness: Yes, sir, the two ladies in the car did report injuries, and I believe they were carried on by somebody to the hospital. I later checked on them and I don't know if I actually list them or not as minor injuries.
2/8/68 page 25 } Mr. Ellett: All right, Trooper, that's all.
Mr. Rogers: Now, if Your Honor please, I'm going to have to see the Court in Chambers just one second. I'm sorry, but the way Mr. Ellett asked the question, I must see the Court.

In Chambers at 10:35 o'clock A.M.

(Out of the presence of the Jury.)

Mr. Rogers: If Your Honor please, I had understood that we were not going to get into the facts of the accident, but we have. And I most seriously—

The Court: As soon as you objected I sustained your motion.

Mr. Rogers: I understand that, Judge, but my point is—and I know I'm not being critical of anybody, and it's just one of those things that happen—but we are in it now because the Trooper volunteered the statement, "because we do not allow left turns". And then he was then questioned whether the Defendant made a left turn, and there is only one conclusion to be drawn from that, and that is that the young man, the Defendant, made a left turn when he wasn't supposed to.

Now, if Your Honor please, I think we ought to have the right and I will ask for the right to question Trooper Riddle on a little more detail of the accident, or what he knows, or any other witnesses on this, because—

2/8/68 page 26 } The Court: You want to go into the accident?

Mr. Rogers: We are going to have to now.

The Court: All right, you want to go into it. Now that's what you objected to and I sustained it, but if you want to go into the accident and both of you all agree to it—I don't care—I don't think it's proper, however I didn't think he was going to ask that quesion. I don't think he asked it. I think the Trooper volunteered it.

Now, I can tell the Jury that anything that occurred at that accident has nothing to do with this case, and that they should not consider it in considering this case.

Mr. Ellett: You mean as far as the accident itself?

The Court: As far as the accident itself.

Mr. Rogers: As far as fixing liability or who was at fault.

The Court: I can tell them that and it looks to me that ought to end the case; if you go ahead you may be getting into trouble.

Mr. Rogers: Judge, I'm afraid we are in it now.

The Court: I am not going to sit here and try a liability case when you all asked specifically to separate the liability case from the release.

Mr. Rogers: I think we just have to, Judge, at the conclusion.

2/8/68 page 27 } The Court: You raised the objection. And I'll tell the Jury. I don't see that we can go into that.

I will tell the Jury that, and I sustained your objection, and that anything which happened down there at that accident is absolutely inadmissible in this case. I mean absolutely should not be considered by them. We are not trying that. The only thing we are trying is the release.

Mr. Davis: I understood Trooper volunteered the damage part, or his part of it wasn't responsive to any—

Mr. Rogers: I'm not being critical of Mr. Ellett, but the Trooper has implied rather clearly that my client turned left.

The Court: What you're trying to do now is absolve yourself from liability.

Mr. Rogers: I think if the Jury is going to determine this, the Jury has the right now and they're going to sit and says, "There's no question that the young man was at fault".

The Court: Maybe the police officer waved him on, I don't know.

Mr. Rogers: That's exactly what he did. The officer waved him on, and I think we have the right to show that.

The Court: You object to him showing that the other officer waved him on?

Mr. Ellett: Without going into the complete details, yes, because that's just going to be a conflict there.

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page 28

Mr. Rogers: How is it going to be a conflict?

Mr. Ellett: Because my man is going to testify that the officer was waving him on and holding up your man.

The Court: Well, it may be a misunderstanding. That's exactly the reason I don't think we have got any business going into it.

Mr. Rogers: Well, if Your Honor please, I have to now that the Trooper has made the statement. I've got to insist on that because—

The Court: Gentlemen, I'm going to do this: I am not going into the details of this accident, and I'm not going to permit you to go into the details of this accident. I will tell the Jury, if you want me to, that whatever happened in regard to the accident has nothing to do with it, and that we are not trying this accident, but we are trying the release.

Mr. Ellett: Right.

The Court: If you want me to do that, I will tell them. I have already sustained your objection. In other words, I don't think you ought to have your pie and eat it too.

Mr. Rogers: Well, if Your Honor please, I was perfectly happy until the Trooper volunteered this statement.

The Court: I realize the trooper volunteered that, but I'm

trying to get it *straigtened* out, and if I permit all the facts in this accident, then we might as well try it all the way.

2/8/68
page 29 } Mr. Rogers: The only thing and the only point I'm making is that the Trooper has indicated to the Jury "we do not allow left turns," when in fact the young man was signaled to make a left turn. I think the Jury has a right to know that.

The Court: I asked him and he says he has no objection to you saying that.

Mr. Ellett: Then I want to go—

The Court: No, sir, I'm not going to go into all the details of that accident.

Mr. Ellett: Well, I don't think we should go into any—

The Court: Of course, just a few minutes ago you were trying to get that into them, and now you're trying to get out of them. But if we get into that, then we get off the issue that we want to bring, the issue in this case. If you want to make a motion for a mistrial, that is a different thing.

Mr. Rogers: Well, let me see how the evidence develops, Judge.

The Court: Well, you better do it now. You're again trying to have your cake and eat it too.

Mr. Ellett: I'm not raising anything else.

Mr. Davis: There is one thing out there that I'm hoping that will not erase, or will take care of, and that is the Trooper's diagram on that board, that the Trooper made. And we have been in here and I don't know what they have seen.

2/8/68
page 30 } The Court: What is it doing on the board?

Mr. Davis: He shows Mr. Rogers' client in the middle of the road at the time of the accident. It's on the blackboard.

The Court: Has anybody's attention been called to the Jury?

Mr. Davis: I certainly haven't.

Mr. Ellett: No, sir.

The Court: I don't think it has been called to the Jury's attention.

Mr. Davis: But they can turn right and see it.

The Court: Too many things are happening in here. You all want to declare a mistrial?

Mr. Ellett: No, sir, I don't. I've got too much to pay my doctors on.

The Court: It looks like, from the opening statements, it will resolve itself in a question of law.

Mr. Rogers: Let's go on, Judge, and I think we'll see.

The Court: All right, let's go. Bob, you want me to caution that Jury about there is no fault, or there is no question of fault in this case?

Mr. Rogers: Might not be a bad idea, that is from the viewpoint of determining it is not their obligation to determine who was at fault.

2/8/68
page 31 } The Court: All right.

(Thereupon, Court and Counsel returned to the Courtroom at 10:55 o'clock A.M. and the following occured before the Jury:)

The Court: Gentlemen of the Jury, some mention was made of the manner of this accident, or some question was made as to the manner of how this accident happened. We have nothing to do with that. Anything that was stated by the Officer in that regard, as to how this accident happened, has nothing to do with it. Please disregard any statements made with regard to the accident itself.

It is not a question of who was at fault, or whether it was Mr. Marshall's fault or Mr. Cundiff's fault; that is not the question. The whole question here is the question of the release. Do you understand that now, gentlemen?

Mr. Ellett: Well, I have no further questions.

Mr. Rogers: I have no questions.

The witness stands aside.

DR. GENE E. CLAPSADDLE called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

2/8/68
page 32 } By Mr. Ellett:

Q. Dr. Clapsaddle, would you give us your full name, please?

A. Gene E. Clapsaddle.

Q. And what is your profession?

A. I am a physician.

Q. Where did you go to college, Doctor?

A. Medical College of Virginia.

Q. Was that where you received your M.D. degree?

A. Yes.

Dr. Gene E. Clapsaddle

Q. And—

Mr. Rogers: We will stipulate the Doctor's qualifications if you like, sir.
Mr. Ellett: All right, sir, fine.

Q. (continued) Doctor, where do you practice medicine?
A. In Vinton.
Q. Are you engaged in the general practice of medicine?
A. That's correct.
Q. In the course of your practice, did you have opportunity to come in contact with Malcolm Cundiff and examine him and treat him as a patient?
A. Yes.
2/8/68 page 33 } Q. Doctor, would you refer to—refresh your memory and refer to your notes and tell us when the first occasion was that you saw and treated Mr. Cundiff?
A. On the 28th of September, 1964 (indicating).
Q. And did you take a history from him at that time?
A. Yes.
Q. And what was the history?
A. Mr. Cundiff complained of pain in his mid and lower section of his back that radiated up to his neck; and he stated that this pain had had a very insidious onset with no specific date that he could recall that it started. And that at that time he didn't relate any specific injury.
He did relate the nature of his work was driving this van-type truck, and that he thought that perhaps just the jostling and so forth had caused his back to hurt, although he didn't come to any particular incident that caused his back to hurt.
Q. Then after that—that was on the 28th?
A. That was on the 28th, that's correct.
Q. 28th of Spetember, 1964. When was the next time that you saw him?
A. I saw him on the 12th of October, '64.
Q. What was his complaint at that time?
A. Well, he stated then that the medicine that I had prescribed for him on the 28th had helped in some degree, but that the pain had returned once again spontaneously.
2/8/68 page 34 } Q. Did on that visit, or a subsequent visit shortly thereafter, did you have any discussion about whether or not he had been involved in an automobile accident?

Dr. Gene E. Clapsaddle

A. Well, not on the 29th. I saw him on two other occasions —three other occasions—but on the 29th of October, when I had seen him in the office, he, in reviewing this thing, because of the persistence of his symptoms and obviously it hadn't responded to the usual measures—when he related that he had been in an accident on approximately the 4th of September, and I felt that this probably was the actual cause of the pain.

Q. You felt that the injury received in the accident was the cause of the pain, in your opinion?

A. Yes, I think so.

Q. Did he relate to you when he first had an onset of this pain?

A. No. As I mentioned, the first time I saw him he said that the pain had just come on gradually and he didn't refer it to any particular time that he could actually say that the pain started.

Q. Well, Doctor, reviewing your file briefly, can you give us an estimate of the number of times that you treated Mr. Cundiff, and just generally the nature of the treatment, without going into too much detail?

A. Well, certainly I saw him numerous times from then on through, well on up into November of 1965. I
2/8/68 think that was the last time I saw him, in that vi-
page 35 cinity. I might mention that toward the end of this he was seen by other physicians, trying to come to a cause of his pain.

Q. Did you refer him to other doctors?

A. Yes. Yes.

Q. And who was he referred to?

A. The first referral was to Dr. David Lewis, who practiced medicine at the Lewis-Gale Clinic; and Dr. Lewis is an orthopedic surgeon.

Q. And was there another referral by you?

A. Yes, after Dr. Lewis.

By The Court (interposing):

Q. Would you give him the date that you referred him to Dr. Lewis?

A. He was seen by Dr. Lewis on the 30th of December, 1964. And then Dr. Lewis saw him on several occasions, and Mr. Cundiff didn't show any response, and he asked that he be sent to another orthopedic surgeon. And because of this he was referred to Dr. Louis Ripley of the Roanoke Orthopaedic Clinic, and doctor—let's see when he saw him—he saw him on the 25th of March, 1965, and I had seen Mr. Cundiff

on several occasions between the time Dr. Lewis saw him and the time that Dr. Ripley saw him.

2/8/68 page 36 } To answer your question about the nature of the treatment: He was first given prescription for muscle relaxants type of medication, which is normally used for muscular pain. And this second time, since he had shown some response, this was repeated, but he didn't show any response to the treatment at that time, and he was given physio-therapy treatments, five or six of them, in mid-October.

And then after that he had various combinations of muscle relaxants and analgesics, and Dr. Lewis, according to his notes—Dr. Lewis isn't in the Roanoke area any more—and Dr. Lewis had also prescribed physio-therapy treatments. And I think he had, I think used a number of injections in this painful area of discomfort in the back in an effort to relieve his pain.

By Mr. Ellett (continues examination):

Q. Dr. Clapsaddle, did you reach an opinion as to whether or not Mr. Cundiff had been injured as a result of this automobile accident?

Mr. Rogers: Let me object to that unless he can state that opinion with reasonable medical certainty.

Mr. Ellett: Well, I was going to get to that.

The Witness: I certainly can't say with any certainty.

By Mr. Rogers (interposing):

Q. Can you say with reasonable medical certainty?

A. I think with reasonable certainty, considering that he had the accident and that the pain had come on

2/8/68 page 37 } after that, without any other specific incident, and that the pain obviously was not a minor type of muscular pain that might result from a rheumatism or following a cold or something of that sort. I could think, or I could say with reasonable certainty that the pain did result from the accident.

By Mr. Ellett (continues examination):

Q. Now, in determining this type of injury, is it true that in some cases that the pain does not manifest itself, or nothing manifests itself to a person to indicate that they have been injured?

Dr. Gene E. Clapsaddle

A. I think in cases where there is no direct injury to the muscle, such as an object running into a muscle or falling against something of this sort, but where a muscle would be strained, in other words, or a ligament would be strained, that it would be common for the pain to occur sometime later rather than at that specific moment, unless of course the injury was so severe that you had a hemorrhage in the muscle or something of that sort, or the muscle actually be torn.

Q. Would it be reasonable for it to appear after, 11 days after the accident?

A. The amount of time that it would take this sort of injury to appear would be so variable that it would just be impossible to say, but certainly I don't think that it would be unreasonable for it to go even as much as two weeks, or sometimes even longer. But it is just purely speculation in this situation, as far as I'm concerned.

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Mr. Ellett: All right, sir.

CROSS EXAMINATION

By Mr. Rogers:

Q. Dr. Clapsaddle, you first saw him on September 28th, 1964, is that correct?

A. That's correct, yes, sir.

Q. And at that time not a thing in the world was said to you about an automobile accident?

A. That's correct.

Q. And you saw him several times after that and—

A. That's correct.

Q. —and nothing was said about an automobile accident?

A. That's correct.

Q. Then finally on October 29th, 1964 he told you he had been in an automobile accident, did he not, sir?

A. That's correct.

Q. And he volunteered that, I take it, did he not?

A. No, not specifically. As I recall, and of course it is not of particular relation to this case, but very often when you sort of hit a dead spot and you can't find out, then you go back and review the situations. And so I had come to this point where Mr. Cundiff—having seen him on a number of occasions and gone through the usual methods of treatment with really no response, so I went back to talk to him some more and to find out if there was any possible thing that we could be overlooking as to any cause of this thing and so forth.

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Dr. Gene E. Clapsaddle

And it was during this time that he mentioned that he had been in involved in this accident. But as to say specifically exactly how this information was brought about, I just can't say it for this long period of time.

Q. Well, when he first saw you on September 28th, 1964, did he tell you how long he had been having pain in his back?

A. No. No, he didn't.

Q. Well, you would normally ask that question, wouldn't you?

A. That's right. I mean it had come on in a several-day period of time.

Q. What do your notes show as far as your history—that would be information, wouldn't it?

A. Right.

Q. What do your notes say?

A. My notes say this: That he had complained of pain from the lumbar area to his neck, and that it had an insidious onset. Now, I didn't mention a specific time that it started.

Q. "Had an insidious onset."

2/8/68 page 40

A. That's right. And that there was no specific injury, and that he in his job sat in this high seat in the van truck, and that this was related to that.

Q. May I see this one second?

A. Yes. Now this is the actual note, and I'd like to point out that this was put on his wife's notes in error (indicating). I had seen her before and Mr. Cundiff came in at this time. Now, this is the note in question right here (indicating).

Q. I see. You said something about "no accident or no" —you were reading there one of those things.

A. Yes. Excuse me. I had transferred this to this (indicating).

Q. Oh.

A. Right now.

Q. Just read your notation there, September 28th, 1964?

A. All right. "Complains of back pain from lumbar area to neck and sits in high seat in van truck." And, well, wait a minute now. Okay. And I didn't say anything about the injury in this (indicating), but I had asked him this question, as I recall, and this is how it happened. And he was tender over his paravertebral area.

Q. You have a notation over here (indicating)?

A. That's right, this one, this notation that I made right here on this other piece of paper (indicating). And this was not made at the time this was made (indicating), but in an effort to try to review this situation, to get it together.

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Q. I understand.

A. That the difference being that he had had an insidious onset and no injury was recorded.

Q. All right, sir.

A. Now I say this was not shown on this injury, but as I recall, and we discussed the situation.

Q. All right, sir.

A. And that this was what came forth (indicating).

Q. Let me see this now.

A. Now this is Mrs. Cundiff's (indicating) and this is Mr. Cundiff's right here (indicating).

Q. All right. Now your notation of the 23rd of October, 1964—just read that, if you would, please?

A. Well, on the 23rd of October, 1964—this was after he had had this series of physio-therapy treatments, "that he was doing better," and he actually had come in on that day for another problem.

Q. I see. Oh, he hadn't come in on that day for his back?

A. That's correct.

Q. Then on October 26th, 1964 you saw him again?

A. That's right.

Q. And what did he say there?

2/8/68 A. He had picked up—I made this note of "some
page 42 } potatoes", and this is, as I recall, he said "he picked up a small bag of potatoes on the 24th and that the pain was now worse than when he had come in".

Q. Did he come in when he had pain from picking up the bag of potatoes? Is that your impression?

A. Well, yes and no. It was my interpretation, as I recall, that the bag of potatoes wasn't so large that in of itself—now his back had become quiet and then when he picked this up it started again.

Q. The next notation, the 29th of October, 1964.

A. That he relates that he was in an auto accident about 4 September and his back had started hurting after that.

Q. "His back started hurting after that."

A. Ahum.

Q. Did you gather that it started hurting shortly after the accident?

A. No, since I had seen him on the 28th of September and it wasn't hurting at that time, that it had, or the injury just started hurting, you know, some period of time after the accident.

Q. All right, sir.

A. These are copies of various insurance forms of his own private *dompany* (indicating), and other correspondence.

Dr. Gene E. Clapsaddle

2/8/68 page 43 } Q. I understand that. Did he indicate in discussing the accident what sort of blow he received, if any, in the automobile accident?

A. I don't recall that he mentioned any particular thing, or having been what? Well, a month and a half at least after the accident, that he didn't even then recall any specific injury that had occurred?

Q. He didn't recall receiving any kind of blow to his back or anything?

A. No. No, he didn't.

Q. Was it sort of a strain type of thing, so far as you felt?

A. I felt that this did represent a muscular strain and that this was the type of injury that it was.

Q. And it is the sort of thing, I take it, that could result from lifting heavy boxes and that sort of thing, could it not?

A. This type of strain could result from almost any activity, even a cough of people will cause strains. Anything can cause a muscular strain.

Q. Any type of straining?

A. Yes, that's right.

Q. I take it you say you thought it probably resulted from the accident, but I presume it could have resulted from other types of strains, could it not, sir?

A. That's correct.

Mr. Rogers: That's all I have.

2/8/68
page 44 } RE-DIRECT EXAMINATION

By Mr. Ellett:

Q. Dr. Clapsaddle, just let me ask you one more question. Let's get it clear in my mind what was the period of time from September 28th, '64 to your final treatment of Mr. Cundiff?

A. Now the last time that I treated Mr. Cundiff was on the 22nd of October, 1965, and at that time the note that I made indicated that his condition was essentially static, with pain as result of prolonged standing, or prolonged sitting, or specific motions that had previously demonstrated the pain.

The last time I actually saw him relative to this condition at all was on the 18th of November, 1965, and he stated at that time he just—he really came to see if I thought that it would be okay so to speak, I mean he wasn't completely dissatisfied, but he said he wanted to go see Dr. Jessie Tucker in Moneta and that Dr. Tucker had had a back injury like his,

and he thought he might have some inside information. And he came into the office on the 18th of November just to see what I thought of that, and not as a patient.

Q. You said he had been in numerous times. Can you give us some estimate of the number?

A. I can count the entries in this thing (indicating).

2/8/68 page 45 } Q. Well, I show you a copy. This is probably easier—a copy of a statement. Now I don't want you to give the amount, but just the number of visits, if you will (paper handed to the witness).

A. Well, I don't believe this is complete.

Q. How many is on that?

A. Let's see, this is—I count 18.

Q. And you think there are several visits in addition?

A. Well, I think, I know the last entry on that was in May or April (indicating), and I see here it was the last date shown on that—or what is the last date shown on that?

Q. April the 12th, '65?

A. On the 12th of April, '65. Well, now here are two in June (indicating), one in August, one in July, one in August and one in September, and then the last one in the 22nd of October that I mentioned, so that would be—

Q. Roughly 25?

A. 6 in addition to the ones you have there (indicating).

Mr. Ellett: 24 then. All right, Doctor, thank you.

Mr. Rogers: That's all.

The witness stands aside.

DR. JESSIE M. TUCKER, JR. called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

2/8/68 page 46 } DIRECT EXAMINATION

By Mr. Ellett:

Q. Dr. Tucker, give us your full name?

A. Jessie M. Tucker, Jr.

Q. Dr. Tucker, what is your profession?

A. I am a medical physician and a general practitioner at Huddleston, Virginia.

Mr. Ellett: Mr. Rogers, will you waive the qualifications of the Doctor?

Dr. Jessie M. Tucker, Jr.

By Mr. Rogers (interposing):
Q. I would like to know just simply this: Aren't you the same type of doctor as the Doctor who was in front of you? Dr. Clapsaddle.
A. A general practitioner.
Q. You all do the same type of practice?
A. The same type of practice, yes, sir.

Mr. Rogers: All right.

By Mr. Ellett (continues examination):
Q. All right. Dr. Tucker, in the course of your practice, did you have an opportunity—

By The Court (interposing):
Q. Where is your residence?
A. At Huddleston, Virginia.
Q. You practice at Huddleston?
A. Yes, sir. I am a country doctor.

2/8/68
page 47 } The Court: I just wanted to know. You didn't qualify him.
Mr. Ellett: No, sir, I didn't. I failed to.

Q. (continued) Dr. Tucker, when did you first come in professional—professionally come in contact with Mr. Malcolm Cundiff?
A. For this accident or prior to this? Because I knew him before.
Q. For this accident.
A. All right. On November the 23rd, 1965.
Q. All right. Did you take a history from him at that time?
A. I did. And of course, I—all this had preceded that you have just heard, and so he just gave me a history of the accident itself.
Q. Ahum.
A. And told me that apparently following an accident in September of 1964, by a week or two weeks, he began to have pain in the mid dorsal region, which is the mid chest region in the back (indicating), with occasional extension over the right side of the chest. In other words, the pain would come around through the right side of his chest. And he was given a brace.
He told me he had seen Dr. Clapsaddle, but he was in the process of the year that had gone by or a little over a year

2/8/68 page 48 } that had gone by, that he had seen an orthopaedic surgeon in Roanoke who had given him a brace. But that he had had to quit work October 7th, 1964 because of the discomfort of the pain.

He told me at that time—now this was November 23rd, 1965, and the accident happened in 1964—he told me he had not worked since October the 7th, 1964 and stated that as long as he was in a recumbent position he had very little trouble, but upon standing and with continued body movement, the pain became almost unbearable.

He was extremely tender to pressure upon deep pressure—this is manual pressure—at the areas of D-6 and D-7. Now these are vertebral bodies—in other words, you count from the cervical and then you count down the thoracic or dorsal spine, and on the 6th and 7th areas there was a great deal of pain upon deep pressure. There was a good deal of crepitus and a popping type of sensation with deep pressure pushed on the verbetra. He had had myelograms which were negative. Now these are x-rays of the spine. This is where you inject a dye into the lower part of the spine and the dye is, well, you put it in in a lying down position and the dye is run toward the neck region and you find where the negative shadows may be, and these were all negative.

Now this is about the history I have up to this time.

2/8/68 page 49 } Q. Now, Doctor, if you will review your file just briefly, can you give us the approximate number of visits that Mr. Cundiff made to you?

A. 60 visits. About 60 visits in total.

By The Court (interposing):

Q. 60?

A. 60, yes, sir.

By Mr. Ellett (continues examination):

Q. Dr. Tucker, while he was under your care, did you refer him to any other doctors?

A. Yes, sir. I first referred him to Dr. Jack Buton who is a neurosurgeon in Lynchburg; and Dr. Buton found approximately the same.

Mr. Rogers: If Your Honor please, I object to what Dr. Buton found.

The Witness: All right, excuse me.

By The Court:

Q. You referred him to a neurosurgeon?

A. Yes, sir. Well, can I tell you that he didn't agree with me and that I sent him to another one later on?

Mr. Rogers: I would object to that.

By The Court:
Q. Well, you sent him to another neurosurgeon after Doctor—
A. Buton, yes, sir.

2/8/68 By Mr. Ellett (continues examination):
page 50 } Q. And who was the other neurosurgeon that you referred him to?
A. Dr. Charles E. Troland who was Professor of neurosurgery at the Medical College of Virginia.

By The Court (interposing):
Q. Dr. Charles E. who?
A. Troland. T-r-o-l-a-n-d. Charles E. Troland.

By Mr. Ellett:
Q. Now, do you know for a fact that after he was referred to Dr. Troland that he was operated on by Dr. Troland?

Mr. Rogers: Now, if Your Honor please, I object.
The Court: If he knows it, he can say.

Q. Did you see him afterwards?
A. Yes, sir.

The Court: All right.

By Mr. Ellett:
Q. Go ahead and answer it, Doctor.
A. I saw him in the hospital in Richmond afterwards.
Q. Well, you did see him in the hospital?
A. Yes, and talked with Dr. Troland and Dr. Troland told me what he found.

Mr. Rogers: I object to that.

By The Court:
Q. If you know what he found—he had an operation?
A. Yes, he had an operation.

2/8/68
page 51 } By Mr. Ellett (continues examination):
Q. And did you all discuss this in medical consultation, one with the other?

A. Yes, sir.
Q. And what did Dr. Troland find?

Mr. Rogers: If Your Honor please, I object to that.
The Court: Well, if he had consultation with the Doctor after seeing this patient, I think he has a right to tell it.
Mr. Rogers: Save my exception, please.

By Mr. Ellett:
Q. Go ahead, Doctor?
A. All right. Dr. Troland found an osseous ridge or a calcification or a ridge along the bodies of the—may I refer to my notes on this, on my letter?

Mr. Rogers: You might just as well read his report.
The Witness: No, I'm not going to read it.
The Court: Refresh your memory.
The Witness: Yes.
The Court: If you can find it, you can tell what the conversation was and what his report was.

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The Witness: Because he did decompress the nerve roots. Now these are technical terms and I will have to do my best to explain it so that you understand it.
The Court: Well, you know what the condition is that you found.
The Witness: He found a calcification or a ridge of calcium that was abnormal and shouldn't be there extending from the part of the vertebral body beneath the periosteum. Now, these terms, I don't know how to explain all of them to you, but I can give you a little more simple definition if you let me just—
The Court: I think I know what you're talking about.
The Witness: All right.
Mr. Rogers: If Your Honor please, may I ask one question of the Doctor?
The Court: Yes, sir.

By Mr. Rogers:
Q. Dr. Tucker, these things were what Dr. Troland found. How do you know that he found those things?
A. How do I know he found them?
Q. Yes, sir.
A. Well, he wrote me a letter. I talked to him in medical consultation.

Dr. Jessie M. Tucker, Jr.

Q. He told you these things?

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A. These things were discussed after he was operated on, and I saw him in the hospital. These were told me, and I have no other way of knowing it.

Q. All right.

A. It's impossible to tell this type of thing on x-ray.

Q. I understand, sir.

A. And I cannot know—no one could show you x-rays of this.

Mr. Rogers: I understand. I just wanted to find out.

By The Court:

Q. In brief, what he found was a calcium formation which had to be removed?

A. No. The calcium was, or the formation was beneath this periosteum and removal would only bring back another calcification in the same spot. So, in other words, or in order that these be, or that the pain be relieved, that the pain fibers at D-5, 6 and 7 on the right were severed, because the calcification was pressing on the nerve roots here (indicating).

By Mr. Ellett (continues examination):

Q. All right, Doctor. After he was operated on by Dr. Troland, did you see, or have you seen Mr. Cundiff since that time?

A. Yes, sir, many times.

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Q. Is he still experiencing discomfort and pain?

A. Some, but nowhere near as much. He is now able to drive. Well he was driving a bakery truck and now I understand he's been promoted to supervisor. He does have some pain, but nothing like he had at that time.

It is more, at the present time, more of a muscle type of pain, but he has a numbness where the sensory fibers or the nerve fibers were cut from the area of the spinal cord, anteriorly or around the chest to the mid-line (indicating).

Q. All right. Dr. Tucker, from the medical history that you took from Malcolm Cundiff and your examination and your analysis and your consultation, can you say with reasonable medical certainty that the injuries he received was the result of the accident, the automobile accident in which he was involved on September 4th, 1964?

A. I believe and I have no doubt about it.

Q. You have no doubt about it?

Dr. Jessie M. Tucker, Jr.

A. I have no doubt about it, and if I may, I will discuss it a little bit, of the pathology or the process that went on, if that's all right with you and if it's all right with him.

Very often we see people that were in automobile accidents maybe a month or maybe six weeks before—

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

The Court: We are not interested in what the Doctor thinks.

2/8/68 The Witness: I'm only trying to explain. I can't tell you this if I told you—

page 55 } Q. You say that with reasonable medical certainty you could relate that to the accident?

A. I can, yes, sir.

Mr. Rogers: I think he answered the question, Judge, and I don't think you need to have his knowledge of the accident.

The Court: That's what he asked him.

By Mr. Ellett (continues examination):

Q. All right. Doctor, in your opinion will Mr. Cundiff suffer permanently from the injuries that he received?

A. He will.

Mr. Rogers: Unless he can state it with reasonable medical certainty.

The Witness: I know he will.

By Mr. Ellett:

Q. You know he will?

A. I know he will.

Mr. Ellett: I think that is pretty good reasonable medical certainty.

By Mr. Rogers (interposing):

Q. And you are a general practitioner?

A. Yes, sir.

By Mr. Ellett (continues examination):

2/8/68 Q. Dr. Tucker, in the type of injury that you determined that Mr. Cundiff experienced, in your

page 56 } opinion, or is it a fact that these injuries did not manifest itself until sometime, in some cases, until sometime after the traumatic experience?

A. Yes, sir. This is what I was trying to explain a minute ago.
Q. All right. Would you explain it?
A. If it's all right, may I give you an illustration?
Q. Go ahead.

The Court: Don't give any illustrations.
The Witness: Don't?
The Court: Do not give any illustrationss
The Witness: All right, then I will say that at the time of the accident, apparently he had a break of the bony substance beneath the periosteum. Do you understand what I'm talking about?
The Court: Yes.
The Witness: And very slowly, and it takes possibly, as it does in any broken bone—and unless you break the periosteum there is no pain, but once you break the periosteum there is pain. But apparently he had a minute crack under the periosteum, which takes some six weeks to develop into the full process of the region that we found, or—excuse me. That was found at the operation and that I was told about.
2/8/68 It takes some six weeks for this to manifest itself,
page 57 } and I believe you will find not from—you will find out from Mr. Cundiff that if you took—
The Court: This part is objectionable.
The Witness: All right. Excuse me.

By Mr. Ellett:
Q. Dr. Tucker, in your opinion, you say with reasonable medical certainty that Mr. Cundiff will, as a result of these injuries, have to seek further medical attention, can you say that?
A. From time to time, yes, sir.

Mr. Ellett: All right, sir, answer any questions Mr. Rogers might have.

CROSS EXAMINATION

By Mr. Rogers:
Q. Dr. Tucker, what sort of blow did this man receive to his back as described to you?
A. None.
Q. Received no blow at all?
A. It need not be his back, it need not be this.

Dr. Jessie M. Tucker, Jr.

Q. All right.
A. All right, he didn't receive a blow to his back.
Q. He did not tell you of any?
A. No, sir, he did not tell me such.
Q. All right. Now could this problem have re-
2/8/68 sulted from any sort of strain?
page 58 } A. You want me to answer "yes or no"?
Q. Yes, sir. Did—Dr. Clapsaddle didn't have any difficulty with the question.
A. No.
Q. He could not—it could not develop from a strain?
A. No.
Q. Well, you disagree then?
A. You're going to talk about something, and there's a difference in the degree of a strain and a tremendous force that is put on somebody. Now if you talk about a strain like a strained back, in picking up a tire to put it on, then this is entirely different than somebody who is grabbing the steering wheel and gets a lick from the front and it jerks his body. Now these are also strains, but this is the degree of severity of the strain.
Q. I'm asking you as I asked Dr. Clapsaddle, whether or not the difficulty he had could have resulted from any sort of strain?
A. A severe strain, yes, sir.
Q. Now, Dcotor, then you would disagree I take it with Dr. Clapsaddle when he said it could result from any sort of strain?
A. Yes, sir.
2/8/68 Q. Dr. Clapsaddle is wrong in your judgment?
page 59 } A. Well, I didn't say that.
Q. If you *digress*—
A. We disagree.
Q. And in your opinion he's wrong?
A. We disagree.

The Court: That's sufficient I think.

By Mr. Rogers:
Q. Now what sort of severe strain would this take? Would it take a trauma as such?
A. It would take a strain strong enough to break a bone.
Q. Now, so a person involved in an accident would have to receive a pretty tough strain, would he not?
A. A fairly severe strain.

Mr. Rogers: That's all.
Mr. Ellett: That's all.
The Court: Have you all finished with Dr. Tucker?
Mr. Ellett: Yes, sir.
The Court: Are you finished with him, Mr. Rogers?
Mr. Rogers: He may be excused.

The witness stands aside.

(Thereupon, a recess was taken from 11:20 to 11:30 o'clock A.M.)

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page 60 } MRS. JEWELL CUNDIFF called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellett:
Q. Give us our name, please, ma'am?
A. Jewell Cundiff.
Q. How old are you, Mrs. Cundiff
A. I am 41.
Q. Are you the wife of Malcolm Cundiff

Mr. Davis: Will you speak up so that Judge Jones can hear you and we can hear you?
The Witness: Sir? What was the question?

By Mr. Ellett:
Q. Are you the wife of Malcolm Cundiff, the Plaintiff in this suit?
A. Yes, sir.
Q. Mrs. Cundiff, were you and your husband on September 4th, 1964 when this accident occurred?
A. Yes, sir.
Q. Who else was with you?
A. My two daughters and son.
Q. And where had you all been?
A. To a football game.
2/8/68 Q. And I believe that, as the evidence has re-
page 61 } vealed, this accident happened down at the inter-

section of Route 40 with Perdue Lane, is that correct?

A. Right.

Q. Which way were you and your husband proceeding?

A. We was going east.

Q. On Route 40?

A. On Route 40.

Q. Mrs. Cundiff, as a result of this accident, were you taken to the Franklin Memorial Hospital?

A. Yes, sir.

Q. Was your daughter taken there?

A. Yes, sir.

Q. Did Mr. Cundiff go to the hospital?

A. No, sir.

Q. Mrs. Cundiff, I will ask you if this is a statement for $2.50 (indicating)? Do you want to see this, Bob?

Mr. Rogers: I think I have seen it. I don't think there's any question about it.

If Your Honor please, we will be happy to stipulate that a bill was rendered for $2.50 for emergency room examination of Mrs. Cundiff from the Franklin Memorial Hospital and a bill also for $5.00 from the Wolfe Medical Group—whoever the doctor there was.

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Mr. Ellett: All right. That is a total of $7.50, as far as Mrs. Cundiff is concerned.

Mr. Rogers: That's right.

The Court: You are going into Mrs. Cundiff's release?

Mr. Rogers: I object to the admission of those into evidence because I don't see what they have got to do with the case.

The Court: The only thing we're concerned with of course is the husband's release. However, she did sign this release and I understood from your opening statement that in that release was included a payment to her.

Mr. Ellett: Is that right?

Mr. Rogers: No, sir. I did refer to these bills in the opening statement.

The Court: You are admitting that the bills—

Mr. Rogers: Yes, sir.

The Court: All right, no use to go into that.

Mr. Ellett: All right. I just introduce these as Plaintiff's Exhibits 1 and 2.

Mr. Rogers: Judge, may I point out that on one of the bills is another item of payment for some Wolfe Medical Group for the daughter, Wanda Faye for $5.00.

The Court: That has nothing to do with it.

Mr. Rogers: I just want to point out that this was paid separately by the insurance company.

2/8/68 page 63 } Mr. Ellett: That's right.

The Court: The only thing we are concerned with is the amount of Mrs. Cundiff.

Mr. Rogers: That's right.

(Two bills referred to above were received in evidence and marked "PLAINTIFF'S EXHIBITS NOS. 1 and 2 respectively".)

By Mr. Ellett (continues examination):

Q. Mrs. Cundiff, the evidence shows that you with Mr. Cundiff both signed a release on September 15, 1964, which was 11 days after this accident. Prior to the signing of this release, did Mr. Cundiff ever express to you or in any way complain about being injured in the automobile accident?

A. No, sir, he did not.

Q. After the 15th of September, do you recall generally say in time when he began to complain about his back?

A. I can't say. I couldn't say.

Q. Was it sometime you think prior to the 28th of September, when he went to the doctor?

Mr. Davis: You're leading the witness.

The Court: You are leading.

Mr. Ellett: I agree.

Q. (continued) But you know that prior to the 15th that he made no complaint to you?

2/8/68 page 64 } A. No, sir.

Q. Or none of his actions indicated that he might be injured in the accident?

A. (There was no response.)

Q. Mrs. Cundiff, what had been—after this trouble developed, just tell us briefly from what you observed as a layman of Mr. Cundiff's condition, as to whether he apparently was uncomfortable or whether he apparently suffered as a result of this?

Mr. Davis: Your Honor, this has nothing to do with it.

Mr. Ellett: I think—this goes to the extent.

The Court: Well, it is, but the Doctor said he was suffering from a back injury to the lumbar section.

Mr. Ellett: All right, Mrs. Cundiff, that's all.

Mr. Rogers: We have no questions.

By The Court:
Q. Let me ask Mrs. Cundiff a question. Mrs. Cundiff, did you—you saw this release?
A. Yes, sir, I did.
Q. Was it brought home to you?
A. Yes, sir.
Q. Did you read it?
A. I glanced over it.
Q. All right. Do you know whether your hus-
2/8/68 band read it?
page 65 } A. No, sir, I wouldn't know because it was done away from home.

The Court: All right.

The witness stands aside.

MR. MALCOLM J. CUNDIFF the Plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellett:
Q. Mr. Cundiff, just for the record, would you give us your full name?
A. Malcolm Joel Cundiff.
Q. Mr. Cundiff, at the time of this accident, how old were you?
A. 38.
Q. What was the state of your health at that time?
A. Good.
Q. Prior to the time that—prior to the accident, had you in any way injured your back?
A. No, sir.
Q. Had you ever experienced any back trouble at all?
A. No, sir.
Q. Where do you live, sir, Mr. Cundiff?
2/8/68 A. I live on over in the Hardie section of Frank-
page 66 } lin County.
Q. And how many children do you have?
A. Three.
Q. I believe that on September the 4th, 1964 you were the

driver of the automobile that was involved in the accident, is that correct, sir?

A. Yes, sir.

Q. After the impact and after the accident occurred, were your wife and your daughter, with your wife and your daughter, taken to the hospital?

A. Yes, sir.

Q. Any reason that you didn't go?

A. I didn't have no reason to go. I didn't—as far as I knew I didn't have any injury that I knew about, so there was no reason for me to go.

Q. What did you do, did you just stay there and take care of the automobile?

A. I stayed there and got the automobile moved, and after the automobile was moved I got the State Trooper to carry me to the hospital and I made my brother pick up my wife and daughter and carried us all home.

Q. Now, Mr. Cundiff, just explain to the Court and Jury how it came about that you came in contact with the adjustor for Nationwide Insurance Company?

2/8/68 page 67 } A. Well, I waited for a few days and I didn't hear anything from them. I called the adjustor for my insurance company and asked him about it, and he gave me the name of the insurance adjustor for Nationwide.

I called him up over the telephone and he asked me to come if I could—

Mr. Rogers: Now, if Your Honor please, I'm going to have to object at this point, and keep objecting. I would rather not keep objecting, so the witness can be instructed not to testify as to what somebody else said.

The Court: Well, he's supposed to testify as to what he knows. Actually, if he had any conversation with your adjustor he may tell it.

Mr. Rogers: I beg your pardon?

The Court: Any conversation with your adjustor he may tell about.

Mr. Rogers: Well, I object very strenuously.

The Court: But he can tell what—

Mr. Rogers: I think he can testify to what he said, if Your Honor please, but I would object to his stating what Mr. Martin said.

The Court: Well, not what Mr. Martin—he's the third person.

Mr. Rogers: He's an insurance adjustor and
2/8/68 that would be clearly hearsay.
page 68 } The Court: He can tell about his negotiations.
The Witness: How can I tell what was said if I can't tell what Mr. Martin said?

Mr. Rogers: Well, I'm going to object to it.

The Court: Who is Mr. Martin?

Mr. Rogers: He's the adjustor for Nationwide, if Your Honor please.

The Court: Nationwide's adjustor.

The Witness: Yes.

The Court: That was who he negotiated with in regard to this settlement?

Mr. Rogers: Yes, sir. And I think that the witness has a perfect right to testify what he said, but I don't think he has a right to testify what the other individual said. I think the other individual should testify to that.

The Court: I think we want to find out what went on in regard to the settlement.

Mr. Rogers: Yes, and I think that person ought to testify.

The Court: And I think he can tell what the negotiations were in the settlement or compromise. That is what this is mentioned here.

Mr. Rogers: Yes, sir.

2/8/68 The Court: And I think he can tell that. He
page 69 } couldn't tell it without—

Mr. Rogers: Well, he was getting ready to say what was said to him over the telephone by Mr. Martin, and are you going to allow—

The Court: Let me bring him in the office and see what he's going to say. That's the best way I can do it.

Mr. Rogers: All right.

IN CHAMBERS AT 12:00 NOON

(Out of the presence of the Jury.)

The Court: All right, let him go ahead and answer the question.

The Witness: I've got to say what Mr. Martin said before I can tell what I said.

By Mr. Ellett:

Q. Right. Go ahead.

Mr. Malcolm J. Cundiff

By The Court:

Q. You contacted Mr. Martin. That's when you were testifying.

A. Yes, over the telephone. And he informed me, or asked me the question: "If I could come by his office," and I told him I could. I went by his office and the next morning, which was on the 15th of September, and he made a record of my statement pertaining to the accident.

2/8/68 page 70 } He brought this release out and told me I'd have to sign it before that he could pay me for fixing the automobile. I said, "All right". So I signed it. Well, he called this girl out of the office there to witness my signature, and he says, "Now your wife will have to sign it before you can get your check".

He said, "Will you take it home and get your wife to sign it? And get it back to me as quick as possible." I said, "I will". And nothing was explained to me other than I was told that I had to sign a release to get paid for my automobile, and so I could get it fixed.

Mr. Rogers: Now, if Your Honor please, the Defendant, who of course is the individual who is sitting in the Courtroom, Michael Marshall respectfully objects to this testimony as being hearsay testimony of a third party.

The Court: No, sir, this man was acting for his insured, who was Mr. Marshall, and Mr. Marshall has never come into the picture at all. He negotiated everything with Mr. Marshall's insurance agent.

The Witness: I never saw Mr. Marshall from the night—

The Court: Wait a minute.

The Witness: Excuse me.

2/8/68 page 71 } The Court: And this whole thing grows out of the insurance company and not from Mr. Marshall himself. It was done for his benefit and they had a contract—I assume they had a policy on him, and while the policy is not in evidence, and for all that I have ever seen, gave the insurance company the right to negotiate for settlement of these things. That is where the whole thing arises, is the negotiation between this man and Mr. Marshall—I mean Mr. Martin.

Mr. Ellett: Mr. Martin.

The Witness: Martin.

The Court: Martin. The whole negotiation was between those two, isn't that true?

Mr. Rogers: Yes, sir, but the point I'm making, and I am not making it well, is that Mr. Martin is not a Defendant in

this case, nor is the insurance company a Defendant in this case, and that his testimony is hearsay; the testimony of this witness, Mr. Cundiff, as to statements made by Mr. Martin is hearsay, and I don't know of any rule under which it is admissible. How could you ever get a negotiated—

The Court: Do you admit that that man was acting as a stranger, that Mr. Martin was acting as a stranger to this? And if he was, then he had no right to negotiate a release. And you have got an action against Mr. Martin.

2/8/68 page 72 } Mr. Rogers: Just save our exception then

The Court: But I want you to answer that question.

Mr. Rogers: I didn't hear you, Judge.

The Court: My question was this: Are you contending that Mr. Martin, the agent or the adjustor for the Nationwide Insurance Company, was an absolute stranger to this thing?

Mr. Rogers: Judge, this isn't a part of the evidence really. I will say to you that it was—that he was not a stranger, but this isn't a part of the evidence, I think. What I'm saying, if Your Honor please, is that Mr. Martin should have a right to testify.

The Court: Do you want him to bring the policy in to show that Mr. Marshall was insured by Nationwide, and that Nationwide was acting for him and for the Company in sending this? Because if you do I will give him an opportunity to bring it in, then that will make him a party in interest, acting for Mr. Marshall and for his Company.

Mr. Rogers: I'm just saying, if Your Honor please, I think Mr. Martin should be the one testifying and that Mr. Ellett should have subpoenaed Mr. Martin and have him here as a witness.

The Court: I can't see that. If you want to say that he's a stranger to the proceeding, yes.

2/3/68 page 73 } Mr. Rogers: Judge, I don't think it is really up to me to say.

The Court: All right. Mr. Ellett, you will have to prove your insurance, whether this man had insurance and that Mr. Martin had a right to show that he had insurance, and he had a right to act for him. Then you can put this man on to answer these questions.

Mr. Ellett: Judge, is that—

The Court: Let me see the Pleadings. Go out here and get the Pleadings, please.

Mr. Rogers: You want your original file.

The Court: Yes, the original Pleadings, that is the crux of

it. That's the crux of the whole case. If he's going to deny liability on the policy, that's another thing.

Mr. Ellett: But they haven't done that.

The Court: You are admitting in here and you're claiming that this release is in evidence.

Mr. Rogers: Yes, sir.

The Court: You are adopting the release as your own.

Mr. Rogers: Yes, sir.

The Court: And the whole thing is predicated on a mutual misunderstanding or mistake between the adjustor for the insurance company and also for Mr. Marshall, all the way through here. I think it is so clear that a wayfaring person can see that Mr. Martin was being negotiated—that Mr. Marshall was being negotiated and his interest was being protected or attempted to be protected by Mr. Martin, who was the agent for the insurance company. Now if you want to deny it—you haven't denied this, that there wasn't insurance.

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Mr. Rogers: I don't deny it.

Mr. Ellett: He admitted it in the opening statement.

The Court: That's right, you did in your opening statement, so I would have to let in any talk between Mr. Martin —I mean Mr. Martin and Mr. Cundiff, and have that be admitted.

Mr. Rogers: all right, sir, note our exception.

(Thereupon, Court, Counsel and Plaintiff returned to the Courtroom at 12:08 o'clock P.M. where the following occurred before the Jury:)

By Mr. Ellett (Continues examination):

Q. I believe I asked you originally how you came in contact with the adjustor for Nationwide Insurance Company?

A. Over the telephone.

Q. I believe that you stated that you had called your insurance agent?

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A. That's right.

Q. And now pick it up from there and tell us what happened?

A. All right. I called my insurance adjustor for my insurance company, and asked him a question: "How I could get in touch with him, what was to be done?" And he gave me the name and telephone number, and I called this Mr. Martin up and he asked me the question: "If I could come by his office". I told him, "I could".

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I went by his office the next morning and he brought—he made the report of my statement pertaining to the wreck, brought the release out—this paper—and asked me to sign it. Said, "I'd have to sign it before he could pay me for fixing the automobile". He had the girl to witness it. I signed it, she witnessed it, and he asked me, "Could I take it home," said, "my wife would have to sign it before he could give me the check. And if I would take it home and return it to him as soon as possible, he'd give me the check for the automobile."

Q. All right. As I understand it, you had called Mr. Martin and he asked you to come to his office?

A. That's right.

Q. Now when you went to his office, Mr. Cundiff, prior to that time had you obtained two estimates for the repair to your automobile?

A. Yes, sir, I had.

2/8/68 page 76 } Q. Where did you obtain these two estimates?

A. One from the Wickline Chevrolet Corporation here in Rocky Mount, and one from Nickle's Body Shop here in Rocky Mount.

Q. I had you a copy and ask you if this is a copy of the estimate that you received from Wickline(handed to the witness)?

A. Yes, sir.

Q. And how much was that estimate for, the total?

A. $306.20.

Q. All right, where did you receive the second estimate?

A. From Nickel's Auto Body Works here in Rocky Mount.

Q. And what was the amount of that estimate?

A. $272.12.

Mr. Ellett: All right. I would like to introduce these.

Mr. Rogers: I have no objecton.

Mr. Ellett: As Plaintiff's Exhibit 3 and 4.

(Estimate from Wickline Chevrolet Corporation in the sum of $306.20 referred to above was received in evidence and marked "PLAINTIFF'S EXHIBIT NO. 3". Estimate from Nickle's Auto Body Works in the sum of $272.12 referred to above was received in evidence and marked "PLAINTIFF'S EXHIBIT NO. 4".)

2/8/68 page 77 } By Mr. Ellett (continues examination):

Q. Mr. Cundiff, as I understand it, then you took the two releases to Mr. Martin at his request, is that correct?

Mr. Malcolm J. Cundiff

A. That's right.

Q. All right. Now when he brought the release—I mean the estimates—and he brought the release out, did he ever read you the release?

A. No, sir.

Q. Did he ever explain it to you?

A. No. There was no explanation given to it, other than I supposed to sign them before he could pay me for fixing the automobile.

Q. In other words, it was your idea at that time that he was paying you for the automobile?

A. Well, so far as I knew, that was all the damage, so that's all I figured I was getting paid for.

Q. Did you have any conversation as to the—as to your wife's hospital bill in the amount of $7.50?

A. Yes. He asked, or added the estimate on the automobile and the $7.50 for her bill altogether, and—

Q. In other words, he took the lower of the two estimates and added the $7.50?

A. That's right.

Q. This is how he arrived at the amount of $279.62?

A. That's right.

2/8/68 page 78 } Q. Did you read the release, Mr. Cundiff, before you signed it?

A. Just glanced over it roughly, didn't read it word for word, no.

Q. How much education do you have, Mr. Cundiff?

A. I finished the 7th grade.

By The Court (interposing):

Q. 7th grade?

A. Yes, sir.

By Mr. Ellett (continues examination):

Q. Now at the time that you signed this release, which I believe was on the 15th of September, did you know or have any reason to believe that you had been injured in this automobile accident?

A. No, sir, none whatsoever.

Q. Did you and Mr. Martin ever discuss this fact?

A. No, sir.

Q. Did you ever discuss the fact that the release that you were signing stated on the fact of it that you were releasing unknown injuries?

A. No, sir, we did not.

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Q. If you had known at that time that you were injured, would you have signed the release?

A. No, sir. I didn't know there was no such thing as unknown injuries.

2/8/68 page 79 } Q. But tell the Court and Jury once again what your impression was that you were being paid for with this check?

A. I was being paid for the lowest estimate on my automobile, plus the $7.50 for my wife being examined at the hospital. That's all I got paid for.

Q. Now I believe that you took the release home, is that correct?

A. That's right.

Q. Did your wife sign it?

A. She did.

Q. I believe that Mr. Rogers has stated a separate check was given for the $7.50 for the daughter, is that correct?

A. That's right.

Q. Did you and your wife execute a release for her?

A. We did.

Q. Now, Mr. Cundiff, when did it first—can you give us some approximation when did it first occur to you, or when did you first start having back pain after this accident?

A. Oh, it was something like a week or something of the sort before I *want* to the doctor. It just crept up on me so slow I couldn't specify it right to the date. The thing had just, in a period of three or four days or four or five, it just gradually crept up on me, and over a period of four or five days or a week or so, it just got so bad I went to the doctor.

2/8/68 page 80 } Q. Is that, you mean that was after you signed the release?

A. That's right.

Q. And who did you go to see?

A. I went to see Dr. Clapsaddle in Vincton.

Q. And I believe there's been in evidence, or testimony that Dr. Clapsaddle treated you approximately 24 times?

A. That's right.

Q. And who did you go to after that?

A. I went to Dr. Lewis at the Lewis-Gale Hospital. That was on the recommendations of Dr. Clapsaddle, he sent me.

Q. Do you know approximately when that was?

A. No. I believe it was December the 30th.

Q. Of the same year of the accident?

A. Of the same year.

Q. And you don't recall how many times, approximately, that you saw Dr. Lewis?

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A. No, I don't. It was over a period of about, approximately three months and a half.
Q. Did you see any doctors after seeing Dr. Lewis?
A. Yes, I did.
Q. And what doctors did you see?
A. Dr. Ripley over at the Roanoke Orthopaedic Clinic.
Q. And then do you recall how many times you saw Dr. Ripley?
A. Two times I think is all I went to him.
2/8/68 page 81 } Q. Do you know approximately when you saw Dr. Ripley?
A. I don't recall the dates on that.
Q. It was sometime after you had seen—
A. Dr. Lewis.
Q. —Dr. Lewis?
A. Again, Dr. Clapsaddle recommended that I go to him.
Q. To Dr. Ripley?
A. Yes.
Q. Did you see any doctors after you saw Dr. Ripley?
A. I seen Dr. Jessie Tucker at Huddleston.
Q. All right. Now approximately how many times did you see Dr. Tucker?
A. I believe it was stated 60 times.
Q. Did Dr. Tucker refer you to any other doctors?
A. He sent me to Dr. Troland in Richmond.
Q. Did he send you to Bedford or to Lynchburg?
A. Oh, yes, he sent me to Lynchburg to Dr. Buton, to have a myelogram run on my back. That was I believe in March of—January of '66.

The Court: '66?

By Mr. Ellett:
Q. Did you have anything, Mr. Cundiff, that you can refresh your memory on some of these dates?
A. (Witness extracted paper from pocket.) Yes,
2/8/68 page 82 } went to Dr. Buton in his office for an examination 12/27 of '65. Went to him, back for the myelogram in Lynchburg Hospital 1/10/66.
Q. All right. Now after you saw Dr. Buton, did you see any other doctors?
A. Dr. Tucker sent me to Dr. Troland in Richmond.
Q. All right. How many times did you see Dr. Troland, that you can recall?
A. I made one visit to his office and I believe that was

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12/29/66, and he examined me and told me I'd have to have an operation. And he made arragements for me to go to Richmond Hospital and—

Q. Do you recall whether Dr. Troland had x-rays made at that time?

A. Dr. Troland had x-rays made.

Q. All right. Do you recall when you went to the Richmond Memorial Hospital?

A. It was on the 11th of January, 1967.

Q. And how long did you stay there in the hospital?

A. 11 days.

Q. All right. What was done to you while you were in the hospital?

A. They operated on my back and as to the details of it I don't know.

Q. Now you were released from the hospital on, I believe you said January the 20th of '67?

2/8/68 page 83 } A. That's right.

Q. Did you have a rehabilitation or recovery period after that?

A. Yes, I did. I was off from work till the 13th or 15th of March.

Q. Now, Mr. Cundiff, after this accident, can you give us some estimate of how many weeks, how many total weeks that you have been off from work as a result of this injuries?

A. I was off from work the total of 76 weeks.

Q. All right. Do you know from what dates that represented?

A. It was from October the 22nd, 1964 to April of '66. I don't recall just the exact date there. And then—

Q. And that was approximately 76 weeks?

A. Well, no. Yes, that's right, 76 weeks.

Q. During '66 were you off again from work and, if so, what period of time?

A. From December 30th, 1966 to March 15th, 1967, 11 weeks.

Q. So in all you were off a period of 87 weeks?

A. 87 weeks, yes.

Q. Well, why were you off work, Mr. Cundiff?

A. From the back trouble; I couldn't work.

Q. Did this injury cause you any pain?

A. Yes, it did.

Q. Can you describe it to us?

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page 84 } Mr. Rogers: If Your Honor please, I object to this. We are getting into the damage case.
The Court: That is not necessary.

By Mr. Ellett:
Q. Well, just the degree of pain that you had suffered?
A. Well, it just would get so severe that I couldn't keep going. If I just tried to stir around or work around, or even walk around, the more active I was the more severe the pain would get.
Q. Did you obtain any relief after the operation of Dr. Troland?

Mr. Davis: If Your Honor please, that's got nothing to do about this release, his being operated on.
The Court: I don't think that is necessary.
Mr. Ellett: All right.
The Court: You can ask him if he is still unde the doctor's care.

By Mr. Ellett:
Q. All right. Are you still under the doctor's care? Are you still going to the doctor?
A. Occasionally. I mean not too frequent visits, but I was informed by the doctor that I would continue to
2/8/68 have medical aid from time to time.
page 85 } Q. The rest of your life?
A. That's right.

Mr. Ellett: All right. Answer any questions that Mr. Rogers may have.

CROSS EXAMINATION

By Mr. Rogers:
Q. Mr. Cundiff, when did you stop work? Somebody said October of '64.
A. That was on October the 22nd, 1964.
Q. Now who had you been working for at the time?
A. Murray Biscuit Compasy.

By The Court (interposing):
Q. The what?
A. Murray Biscuit Company.

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By Mr. Rogers (continues examination):

Q. Why did you stop work? Was it this—did this work require some lifting or straining or anything?

A. No strain. It just was the activity of stirring around, and the more I'd move the more severe the pain would get.

Q. But you did lift some boxes, didn't you?

A. Sir?

Q. Hadn't you lifted boxes in your work?

A. Oh, the boxes weigh maybe 12 or 15 pounds.

2/8/68 page 86 } Q. What did you do specifically for Murray Biscuit Company?

A. I delivered from store to store, little pound boxes of cookies.

Q. And you would carry these in and larger cartons too, did you not?

A. Well, like I say, 12 or 15 pounds to the carton.

Q. You did this all day long, did you not?

A. That's right.

Q. Now right after the accident, I believe you said, or you stated that you stayed at the scene of the accident, did you not, until the police investigated it and so forth? And your wife and daughter were taken to the hospital?

A. That's right.

Q. And then you did go to the hospital, didn't you? Didn't you go to the hospital to get them?

A. That's right.

Q. And then your brother or somebody took you home, did he not?

A. That's right.

Q. Then did you go to work the following day or the day after that?

A. I went back to work on Monday; this happened on Friday night.

Q. And didn't you work for a period of about six weeks, did you not?

2/8/68 page 87 } A. From the 4th to the 22nd of September. Well, I went back to work then on the 7th and worked until the 22nd of October.

Q. So you worked about six weeks, did you not?

A. That's right, close to it.

Q. And you were able to do your work all right, weren't you? Did you have any trouble doing your work?

A. Yes, I did. After the last couple of weeks on the job I didn't do the job that I should have been doing.

Q. Well, did your back get you—you were carrying, or

what I'm trying to get at: during the first, say the first week you went back to work, were you doing your regular job?

A. The first week, yes.

Q. Carrying heavy boxes?

A. No, not heavy boxes.

Q. Well, 15 pound boxes?

A. Yes, 12 or 15 pound boxes.

Q. And you were putting in a full day, weren't you?

A. That's right.

Q. And did you feel any trouble with your back then?

A. Not the first week, no, sir.

Q. How about the second week?

A. Well, I'd say not the second week.

Q. How about the third week?

A. Well, you're getting now to the point where I say I don't know just the specific day that it started.

2/8/68 page 88 } Q. Well, now what I'm trying to get at is when it started. Do you know whether or when it started —whether you strained your back carrying these things, or it came in this automobile accident?

A. Well, it didn't start when I had the automobile accident, no.

Q. All right, sir. So your back—what I'm trying to get at is: Your back pain didn't come from the automobile accident, did it?

A. No, I didn't say it didn't come from the accident. The doctors say it did.

Q. Well, weren't you lifting boxes and couldn't it have come from straining while you were carrying packages?

A. I wasn't straining myself carrying boxes.

Q. But you were carrying them, weren't you?

A. Yes, but a 15 pound box don't strain you.

Q. Were you carrying them all day long?

A. Well, off and on during the day. Of course, in the process of doing my job.

Q. Had you ever had back trouble before?

A. No, sir.

Q. None?

A. No, sir.

Q. Never had seen a doctor for any back trouble?

A. Not that I can recall right off.

2/8/68 page 89 } Q. As a matter of fact, you went to Dr. Buttery right here, didn't you, for your back problem a couple of years prior to this accident, didn't you?

A. (Witness pondered.) Yes.

Q. I believe you did, didn't you?

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A. Yes, that was a couple of years. I was in the feed business and pulled a muscle in the lower part of my back.

Q. So you did have some prior back trouble, didn't you?

A. One time.

Q. You went to see a doctor about it?

A. (The witness nodded his head.)

Q. You also went to some other doctors, or another doctor than the one you talked about, didn't you? You went to three different bone specialists in Roanoke, didn't you?

A. (There was no response.)

Q. Let me go back a little bit and I'll try to help you. You first started off with Dr. Clapsaddle?

A. That's right.

Q. Did you get dissatisfied with him?

A. No, sir, I didn't get dissatisfied with Dr. Clapsaddle; he sent me to another doctor.

Q. He sent you to Dr. Tucker?

A. He sent me to Dr. Lewis.

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Q. Right. And then Dr. Lewis. Didn't then you get dissatisfied with Dr. Lewis, didn't you?

A. Dr. Lewis told me he didn't know anything to do for me.

Q. I'm not interested in what Dr. Lewis told you. I'm interested in your own reaction, and you asked to see the doctor, didn't you?

A. I went back to Dr. Clapsaddle, yes.

Q. And asked to see another bone specialist?

A. That's right.

Q. And you went to Dr. Ripley then, didn't you?

A. That's right.

Q. And then later you went to see Dr. Ernest Keffer in Roanoke, didn't you?

A. I had a disability insurance and they made an appointment for me to see Dr. Keffer.

Q. All right. And he didn't find anything wrong with you, did he?

A. Well, he told me as far as he was concerned, I might as well go on and forget it.

Q. All right, sir. Then you came on back then and then Dr. Clapsaddle was treating you then?

A. Now would you like for me to relate what happened after I went to Dr. Keffer?

Q. No, you just answer my questions, if you would.

A. All right.

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Q. You went to Dr. Tucker, didn't you, sir, in November of 1965?

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A. That's right.

Q. And isn't he the same type of doctor that Dr. Clapsaddle is?

A. Well, I can't qualify a doctor.

Q. Who sent you to Dr. Tucker?

A. Well, I knew that Dr. Tucker had had a lot of back trouble, and I felt that maybe he would be one that could do something for me.

Q. So you stopped going to Dr. Clapsaddle, is that right?

A. I went to Dr. Clapsaddle and asked him if he thought it would be wise for me to go to Tucker.

Q. He didn't have any objection to that, did he?

A. No, sir, he didn't.

Q. Of course not.

The Court: You will be some time before you finish with this witness?

Mr. Rogers: Are you thinking about lunch, sir? I'll be through probably in about fifteen more minutes I expect.

The Court: Well, I thought maybe we'll try—

Mr. Rogers: I will try to keep it short.

The Court: I hate to break in in the middle of a
2/8/68 witness. I just hate to do that.
page 92 } Mr. Rogers: I don't think it will take much longer.

The Court: I think maybe the Jury would anticipate—maybe we had better adjourn for lunch.

Mr. Rogers: Whatever Your Honor says.

The Court: Let me admonish this witness that he is still on the witness stand and not to discuss this case with anyone, nor permit anyone to discuss it with you while you are on the witness stand. And you are on the witness stand while you go to lunch.

And I admonish the Jury to the same effect, do not discuss this case with anyone nor permit anyone to discuss it with you or in your presence, and be back at 1:30.

Sheriff, dismiss the Jury until 1:30. Adjourn Court until 1:30.

(Thereupon, a recess was taken for lunch from 12:30 o'clock P.M. to 1:30 o'clock P.M.)

AFTERNOON SESSION

(Court reconvened pursuant to the luncheon recess.)

Mr. Malcolm J. Cundiff

The Court: You gentlemen waive the call?
Mr. Rogers: Yes, sir.
Mr. Ellett: Yes, sir.
The Court: Proceed.

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page 93 } By Mr. Rogers (continues examination):
Q. Mr. Cundiff, going back to the time when you executed this release, if I recall your testimony correctly—and I may not—and you may correct me if I don't—you contacted the Nationwide representative, did you not, sir?
A. Yes.
Q. Now this was about 10 days after the accident, was it not?
A. I would say that is—
Q. I think you—
A. —about right.
Q. I think you testified the day you went to see—the day you telephoned Mr. Martin, or got him on the telephone, the following day you went to his office?
A. I think that's right.
Q. And was that the day of the release, September 15th?
A. That's right.
Q. Which I believe was 11 days after the accident of September 4th?
A. That's right.
Q. All right, sir. Now prior to the time that you telephoned Mr. Martin, had you been to the Nationwide office before?
A. No, sir, I had not.
2/8/68 Q. You did not go into that office at all?
page 94 } A. Not before then, no.
Q. So you only went to the office one time?
A. That I can recollect, the one time.
Q. You did not go any more than that?
A. Well, I went one day and then I carried the—
Q. The release back?
A. —the release back, yes.
Q. Prior to that time, had you been in the office before at all, trying to find Mr. Martin?
A. No, sir.
Q. All right, sir. And you were not contacted by Mr. Martin or anybody of Nationwide; you contacted them, did you not, sir?
A. That's right, sir.
Q. So when the money or the draft from Nationwide was

issued to you and you signed the release, it was done at your request, wasn't it, sir?

A. Well, I'd say yes.

Q. And no pressure was put on you to sign that release, was it?

A. Nothing other than he just told me I'd have to sign it to get paid for fixing my automobile.

Q. Well, now did Mr. Martin—or are you saying that Mr. Martin tricked you in any way?

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A. No, I'm not saying that he tricked me, no.

Q. You took the release home and you had plenty of time to read it, did you not, sir?

A. Well, I'd say I could have, yes.

Q. How long did you have it, approximately? 12 hours or something like that?

A. I'd say approximately, yes.

Q. Where were you living at the time?

A. The same place I'm living now, in the Franklin County section of—Hardie section of Franklin County.

Q. And how far is that from Roanoke?

A. Well, I'd say approximately 15 miles from the Nationwide office.

Q. So you had driven 15 miles to see Mr. Martin, had you not, sir?

A. Well, yes and no. I was working in and out of Roanoke at the time.

Q. I see.

A. In other words, I passed there in the process of my work.

Q. I beg your pardon. And then you stopped by his office one day while you were working?

A. That's right.

Q. I see. And then you took the release home. Was it in the morning that you talked to Mr. Martin, do you remember?

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A. It was in the morning that I talked to Mr. Martin.

Q. And then you took the release home and did you return it the next morning?

A. That's right.

Q. So you had the release say about 24 hours, didn't you?

A. Well, I had it in my possession approximately 24 hours.

Q. All right, sir. And I think you indicated in the earlier testimony that you read the release, did you not?

A. I said I glanced over it. I didn't read it word for word, no.

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Q. Well, let me ask you this: You can read, can you not, sir?

A. Yes.

Q. Do you have any trouble reading?

A. No, normally I don't, no.

Q. In your job with the Murray Biscuit Company, did you take orders and write down orders and that sort of thing?

A. No, sir, I just delivered the merchandise.

Q. You delivered the merchandise. How did you know what merchandise to deliver?

A. Well, I just—most of the merchants will tell you what they want.

2/8/68 page 97 } Q. Did you ever have any correspondence with your employer, and in writing, or any of that sort of thing?

A. Nothing more than to send in a report.

Q. You had sent in a routine report?

A. That's right.

Q. And would they send you instructions?

A. No, it was the supervisor who was living in the area, and he gave me my instructions?

Q. He talked to you. But you had no trouble reading the release, did you, sir?

A. Sir?

Q. You had no trouble reading the release, did you?

A. Well, I said I didn't read it word for word. I just glanced over it.

Q. Now, Mr. Cundiff, what is on the top of that release? What is that say?

A. You mean up here (indicating)?

Q. Yes, sir.

A. Says "release of all claims".

Q. And that is in bold print, is it not, sir?

A. Yes, sir.

Q. That means—that meant to you that you were releasing all claims that you had, did it not, sir?

A. Well, at that time the only claim I had that I knew was damage to my automobile.

2/8/68 page 98 } Q. I understand that. But you knew that you were releasing any claim you had, did you not, sir?

A. Well, I say that all I knew of—yes, was for the damage to the automobile.

Q. All right, sir. And you could read this release that you were releasing "Michael Lee Marshall from all claims, de-

mands, causes of action and so forth on account of, or any way growing out of any and all known and unknown personal injuries". You could read that, couldn't you?

A. I'd say I could have, yes.

Q. Well, didn't you read it?

A. I say I didn't read it word for word.

Q. But you knew as a practical matter, Mr. Cundiff, you knew that this released claims as to injury claims as well as damage claims. Now you knew that, didn't you?

A. I didn't have no—so far as I knew, I didn't have no injury claims, and I didn't know there was such a thing as unknown injury.

Q. You haven't answered my question. You knew that that released injury claims as well as property damage claims now, didn't you?

A. Well, I answered it the best I could.

Q. Let me ask you this: Did you not testify that if you had had an injury claim, or if you had known you were injured, you would not have signed that release?

2/8/68 page 99 } A. I think I did.

Q. Why would you not have signed that release?

A. Because if I had a known injury I certainly wouldn't sign the release, when all they paid me was damage to my automobile.

Q. You're saying that had you had an injury you wouldn't have signed that release because it would have released that injury claim. You wouldn't sign that, is that what you're saying, in all fairness, isn't it? Isn't that why you said you would not sign the release, if you had had an injury claim?

A. Well, I'd say yes, because that was all filed, that if I had that claim, yes.

Q. All right, sir.

A. But I didn't have that claim.

Q. Didn't you believe as a practical matter that the release, or this release that you signed covered personal injuries?

A. I didn't have any personal injuries.

Q. I understand that you didn't, but when you signed the release, didn't you know or believe that that release covered personal injuries?

A. Well, it was covering the injuries to my wife, yes, because it was all included in that.

Q. All right, sir. And it would have covered any injuries had you had any, wouldn't it?

2/8/68 page 100 } A. If I'd have had any?

Q. Yes, sir. And didn't you know that that

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release said it would have covered any injuries unknown as well as known? Isn't that what the release says?

A. Well, that's what you say is in it, yes.

Q. You knew later that after you had signed that release and you went to Dr. Clapsaddle, you knew that the release had released your injury claim, now didn't you?

A. Well, no, not for sure I didn't. Not until I went back to the Nationwide office and asked them.

Q. And they told you that it had, didn't they?

A. They told me that it had.

Q. And you thought it had?

A. Well, I had their word for it.

Q. Well, even before you went there you thought that you had made a mistake, didn't you, in releasing that claim?

A. I'd say it's possible I thought I had made a mistake, sure.

Q. You remember testifying in a case you brought against the Continental Casualty Company for your disability benefits, don't you?

A. Yes, sir.

Q. You testified on November 19th, 1966?

A. I don't remember the date, but I remember.

Q. It was sometime after your accident, wasn't it?

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page 101 } A. Yes.

Q. And you remember—it was sometime after your accident, wasn't it?

A. Yes.

Q. And you remember—

Mr. Ellett: Your Honor, I'm going to object to that. It is not part of these proceedings and not any discovery depositions.

The Court: Did you all take discovery in this case?

Mr. Rogers: No, sir. This was a discovery deposition in another case, but—

The Court: Let me see you all in Chambers.

IN CHAMBERS AT 1:43 O'CLOCK P.M.

(Out of the presence of the Jury.)

Mr. Rogers: Judge, just for the purpose of the record, let me see right what this is. This is a deposition for the Defendant taken on November 19th, 1966, in a suit filed in the Circuit

Court of Franklin County by Malcolm M. Cundiff, Plaintiff versus Continental Casualty Company. This suit which was brought on behalf of the Plaintiff by Mr. Ellett, his present Attorney, was to recover, as I understand it, disability benefits

Mr. Ellett: That's correct.

Mr. Rogers: Of course, the Continental Casualty I think had stopped paying him after a while, and the 2/8/68 was defended by Mr. Poff of my office. Now page 102 } I knew nothing about the suit and knew nothing about it. I later secured the deposition and the question I was interested in, or in Mr. Poff in taking the deposition in that case, and of course was not concerned with this automobile accident. He did ask this question, however:

"Was any claim ever presented against the driver of this automobile that struck you?" And the witness, Mr. Cundiff, answered: "Yes, they fixed my automobile."

Mr. Poff asked further: "How about your personal injury claim?" And he answered: "Well, that's where I made a big mistake however".

The Court: He has already said that.

Mr. Ellett: Exactly what he said from the witness stand.

The Court: But he hasn't contradicted it.

Mr. Rogers: No, sir. I just want to reiterate the fact that he thought he made a mistake in signing it, and therefore had released.

The Court: He admitted that he made that statement. Didn't he admit that, Mr. Reporter?

Mr. Ellett: Well, the whole suit is based on the fact he made a mistake.

Mr. Rogers: Well, what I mean, or this is the problem: And why I wanted the Judge to hear this—it's not the 2/8/68 fact that he was mistaken at that time, but the page 103 } fact he says here that he made a mistake in signing the release because it indicates here he knew he had released his claim.

The Court: He said that thing all the way. I think he is saying that all the way through the case.

Mr. Rogers: Well, if he is, then I'm all right. What I'm afraid of and why I wanted to present this in evidence was to show that he knew.

The Court: You used the information ostensibly to contradict him, but you have nothing to contradict because he has admitted it.

Mr. Malcolm J. Cundiff

Mr. Rogers: Judge, he did—I thought he had denied this. I had asked him if he didn't know that he was admitting that he had released all claims, including the unknown personal injury claims.

The Court: Yes, all right. Now, if you're going to contradict him, you have to lay your foundation. And you started out to lay your foundation, and you asked him, "Didn't you testify to this?" And he said, "Yes, sir".

Mr. Ellett: That's right.

Mr. Rogers: Then the only thing I asked him is if he testified in the case, and I haven't—

(The Reporter read the last two questions and answeres in the witness' previous testimony.)

The Court: Well, what are you going to contradict him on?

2/8/68 page 104 } Mr. Rogers: He of course is contending he was mistaken as to the fact of his injury. What he said here when he made a big mistake was not so much the mistake of the injuries, but was the mistake in signing the release. I want to show that he knew after he had signed that release that he had.

The Court: Why didn't you ask him if he made a mistake —but how is that contradicting him? You want to bring in some direct testimony.

Mr. Rogers: I'm not making myself clear, obviously. What I want to show is—I'm just simply trying to show not that he made that mistake in the use of the word, but that he knew.

Mr. Ellett: You asked him that when you cross examined him.

Mr. Rogers: And he denied that he knew he had released the claim as to unknown injuries.

The Court: No, he didn't. He said—wasn't that in there? Did he say in this testimony and you asked him the question: "Didn't you know that in this contract you were releasing unknown injuries?" And he said, "That's what you say is in the contract".

Mr. Rogers: But that is not giving me a direct answer. If he said, "Yes," I would ask him that question back.

The Court: Yes.

2/8/68 page 105 } Mr. Rogers: All right, sir. And I won't go into this, Judge.

Mr. Ellett: I'm going to raise the objection if you want—I think Mr. Rogers wants to get before the Jury that he had a case against the other insurance company.

The Court: What are you trying to do?

Mr. Rogers: I'm trying to show, Judge, that he knew, as he says clearly in this deposition, that he had signed a release releasing all claims.

Mr. Ellett: He hasn't said that in this deposition.

Mr. Rogers: He certainly does. He said, "I made a big mistake".

The Court: Didn't you ask him the question before that?

Mr. Rogers: "Was any claim ever presented against the driver of the automobile that struck you?" "Yes, they fixed my automobile." "How about your personal injury claim?" "That's where I made a big mistake, I reckon."

He is saying here he knew that he was through.

Mr. Ellett: He is not saying that he knew he was through. All he is saying is he made a mistake, that's what the whole suit is based on, otherwise we wouldn't be here.

Mr. Rogers: Well, I'll ask him the other question.

(Thereupon, Court and Counsel returned to the Courtroom at 1:50 o'clock P.M., where the following occurred before the Jury:)

2/8/68
page 106 } By Mr. Rogers (continues examination):

Q. Mr. Cundiff, I have just one more question for you, sir. I just want to make sure I understand it. When you signed this release, you knew that you were releasing all claims for injuries, unknown as well as known, did you not, sir?

A. Well, all I knew that I was signing a release for damages to my automobile, and the claim my wife had for the hospital that she was examined.

Q. But you knew that this release extended to all injury claims of you and your wife, did you not, sir?

A. Well, so far as I knew, yes, because I didn't know of anything else.

Mr. Rogers: All right. Yes, sir, that's all I have.

RE-DIRECT EXAMINATION

By Mr. Ellett:

Q. Mr. Cundiff, let me just ask you one question. When you were operated on, would you get up and point as to where the operation was?

Mr. Malcolm J. Cundiff

A. Oh, it's—it runs from there (indicating back of neck) about, well, I don't know, I'd say approximately 6 inches down my back.

Q. In the higher upper part of your back?

A. That's right, right between the shoulders (indicating).

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page 107 } Mr. Ellett: That's all.

By The Court:

Q. Mr. Cundiff, let me ask you a question. Have your seat there.

Mr. Rogers: Have you finished?

The Court: Have you finished?

Mr. Rogers: Yes, sir.

The Court: Do you have any more questions?

Mr. Ellett: No, sir, I have rested.

By The Court:

Q. When you went to see the adjustor of Nationwide, did you then have the damages for your automobile?

A. Did I what?

Q. Did you then have these estimates for your automobile?

A. Yes, sir.

Q. At whose instance did you get these estimates up?

A. At whose what?

Q. Whose instance, at whose instance did you have the estimates made?

A. I just knew that normal procedure was to get two estimates and turn them in for a claim.

Q. And when you went to see the adjustor on the morning of the 15th or the 14th, whichever morning it was, the 14th or 15th, you then had these estimates in your hand?

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page 108 } A. As well as I remember, yes, sir. That's how he got them.

Q. Did you discuss anything about your wife's injuries?

A. Nothing, no.

Q. Did you have any medical reports from your wife?

A. All I had was the statement from the doctor in the hospital, where they were treated.

Q. Had you gotten that on your own—

A. Yes, sir.

Q. —initiative?

Mr. Malcolm J. Cundiff

A. Yes, sir.
Q. Did he ask you whether you were hurt?
A. No, sir.
Q. Did you say anything about whether you were hurt?
A. No, sir.
Q. And you made no claim at that time as to whether you were hurt or not?
A. No, sir.

The Court: All right, sir.
Mr. Ellett: That's all.

The witness stands aside.

Mr. Ellett: Your Honor, we rest.
Mr. Rogers: May we see the Court?

2/8/68
page 109 } IN CHAMBERS AT 1:53 o'clock P.M.

(Out of the presence of the Jury.)

Mr. Rogers: If Your Honor please, at this stage of the proceedings in Chambers, and without the presence of the Jury, the Plaintiff having rested his case, the Defendant respectfully moves the Court to strike the evidence of the Plaintiff and to enter summary judgment for the Defendant upon the following grounds, and as a matter of law there was no mutual mistake in this case.

First of all, mutual mistake says that it means, "mutual", it takes two to be mutual. The only evidence we have is that of the Plaintiff himself, who says that so far as he now knew he was not injured. That was the purport of the evidence to me.

There is no evidence whatsoever of the thinking, knowledge, opinion or information available of what was in the minds of the insurance adjustor, or the insurance company, whether there was a mistake on the part, or on its part, there is simply no evidence. The only mistake of which there is any evidence at all pertains to the Plaintiff only, and anything beyond this would be entirely speculative. I mean you could speculate that the insurance adjustor may have assumed that the Plaintiff was not injured; we can also speculate that he may have assumed that he was injured. And we
2/8/68 do know that this one thing is certain from the

page 110 } evidence in this case, and that comes from the release itself and from the testimony of the Plaintiff that the release extended to the property damage and also dealt with the permanent injury, and that it was signed by two people. And as to—there was no differentiation as to the property damage or otherwise the Plaintiff himself acknowledged that he knew that it extended to the release of permanent injury, and as a matter of fact, would not have been signed if he had been injured. And therefore he knew that it extended to the injury claims.

And the Plaintiff in effect simply was mistaken perhaps as to his own injuries so far as he alleges, but he knew that that release released all injury claims and he so testified, particularly with respect to his wife.

Now that I may point out also, if Your Honor please, that so far as I know there has been no dispute in fact in this case, and we suggested this point would come up before His Honor. I know of no dispute of the facts. The evidence is rather clear and we haven't denied—there's been no denial of the Plaintiff's version, and therefore there's really no question for the Jury in this case. It is strictly a legal question.

In the case of *Page versus Means,* in 192 Federal Supplement 475, a case decided in 1961, we had this situation—and His Honor is familiar with this case—in which the insurance company paid $100 for permanent injury release as well as property damage. The $100 really was the collision loss, $100 deductible, and the District Court considered all of the evidence and held, which is precisely our position here, that there was no mutual mistake of fact. This Court said:

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page 111 }

"There was no mutual mistake of fact at the time of the release. The words of the release itself covered the situation."

And then it quotes that portion of the release referring to the "known and unknown, foreseen and unforeseen injury". The Court then went on to say at Page 477:

"Thus, it was precisely agreed among the parties that the release was to cover any unknown injuries. There was no mistake by any of the parties. The condition of the Plaintiffs at the time of the release has no importance, and neither does their knowledge or lack of knowledge of any existing physical condition. The release covered all injuries, 'known and/or unknown'."

And the Court pointed out in later discussing it that, "in

fact, Dudley Page," who was the Plaintiff in that case, "in his testimony, repeatedly stated that he believed the release covered permanent injuries; and he put no limitation on this statement that would contradict the wording of the release".

So, if Your Honor please, just to summarize, first of all the Plaintiff has completely failed to show any mu-
2/8/68 tuality. Certainly there's nothing in the law that
page 112 } I know of allows avoidance of a release on the basis of a unilateral mistake. Any avoidance of release on the basis of mutual mistake, just as the Plaintiff has alleged in his Pleadings—I don't have those Pleadings here—but as I recall, he alleged that both the Plaintiff and the insurance company representative, or the Defendant's representative, were mistaken. There has been absolutely no evidence of any mistake on the part of the insurance company in this case. Any mistake with respect to the evidence comes only as to the Plaintiff himself.

And secondly, as the Court points out in this case I have just recited, the knowledge doesn't make any difference since the agreement expressly provided for the release to extend to unknown, permanent injuries as well as to known permanent injuries.

The Court: What do you have to say about this?

Mr. Ellett: Judge, in reply to Mr. Rogers' motion, I am citing from and reading from 71 A.L.R. 2d, Page 89, where it states:

"The distinction between mutual and unilateral mistake does not appear to be particularly important in this context."

I don't think it really makes a whole lot of difference, but in this case the evidence of Mr. Cundiff is uncontradicted and and which has to be accepted as fact, that he did
2/8/68 not know he was injured. And by the same token,
page 113 } it would be impossible for Mr. Martin to know that he had been injured. They never discussed this fact because they never knew it existed.

So it is bound to be based on a mutual mistake; if Mr. Cundiff does not know it, then there is no way Mr. Martin could have known it. Now I think the cases in most of the jurisdictions, including Virginia, hold that where there is a mutual mistake of fact, that it goes to the heart of the agreement of what the parties contemplated and of what factors they were considering at the time that they entered into the release themselves.

I am citing from the *Greyhound versus Metz* case, which said:

"That the doctrine is firmly rooted in equity that when an instrument is so general in its term as to release the rights of a party of which he was ignorant, and which were not in contemplation of the bargain at the time it was made, the instrument will be restrained to the purposes of the bargain and the release confined to the right intended to be released."

In that case they set aside the release and I think going through all these cases that you will find that the weight of the authority is, if there is a mistake of fact, that
2/8/68 it is material. And that the release will be avoided.
page 114 } I will quote again from 71 A.L.R. 2d, Page 89, which says:

"It is equally clear that if the parties to a release were in fact laboring under a material mistake as to the nature or the extent of injuries, relief may be had and a release avoided in most jurisdictions."

Now I think the evidence conclusively shows that there was a mistake of fact. I don't think this can be denied. It had been proven in the evidence clearly and convincingly and without contradiction. Now I think under the evidence in this case, supported by the laws of Virginia, that we are entitled to a summary judgment on behalf of the Plaintiff and ask the Court to enter summary judgment and set the release aside.

The Court: Gentlemen, as I indicated this morning, I have not given as thorough a study of this question as I would like to. I did read some cases. I read two in Virginia before we started this case. The *Seaboard Ice Company against Lee and Corbett versus Bonney,* and it seems that Counsel is basing his case more after the *Ice Company against Lee.*

Mr. Ellett: That's right.

The Court: In that case the release was not unlike the release in this case. It has in it any claims which I now have or may and hereafter may have on account of or growing out of the injuries known and unknown resulting or to result from the accident that occurred on such and such a
2/8/68 date.
page 115 } Then this man Lee, who was the claimant, related in detail and his visits to the doctors and his visit to the attorney for the insurance company, in which he had actually been seen by the doctors there, and the doctors did not relate the injury to the accident at all, that the bursitis or reactivation of a former condition of bursitis.

In the Lee case the doctors testified that the type of injury he received was one which would not show up for a considerable length of time thereafter. That's what it says in this case.

That's what was said in this case. The direct questions which were asked in the Lee case, "did you think you had any personal injury at that time from the accident?" That is, when he signed the release. He said, "No, sir". He signed the release for two visits to the doctor, I think was $6. And the first one was submitted to him for that, and then he wanted something for the loss of the use of his truck and they gave him $100, or $12 a day for the loss of his truck, and $6 for the doctor's bill. Nothing was said by the adjustor or by the claimant or the attorney I believe in the Lee case.

I don't see how I can strike the evidence, gentlemen. I also notice A.L.R. Volume 71, A.L.R. 2d, 71, beginning on Page 85 or 86, that there is a long discourse of, or treatise on avoidance of releases, on mutual mistake, particularly beginning on Page 90. And it makes this statement on Page 92, near the bottom of the page, in the righthand column:

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page 116 } "When the consideration paid for a release was intended as compensation, in whole or in part, for the injuries sustained, and it subsequently developes that a substantial injury existed which was not known to the parties when the settlement was made, and consequently was not taken into consideration in fixing the amount of compensation, the release may be avoided on the grounds of mutual mistake, unless the parties have clearly and expressly agreed that it should apply to unknown injuries as well as to those that were known.

Now, that comes down to a question of fact as to whether or not it was clearly and expressly agreed that this should apply to unknown injuries. It is true that that is in here, just as it was in the Lee case, but I don't known as I could say at the present moment that you are entitled to have the evidence struck. I think it is a matter which I would have to strike the evidence—I mean I would have to overrule your motion to strike the evidence at this time.

Mr. Rogers: All right, sir, note our exception, please, sir, for the reasons stated.

The Court: Respectfully.

Mr. Rogers: "Respectfully," excuse me, yes, sir. (Laughter.)

2/8/68 Mr. Ellett: Judge, I assume you are overrul-
page 117 } ing my motion for a summary judgment on behalf of the Plaintiff?

The Court: Yes, sir.

Mr. Ellett: I take an exception to that also, then we except also on the basis of the *Seaboard Ice* case.

Deputy Sheriff Reginald C. Amos

(At this time Deputy Sheriff Amos was brought into Chambers.)

Mr. Ellett: Do you want to swear Deputy Amos in, Your Honor?

The Court: Now let the record show that Mr. Rogers is putting this witness on in view of the fact that the witness for the claimant—and I have been designating claimant rather than Plaintiff throughout this case—in which he stated that a person was not supposed to—Trooper Riddle testified that a person was not supposed to make a left turn, and after which I instructed the Jury that the question of liability was not involved in this case and that they should disregard any testimony in this case, whether he had a right to make a left turn or not. And now you are asking me to put on this witness in regard to that left turn?

Mr. Rogers: Yes, sir.

The Court: All right, out of the presence of the Jury.

Mr. Ellett: Show my objection and exception.

2/8/68 page 118 } Mr. Rogers: Well, Mr. Ellett has already objected and the Judge has already ruled. I simply wanted to question the witness without the presence of the Jury.

The Court: Yes.

DEPUTY SHERIFF REGINALD C. AMOS called as a witness on behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rogers:

Q. State your name, please?

A. Reginald C. Amos.

Q. What is your occupation?

2/8/68 page 119 } A. Deputy Sheriff of Franklin County.

Q. Deputy Amos, were you employed as such on September 4th, 1964?

A. Yes, sir, I was.

Q. And were you employed as such in connection with an accident which occurred on that day on Route 40, and at the intersection of Route 40 and Perdue Lane in Franklin County?

A. Yes, sir.

Q. Was that in Rocky Mount?

A. Yes, sir.

Deputy Sheriff Reginald C. Amos

Q. For the purposes of speeding it up a little bit, I believe that you were directing traffic?
A. I was.
Q. And I believe you and Deputy Hodges—
A. Hodges.
Q. —and Trooper Riddle?
A. Yes, and Trooper Riddle.
Q. And this traffic that was coming from the parking lot of the football game at the Franklin County High School?
A. Yes, sir.
Q. And this was at night time, I believe?
A. Yes, sir.
Q. After the game?
A. Yes.
Q. What traffic were you directing? Where were you standing, approximately?

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A. Well, you have one man in the center right at the entrance to Perdue Lane.
Q. Who was that man?
A. That was me.
Q. That was you.
A. Then you have one to control Route 40 (indicating), and then you have an officer at the entrance where it comes out from the school, and Route 40 coming down, and that was Trooper Riddle.
Q. Were you standing at the intersection of Route 40 and Perdue Lane?
A. I was standing in the center of Route 40, directly straight across from Perdue Lane.
Q. Did you see the vehicle operated by the Defendant, in this case, Michael Marshall, approach and stop to make a left turn into the school area?
A. Yes, sir, I did. I didn't notice the left turn signal until he done started into it.
Q. All right, sir. Did you give him any sort of signal?
A. I give both cars a signal to go (indicating).
Q. This was both cars coming in opposite directions?
A. That's right, and I was standing in the middle of the road and give the car coming from Rocky Mount the signal to go (indicating), and the one from the forward here (indicating).
Q. And Mr. Marshall's car was headed west, was it not?

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A. Yes, sir.
Q. And then you gave him a signal, thinking he would come behind you?

A. Yes.

Q. And apparently he misinterpreted it and thought you were telling him to go ahead and make the turn, is that right?

A. That's right.

Q. And then the other driver, who turned out to be the Plaintiff in this case, also saw your signal I take it and came forward I take it?

A. That's right.

Q. How far were you from the point where the vehicles collided?

A. Well, I was right at it, almost in it.

Q. And would you describe the nature of the impact? Was it a severe impact or—

A. No, sir, it was a light impact. In fact, I would say neither vehicle was running over, oh—the vehicle coming from towards Rocky Mount, I would say was 4 or 5 miles an hour, and the vehicle coming down the road from, well, that was probably 10 miles an hour.

Q. The one operated by Mr. Marshall, which was making the turn, about 5 or 6 miles an hour?

A. Yes, sir.

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

2/8/68
page 122 } CROSS EXAMINATION

By Mr. Ellett:

Q. Deputy, where was Deputy Hodges standing with reference to where this accident occurred?

A. Well, he would be about 50 feet below where I was.

Q. In which direction?

A. On east.

Q. It would be east of where you were standing?

A. Yes, sir.

By The Court (interposing):

Q. Was he on 40 or on Perdue?

A. He was on 40. We don't have anybody on Perdue Lane. In other words, the man right in it, like I was, controls Perdue Lane (indicating). And then, you know, in other words, I'm supposed to be the man who's supposed to control northerly traffic, and you give a signal to the other officers (indicating). And Trooper Riddle would stop the traffic coming this way on 40 (indicating), and Hodges, would have stopped the school traffic going this way on 40.

Deputy Sheriff Reginald C. Amos

Then I would put Perdue Lane out and then when I stopped Perdue Lane, I give them, each one of them signals for traffic to go both ways on 40.

By Mr. Ellett (continues examination):

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Q. As I understand it, Marshall was going west on 40 and Cundiff—

A. Was going east.

Q. —was going east. And you waved them both to go over at the same time?

A. To go, that's right.

Q. You didn't have any idea Marshall was going to make a left turn in front of Cundiff, did you?

A. Not until he almost made it.

Q. All right, sir, that is—

A. In fact, I noticed it just as he was making it, and I tried to stop the other man, but it was too late to stop either one.

Q. As far as you know, he didn't have his signal on or anything to make a left turn?

A. Yes, sir, I noticed that his signal was on just before the accident. But at the time I was facing mostly towards Rocky Mount, and in other words, I motioned the traffic this way (indicating) and this way (indicating) with this hand, and this way with this one (indicating). And just as I kind of turned a little bit I noticed that he had a signal on and was turning, but it was too late for me to do anything.

Q. But when he started—when you started your motion, you don't know whether he had the signal light on or not, do you?

A. No, sir, I don't.

Mr. Ellett: All right.

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RE-CROSS EXAMINATION

By Mr. Rogers:

Q. The first time you noticed he had the signal light on was when you got a good look at it?

A. The first time I noticed he was already in the turn.

Q. And that was coming subject to your signal?

A. That's right.

Q. So far as you know, there is nothing—you don't know of anything, and there is nothing to let you know he had the signal on before this?

A. No, sir.

Mr. Rogers: All right.

RE-CROSS EXAMINATIN

By Mr. Ellett:

Q. You certainly wouldn't have waved two cars, one to go straight and one to go on a left turn at the same time, if he had the signal on?

A. I didn't wave anything. You see, I was waving that way (indicating), not for a left turn or anything.

Q. Are you saying you were waving to the other officer?

A. No, sir, I was waving both lanes or lines of traffic to move.

Q. To move?

2/8/68 A. To move.

page 125 } Mr. Ellett: All right.

Mr. Rogers: That's all I have, Judge. Do you have any questions?

The Court: No, I don't have any questions.

The witness stands aside.

(The witness left Chambers at this time and returned to the Courtroom.)

The Court: I said you wouldn't go into the evidence of negligence except to the severity of the crash.

Mr. Rogers: No, sir, That's all the evidence we have. We rest, Your Honor. We, of course, renew our motions previously made.

The Court: All right.

Mr. Ellett: I renew our motion for a summary judgment.

The Court: Overruled.

Mr. Rogers: We except to the ruling of the Court.

Mr. Ellett: We except to the ruling of the Court.

The Court: And I go back to the ruling of the *Ice Company against Lee,* and in that case it was a question of fact and the trial Judge heard the case; there was no question of fact, and made the decision of fact. Here we have a Jury to

2/8/68 make that decision, and in the *Lee* case they made

page 126 } the statement, the last paragraph in this Page 253:

"The trial Judge had the opportunity of seeing, hearing and

observing the witness testify and there is ample evidence to sustain his finding."

That was the decree in the Chancery matter. I think this is the same proposition; it is a question of whether or not there was mutual mistake, and I will have to submit the case to a Jury.

Mr. Rogers: Well, you understand we, of course, except to the ruling for the reasons previously assigned.

The Court: And for the same reason I'm overruling the motion made by Mr. Cundiff's Attorney.

Mr. Rogers: Let's go off the record.

(Discussion off the record.)

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

(Instruction P-1 offered by the Plaintiff; and Instruction P-2 offered by the Plaintiff. Both the Instructions P-1 and P-2 were refused by the Court. Thereupon Instruction P-3 was offered by the Plaintiff.)

Mr. Rogers: If you tell them they can consider these factors, then—

The Court: I said "with all other factors". I don't have to detail them.

2/8/68 page 127 } Mr. Rogers: Well, I think you ought to outline them.

Mr. Davis: Judge, we agreed a while ago that if you and I execute a release and there's no question, that you get out in front of the Courthouse—a release of known and unknown injuries—it doesn't make any difference or consideration of whether anything was entered. I mean a dollar could do it.

The Court: This goes to the question of what they had in mind at the time of the contract.

Mr. Davis: This goes into the question of consideration.

The Court: That just says the inadequacy of the consideration is taken into account. Now whether that takes into account a mutual mistake afterwards—that's what has got me. You see, at the time that, what was known to them, it may have been adequate. But what we have got to do is—was this intended for you to take care of something you didn't know or never dreamed about? So I'm going to refuse it anyhow. We have made enough errors already.

Instruction P-3 is refused.

Mr. Ellett: That's all I've got, but I'd like to have the opportunity to object and except to all the instructions.

The Court: What I do is, that I get them all together and then I number them, and then I say what I'm
2/8/68 going to give and what I won't give. And then
page 128 } you make your exceptions to what I don't give.

Gentlemen, we have been discussing instructions and I have attempted to come up and draw up *and* instruction here which I think states the issue, which I have given in Instruction No. 1.

It might be stated that the Plaintiff did not have any instruction drafted at the time we started considering the instructions. However the Defendant did have, or the Plaintiff did have instructions—that is, Malcolm J. Cundiff did have instructions.

Mr. Rogers: Well, if Your Honor please, may I just for the purposes of information and of correcting the record state that I did have instructions. I don't want the Court of Appeals or anyone else to think I came unprepared.

The Court: In other words, you left it to me.

Mr. Rogers: Yes, sir, I left it in your capable hands. I did not tender an instruction or instructions because I don't think the instructions are proper in this case.

The Court: Well, scratch all of this and say that we came to the consideration of instructions and Counsel for Malcolm J. Cundiff, who was in this proceeding has been denominated as Plaintiff, tendered certain instructions which are numbered P-1 through P-4, which the Court did not consider was sufficient to cover the issues in this case, and will be referred to later.

2/8/68 The Defendant, Michael Lee Marshall, after
page 129 } considering the case, did not tender the instructions drafted, but requested the Court to draft an instruction covering its theory of the case. This the Court has tried to do in Instruction No. 1, and to present the issues squarely to the Jury. We have been over this in right much detail and at this time this instruction will be granted and given.

Instruction No. 2 is the one on sympathy and speculation, which there is no objection to, and is offered by the Defendant and will be granted.

The Plaintiff offered Instructions P-1, 2, 3 and 4, which were refused. P-1, first, does not throw any burden on the Plaintiff; it just simply says if he didn't have any—if they didn't have any knowledge of the injuries received, it was a mutual mistake. I don't think that that is the law. I think it has to be in contemplation of the parties at the time. If they didn't intend to cover it, that is future mistakes, that of course would be one thing; if they didn't have it in mind it would be

another. P-2 is almost the same instruction, however it only puts it as to the mistake on the part of Malcolm J. Cundiff, when as a matter of fact it should be a mutual mistake between both parties. P-3 is objectionable not only for the reason of burden of proof, which is not in the instruction, but also at the time that the release was executed there was not known anything of any injuries existing from the accident, and it leaves out the fact that if they just didn't know it, that that would automatically open up the release. I don't think that is the law.

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The second was—p-4 was inadequacy of consideration. It is admitted in this case that nothing was paid for future injuries; it was not in the mind of the parties at the time. Mr. Cundiff didn't claim anything for injuries and didn't ask anything for injuries, and the Court has ruled out, whether wrong or right, the fact that the amount of money he spent, which comes to the question of damages in the trial of the wrongful, or the *torte* action rather, and for these reasons the Court doesn't think that this instruction is proper in this case, so they are refused. Now, gentlemen, you can make your objections to these instructions, and I'm going to permit you to do so.

Mr. Ellett: Judge, in reference to Instruction P-1, I would like to offer an amended instruction, amending P-1 as given. "The Court instructs the Jury that if they believe from a preponderance of the evidence"—I would like to resubmit this instruction, putting in a "preponderance of the evidence" and the rest of the instruction remain the same.

The Court: Well, it will have to be refused on the grounds which I mentioned in it.

Mr. Ellett: All right, I object and except to the refusal of the Court to give the instruction as revised, on the grounds that it clearly states the law as set forth in the *Seaboard Ice* case *verus Lee*, that if the Plaintiff, Malcolm Cundiff, or the adjustor, Algie Martin, had no knowledge of the injuries which in fact did exist, that this was a mutual mistake of fact which would in essence avoid the release and the Jury should be so instructed.

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Counsel for Malcolm Cundiff would also resubmit Instruction P-2 with the following amendment: "The Court instructs the Jury that if they believe from a preponderance of the evidence", with the remainder of the instruction remaining the same.

The Court: And the amended instruction will be refused as offered.

Mr. Ellett: I think the reasons assigned for objecting to the refusal of the Court to give Instruction P-2 are materially

the same as those stated in P-1. And in addition, Counsel states that a unilateral mistake of fact is sufficient to avoid a release and the law does not require that it be mutual, that if one part is mistaken as to a fact, there could not conceivably be a meeting of the minds.

Instruction P-3 is resubmitted with the following amendment: "The Court instructs the Jury that if they believe from a preponderance of the evidence," with the remainder of the instruction P-3 remaining the same.

The Court: That will be refused.

2/8/68 page 132 } Mr. Ellett: And then objection is taken and exception is saved to the Court's refusal to give Instruction P-3 as amended basically upon the same grounds as mentioned, and the same reasons as mentioned for prior *insr tions,* that it sets forth clearly the law and the Jury should be instructed accordingly.

As to Instruction P-4, Counsel objects and excepts to the Court's refusal to grant P-4 and is basing it on the grounds on the holding in the *Seaboard Ice* case *versus Lee,* 199 Virginia at page—beginning at Page 252, at the bottom of the page, in which the Supreme Court of Virginia has said: "While not ordinarily in itself sufficient basis for the cancellation of a contract, inadequacy is a proper element to be considered along with the other circumstances".

I think the Court, and there is no question there, is referring to the inadequacy of the consideration, and this instruction clearly sets forth that the Jury could consider this along with the other elements and determine whether or not the release is invalid.

Judge, I have one objection to Instruction No. 1. Counsel objects and saves the exception to the giving of Instruction No. 1 on the following grounds:

First, that the instruction is faulty in that I believe it is incumbent upon the Defendant or Nationwide Insurance Company—whichever the case may be—to prove by a preponderance of the evidence that it was mutally agreed

2/8/68 page 133 } and understood that the compensation therein should apply to all present as well as future injuries, even though it was unknown that any injuries existed or may have been discovered thereafter. I object also to Instruction No. 1 in the first paragraph on the grounds that there is no evidence to support it, that the only evidence in this respect has been the evidence of Malcolm Cundiff, that it was not agreed, mutually agreed and understood, that the compensation should apply to all future, present and future injuries, whether known or unknown, and the Court should have granted summary judgment to the Plaintiff when the evidence conclusively—which evidence was un-

contradicted—that there was a mutual mistake of fact, being the fact that neither Mr. Cundiff nor Mr. Algie Martin knew that Mr. Cundiff had been injured as a result of this accident and could not, during the *negotatinns* and discussion, have considered this matter since it was unknown to them both. This is purely speculative in giving the Jury the opportunity to speculate on what the parties intended, without relying on the uncontradicted evidence which is before them. And the exception is saved on those grounds.

For the same grounds stated in objection to Paragraph No. 1, Counsel for Mr. Cundiff objects and saves the exception to the sentence in Paragraph 2 which states: "It was not the mutual intention of the parties that the release should apply to unknown but subsequently discovered injuries." That the evidence is clear and uncontradicted that the injuries were unknown and could not have possibly been considered by the parties at the time of the execution of the release. And I assign the same reasons to Paragraph No. 3.

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Mr. Rogers: If Your Honor please, I will be very brief I think. The Defendant, Michael Marshall, respectfully excepts to the ruling of the Court in granting any instructions for the reasons heretofore assigned, with reference to the Defendant's motion to strike the Plaintiff's evidence. And the Defendant incorporates those grounds in this part as his reasons for objecting to any instructions. Specifically with respect to Instruction No. 1, the defendant excepts to the granting of instruction 1 as it is not supported by the evidence in the case.

The Court: All right, sir.

(Thereupon, Court and Counsel returned to the Courtroom at 3:45 o'clock P.M., and the following occurred in the presence of the Jury:)

The Court: Gentlemen of the Jury, turn around to me, please. I want to apologize to you all for taking so long in this case. I can tell you that the evidence has been completed and it was necessary for me to draft the instructions. When you draft instructions, we try to make them as clear as we can, sometimes it doesn't come out as well as we'd like, but I think that with patience—and I thank you for your patience.

I didn't know that I had that much patience, however I am going to give you the instructions, which is the law. You are the tryers of fact and you consider the evidence in this case. You heard this statement before, that the Jury are the sole judges of the fact and the credibility of the witnesses. The Judge, or as we refer to him as "the Court", is the Judge of the law and gives

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you the law in the form of instructions. It is just simply the rule to guide you. They are my instructions; they are not the Plaintiff's instructions, nor are they the Defendant's instructins.

We try to set forth the theory of both the Plaintiff and the Defendant, but they are however the Court's instructions. They were drafted by me and dictated by me, and I'm going to read them to you. Of course, you can take them into your room for consideration. And I will now read you the instructions.

(Thereupon, the Court read the instructions to the Jury.)

The Court: Gentlemen, they are all the instructions in this case and you may now listen to argument of Counsel.

(Mr. Ellett made the opening argument to the Jury in behalf of the Plaintiff.)

(Mr. Rogers argued to the Jury in behalf of the Defendant.)

2/8/68
page 136 } (Mr. Ellett then made the closing argument to the Jury in behalf of the Plaintiff.)

The Court: Gentlemen of the Jury, you will retire to consider your verdict, and select one of your number as foreman. In order to assist you in the form of a verdict only—one of the verdicts you can find in this case is if you find it is a valid contract, or another is, you can find that it is an invalid contract that is applicable to the facts. The Attorneys have agreed that I might write out a form of verdict—two verdicts—and you use either one you want. If you find in favor of Mr. Cundiff, who is the Plaintiff, say "we, the Jury, find the contract of September 15, 1964 is not a valid contract as to Malcolm J. Cundiff, and find a verdict in favor of Malcolm J. Cundiff". And it is to be signed by your foreman.

If you find that the contract is valid, then you use the second one, "We, the Jury, find that the contract dated September 15, 1964 is a valid contract, and we find a verdict in favor of Michael Lee Marshall". Any objection to that, gentlemen?

Mr. Ellett: No, sir.

The Court: This is just to help you in consider-
2/8/68 ing the case, that's all. It is helping you to write
page 137 } the verdict.

You may retire now.

(The Jury retired to the Jury room to deliberate over their verdict at 4:20 o'clock P.M., and returned to the Courtroom at 4:45 o'clock P.M., with the following verdict:)

The Court: You all waive the call, don't you?
Mr. Ellett: Yes, sir.
Mr. Rogers: Yes, sir.
The Court: Gentlemen, have you agreed upon a verdict?
The Foreman of the Jury: We have.
The Court: Give it to the Clerk, please.
Mr. Clerk, will you read the verdict, please, sir?
The Clerk: (reading): "We, the Jury, find that the contract dated September 15, 1964, is a valid contract, and we find a verdict in favor of Michael Lee Marshall. C. W. Kennett, Foreman."
The Court: Is that your verdict, gentlemen?
The Jury: Yes.
The Court: Any motion before the Jury is discharged?
Mr. Ellett: Judge, I have a motion after the Jury is discharged.
2/8/68 page 138 } The Court: I said before their discharge.
Mr. Ellett: No, sir.

(The Jury was then discharged and retired from the Courtroom.)

Mr. Ellett: Your Honor, I would like to make a motion to set aside the Jury verdict as being contrary to the law and the evidence.
The Court: Well, you can go on now.
Mr. Ellett: Judge, I just want to make the motion to set aside the verdict as being contrary to the law and the evidence, and I would like to ask the Court to set a time that I can argue the motion.
The Court: Yes, sir, I will take your motion under advisement. I can't set an exact date at the present moment, however I will give you a date. And I would like for you to do this: I would like for you to give me some authorities. Now I have got some, but I know you want an opportunity to look them up.
Mr. Ellett: Yes, sir.
The Court: I think I have the evidence pretty well in mind. I don't care anything about a brief, that is not what I am after. I am after the authorities, and I think I have most of them available, and as I told you all when I came up, and when we went into this case, that I didn't
2/8/68 page 139 } look it up from a legal standpoint or from a law

point as closely as I would like to have, or as closely as I would like to look it up.

It is a novel question and it is one we don't run into every day, and I would like to take it under advisement.

Mr. Ellett: Judge, if you set a date, I would just wonder if you could notify us sometime ahead so that we could prepare?

The Court: I will do this: I have every single day next week filled completely. Now I am in this condition: I have been helping some in Judge Mitchell's Court over in Halifax and Mecklinburg, and we—all the Judges in the area are trying to help him because he's been sick, so I am a little bit overloaded at the present time.

But I could do this, or why don't you do this: Why don't you present your authorities to me within 10 days, if that's agreeable, or 15 days, then giving a copy to Mr. Rogers and Mr. Rogers can then send me his authorities, giving a copy to you. I could check them and set a date which would be convenient to you all to hear you.

Mr. Ellett: Judge, I just wondered if I could
2/8/68 have 20 days on that? Could I have 20 days?
page 140 } The Court: Can you have 20 days?
Mr. Ellett: Yes, sir.

The Court: Yes, sir, you may have 20 days. And that will go in the Order, that the Plaintiff is given 20 days in which to file a memorandum of authorities. And the Defendant is given—how much time after that, Mr. Rogers?

Mr. Rogers: Judge, I am to wait until after he files his memorandum?

The Court: Yes, I say after he files, how many days do you want?

Mr. Rogers: Whatever the Court says. 10 days, would that be all right?

The Court: 10 days. Well, make it 10 days thereafter. I would like to try to get this over by the next term of Court, and so I'm going to have to take a little time to consider it.

Mr. Rogers: I understand.

The Court: I don't like you all to come up here and argue to me when I haven't looked into the cases, because then I will do a little better when I have time. And it might be that I will come to the conclusion that I don't care to hear your arguments unless you all particularly want to
2/8/68 do it; then I will go on and render my opinion.
page 141 } Mr. Rogers: All right.
Mr. Ellett: Yes, sir.

The Court: So leave it in that state. 10 days after Mr. Ellett has filed.

Mr. Ellett: Yes. And I will have 20 days in which to file mine.

The Court: Thank you, gentlemen.

(Proceedings were concluded at 5:00 o'clock P.M.)

ENDORSEMENT BY COUNSEL

The foregoing transcript has been reviewed and signed as provided in Section 3 (e) of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia.

J. Albert Ellett, Counsel for Plaintiff,
Malcolm J. Cundiff

Robert J. Rogers, Counsel for Defendant,
Michael Lee Marshall

* * * * *

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APPEARANCES: J. Albert Ellett, Esq. (Copenhaver, Ellett & Lawrence), and Nathan B. Hutcherson, Jr., Esq. (Hutcherson & Rhodes), of Counsel for the Plaintiff; and Robert J. Rogers, Esq. (Woods, Rogers, Muse, Walker & Thornton), and B. A. Davis, III, Esq. (Davis, Davis & Davis), of Counsel for the Defendant.

Stenographic report of all the testimony, together with the motion, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, the objections and exceptions to instructions, and other incidents of the trial of the case of *Malcolm J. Cundiff* v. *Michael Lee Marshall,* tried at Rocky Mount, Virginia, on April 18, 1969, before Honorable Langhorne Jones and Jury, in The Circuit Court of Franklin County, Virginia.

* * * * *

4/18/69
page 3 } April 18, 1969
9:00 o'clock, A. M.

(The reporter was sworn.)

IN CHAMBERS

The Court: All right, Mr. Rogers.

Mr. Rogers: Yes, sir, I want to make a motion. If the Court, please, the defendant, Michael Lee Marshall, by counsel, respectfully reminds the Court of this matter—a phase of this case—was heard previously in a trial on February 8, 1968, at which time the issue was limited to the validity of a release which was pleaded by this defendant at that time.

After a full day of trial, and on instructions from the Court, the jury retired and returned a verdict in favor of the defendant.

Thereafter, plaintiff made a motion to set the verdict aside, and after considering legal authorities, the Court granted that motion by order entered May 24, 1968, referring to the letter opinion of the Court, May 6, 1968. Exception to the action of the Court was taken by the defendant, by counsel, and reasons for the error or for the assigned error were stated in the order of May 24, 1968.

The defendant very respectfully at this time
4/18/69 simply would like to move the Court to reconsider
page 4 } its action and request the Court to reinstate the
verdict of the jury, and to enter final judgment for the defendant and to dismiss this action.

The Court: Let me make this observation. You don't have the right, after twenty-one days have passed, until it's final, however, I don't think I will do it even—

Mr. Rogers: Well, Judge, I think this is not a final order. Your order was not a final order.

The Court: It is not a final adjudication of the case. But, anyhow, regardless of that, I think I will have to stand on my opinion.

Mr. Rogers: I felt that we should make the motion and give the Court an opportunity to reconsider it, and we will please note our exception to the action of the Court in refusing our motion.

The Court: All right.

(At 9:15 o'clock, A. M., Court and counsel then returned to the Courtroom.)

The Court: Gentlemen for the plaintiff, are you ready?

Mr. Ellett: Yes, sir, Your Honor.

The Court: For the defendant, are you ready?

Mr. Davis: Yes, sir.

The Court: Call a venire of thirteen by lot.

4/18/69
page 5 } (A jury of seven men was duly impaneled and sworn.)

The Court: Let the witnesses be called and separated.
Mr. Rogers: If Your Honor, please, we have some more coming. They have not quite arrived but I will keep an eye out for them.

(The witnesses were called forward and sworn.)

The Court: Now, let the witnesses for the plaintiff go in the jury room, and the witnesses for the defense, either go in the hallway or back in one of the witness rooms. They may be more comfortable out in the hall.

(The witnesses were separated and excluded from the Courtroom.)

Mr. Hutcherson: Judge, could we have a sketch brought out?
The Court: Yes, sir.

(Diagram on blackboard was then brought into the Courtroom.)

(Mr. Hutcherson opened to the jury in behalf of the plaintiff.)

(Mr. Rogers opened to the jury in behalf of the defendant.)

4/18/69
page 6 } EVIDENCE ADDUCED IN BEHALF OF THE PLAINTIFF

TROOPER D. L. RIDDLE called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hutcherson:
Q. You are Trooper D. L. Riddle?
A. Yes, sir.

Trooper D. L. Riddle

Q. Are you a member of the State Police stationed here at Rocky Mount, in Franklin County?

A. Yes, sir.

Q. On the night of September 4, 1964, were you helping direct traffic out at the high school on Route 40?

A. Yes, sir, I was.

Q. At the intersection of Tanyard Road?

A. Yes, sir, I was at Tanyard Road and Route 40.

Q. Mr. Riddle, did you investigate an accident that occurred between Mr. Malcolm Cundiff and Mr. Marshall?

A. Yes, sir, I did.

Q. Was this immediately after a football game?

A. Yes, sir, it was.

Q. How was traffic?

A. It was very heavy. There was a large parking lot in behind the school, which—and also on the west side of
4/18/69 the school—and part of the traffic came out onto
page 7 } Tanyard Road and a large number come out Perdue Lane and it was congested for some thirty minutes usually.

Q. And where—did you prepare this drawing (indicating)?

A. Yes, sir, I have one error in it and I would like to be allowed to correct it if I could.

Q. All right.

A. I have the police officer here on this side of the collision (indicating) and it was on this side (indicating). He was on the—he would be on the west side. (Witness then made correction on blackboard.)

Q. Now, you have three "x's (on that drawing, one at the intersection of Tanyard Road and Route 40. Who was that?

A. That was me, Trooper D. L. Riddle.

Q. Now, you have one standing in the center of Route 40 at the intersection of Perdue Lane. Who was that?

A. That was Deputy Sheriff R. C. Amos.

Q. Then one east of Perdue Lane and Route 40, in the center of the road. Who was that?

A. That was former Deputy Sheriff Hodges—James Hodges.

Q. Now, how long had the—do you remember how long the ball game had been over when this accident occurred?

A. No. I do not. It was right in the middle of
4/18/69 the heaviest traffic.
page 8 } Q. Right in the middle of the heaviest traffic?

A. Yes.

Q. All right. Now, when you were standing in a position

—were you standing in a position that you could see Deputy Sheriff Amos?

A. Yes.

Q. Now, would you tell the ladies and gentlemen of the jury how you all operated there that night? I mean, what traffic you let go at the same time and what traffic you stopped.

A. Just prior to this accident, all traffic was stopped on Route 40 and traffic was coming out of Perdue Lane (indicating). Amos—he's the one or would be the supervisor of the traffic, or the director (indicating). All of my signals were derived from him and also James Hodges's signals are derived from Amos (indicating).

Amos had stopped the traffic on Perdue Lane and had motioned—a hand motion—motioned in my direction for traffic to proceed east on Route 40, which I was holding up the traffic on Tanyard Road, and also the traffic that was headed east at Tanyard Road on Route 40. And he first stopped the traffic on Perdue Lane, then motioned, hand signaled in my direction to move the traffic east on Route 40 which I started
4/18/69 moving the traffic. He turned around at that time
page 9 } and motioned the west traffic on Route (*indicat-*
iong to proceed west on Route 40.

Q. In other words, he first gave a signal for the traffic to move east on Route 40 and then turned and gave a signal for the traffic to move west on Route 40?

A. That's right.

Q. Did he—could you see him?

A. Yes, sir.

Q. Did he at anytime give any signal for any left turn into Perdue Lane?

A. No, sir, I didn't see at anytime any left signal.

Q. Now, do you remember Mr. Malcolm Cundiff passing you?

A. Yes, sir, I do. As I recall, he was the first vehicle that was in line. I wouldn't say he was the very first but he was one of the first after we changed traffic from Perdue Lane to Route 40.

Q. He was one of the first?

A. Yes, sir.

Q. Then he proceeded on by you?

A. Yes, sir.

Q. Did you hear the impact?

A. Yes, sir, but I didn't see it. I heard the impact.

4/18/69 Q. All right. Did you go to the scene?
page 10 } A. Yes, sir, I walked on down there probably—
I ran down to the intersection of Perdue Lane and

I arrived there about the time they were starting to—some of them were starting to get out of the vehicle.

Q. And what did you find there?

A. I found Mr. Cundiff's vehicle completely in the east-bound lane and the Marshall vehicle was across the double solid line at the intersection of Perdue Lane and at an angle similar to the angle here that I have drawn (indicating) and headed into the left front of the Cundiff vehicle.

Q. Could you tell me how far from the center line in the east-bound lane the Cundiff car was?

A. As soon as we had got some of the traffic started back around and moving it on out (indicating), I started investigating the accident and found that the skid mark and the left front wheel of Mr. Cundiff's vehicle was five foot from the center line.

There was a double solid line (indicating) and from the center of that line to the left front skid mark of the left front wheel of Mr. Cundiff's car was five foot.

Q. In other words, he would have been five foot from the center line over in his lane?

A. Yes, sir, that was a left front tire mark and the car was pretty well in line with the—pretty well parallel with the center line.

4/18/69
page 11 } Q. And was he in his proper lane?

A. Yes, sir.

Q. Now, how far—then the Marshall car was across the center line?

A. Yes, sir. It was across the center line and I didn't actually measure the portion that was over but it was up against the left front of the Cundiff vehicle which left front was five feet.

Q. Were the cars stopped in Perdue Lane at that time?

A. Yes, sir, traffic had been stopped prior to directing this other traffic on Route 40 and they were stopped in Perdue Lane. There was a long line of traffic on Perdue Lane.

Mr. Hutcherson: Judge, one of our witnesses has come in. He is a medical witness.

The Court: All right, do you want him separated?

Mr. Davis: That's all right, sir.

Mr. Rogers: We have no objections to him staying here.

The Court: All right.

By Mr. Hutcherson: (continues examination)

Q. And what damage was done to the Cundiff car?

Trooper D. L. Riddle

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A. The entire left fender and bumper—that is, the left front fender and bumper was caved in and dented.

Q. And what damage was done to the Marshall car?

A. The entire front end, just about all the way across, was damaged.

Q. Just about all the way across?

A. Yes, sir.

Q. What were the weather conditions that night? Was it dry or wet?

A. It was dry and the weather was clear. The surface was blacktop. It was straight at that particuar point, some grade.

Q. And you say that was a double solid line?

A. Yes, sir. The way I have it drawn is straight (indicating) but it does have a little curve in it at that point.

Q. Slight curve?

A. Going on up towards Tanyard Road, there is a little curve in it as you head up to it.

Q. A slight curve to your left?

A. Well, coming from—coming toward Rocky Mount, it would be a slight curve to the right.

Q. To the right?

A. Yes.

Q. Now, the blow that the Cundiff car received was on the driver's side—

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Mr. Rogers: I think he said the left front fender, didn't he?

The Witness: Yes, sir, yes, sir.

By Mr. Hutcherson:

Q. Is that right?

A. Yes, sir.

Mr. Rogers: That is self evident.

Mr. Hutcherson: Your witness.

Mr. Rogers: We have no questions.

The Court: Trooper, will you make me a copy of what is on that board?

Mr. Hutcherson: Do you want me to introduce that into evidence, Judge?

The Court: I want you to look at it first.

The Witness: The only difference is I have inserted the police officer's name under it, as I have on the chart there.

(Drawing on piece of paper that had been made by the officer was then handed to counsel for inspection.)

Mr. Rogers: I have no objections.
The Court: Do you have any objections?
Mr. Davis: No, sir.
The Court: Mr. Hutcherson?
Mr. Hutcherson: No, I have no objection.

The witness stands aside.

4/18/69
page 14 } DEPUTY SHERIFF R. C. AMOS called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hutcherson:
Q. You are Deputy Sheriff Reggie Amos?
A. Yes, sir.
Q. And you are a member of the Sheriff's Department of Franklin County, Virginia?
A. I am.
Q. On September 4, 1964, were you helping direct traffic after a football game at the high school?
A. Yes, sir, I was.
Q. And where were you standing, sir? You can use this map to show the jury if you want (indicating).
A. I was in the center of Route 40 (indicating) here, like right directly across from Perdue Lane.
Q. The center of Route 40?
A. Yes, sir (indicating).
Q. Do you remember the happening of an accident between the car driven by Mr. Malcolm Cundiff and Mr. Marshall?
A. I do.
Q. You were pretty close to it, weren't you?
A. Oh, approximately two feet.
4/18/69 Q. Two feet?
page 15 } A. Two or three feet.
Q. All right, sir. Now, would you tell me the Number 1 car there (indicating) as it has been explained here before is the Cundiff car? Does that represent correctly the position of the Cundiff car?
A. Yes, sir.
Q. And then the Number 2 car (indicating) has, by Trooper

Riddle, been named the Marshall car. Does that represent the proper position of the Marshall car?

A. Yes, sir.

Q. Now, just tell the jury—ladies and gentlemen of the jury—and tell them what you were doing at the time the accident occurred.

A. Well, now, the officer right here (indicating) directed all the traffic. This officer here (indicating) holds the traffic on Route 40 while I'm letting it out on Perdue Lane from the school. And when I give a signal for Route 40 to move, why then they let the traffic go both ways.

And so I had just give a signal for the traffic to go on Route 40 and I was in the center of the lane, motioning for the traffic to go both ways (indicating). And, right at the time of the accident, I just had looked up Route 40 towards Rocky Mount and the Cundiff vehicle was coming and, just as I turned back, the vehicle Number 2 (indicating) was turning in.

page 16 } The Court: Wait just a second until this traffic gone by. That big truck is making a lot of noise, and you have got your head turned the other way, and sometimes we don't hear you.

The Witness: Just as I turned to look back, car Number 2 was turning in here (indicating) and it was—throwed me complete—he was completing his turn and I couldn't stop either one of the vehicles in time to avoid the accident.

By Mr. Hutcherson:

Q. Now, had you signaled anyone to turn in?

A. No.

Q. What signals had you given?

A. Well, my signals was for this car (indicating) to go down 40 and this one was to go up 40 (indicating).

Q. And, as I understood, you had stopped the traffic on Perdue Lane?

A. Yes, sir.

Q. That was stopped, and you were letting traffic move east and west on Route 40?

A. Yes, sir.

Q. Had you given those signals to Mr. Hodges and to Mr. Amos also—I mean Mr. Riddle also?

A. Yes.

4/18/69 page 17 } Q. Had the Cundiff car and the Marshall car been sitting there for any length of time before they started out; do you know?

Deputy Sheriff R. C. Amos

A. They had for a good while because I was letting Perdue Lane out (indicating). You see, Hodges holds the traffic here (indicating) and Riddle was holding the traffic here (indicating) and I say it probably had been sitting for three or four minutes to let Perdue Lane out.

Q. Did you—before the Marshall car made its turn, did you see any signal lights on it?

A. Not to my knowledge. I really wasn't paying any attention. When I turned around, I noticed his signal light on when he was—he was done into his turn then.

Q. He was in the turn?

A. Yes, sir.

Q. In other words, was he across the line at that time?

A. Yes, sir, or up to the line.

Q. Now, Mr. Cundiff, from that drawing, never left his right proper lane; is that correct?

A. No.

Q. And he had your signal to go east?

A. Yes, sir.

Q. And, from what you say, Mr. Marshall had your signal to go west?

A. Yes, sir.

4/18/69 page 18 } Q. What part of the Marshall car struck the Cundiff car?

A. I believe it was right—kind of right front, and the left of the Marshall car and the left front of the Cundiff car.

Q. It was into the side of the fender, was it not?

A. Yes, sir.

Q. Was anybody taken to the hospital as a result of this?

A. I am not absolutely sure. I believe Mrs. Cundiff went. Now, I am not for sure but I believe she went for a checkup.

Q. Do you know who Mr. Cundiff had in the car with him at the time of the accident?

A. No, sir, I don't.

Q. He did have some passengers?

A. Yes, sir. I think it was passengers in both cars, if I'm not mistaken.

Q. Passengers in both cars. And then you controlled the traffic coming out of Perlue Lane and also it was your duty at that time—excuse me, strike that.

It was your duty and you were controlling the traffic coming out of Perdue Lane—that is, from behind the school at the parking lot—and also the traffic going east and west on Route 40?

4/18/69 A. Yes, sir.
page 19 } Q. Do you remember or how did you give a signal when you allowed anybody to turn into Perdue Lane?
A. Well, we have never allowed anybody to turn into Perdue Lane.
Q. You didn't allow—

Mr. Rogers: Well, if Your Honor, please, I object to what they don't allow and did not allow He didn't answer the question. The question was, "to describe the signal", as I understood it.
The Court: He asked him what signals he gave, I think.
Mr. Rogers: Yes, sir, and the answer was not responsive.
The Court: No; I think he can show the signals he gave, if he wants to.
Mr. Rogers: I think that is proper, yes, sir.

By Mr. Hutcherson:
Q. In other words, you didn't ever give a signal to turn into Perdue Lane; is that right?
A. No, sir.

The Court: The question was "How did he give a signal".
Mr. Hutcherson: All right.
The Court: You want that answered or not?
4/18/69 Mr. Rogers: I would like to have it answered.
page 20 } Mr. Hutcherson: He said he never gave one.
The Court: You said or you asked him how he gave his signals and he never did answer it. Do you want it answered?
Mr. Hutcherson: He answered it, as far as I'm concerned because he said he never gave a signal.
The Court: All right.

By Mr. Hutcherson:
Q. Did you give a signal that night to turn into Perdue Lane?
A. No, sir.
Q. And you had directed traffic there before, I take it?
A. Yes, sir.
Q. And while directing traffic there, did you allow entrance into Perdue Lane?
A. No, sir.
Q. I take it that both Mr. Hodges and Mr. Riddle could see you when you signaled—

Deputy Sheriff R. C. Amos

Mr. Rogers: If Your Honor, please, I object. I don't know how he would know that. It is a leading question anyhow.

The Court: Well, he can tell whether they were in his view or not.

4/18/69
page 21 } By Mr. Hutcherson:

Q. Were both Mr. Riddle and Mr. Hodges in your view?

A. Yes, sir.

Q. Were they taking signals from you?

A. Yes, sir.

Mr. Hutcherson: That's all.

CROSS EXAMINATION

By Mr. Rogers:

Q. Mr. Amos, I want you, if you will and so this jury can understand—how about standing up here if you will? Just stand up where you are and we will let this be right behind you, Perdue Lane (indicating), and will let this little lane right here be Route 40 (indicating) directly in front of you running east and west.

Now, would you indicate how you were facing? Were you facing toward Perdue Lane or were you facing away from Perdue Lane toward the jury as you are now facing?

A. I would have been facing away from Perdue Lane.

Q. Like you are now?

A. Yes, sir.

Q. In other words,—

A. Perdue Lane would be right here (indicating).

Q. Now, may I understand that you had been facing toward Perdue Lane to get traffic—

4/18/69 A. That's right.

page 22 } Q. —you had stopped traffic and then you had turned away from Perdue Lane and you were facing opposite from Perdue Lane?

A. Yes, sir.

Q. And to your left, I take it, would be Route—would be the direction where Tanyard Road and Rocky Mount is; is that correct, sir?

A. Yes, sir.

Q. That would be looking east, would it not, sir?

A. Yes, sir.

Q. And looking to your right would be west or towards Martinsville or a way to go to Martinsville to your right?

A. Well, actually to your right would be east and to your left—

Q. Well, standing in the direction you are looking now, wouldn't this be to the right and wouldn't that be west?

Mr. Davis: It would be east.

By Mr. Rogers:

Q. I beg your pardon. I've got it wrong then. Is north up to the top here (indicating) or the bottom of the map?

Mr. Hutcherson: Bottom.

Mr. Rogers: Well, do you mind if I put "north" up here (indicating)? That's where I got confused.

4/18/69 page 23 } Mr. Hutcherson: He's got north.

The Court: Usually north points upward but this map happens to have it pointed down.

By Mr. Rogers:

Q. So you and I are standing and so we can all be on the same channel, we are facing north in the same direction?

A. That's right; that's right, yes.

Q. And behind you would be Perdue Lane and the south?

A. Yes, sir.

Q. And, to your left, would be west and Rocky Mount; is that right?

A. Yes, sir.

Q. And to your right would be the east?

A. Yes.

Q. All right, sir. Now, after you had stopped traffic from Perdue Lane, coming from your rear, then you turned away from Perdue Lane, I take it, Trooper, and that you were concentrating primarily on traffic, or the direction of Rocky Mount, were you not, sir?

A. Yes, sir.

Q. And your attention was more focused in that direction to your left, or the direction from which Mr. Cundiff was coming; is that fair?

A. At the time, it was.

4/18/69 page 24 } Q. At the time, yes, sir. And now, will you indicate what sort of signals did you give? Did you signal both cars to come on about the same time?

A. Well, I usually had my flashlight in my right hand and

give the signals with my flashlight this way (indicating) and my left hand this way (indicating).

Q. Is it fair to say that you just kind of waved both cars on like that (indicating)?

A. Yes, sir.

Q. And that you almost simultaneously gave waving motions that each car could see?

A. Yes, sir.

Q. I take it you didn't wave any car in either direction, left or right, but that you just simply had them to move on; isn't that a fair statement?

A. Well, I waved the traffic from looking east on (indicating), and the traffic from this way on, too (indicating).

Q. Right. But you weren't making—you weren't waving for any particular direction? You were just waving them to proceed on. Isn't that a fair statement? You weren't expecting a left turn; isn't that fair?

A. No, sir, I wasn't expecting a left turn.

Q. All right, that's what I'm trying to get. Now, you have indicated that these cars—Mr. Cundiff's car which was coming from your left and Mr. Marshall's car coming from your right—had been sitting there for probably—each one of them at least two or three minutes, had they not?

4/18/69 page 25

A. Yes, sir, I would think so.

Q. Yes. And then, so both of them really proceeded from a stopped position?

A. Yes, sir.

Q. I think that at that time, or the time that the impact occurred, I think you have indicated that the speed of both vehicles was very slow, was it not, sir?

A. Yes, sir.

Q. What would you estimate Mr. Cundiff's speed—about ten miles an hour?

A. Probably something around, oh, ten miles an hour.

Q. And this young man about five miles?

A. Yes, sir.

Q. And would you describe the impact as quite light?

A. Yes, sir.

Q. As far as you know, were you the only eyewitness to it —to the accident?

A. So far as the officers was concerned. Of course, the passengers in the car, I mean.

Q. Yes. I mean people not in the car?

A. Yes, sir.

Q. You were almost in the accident?

A. Yes, sir.

4/18/69 page 26 } Q. Now, as I understand it, after giving both vehicles a signal to proceed, at that time you were pretty much looking in the direction of Mr. Cundiff, were you not, sir?

A. Yes, sir, I was.

Q. And then you, I think, indicated you had not been paying particular attention to traffic coming from your right and then, when you looked to your right, that's when, I take it, that you noticed this young man's left signal or left turn signal was on and he was beginning to make a left turn?

A. Yes, sir, he was already in the turn.

Q. Yes and, at that time, you realized you weren't—that you wanted to try to stop both cars and I think you first tried to stop Mr. Cundiff's car, did you not, sir?

A. I really don't remember. I tried to stop both cars but—

Q. Did you not—you don't recall whether you tried to stop his first?

A. I couldn't say absolutely. I probably did.

Q. All right, sir. Now, of course, you weren't paying close enough attention, I'm sure, to know whether or not Mr. Marshall had his left turn signal on before he started in his turn?

A. No, sir, I wasn't.

Q. You couldn't say one way or the other on that?

4/18/69 page 27 } A. No, sir.

Q. All you know is, your attention was primarily focused in the opposite direction?

A. Yes, sir.

Q. And that you were not paying particular attention to him, and then you gave a signal to proceed on?

A. Yes, sir.

Q. And then when you did notice it, he had the left turn signal on and was in his left turn?

A. Yes, sir.

Q. Do you know offhand, Deputy Amos, or can you estimate, the width of Perdue Lane here (indicating)? We have a measurement on Route 40 but is that a wide lane or—

A. Perdue Lane would be wide there at the intersection.

Q. At the intersection. How about back here (indicating), does it narrow down here some?

A. Yes, sir, yes, sir. In other words, it's a stop sign in this center of Perdue Lane (indicating) and traffic goes on both sides.

Q. There is a stop sign right here in the center of Perdue Lane (indicating)?

A. Yes, sir, I believe it's in the center.

Q. That would be on the south side?

A. Yes, sir, and traffic going out of Perdue Lane
4/18/69 goes on this side and traffic going in goes on this
page 28 } side (indicating).

Q. I see. And I take it that traffic—there was a lot of traffic on the road and they had backed up on Perdue Lane after you stopped it?

A. Yes, sir.

Q. Excuse me, sir. After the accident, did Mr. Cundiff say anything to you or make any complaint about being injured or any trouble himself?

A. No, sir, not to my knowledge.

Mr. Rogers: All right, sir, just one second. I believe that's all.

RE-DIRECT EXAMINATION

By Mr. Hutcherson:

Q. Mr. Amos, was there anything to block the view of Mr. Marshall seeing the Cundiff vehicle?

A. The only thing that could have been would have been me to a certain extent; I mean I was in the center of the road here (indicating).

Q. Yes.

A. And Mr. Cundiff was coming this way (indicating) and—

Q. The only thing that could have blocked the view was you?

A. I was on the road.

4/18/69 Q. That's the only thing that could have blocked
page 29 } the view?

A. Yes.

Mr. Hutcherson: All right.

RE-CROSS EXAMINATION

By Mr. Rogers:

Q. I assume the same would have been true the other way around. You would have been the only thing to block Mr. Cundiff's view also?

A. I would have been the only thing that blocked their view.

By Mr. Hutcherson:

Q. Mr. Cundiff never came out of his proper lane of travel?

A. No.
Q. And there was a double solid line there, was it not?
A. Yes, sir.

Mr. Rogers: Judge, he's been over that once before.
Mr. Hutcherson: Not with this witness.
Mr. Rogers: Yes, you have.
The Court: I don't know if he has asked him if it was a double solid line.

4/18/69 page 30 } Mr. Hutcherson: All right. Just a minute, Judge. Could I have just a minute? I think I could save some time.

(Mr. Ellett and Mr. Hutcherson left the courtroom to confer at 10:25 o'clock, A. M., and returned at 10:30 o'clock, A. M.)

Mr. Hutcherson: That's all, Mr. Amos.

The witness stands aside.

DEPUTY SHERIFF JAMES HODGES called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hutcherson:
Q. Your name is James Hodges?
A. Yes, sir.
Q. Mr. Hodges, I believe in 19—I mean 1964, you were employed as a deputy sheriff?
A. Yes, sir.
Q. Were you, on the night of September 4, 1964, working traffic at a football game out on Route 40?
A. Yes, sir.
Q. Now, look at this map, which has been drawn by Trooper Riddle, and would you show the ladies and gentlemen of the jury, and the Court, where you were standing?

4/18/69 page 31 } A. I was standing here (indicating)—that is east. That would be east on 40.
Q. East on 40?
A. Yes, sir.

Q. And who was standing up here in the center of Perdue Lane (indicating)?

Deputy Sheriff James Hodges

A. Deputy Sheriff Amos was here (indicating) at Perdue Lane and Route 40. The trooper was at Tanyard Road and Route 40 (indicating).

Q. Would you tell us what your duties were?

A. I was to stop the traffic approaching west on Route 40, coming into town (indicating) and when Mr. Amos gave me the signal to stop them. And he also would give me the signal, you know, to let them go when he wanted traffic to move west and east on 40.

Q. And do you remember seeing the Marshall vehicle?

A. Well, that's been a long time. The car was there and I think it was the first car that I had stopped.

Q. You think it was the first car you had stopped. And what kind of signal did you give it?

A. I just motioned for him to proceed on Route 40, on west (indicating).

Q. West on Route 40?

A. Yes, sir.

Q. Do you remember at that time whether he was giving any signal, or not, of any kind?

4/18/69 page 32 } A. No, sir. I had my back turned to Deputy Sheriff Amos and the other Trooper Riddle. I was motioning for traffic to proceed on 40 (indicating) and I was looking towards east on 40 and I had my back turned to them.

Q. In other words, you were moving the traffic on—

A. Yes, sir.

Q. —on west?

A. Yes, sir.

Q. And were you moving them east also on 40?

A. Well, yes, sir, both ways (indicating).

Q. Both ways?

A. Yes, sir.

Q. Did you see the accident?

A. No, sir, I did not.

Q. You had your back to it, I take it?

A. Yes, sir.

Q. You could see, I take it, you could see Mr. Amos?

A. Yes, sir, I was standing approximately, oh, forty-five to fifty feet from him.

Q. And you could see when he signaled to you?

A. Yes, sir.

By The Court: (interposing)

Q. Did you say how far you were away?

A. Sir?

Deputy Sheriff James Hodges

Q. Did you say how far?
4/18/69 A. Oh, forty-five to fifty feet, yes, sir, approxi-
page 33 } mately.

The Court: Thank you.

By Mr. Hutcherson: (continues examination)
Q. At the time of the accident, do you know whether or not the traffic was stopped coming out of Perdue Lane?
A. Yes, sir. Deputy Sheriff Amos had stopped the traffic from coming out from behind the high school, which is Perdue Lane, and he had proceeded to move the traffic east (indicating) on 40 and motioned for me to proceed with the traffic west on 40.
Q. Did you go up to the scene of the accident?
A. I don't believe I did.
Q. You don't believe you did?
A. No.
Q. All right. Do you know anything else about the accident?
A. No, sir. Trooper Don Riddle came down and he took charge of the accident and Deputy Sheriff Amos and myself proceeded on moving traffic.

Mr. Hutcherson: Just moving traffic, all right.

CROSS EXAMINATION

By Mr. Davis:
Q. Mr. Hodges, let me ask you this question.
A. Yes, sir.
4/18/69 Q. You were about forty-five feet east of the
page 34 } intersection of Perdue Lane and Route 40?
A. Yes, sir.
Q. All right, and your main concern, I take it, was moving traffic—that is the traffic that was going west or coming into town, or any traffic going east, you weren't particularly interested in and you were glad to get that out of there, weren't you?
A. Well, you see, Reggie—Deputy Amos—he was at the intersection and he moved that traffic first.
Q. The only traffic you were stopping was the traffic headed west, headed into town?
A. Yes, sir.
Q. And that's what you were there for?
A. Yes.

Q. And, when Mr. Amos quit letting traffic come out of Perdue Lane and which traffic went both east and west—

A. Yes, sir.

Q. —when he stopped that traffic, then he signaled you and Trooper Riddle to let the traffic go east and west on Route 40?

A. Yes, sir.

Q. And the Marshall vehicle, whether you recall it or not, had to be somewhere in the vicinity where you were and you evidently signaled it on; is that correct?

4/18/69 page 35 } A. Yes, sir.

Q. And your signal to that vehicle or any other vehicles was given by you some forty to fifty feet prior to the intersection of Perdue Lane and Route 40?

A. Yes, sir.

Mr. Davis: That's all.

By The Court:

Q. Let me ask you a question. Traffic was stopped going west?

A. Yes, sir.

Q. Did all traffic stop in front of you—that is, east of you —or was there any traffic between you and Mr. Amos when it was stopped?

A. No, sir, there was no traffic between me and Mr. Amos.

Q. So, when you gave the signal to go west, there were no cars between you and Mr. Amos?

A. No, sir.

Q. Traffic was west of you?

A. Yes, sir. The traffic would have been east of me.

Q. I mean east of you.

A. Yes, sir.

Q. And you motioned them to go west?

A. Yes, sir.

4/18/69 page 36 } Q. You do not remember this particular car, or do you?

A. No, sir, I don't remember the particular car.

The Court: All right.

The witness stands aside.

MR. MALCOLM J. CUNDIFF the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Malcolm J. Cundiff

DIRECT EXAMINATION

By Mr. Ellett:
Q. For the record, give us your full name.
A. Malcolm J. Cundiff.

Mr. Rogers: If Your Honor, please, since Mr. Cundiff is going to testify and he has two physician witnesses present, we would like to exclude these physicians at this time.
Mr. Ellett: We have no objections, Your Honor.
The Court: All right, let them go.
Mr. Ellett: They didn't want to exclude them at first.
Mr. Rogers: We didn't know you were going to put it on in this order.
The Court: Suppose we have a brief recess then.

(The two physician witnesses present were then excluded from the courtroom, and a recess was taken from 10:35 o'clock, A. M., to 10:45 o'clock, A. M.)

4/18/69
page 37 } The Court: All right, gentlemen, proceed.

By Mr. Ellett: (continues examination)
Q. I believe all you had given us was your name; is that correct?
A. That's right.
Q. Mack, where do you live?
A. I live at Route 1, Hardy, in Franklin County.
Q. What is your age?
A. Forty-four.
Q. Are you married?
A. Yes, sir.
Q. How many children do you have?
A. I've got three.
Q. Mack, were you involved in an automobile accident on September 4, 1964?
A. Yes, sir, I was.
Q. And where was this accident?
A. It was at the intersection of Perdue Lane and Route 40, just below the Franklin County High School.
Q. And that is in Franklin County?
A. In Franklin County.
Q. Prior to this collision, where had you been?
A. Had been to a football game at the high school.

Malcolm J. Cundiff

Q. Was anyone else with you; was anyone with you?

4/18/69 page 38 } A. Yes, uh-hum.

Q. Who was with you?

A. My wife and all three of the children.

Q. They were all in the car with you at the time of the collision?

A. Yes, sir.

Q. What kind of car, Mack, did you have at that time?

A. I had a '57 Chevrolet.

Q. All right. If you will, Mack, go ahead and tell the Court and jury what happened from the time—now, keep it brief—that you left the football game.

A. Where he indicated (indicating), you want me to indicate it there?

Q. If you can, to give the jury some general idea where you were parked.

A. I was parked over at the far end, I guess it would be the south end of the high school (indicating). After the football game, came out from the high school into the Tanyard Road and out Tanyard Road into Route 40, and the State Trooper Riddle was directing traffic as I came out of Tanyard Road into Route 40.

Q. And he was standing where it is indicated with an "X"?

4/18/69 page 39 } A. Where it's indicated on the chart, yes. He directed me to proceed east on Route 40. I continued on 40 east and Deputy Sheriff Amos was at the intersection of Perdue Lane and Route 40 and he was motioning traffic (indicating) on east on 40 and just as I came into about even into the intersection, I saw this other car crossing the road, making a left turn (indicating), and I hit my brakes but it was too late. We'd done collided.

Q. So, as I understand it, you came up Tanyard Road and Traffic Officer Riddle waved you on west on—I mean east on 40. Were you stopped anytime between Tanyard Road and Perdue Lane?

A. No, sir, I was not.

Q. Were the officers signaling you at all times to proceed east?

A. At all times, I was being directed to continue on east on 40.

Q. And, Mack, immediately prior to this, what—can you give an estimate of what your speed was?

A. Well, I was going ten or twelve miles an hour, somewhere along there. I was—well, that's about as close as I can get at it.

Malcolm J. Cundiff

Q. Could you estimate the speed of the Marshall car at the time that your car was struck?

A. No, I couldn't.

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Q. Did the collision occur entirely within your lane of traffic?

A. Yes, sir, it did.

Q. Do you know approximately how far you were from the center double line there on Route 40?

A. Well, it was a considerable distance. The state trooper measured it but I didn't.

Q. And what part of the Marshall car struck your car, Mack, and where was your car struck?

A. The front of his car, somewhere between the right front and the center, struck the left front corner of mine, more or less to the corner and side.

Q. Was it right much damage; could you drive your car away from the scene?

A. No, sir.

Q. Could the Marshall car be driven away from the scene?

A. Well, when I left, it was still there.

Q. Now, what was the weather condition that night?

A. It was dry and clear.

Q. Dry, and the trooper testified that this is a hardtop, hard surface road?

A. Hard surface road.

Q. And plainly marked?

A. Yes, sir.

Q. Was the visibility good at that point?

A. It's good—it was good.

* * * * *

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4/18/69 page 42

Q. Mack, you were—or were you always in your proper right-hand lane of traffic as you proceeded east on 40?

A. Yes, sir, I was.

Q. And did the impact occur in your lane?

A. Yes, sir.

Q. All right. Mack, *af* the time immediately following the accident, did you realize that you had been injured?

Malcolm J. Cundiff

A. No, sir, I did not.

Q. How long after this accident did anything manifest itself or anything happen that brought it to your attention that you might have been injured?

A. Well, it came on me slowly. I really can't pinpoint the day but it was between two and a half to three weeks before I realized that I had something wrong with my back.

Q. When—how did you know that you had something wrong with your back?

A. Well, I just started having pain in my back.

Q. And in what general areas or area was the pain that you were having in your back?

A. Well, I call it more (indicating) and turned around here.

Q. In the midback?

A. Up in the midsection (indicating) up there.

Q. When you got the onset of pain, did they just remain the same or did they get worse or just tell us about it.

4/18/69 page 43 } A. Well, they continued to get worse.

Q. So, as a result of this, did you consult any doctors or any medical attention?

A. Yes, sir, I did.

Q. And who did you go to see?

A. I went to see Dr. Clapsaddle in Vinton.

Q. Was he your family doctor at that time?

A. Yes, he was.

Q. Now, prior to this accident, Mack, had you had any trouble with your back before?

A. Well, a few years before that, I had this just minor muscle strain in the lower part of my back.

Q. Was that in the area where this pain developed after the accident?

A. No, sir, it was not.

Q. Was it the same type of pain that you previously had in the lower back?

A. No.

Q. Well, what was the general condition of your health, Mack, prior to the time of this automobile accident?

A. Well, good.

Q. Were you working at that time?

A. Yes, sir, I was.

Q. And where were you working?

4/18/69 page 44 } A. I was working for Murray Biscuit Company, working out of Roanoke.

Q. Did you work regularly?

A. Yes, sir.

Malcolm J. Cundiff

Q. What about the things you did around your house; were you able to or did you engage in activities that required some physical ability?

A. You mean prior to this?

Q. Prior to the accident.

A. Yes, I would come home of an evening and work in the garden, mow the yard and when it needed mowing, and gardening and one thing and another. I got small acreage and it's always something that I can be piddling at until the dark runs me in.

Q. Well, would you say that you were pretty active physically prior to the time of this accident?

A. Yes, sir.

Q. Now, do you recall back when you first went to see Dr. Clapsaddle?

A. Do I recall?

Q. Approximately when it was?

A. When it was?

Q. Yes.

A. I think it was on September the 28th of 1964.

Q. Do you know how many times—I realize, Mr. Cundiff, this can get a little tedious, so if you have any notes that you would like to refer to, you may do so.

4/18/69
page 45 } (Witness produced notes from pocket.)

So that we can keep up with the dates and the visits, and so forth. Now, how many times—how many days, Mack, prior to the time that you went to Dr. Clapsaddle did you—that you had had this pain in your back?

A. Oh, probably a week or so, somewhere thereabouts. I don't know the exact day.

Q. Well, now, when you saw Dr. Clapsaddle, I believe you said it was on the 28th of September of '64?

A. Yes, sir.

Q. What were your complaints at that time?

A. Well, I went to him complaining about my back hurting and this pain building up in my back and the more active, the more I stirred and bent around and about, the more the pain would get.

Q. And what did—what kind of treatment did Dr. Clapsaddle give you?

A. Well, he gave some sort of therapy treatments and gave me some relaxing pills.

Malcolm J. Cundiff

Q. Did he ever give you any injections or shots, or anything of that nature?

A. I have had so many shots, I don't recall whether Dr. Clapsaddle gave me any or not.

4/18/69 page 46 } Q. Mack, can you recall approximately how many times that you visited Dr. Clapsaddle and over what period of time?

A. I don't know how many visits but on several occasions, from 9/28/64 to 11/18/65.

* * * * *

4/18/69 page 68 } Q. Now, will you tell the jury, at my request if you have itemized, or the loss of wages that you have had since this accident happened?

A. Yes, sir.

Q. All right, would you relate to the jury what the loss of wages were during this time?

A. The total, you mean?

Q. Well, I would like you to break it down in time, and when you lost it and just for clarification.

A. Well, I lost ten weeks from work in 1964; fifty two weeks in 1965; fourteen weeks in 1966; and comes to a total of $6,460.00. Then I lost from December 30, 1969 to March 15, 1967, which comes to a total of $820.00, and then this February 10, 1969 to March 12, 1969, $276.21, or a total of $7,561.21 in lost wages.

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CROSS EXAMINATION

By Mr. Rogers:

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Malcolm J. Cundiff

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Q. All right, sir, when did you first experience any pain?
A. Well, all I can say is approximately—that it come up on me so slow, I'd say something between two and three weeks after the accident.
Q. Would it be fair to say the third week after the accident you began to experience some pain?
A. Well, say approximately.

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Q. All right, sir. Now, I'd like to direct your attention to the accident itself. Had you been to the football game yourself?
4/18/69 A. Yes, sir.
page 87 } Q. And you and your wife and children, I think, were in your car?
A. That's right.
Q. Where were you all going after leaving the football game?
A. We were going home.
Q. You were going home, all right, sir. And you came out of that road, Route 40, where Trooper Riddle was?
A. Out of Tanyard Road into Route 40.
Q. All right, sir. And did you stop before coming out of Tanyard Road there before going into Route 40?
A. About the time I got to the intersection of Tanyard Road and Route 40, Trooper Riddle started moving the traffic. If I stopped, it was just a momentary thing (indicating).
Q. All right, sir. And you turned right, I take it. Did you ever give a right signal or right turn signal when you came out of Tanyard Road?
A. Yes, sir.
Q. I take it that the trooper waved you on?
A. That's right.
Q. All right. And you then made your right turn and on the

trooper's signal. How far distant did you go where Trooper Riddle was until the next event occurred, would you say?

4/18/69 page 88 } A. I don't know just how far the distance is there. It's maybe two hundred yards or a hundred and fifty yards, I don't know.

Q. Did you see Deputy Amos there?

A. When I started to proceed on down the road, yes.

Q. Did you ever stop before you got to Deputy Amos?

A. No, sir.

Q. You never saw him at all; you never stopped at all?

A. No, sir, I never stopped from the time I passed Trooper Riddle until the time of the accident.

Q. So, over that period of time and of distance, after you came out of Tanyard Road into Route 40, and you were going, you estimate, some ten to twelve miles an hour?

A. Just guessing, yes.

Q. I understand. I understand you are giving your best estimate. Now, did you see this other car operated by Michael Marshall prior to the time of the collision?

A. Just temporarily, just before he hit me.

Q. And that is when you applied your brakes?

A. Yes, sir.

Q. And did you see his left turn signal?

A. I didn't notice whether he did or didn't have a left turn signal on.

4/18/69 page 89 } Q. Did you see a left turn signal?

A. Did I see it?

Q. Yes, sir.

A. I'd have to say "No" because I couldn't swear that he did.

Q. Was there anything that could have kept you from seeing a left turn signal?

A. Nothing more than I was watching the officer directing traffic and—

Q. How was the officer directing traffic? Did he have any devices or anything to direct traffic with, or was he doing it with his hand or how was he doing it?

A. He had a flashlight in one hand and was motioning with the other hand.

Q. And was motioning to you with which hand?

A. He was motioning to me with his left hand because I could see the flashlight as he waved it over, regardless of which hand he had it in.

Q. All right. As you saw the officer—and the car driven by

Malcolm J. Cundiff

Marshall must have been near him—did you see the left turn blinker on that car?

A. No, sir.

Q. But there was nothing between you and the car that would have kept you from seeing it there?

A. No.

4/18/69 page 90 } Q. Was there a lot of traffic on the road at that time?

A. Yes, the traffic was heavy.

Q. And I take it it was dark, was it not, sir?

A. It was at night, ten o'clock at night.

Q. Would you say the condition was somewhat confusing?

A. Well, it wasn't to me because I was watching the traffic officer.

Q. You were watching the officer. And you weren't—were you not paying attention to traffic coming in the opposite direction?

A. No, sir.

Q. Could you see Deputy Hodges from where you were?

A. Yes, sir, I could see him.

Q. You could see him?

A. Yes, sir.

Q. Was there any traffic between Mr. Marshall's car and Deputy Hodges?

A. That, I couldn't say.

Q. You couldn't say. Where was your car when you first saw Deputy Hodges?

A. Well, before when I noticed Deputy Hodges on further down the road (indicating), I was just about up to the intersection, just a few feet before the accident happened.

4/18/69 page 91 } Q. This was at a point where you would have been just approaching Deputy Amos, I take it?

A. That's right.

Q. So you were looking in the direction of Deputy Hodges. What was Deputy Hodges doing?

A. I couldn't answer that. I just—it was such a short period there, by the time I noticed him standing in the road, and Deputy Amos motioning the traffic (indicating) down the road, and then the accident happened and that's it.

Q. You are not in a position, I take it, to say whether or not this young man had his left turn signal on, are you?

A. No, sir, I'm not.

* * * * *

Dr. Charles E. Troland

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DR. CHARLES E. TROLAND called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellett:

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Q. Did you make an examination, a thorough examination of Mr. Cundiff?

A. Yes, sir.

Q. And what were your findings?

A. Well, the history that was obtained was that he had been involved in an automobile accident some two years before I first saw him and that he had developed pain in the lower thoracic region, which was the lower part of the chest, beginning in the vertebral column—back—and radiating around his chest. He had been treated with traction and also some injections with no permanent relief of his pain.

On my examination, there was tenderness over the mid and lower thoracic region, over the spine, and tapping along this region would produce pain radiating around the chest. This is what is known as a "Tinel sign" named after the man who described it, and it usually means that there is some irritation of the nerve root back at the spinal canal, and that is where the nerve roots come out.

He had worn a brace with no appreciable help at that time. He also stated that he had had a myelogram. I looked at the plates which did not show any definite abnormality
4/18/69 and which is not unusual if someone has only
page 96 } nerve root irritation and not really a great deal of pressure on the cord itself.

Q. All right, sir. And in response to your diagnosis and the medical history, what did you recommend or what did you do for Mr. Cundiff?

Dr. Charles E. Troland

A. I felt that he was having nerve root pressure or nerve root irritation. He stated that he was completely incapacitated by his pain and I, therefore, felt that something had to be done. I therefore recommended an operation which was carried out.

Q. And, Doctor, if you can in terms that we can understand, describe the operation and procedure of the operation exactly as to what you did and what you found.

A. Well, at the operation, we had to remove the spinous processes of three vertebrae. These are the long pieces that come out behind and lie over the spinal canal; and take off the lamina, which is the back portion of the bony canal. We looked for a disk and there was no disk but there was evidence of some nerve irritation.

I then opened the dura—which is one of the coverings of the spinal cord itself—found the nerve root in the affected area and sectioned those on both sides as I felt at that time that that would give the best prognosis for getting rid of his pain.

4/18/69 page 97 } Q. Now, Dr. Troland, when you go into this area, how many layers of muscles do you have to go through, approximately?

A. Approximately three. It is rather heavy muscle.

Q. Is there any aftermath of pain as a result of this operation?

A. Oh, there's bound to be. Whenever you go through this much muscle and separate the back from the vertebral column itself—it is a good-sized procedure—and particularly after you have had to take off the bone of this spinous processes and the lamina—this always causes some irritation. I would estimate that a person would not fully recover from an operation like this, as far as the muscle and the bone part is concerned, for a year.

Q. Doctor, when you operated, could you tell at what point on the nerve in relation to the spinal column that the pressure was being exerted on the nerve?

A. No, sir; we could only tell—I am not certain that there was a great deal of pressure—we only knew that we were having nerves that had been irritated and we did not find at that first operation any direct pressure.

Q. So that nerve was sectioned and what was the effect of the sectioning of the nerve that comes out through the vertebra or from the spinal column?

4/18/69 A. Well, we separated the sensory root from the motor root so that the only thing he would have

page 98 } would be an area of numbness coming around the mid and lower portion of the chest area of approximately four to five inches in diameter.

Q. And this desensitized this area?

A. Yes, sir.

Q. He can't feel it. Would this be permanent?

A. Yes, sir.

Q. There is no way this could be rejuvenated or restored to him?

A. No.

Q. All right. I assume, Doctor, after the first operation, what—that you did refer Mr. Cundiff back to his family doctor?

A. I just sent him back to Dr. Tucker, yes, sir.

Q. And did you see Mr. Cundiff again?

A. Yes, sir, he was next seen in my office on November 14, 1968.

Q. And did you make an additional examination of him at that time?

A. Yes, sir, he apparently had been benefitted by his operation but he had developed pain, which he had to some degree in the hospital, but he had developed pain which was a little below the level at which he had previously experienced his pain, and he had already also noted that his pain was more severe when he'd be carrying out a great deal of activity.

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page 99 } Q. Now, the first operation—they were on what or in the area of what vertebra, do you recall?

A. I think six, seven and eight.

Q. Would that be the thoracic—six, seven and eight?

A. Yes, sir.

Q. And where was he having the pain this time in reference—

A. Just below that, around nine and ten—nine, ten and eleven.

Q. And right in the same general area?

A. Just below.

Q. Just one notch below?

A. Yes, sir.

Q. What did you recommend as a result of your examination on this occasion?

A. Well, at that time, he stated that he was fairly comfortable when he was sitting perfectly erect and I, therefore, recommended that he be fitted with a brace to give that a trial before any more serious procedures were contemplated. I

felt that he should have as thorough a trial on conservative treatment as possible.

Q. All right, and when did you see him next?

A. He was next seen on February 10, 1969, in which he was again complaining of pain in the lower thoracic area, below where he had had his pain before and stated that it had become more severe. He was having difficulty wearing the brace and did not feel that it was giving him as much benefit as he needed to be able to return to normal life.

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Q. All right, sir. What did you do in response to your second examination or your second meeting with Mr. Cundiff?

A. Well, I felt that, as he had gotten progressively worse, an exploration was indicated and this was done. On this occasion, it was essentially the same procedure except that, when we had taken and separated the muscle and taken the bone off and I looked at the nerve root on the side, it was obvious that they were compressed in that at least two areas to some degree on both sides.

I, therefore, did a decompression which is essentially the nerve root as it comes out and comes through a hole or an opening (indicating) and, in this case, we found that this opening was compressed. It was smaller than it should be and, in order to allow the nerve to come out without any pressure on it.

I, therefore, deroofed it, just took off the back portion of the hole so that the nerve root could then ride free without any pressure on it. I did not go into the spinal canal further or into the dura through the covering of the cord because I did not want to give him a wider area of anesthesia and because of the fact that he had obvious compression, I felt that the decompression should be at least sufficient and should have a trial to see if it would take care of his symptoms.

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Q. Did you determine whether he had any hairline fractures or anything or cracks or anything in it?

A. I couldn't see any. I don't think anybody would be able to see a fracture there.

Q. Can a fracture exist without it being able—without you being able to see it there?

A. Yes, sir.

Q. In your opinion, did a fracture exist—

Mr. Rogers: I object unless he can state so.

Dr. Charles E. Troland

By Mr. Ellett:

Q. Well, with reasonable medical certainty, in your opinion, did a fracture exist there?

A. It is impossible for me to say.

Q. All right, sir. Now, Doctor, what is your prognosis for Mr. Cundiff, Dr. Troland?

A. I think he's always going to have this area of loss of sensation on his chest. I don't think his back—I don't believe that anything that we ever do in an operation of this magnitude ever restores anyone to completely normal. I think he may have some aching in his back and he's more likely to have some aching and pain in his back following physical activity than someone who has not had the procedure. I would not expect him to have a recurrence of the type of pain that he had before the surgery.

4/18/69
page 102 } Q. In other words, he is going to be better off now than he was before?

A. He is not going to be well but he's much better off.

Q. All right. Doctor, do you have an opinion, based on reasonable medical certainty, as to the cause of the plaintiff's trouble or disability?

A. From the stories given to me by the patient and by Dr. Tucker, I believe his difficulties were caused by his automobile accident in September '64, I believe.

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RE-DIRECT EXAMINATION

By Mr. Ellett:

Q. Dr. Troland, let me ask you one more question. The type of injury that you discovered and the manifestation as far as the patient is concerned, is this delayed sometimes—that it might show up for—might not show up for maybe say a week or two weeks or three weeks after an injury?

A. It is entirely possible and very frequently occurs that a patient who has an injury can have some hemorrhage around a nerve or the nerve can be swollen and not transmit pain. Now, this can occur up to several weeks and even longer.

Dr. Gene E. Clapsaddle

We not infrequently see people who have an injury and later we find that they have got some very objective thing, such as a ruptured disk, but their symptoms do not come on for a period of several weeks.

4/18/69
page 108 } Q. I will just ask you again so there will be no question about this. Based on your medical history that you obtained, your examination, and your operations, is your opinion based on reasonable medical certainty that the cause of the plaintiff's trouble was this automobile accident on September 4, 1964?

A. It is my opinion that the cause of the patient's difficulty for which he was operated upon by me was caused by his automobile accident.

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DR. GENE E. CLAPSADDLE called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellett:

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4/18/69
page 113 } Q. And how many times approximately did you see him?

A. I saw him over the next year approximately thirty times—thirty-two times.

Q. Was the nature of his complaint substantially the same each time you saw him?

A. More or less. Certainly, his symptoms were continually confined to his back. On the first time I saw him, the pain had been very generalized and had been over a large area but, as more time went on, the pain became or began to localize more to a smaller area.

Q. And what—do you recall, Doctor, what area it localized in?

A. I will have to look here to mention that (witness re-

ferred to notes)—yes, I see several mentionings through my notes about the pain being located about the area of the eleventh thoracic vertebra on the right—on the left, I believe.

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Q. Now, Doctor, the type of injury that Mr. Cundiff experienced, is this the type of injury that does not manifest itself to the patient until sometime after an injury would cause it?

4/18/69 page 115 } A. I suppose this depends particularly on the nature of the actual injury, but certainly muscular injuries or any injury in which you don't get direct blow to the area that you're talking about could certainly be quite insidious in its onset and not be manifest early.

Now, certainly in correspondence later on and in talking with other doctors who had seen Mr. Cundiff, it was my impression that his trouble was not in the muscle and I, of course, think that his poor response to the various treatments that I gave him would indicate that probably the pain that he was experiencing was not muscular in origin. And, in fact, the trouble was probably brought about by an injury or injuries that developed over a *perood* of time; not injuries that developed, but the result of the injury developing over a period of time. And, certainly, would not manifest itself at the time of the accident or even in the immediate days after the accident.

Q. You say sometimes it would take two or three weeks for it to manifest itself?

A. That would certainly not be unlikely.

Q. Doctor, do you have an opinion based on reasonable medical certainty as to the cause of the disability that Mack Cundiff suffered?

A. Well, I think that Mr. Cundiff's disability was the result of the accident that he was in.

4/18/69 page 116 } Q. Of the automobile accident—

A. Yes.

Q. —on September 4, 1964?

A. That's right.

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By Mr. Ellett:

Q. All right. I will ask this question again, Doctor. Do you have an opinion now at this time based on reasonable medical certainty as to the cause of Malcolm Cundiff's disability or trouble?

A. Yes, I felt that the cause of his disability was the accident that he was involved in in 1964.

Q. And you still feel that way?

A. Yes, I still feel that way.

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page 127 }

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DR. JESSE TUCKER, JR. called as a witness in behalf of the palintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellett:

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Q. Now, Doctor, do you have an opinion based on reasonable medical certainty as to the cause of the disability or the problems that Malcolm Cundiff has had with his back?

A. Yes, sir.

Q. And what is that opinion?

Miss Marlene Ruanna Nester

A. I think he had an injury when driving the automobile on the 4th of September, 1964, that he had a whiplash type of injury to the thoracic spine which caused—which subsequently caused pressure on the sixth, seventh, eighth and ninth inner thoracic intercostal nerves.

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EVIDENCE ADDUCED ON BEHALF OF THE DEFENDANT.

MISS MARLENE RUANNA NESTER called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rogers:
Q. Will you state your name, please, and your address and what you do?
A. Marlene Ruanna Nester, and do you want my home address?
Q. Yes.
A. Route 3, Shannon Hills, Ridgeway, Virginia, and I am a college—

Mr. Davis: Will you speak a little louder so we can all hear you?
4/18/69
page 157 } Mr. Rogers: Everybody wants to hear you and we have got traffic outside.
The Court: There are some trucks moving down there and it's hard for us to hear you.
The Witness: My name is Marlene Ruanna Nester and I live at Route 3, Shannon Hills, Ridgeway, Virginia, and I am a college student at Radford College.

By Mr. Rogers:
Q. You are at Radford College?
A. Yes, sir.
Q. What year are you in?

A. I am a senior.
Q. I beg your pardon?
A. A senior.
Q. How old are you?
A. Twenty.
Q. Twenty. Ruanna, back in 1964, on September 4th, were you a passenger in an automobile operated by Michael Marshall?
A. Yes, sir.
Q. Where were you riding in the car?
A. In the front seat on the right side.
Q. Next to the driver on the right side?
A. Yes, sir.
Q. Had you all been to a football game?
4/18/69 A. Yes, sir.
page 158 } Q. Had you been to a football game between your high school and Franklin County High School?
A. Yes, sir.
Q. Now, if you will go ahead and tell these ladies and gentlemen—

Mr. Ellett: Did you ask her what her high school is? If you don't mind, would you ask her what her high school was at the time?

By Mr. Rogers:
Q. All right, what was the name of your high school?
A. Drewry-Mason.

Mr. Ellett: Thank you.

By Mr. Rogers:
Q. I think they were the losers, as a matter of fact, weren't they?
A. Yes, sir.
Q. You all had left the game, I take it, and the people you were with?
A. Yes, sir.
Q. Now, who was with you, Ruanna, besides Michael?
A. Gloria Pace, Bonnie Pace and—

Mr. Hutcherson: I can't hear, Bob; I'm sorry.

Miss Marlene Ruanna Nester

By Mr. Rogers:

Q. You take your time, and yell if you have to, so everybody can hear that. Gloria Pace, you said?

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A. Gloria Pace, Bonnie Pace and Anne Pullium.

Q. And Anne *Pulliam*—P-u-l-l-i-u-m?

A. Yes, sir.

Q. They are all here today, I take it?

A. Yes, sir.

Q. All right. After you all left the football game, were you going on home?

A. Yes, sir.

Q. Now, did anything occur that made you turn or to go back to the football game?

A. Yes, sir, Bonnie Pace had left her blanket at the football game and we turned around to go back and get it.

Q. Now, do you know what road you were—the number of the road you were driving on?

A. No, sir.

Q. All right. There is in evidence a diagram, Ruanna, and if you will turn here and look to your left (indicating), that shows Route Number 40. Now, Number 2 here has been designated as the vehicle operated by Michael Marshall (indicating) and Number 1 was the car operated by Mr. Cundiff (indicating), the other gentleman. In other words, you were in Number 2 there?

A. Yes, sir.

Q. Now, will you please, Ruanna, in your own words and as well as you can, tell the ladies and gentlemen of the jury what you recall, if anything, about this accident?

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A. Well, we had returned to get the blanket and, you know, there were cars—oncoming cars—and also the cars from Perdue Lane coming off (indicating). Two policemen were directing traffic and we had stopped beside one policeman and then we had gone on a little further and the other—Mike had his signal on to turn left and the other policeman then motioned us to go on and turn into Perdue Lane.

Q. Now, let me go back a little bit. You went by a policeman?

A. Well, we stopped.

Q. Did you stop by this way or what I think what might have been a deputy sheriff (indicating)—I believe described as Deputy Amos out there?

A. Yes, sir.

Miss Marlene Ruanna Nester

Q. Do you recall whether or not you stopped here (indicating)?
A. Yes, sir, we did stop.
Q. And then did you move on after stopping—
A. Yes, sir.
Q. —pursuant to a signal from him?
A. Yes, sir.
Q. And did you stop again when you got up to Perdue Lane?
4/18/69 page 161 } A. Yes, sir.
Q. Now, did Michael have his left turn signal on at that time?
A. Yes, sir, he did.
Q. How did you know that, Ruanna?
A. Well, because I saw the light flashing.
Q. You saw the blinking light?
A. Yes, sir.
Q. Then did you see the officer who the testimony indicates was Deputy Amos standing there at Perdue Lane give a signal to Michael?
A. Yes, sir, he did.
Q. And then did Michael, pursuant to that signal, proceed to make his left turn?
A. Yes, sir.
Q. And then what happened?
A. The next thing I knew we had collided with the other car.
Q. The two cars collided almost immediately?
A. Yes, sir.
Q. How far had Michael gone when the collision occurred?
A. Oh, only several—I guess just a few feet because we were right there beside of the street we were turning into.
Q. Were you very near the policeman that signaled you on?
4/18/69 page 162 } A. Yes, sir.
Q. Were you injured in the accident?
A. No, sir.

Mr. Rogers: Now, Ruanna, answer any questions these gentlemen ask. They may have some questions and will you answer them the best way you know?

CROSS EXAMINATION

By Mr. Hutcherson:
Q. Ruanna, what kind of car was Michael driving?

Miss Marlene Ruanna Nester

A. An Oldsmobile.
Q. Whose automobile was it?
A. His.
Q. His?
A. Yes, sir.
Q. It wasn't his father's?
A. Well, it may have been in his name but it was Michael's car.
Q. It was Mike's car and it was practically a new automobile, wasn't it?
A. Yes, sir, it was.
Q. A '65 model Oldsmobile?
A. I don't know the date; I think it was a '65 but I am not sure of the date.

4/18/69 page 163 } Q. Brand new?
A. Yes, sir, he just got it.
Q. And you all had gone part of the way to Martinsville and come back or had started to Ridgeway where you live?
A. Yes, sir.
Q. And your cousins—and had turned around and had come back?
A. Yes, sir.
Q. Now, you say there was a good bit of travel or traffic there, wasn't it?
A. Yes, sir.
Q. And wasn't any traffic coming out or going in Perdue Lane at that time, was it?
A. What?
Q. Wasn't any traffic going out of or going into Perdue Lane at that time, was it?
A. It was traffic there. I don't know if there was anything moving right there at that moment.
Q. There was traffic there and that traffic was stopped, wasn't it?
A. Yes.
Q. Huh?
A. Yes, the traffic coming out of Perdue Lane was.
Q. And the traffic on Route 40 was moving?
A. Yes.

4/18/69 page 164 } Q. The traffic in the east-bound lane was moving, and the traffic in the west-bound lane was moving. In other words, the traffic towards Rocky Mount was moving and the traffic towards or on east of Rocky Mount was moving, wasn't it?
A. Yes, quite right.

Miss Marlene Ruanna Nester

Q. Right?
A. Right.
Q. And Mike decided to turn in, right in between all that traffic, didn't he?
A. No.
Q. Well, how was he going to get in if he didn't turn in between all that traffic?
A. Well, it was all stopped at that moment before he turned in.
Q. Well, didn't you see Mr. Cundiff's car moving?
A. No, I didn't. I wasn't looking.
Q. You weren't looking that way?
A. No.
Q. In other words, you didn't see—you didn't see any car in this lane over here (indicating)?
A. No, because I wasn't looking that way.
Q. Which way were you looking?
A. I don't remember.
Q. You don't remember. Well, I can understand that. I'm not trying to cross you up or make a liar out of you, or anything like that. I can understand that you wouldn't remember probably, but you weren't looking and you weren't looking toward the way Mike was turning, were you?

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A. (Witness shrugged.) Toward the Mike was turning?
Q. Uh-hum.
A. Yes, I was looking toward the way he was turning.
Q. Well, then, why didn't you see the Cundiff car?
A. Because that wasn't the way Mike was turning. He was back up this way (indicating).
Q. Had you all ran right into the side of it, didn't you—into the right—the left front fender of it, didn't you?
A. (There was no response.)
Q. You never did see that car, did you?
A. I did when it hit us.
Q. When it hit you?
A. When we collided.
Q. Well, when you collided, you mean?
A. Yes, sir.
Q. You all hit the right front fender of that car, didn't you?
A. I don't know.
Q. And that car was completely in its lane of traffic, wasn't it?
A. What do you mean?
Q. That it was in its lane of traffic where it was supposed to be?

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page 166 } A. Yes, and so were we.

Q. You all didn't get across the side of that line?

A. When we started to turn, just when we collided.

Q. Well, you got about five feet over there, didn't you?

A. I don't know exactly how far it was.

Q. Well, you got about some distance, didn't you?

A. Some.

Q. Huh?

A. Yes, some.

Q. And you never saw any other car in that lane, did you? You weren't—

A. No.

Q. You weren't looking that way?

A. No.

Q. You didn't see it?

A. No; I wasn't paying any attention to that.

Q. Was Mike looking that way?

A. Yes.

Q. He was looking that way. Well, what kept him from seeing it, do you know?

Mr. Rogers: If Your Honor, please, I don't know how this young lady would know the answer to that question.

The Court: You ask her about it.

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page 167 } By Mr. Hutcherson:

Q. All right, was there anything to keep him from seeing it?

A. I don't know.

Q. I mean, well, you were there now, and you have testified about everything that you all did. Now, let's be fair about this thing and tell me whether or not there was anything in his way. You know whether there was anything in his way or not.

The Court: She can tell what she saw.

By Mr. Hutcherson:

Q. Did you see anything in his way?

A. No.

Q. Well then, you did see the automobile just before you hit it?

A. Just when we collided, I saw it.

Q. Just when you collided?

A. Yes.
Q. You didn't see it before?
A. No.
Q. Well then, but you saw him when you hit it?
A. Yes, sir.

Mr. Hutcherson: That's all.
Mr. Rogers: That's all. You can stand aside, Ruanna.

The witness stands aside.

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page 168 } MISS BONNIE PACE called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rogers:
Q. I'm going to ask you to speak up, if you will, because the Judge wants to hear you and these ladies and gentlemen want to hear you, and we have got a little noise, so speak up.
Tell me what your full name is, please.
A. Bonnie Marie Pace.
Q. And where do you live, Bonnie?
A. In Martinsville.
Q. How old are you?
A. Nineteen.
Q. What do you do—go to school?
A. I go to college.
Q. Where do you go?
A. Patrick Henry in Martinsville.
Q. All right, Bonnie, were you riding in an automobile operated by Mike Marshall back on September 4, 1964?
A. Yes, sir.
Q. Where were you riding in the car?
A. In the back seat, in the middle.
4/18/69 Q. In the back seat, in the middle. Now, to
page 169 } save a little time, I believe you all had been to a football game, hadn't you?
A. Yes, sir.
Q. And you had left the football game and were on the way back to Martinsville area when you discovered *soebody* left a blanket there?
A. Yes, sir.

Miss Bonnie Pace

Q. Was that your blanket that had been left?
A. Yes, sir.
Q All right. Did Michael agree to turn around and go back and get it; is that right?
A. Yes, sir.
Q. Now, Bonnie, as you all came up, back to the football area—turn around here, if you will, please—this is the stadium area (indicating) or the road and this is the road you were on (indicating) and the evidence indicates that you were in car Number 2 (indicating). That was Michael Marshall's car?
A. Yes, sir.
Q. And had approached this little lane coming out of the football, or high school area that is known as Perdue Lane (indicating). Do you recall seeing a police officer standing here (indicating)?

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Mr. Hutcherson: Now, Mr. Rogers, let's don't lead her. I think you called me down once for for that, today.
The Court: All right, let's make an objection and I will rule on it.
Mr. Hutcherson: Well, I object to the leading.
The Court: I think he's gone right much into detail.
Mr. Rogers: Judge, I was trying to save time, but we will string it on then.

Q. (Continued) Where were you riding, Bonnie?
A. Pardon?
Q. Where were you riding?
A. In the back seat in the middle.
Q. All right. And who was driving?
A. Mike Marshall.
Q. All right, where had you been?
A. To the football game at Franklin County.
Q. Where were you going at this particular time?
A. We were coming back to the school to get the blanket.
Q. Get whose blanket?
A. Mine.
Q. All right. Now, tell me, if you will, what happened, if anything happened?

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A. Well, we were coming back. We were stopped and we were going to turn into the school and the policeman motioned us to go in, and so we went in and we just collided; we hit.
Q. Did you see a police officer there?

A. Yes, sir.
Q. Did you see him give a signal?
A. I don't remember.
Q. Where were you sitting, in the back seat?
A. Yes, sir.
Q. Do you have any recollection yourself, Bonnie, of seeing the police officer?
A. I remember that there was one there.
Q. Did you see him give a signal to Mike?
A. I just don't recall.
Q. All right, do you know whether Mike stopped before he made a turn?
A. Yes, sir, we came to a complete stop.
Q. You recall that?
A. Yes, sir.
Q. Do you know—you may not know the answer to this—but do you know whether or not Michael gave any kind of a signal, a left turn signal?
A. I don't remember.
Q. All right, can you tell me how far you went approximately after you had stopped, and the collision occurred?
A. No, sir.
4/18/69 Q. Beg your pardon?
page 172 } A. No, sir, I don't.
Q. Was it far or long, or can you give me any kind of an estimate?
A. Well, we were stopped and we were going up the hill—you know, the hill—and I really don't know how far it was before we collided.
Q. Did you ever see the other car?
A. Pardon?
Q. Did you see the other car that you collided with prior to the collision?
A. No, sir.

Mr. Rogers: All right.
Mr. Hutcherson: No questions.
Mr. Rogers: That's all. You can be seated right over here.

CROSS EXAMINATION

By Mr. Hutcherson:
Q. Just a minute, Bonnie, I do have one question. Just take that seat just one minute, or you can stand right there and answer it.

Miss Gloria Pace

You say you didn't see, and you don't remember whether you saw, the police officer give any signal or not?
A. No, sir.

Mr. Hutcherson: That's all.

The witness stands aside.

4/18/69
page 173 } MISS GLORIA PACE called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rogers:
Q. Will you state your name, please?
A. Gloria Pace.
Q. Where do you live?
A. Martinsville.
Q. What is your address?
A. Route 1.
Q. What is your age?
A. Twenty.
Q. Are you occupied or what do you do?
A. I am a student at Radford College.
Q. You go to Radford College. What year are you in there?
A. I am a junior.
Q. All right. Gloria, were you a passenger in an automobile operated on September 4, 1964, by Michael Marshall?
A. Yes, sir.
Q. Where were you riding?
A. In the right back seat, right behind the front passenger.
4/18/69 Q. Where had you all been that night?
page 174 } A. To a football game at Franklin County High School.
Q. Who was playing?
A. Drewry-Mason and Franklin County.
Q. All right, did you leave the game?
A. What?
Q. Did you leave the football game?
A. Yes, sir. I mean, before it was over—is that what you mean?
Q. Yes.

A. I don't remember. I don't remember if it was over.
Q. And did you leave to return to Martinsville?
A. Yes, sir.
Q. Did you return to Martinsville?
A. Eventually but—
Q. Did anything happen in the meanwhile?
A. Yes, sir, we left our blanket at the game and so Mike said that he would turn around and return for it.
Q. And did you try to return to the high school area to pick up the blanket?
A. Yes, sir.
Q. Now, if you will, turn around, Gloria, and look at this diagram around here to your left. The testimony shows that this is Route 40 (indicating), the road you were on. Vehicle Number 2 (indicating) has been testified as being the vehicle operated by Michael Marshall, the one you had been in. Number 1 vehicle (indicating) was the vehicle operated by Mr. Cundiff.

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Where did you say you were sitting in this car?
A. The back seat on the right.
Q. All right. Now, you go ahead, if you will, and tell the ladies and gentlemen of the jury what you recall, if anything, about this accident.
A. We were turning—we were going up Route 40,—Is that what you said it was? (Indicating)
Q. Uh-hum.
A. —and we stopped in the lane of traffic. There was a lot of traffic and we approached Perdue Lane, where we had to make a left turn to go back into the—to go back to the football field, and a policeman had us stop, and we waited for—well, I forgot for how long—but for awhile to let the traffic *clme* out of Perdue Lane.
And then the policeman motioned for Michael to go ahead and then there was a collision.
Q. And now, do you know, Gloria, whether or not Michael had any sort of signal on his automobile?
A. I was sitting in the back seat and I really can't say.
Q. But do you know whether or not he had his vehicle at a complete stop?
A. Yes, sir, it was.
Q. All right. Did you see the other vehicle at all prior to—the one you collided with—prior to the collision?

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A. No, sir.
Q. Can you tell me in terms of estimated distances,—long or short—how far you went from the stopped position before this collision occurred?

Miss Gloria Pace

A. It didn't seem like it was very far at all.
Q. Did you see the police officer directing traffic?
A. Yes, sir.
Q. Did you see him signal or wave?
A. Yes.
Q. Give a signal to Michael?
A. (The witness nodded her head.)

Mr. Rogers: You answer the questions of these gentlemen now.

CROSS EXAMINATION

By Mr. Hutcherson:
Q. Gloria, you saw more than one police officer there, didn't you?
A. I don't remember but one.
Q. And that was the one down the road where he stopped you?

4/18/69
page 177 } Mr. Rogers: That's not what she said, Mr. Hutcherson.
Mr. Hutcherson: I'm asking her these questions on cross examination.
Mr. Rogers: Don't testify for her, though.

By Mr. Hutcherson:
Q. Is that where you stopped?
A. We stopped right outside Perdue Lane.
Q. Right outside Perdue Lane—right up here then (indicating)?
A. Yes, sir.
Q. And what kind of signal did the officer give?
A. A motioning signal with his hand like this (indicating).
Q. To go straight up the road then?
A. Like—I can't say whether he meant for us to go straight up the road or to turn. He just gave a signal for Mike to go ahead.
Q. He didn't give you a signal to turn in, did he?
A. I can't remember. He just gave a hand signal.
Q. He just gave a hand signal up like this (indicating) and they were running one lane going down there that way (indicating) and one lane this way (indicating). Wasn't he indicating and isn't that what he was doing?

4/18/69 page 178 } A. I can't remember.
Q. You can't remember?
A. No, sir; I remember just the signal.
Q. Did you ever see Mr. Cundiff's car?
A. No, sir, not before.
Q. Well, there were there cars in that other lane of traffic, weren't there?
A. Yes, I remember the lane of traffic but I can't say that I remember Mr. Cundiff's car.
Q. You remember seeing other cars over there, though?
A. Yes, sir, there was a lane of traffic.
Q. And Mike went ahead and made his turn across that lane?
A. Yes, sir, because the policeman motioned him on.
Q. You say you don't remember which way the policeman motioned. Now, did he motion to turn into Perdue Lane or did he motion to go up the road? He did, didn't he?
A. (There was no response.)
Q. Towards Rocky Mount?
A. I can't remember. He just gave a signal.
Q. He just gave a signal. And you don't know what kind of signal he gave?
A. No, sir, but since we were stopped there, ready to turn into the lane—

4/18/69 page 179 } Q. All right. Were you—are you sure you were stopped up here (indicating) or were you stopped back at the first policeman?
A. As I remember, we were stopped right beside the Perdue Lane.
Q. Right beside the Perdue Lane?
A. Yes, sir.
Q. That would be by the officer up here (indicating)—right?
A. Yes, sir.
Q. Well then, you turned directly across the oncoming lane of traffic?
A. Yes, sir, to make our left turn.

Mr. Hutcherson: That's all.
Mr. Rogers: Thank you.

The witness stands aside.

MISS ANNE PULLIUM called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Miss Anne Pullium

DIRECT EXAMINATION

By Mr. Rogers:

Q. Tell us your name and where you live.

A. Margaret Anne Pullium, Ridgeway, Virginia.

Q. Is that near Martinsville?

4/18/69 page 180 } A. That's right.

Q. How old are you, Anne?

A. I am twenty.

Q. Are you in school?

A. That's right.

Q. Where are you in school?

A. Longwood College in Farmville.

Q. All right. And were you a passenger in an automobile on September 4, 1964, operated by Michael Marshall near the Franklin County High School?

A. That is correct.

Q. I am going to ask you if you will turn and look over here, look over your left shoulder at this diagram. For our purposes, the testimony showed that vehicle Number 2 (indicating) was the vehicle operated by Michael Marshall, preparing to make a left turn off of Route 40 into Perdue Lane. And car Number 1 (indicating) was the vehicle operated by the plaintiff, Mr. Cundiff. You presumably were a passenger in car Number 2.

A. That's right.

Q. Where were you sitting in car Number 2, or the car operated by Mike?

A. I was in the back seat on the left side, directly behind Michael.

Q. All right. Now, the testimony, I think, indicates that you all had left the stadium and had returned to get or to pick up a blanket.

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A. That's right.

Q. If you would, you go ahead and tell these ladies and gentlemen and the Court what you recall, as well as you can.

A. Well, we had returned to the stadium to get a blanket and we were waiting in our lane to turn left and I remember two policemen there directing traffic and one policeman nearest us motioning for us to turn left.

Q. Did you see him give a signal?

A. Yes, I did, with the flashlight.

Q. Had Michael stopped his car prior?

A. Yes, he had.

Q. Did you see, Anne, the car that collided with you? Did you see it prior to the collision?

A. No, sir.
Q. Do you know whether or not from where you were sitting, do you know whether or not Mike had any kind of signal on—a signal device?
A. No, sir, I can't say.
Q. You can't say. Are you confident or sure that the vehicle had stopped?
A. Yes, sir.
Q. And did you see the police officer give a signal?
A. Yes, sir.
4/18/69 page 182 Q. How far, in relative terms, did you all go after the officer gave the signal and Mike started his turn before the collision occurred?
A. How far did we go?
Q. Yes. Was it a long distance or a short distance?
A. A very short distance.
Q. And was anybody in your car injured?
A. No.

Mr. Rogers: These gentlemen may have some questions, Anne.

CROSS EXAMINATION

By Mr. Hutcherson:
Q. Anne, you did go over into the other lane of traffic, though, didn't you?
A. To make the turn.
Q. Uh-hum. I say you got over into Mr. Cundiff's lane of traffic?
A. Yes, sir, after we were motioned to turn.
Q. Uh-hum. The trooper gave you—the Sheriff gave you, or the Deputy Sheriff gave you a signal but he gave you a signal to go right on up the road, didn't he?
A. No, sir.
Q. Huh?
A. No, sir; he motioned with the flashlight for us to turn left.
4/18/69 page 183 Q. Didn't you see the other traffic coming down that lane of travel?
A. No, sir.
Q. Were you looking?
A. No, sir.
Q. Well, the officer was standing right in front of you (indicating). This other traffic would have been right in front of you, would it not have been?

Miss Anne Pullium

A. I beg your pardon?

Q. This string of cars coming down Route 40 and Mr. Cundiff being one of them, was right in front of you, right in front of the car you were riding in?

A. No, sir, because I didn't see it. I wasn't looking to see the traffic because I wasn't driving.

Q. You weren't looking?

A. No, because I wasn't doing the driving so I wasn't looking.

Q. You don't know whether he gave a signal or not, do you?

A. I know—do I know which one gave the signal? I have already stated I didn't know if Michael had his signal on but I do know that the policeman motioned for him to turn left, with a flashlight that he had in his hand.

Q. In fact, the policeman was motioning you all to go straight on and also motioning the other line to go straight down the road?

4/18/69
page 184 } A. That's not the way I saw it.

Q. That's not the way you understood the signal?

A. That's right.

Q. Did you see any other traffic turn left?

A. No, sir, because we were in front of all the cars. We had cars behind us and we were waiting to turn left.

Q. Were any cars coming out of Perdue Lane?

A. I don't remember.

Q. You don't remember it?

A. No, I don't.

Q. Do you remember whether both lanes to Perdue Lane were blocked or not?

A. No, sir, I don't.

Q. You didn't even look where you were turning?

A. Because I wasn't driving.

Q. I know, but you were riding. You had to worry about the fellow that was driving, didn't you?

A. Yes, I guess so.

Q. And you didn't even look to see whether he was going into a lane that had traffic in both lanes, or not?

A. No, sir, I didn't.

Q. And this has been some—what, four—over four years ago?

A. Yes, sir.

4/18/69
page 185 } Q. How old were you at that time?

A. Sixteen.

Michael Lee Marshall

Q. Sixteen. And it was how many along with you?
A. Five.
Q. It was a new Oldsmobile?
A. That's correct.
Q. Did all of you all go to Drewry-Mason?
A. Yes, sir.
Q. And you all had been up here to the football game?
A. That's right.
Q. All right, and just one other question. And you didn't see any other traffic coming down the road on the other side?
A. I didn't see any other traffic because I wasn't looking.
Q. Because you weren't looking. But there was traffic there, wasn't it?
A. I'm sure there must have been.

Mr. Hutcherson: All right, thank you.

The witness stands aside.

4/18/69
page 186 } MR. MICHAEL LEE MARSHALL the defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rogers:
Q. State your name.
A. Michael L. Marshall.
Q. What is your age?
A. Twenty-three.
Q. What is your address?
A. R. F. D. 1, Spencer, but I am stationed at New London Connecticut, right now.
Q. Are you in the Military Service?
A. Yes, sir, I am.
Q. What branch?
A. In the Navy.
Q. How long have you been in the Navy?
A. I have been in the Navy, oh, about two and a half years.
Q. Are you in some sort of training school?
A. Yes, in Sub School at—
Q. New London, Connecticut?
A. —New London, Connecticut.

Michael Lee Marshall

Q. What do you regard as your permanent
4/18/69 home address?
page 187 } A. R. F. D. 1, Spencer.

Q. All right. Were you the operator of an automobile on September 4, 1964, when a collision—involving a collision on Route 40 and Perdue Lane in Franklin County?

A. Yes, sir, I was.

Q. Had you all been to a football game, Michael?

A. Yes, between Franklin County and Drewry-Mason High School.

Q. Were you a student at Drewry-Mason at that time?

A. No; I was a freshman at V.P.I. at the time.

Q. I see. Had you brought these girls who have testified over to see the game?

A. Yes, I had.

Q. Were they Drewry-Mason students?

A. Yes, sir.

Q. Had you graduated from Drewry-Mason?

A. Yes, I had.

Q. Now, did you all leave the football game early, before it was concluded?

A. Yes, about the third quarter, I think we left.

Q. All right, and were you intending at that time to return to the Martinsville Area?

A. Yes.

Q. Was there some reason that made you alter
4/18/69 your course?
page 188 } A. Yes, when one of the girls said that—

Q. Wait a minute. Just wait now until that truck passes.

Q. One of the girls had said that they had forgotten a blanket that we were sitting on, and so it was about—I guess we had gone about, oh, five miles outside the school, and so I just said, "I'll just turn around," and I thought the game would still be on by the time we went back, because I mean as they still had another quarter to play.

Q. Did you return then to the high school area?

A. Yes, sir, I did.

Q. And to obtain the blanket?

A. Yes, sir.

Q. As you approached, Michael, on Route 40—as you approached the Perdue Lane—it was Perdue Lane, I take it, that you had come out of previously, had you not?

A. Yes, I had, yes.

Q. As you approached this Perdue Lane, did you see a po-

lice officer standing—I think this has been previously identified as where Deputy Hodges was standing (indicating).

A. Yes, we did. We were stopped once there and then we moved on up to the other point up there as soon as I could get past him, and I moved up.

Q. You were stopped by Deputy Hodges?

4/18/69 page 189 } A. Once, yes, I think I was.

Q. And then later did you move forward and were you stopped again?

A. Well, I stopped at the intersection there (indicating) and I was giving my left turn signal, and cars had started going around me on the left side at the time (indicating).

Q. Going around you on the left side?

A. Excuse me—on the right side, and at the time I saw that the traffic was coming down Route 40 (indicating), so I just stayed in that lane right there.

Q. Well, let me come back. You stopped here pursuant to a signal from Deputy Hodges (indicating)?

A. That's correct.

Q. And then did you go forward and did you stop again?

A. Yes, and we had to wait for this traffic to clear out and—

Q. You say "traffic to clear out"?

A. There were cars coming down Route 40 as well as cars going up, and I was—there was traffic going on up, but I stopped at this intersection and was giving my signal to turn left at the time.

Q. Had you gotten close to the double line there?

4/18/69 page 190 } A. Yes, yes, I was about—about, I'd say, about a foot off the double line and trying to leave enough room for the cars to go around me on the other side.

Q. Now, did you have your left turn signal on?

A. Yes, I did.

Q. And you were stopped?

A. Yes.

Q. Now, did the officer give you any signal?

A. Well, at first, he motioned to stop traffic on Route 40 and then he let a line of traffic out Perdue Lane (indicating), and I suppose we sat there for about two minutes, at least, and I had my turn signal on at this time, and I thought that the officer saw me at the time. It was pretty clear to me that he had and so—

Q. Were you near him?

A. Yes, yes, he was right there at the intersection, and I was just sitting right there just getting ready to turn into the intersection. I mean, turn into Perdue Lane.

Michael Lee Marshall

Q. All right. And you had your left turn signal on?

A. Yes, I did.

Q. Did he give you any kind of signal?

A. Yes, with the flashlight. He kind of gave a circular signal like this (indicating) and, to me, it meant to turn into Perdue Lane.

4/18/69 page 191 } Q. All right. Now, prior to the time that he gave you the signal and you had stopped your vehicle, did you see any traffic approaching in the opposite direction; was traffic moving on Route 40 coming in the direction in front of you when you were stopped?

A. Just at the first part, and then they stopped the traffic on Route 40 and he left the other lane out of, you know, Perdue Lane, and then he had stopped that traffic and in this meantime there had been no traffic down Route 40 at this time.

Q. No traffic coming in the opposite direction?

A. Yes, and then it is when he gave me the signal to turn (indicating) and since I was watching him and the space I was going to turn in is between the stop sign and the side of the road, and there was cars on this other side (indicating), and I wanted to make sure that I had enough room to get through there. I was watching him and the street where I was going to turn in, and then—

Q. Perdue Lane. Mike, was that occupied with any traffic at all?

A. Yes, the right lane (indicating) was completely filled with traffic and it was backed up and you could see it.

Q. Is that the lane going north?

A. Yes, it was backed up, well, just about as far as you could see but it was just in one lane.

4/18/69 page 192 } Q. And you, at that time, turned left?

A. Let to go into the right lane of Perdue. Now, that would be south.

Q. That was south on Perdue?

A. Right.

Q. Can you tell me how far, roughly, you went after receiving the signal from the officer to proceed—a long distance?

A. I was about five or six feet, not too much more. I just did get my front end and was just over the yellow line because (indicating) the Cundiff car came down and hit me right in the center of my car and his left front hit me right in the center of my car and just stopped me dead.

Q. What would you estimate your speed was at the time of the collision?

A. Well, I just had started off so it couldn't have been more than about five miles per hour.

Mr. Rogers: Excuse me just a second. Mike, answer any questions these gentlemen may have.

CROSS EXAMINATION

By Mr. Hutcherson:

Q. Michael, whose automobile were you driving?

A. This was my father's car.

Q. Your father's car?

A. Yes.

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Q. And you, of course, were using it with his permission?

A. Yes, sir.

Q. And you came up there and you were coming back after one of the little girl's blanket?

A. That is correct.

Q. And you stopped. You were first stopped by one deputy sheriff and then you crept on up to the next deputy sheriff?

A. That's correct.

Q. And at that time you were stopped so that the lane of traffic could come out of Perdue Lane; is that right?

A. That's correct.

Q. Well, now, where would you have been so that that traffic could have come out of Perdue Lane?

A. I had turned (indicating).

Q. Wasn't that traffic coming out of Perdue Lane turning both ways?

A. Yes, sir, it was, and it kept right in front of my car.

Q. Well, then, your car must have been back some from the way that drawing is.

A. It was about sitting even with the edge of Perdue Lane, I'll say. Do you want me to show you?

Q. Even with the lower edge?

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A. (Witness left the stand and went to blackboard.) Right about in here (indicating), right there.

Q. Well, show me where the edge of the lane you said it was about at.

A. About even with this edge (indicating).

Q. About even with that edge?

A. The cars turned right in front of my car when he was letting these cars right here out (indicating) and they also turned this way (indicating).

Michael Lee Marshall

Q. In other words, the cars were coming out of Perdue Lane and had room to turn in front of your car and go west?
A. That's correct.
Q. And, of course, some of them were turning east?
A. That's correct.

(Witness returned to witness stand.)

Q. Now, when you were watching this deputy sheriff, he turned both lanes loose, didn't he? He turned your lane loose and he turned the lane going east loose, didn't he?
A. I did not see his other signal.
Q. You didn't see his other signal?
A. All I saw was his right hand.
Q. And you—

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A. And he was looking straight at me when he did it.
Q. Like this (indicating)?
A. Yes.
Q. You didn't see him wave—you didn't see him make a motion toward Perdue Lane, did you?
A. He was—
Q. You said he was making a turn like this.
A. He was looking straight at me and when he made this circular signal (indicating), I took it as a signal to turn into Perdue.
Q. You took it as a signal to turn in but actually,—
A. It was clear to me that it was a signal to turn.
Q. Actually, it was a signal for you to go up the straight part—

Mr. Davis: Judge, that's what the jury is going to determine.
Mr. Hutcherson: Mr. Davis, he's on cross examination.

Q. (Continued) And you took it to signal, or the signal to turn in and he says it was a signal for you to go on up the road.
A. I can't say what he meant.
Q. You don't say—well, you heard him testify this morning.
A. Well, I heard him say that.

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Q. Yes, sir. Now, did you ever see the Cundiff car, Mike?
A. Only when it was about, I suppose it was —oh, about ten feet away, ten feet.

Michael Lee Marshall

Q. Right on you, in other words?

A. Right on me, and I just had—I didn't even have time hardly to put on my brakes and then it struck.

Q. Well, in fact, you didn't put on your brakes, did you?

A. I might have started to but it happened so quick.

Q. And that you didn't put them on because you didn't leave any skid marks.

A. No, because it happened so fast and I wasn't going fast.

Q. Happened so fast, certainly, but you didn't even have time—well, did you or did you ever have time—or is that the only time you saw the vehicle?

A. Yes.

Q. It had lights on, didn't it?

A. Yes, I suppose so.

Q. Was there anything to block your vision looking up the road?

A. None other than that the police officer was there, I suppose.

Q. Well, he wouldn't have blocked your vision looking up?

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A. I suppose not.

Q. That is to your right, would he?

A. I know that at the time that I had looked up Route 40, there was no traffic coming up that way, and then I thought and I focused my attention to the police officer and the other lane. And since I did not see that police officer motion for any traffic to come down that way, I just followed what I thought was his instruction to turn.

Q. All right, you looked when you first got there, in other words?

A. Oh, yes, definitely. I mean, because that's the reason I stopped there in the first place.

Q. You looked up the road?

A. Right.

Q. When you first got there, you stopped?

A. Yes, sir.

Q. And you gave your signal?

A. Yes, sir.

Q. But you didn't look any more then. You just watched out—you didn't look any more as you say because you took it when he went around this way (indicating) with his light, you took that to mean for you to turn into Perdue Lane?

A. It was very plain to me that that was what he wanted me to do.

4/18/69 page 198

Q. And you went ahead and made your turn without looking any further?

Michael Lee Marshall

A. No, no; I was looking at Perdue Lane and I was looking at the officer.

Q. Looking straight ahead and at the officer?

A. Well, the officer was slightly to the side of my vision so I was looking at him and the signal he gave is what I thought was clear to me and was a signal to the left.

Q. And you didn't look back to your right any more?

A. Well, I hadn't seen anything coming from there before and, since he motioned me on, I just went by his signal.

Q. But I say you didn't look any more to your right?

A. No more than that one time, I mean.

Q. When you first came up there?

A. Well, it was more than the first time. I mean it was after the traffic and after I had stopped and all the cars from Route 40 had passed me by.

Q. Yes.

A. And then he started the other lane coming down (indicating). Of course, there couldn't be traffic coming in the other way because the cars were cutting right in front of me and, as soon as he stopped those cars, I took—I was watching him and his signal and maybe it was meant as a signal to turn in and so it—to me, it was a signal to turn in and so I just turned in.

4/18/69
page 199 } Q. And you never saw the Cundiff car—and I think I have asked you this and I'm not going to ask any more—until it was approximately ten feet away?

A. Right, it was right on me.

Q. He was right on top of you?

A. Yes.

Q. And you were over in his lane?

A. I just started my turn.

Q. I say, you were over the double line?

A. I just started my turn, yes.

Q. You were over the double solid line?

A. Yes.

Mr. Hutcherson: All right.

The witness stands aside.

Mr. Rogers: Defense rests, Your Honor.

The Court: Defendant rests. Any rebuttal?

Mr. Hutcherson: Yes, sir. Let me have just a few minutes, please.

Mr. Reggie Amos.

Mr. Rogers: If Your Honor, please, I would like to see Your Honor in Chambers because I think he heard some of the testimony.

The Court: All right, let me see you all in
4/18/69 Chambers.

page 200 } IN CHAMBERS AT 3:20 O'CLOCK, P.M.

(Out of the presence of the jury.)

Mr. Rogers: If Your Honor, please, the defendant respectfully objects to recalling of the witness by the plaintiff—recalling the witness, Reggie Amos,—because Mr. Amos was in the courtroom during the part of the testimony of the defendant, which just occurred.

Mr. Hutcherson: He was in the room when I asked him two questions.

The Court: I saw him come in the door and somebody motioned him to leave.

Mr. Hutcherson: I did.

Mr. Rogers: I don't know who motioned him to leave.

Mr. Hutcherson: As soon as I saw him, I motioned him to leave.

Mr. Rogers: I can't recall. I don't know when he came in.

The Court: He couldn't have heard over one or two questions because I saw him.

Mr. Hutcherson: I vouch to the Court that he heard me ask—

The Court: Well, now, let me say this. The door opened and made a noise and it interferred with my lis-
4/18/69 tening and I looked around and it was Mr. Amos.
page 201 } Mr. Rogers: Well, I would object, Your Honor.

The Court: And about that time, somebody waved him to go back and he went back, but anyhow, I am going to let him testify.

Mr. Rogers: Please note my objection because I don't know what the questions were and I think it would be prejudicial without knowing what he did hear, and also in view of the separation of the witnesses.

The Court: All right, sir.

Mr. Rogers: What he heard, we don't know, Your Honor.

(Thereupon, Court and counsel returned to the Courtroom at 3:24 o'clock, P. M., and the following occurred before the jury.)

EVIDENCE ADDUCED IN BEHALF OF THE PLAINTIFF IN REBUTTAL

DEPUTY SHERIFF R. C. AMOS called as a witness in behalf of the plaintiff in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hutcherson:

Q. Mr. Amos, on September 4, 1964, the night of the accident between Mr. Cundiff and Mr. Marshall, you were directing—as already has been testified, that you were directing—traffic at the intersection of Perdue Lane and Route 40.

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Did you at anytime that night give a signal to anybody to turn into Perdue Lane?

Mr. Rogers: Now, if Your Honor, please, I am going to object to that question. He asked that same question.

Mr. Hutcherson: No, sir, I did not ask that question before.

The Court: All right, let him answer it. Let him tell what kind of signal he gave.

Mr. Rogers: Note my exception.

The Witness: No, sir, I did not give any turn into Perdue Lane.

Mr. Hutcherson: That's all.

CROSS EXAMINATION

By Mr. Rogers:

Q. There's no question, Mr. Amos, that you did give a signal to this automobile operated by this young man?

A. Sir?

Q. You did give a signal, did you not, sir, to this automobile operated by this young man?

A. Yes, sir.

Mr. Rogers: All right.

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RE-DIRECT EXAMINATION

By Mr. Hutcherson:

Q. What signal did you give him?

A. To proceed up 40.
Q. Proceed up 40?
A. Yes.
Q. Did you also give a signal to Mr. Cundiff?
A. To proceed down 40 (indicating).

Mr. Hutcherson: That's all.

RE-CROSS EXAMINATION

By Mr. Rogers:
Q. Hold it just a second. What sort of signal, Mr. Amos, did you give to Trooper Hodges and Deputy Hodges and Trooper Riddle to start traffic going?
A. I believe at that time we were using two blows on the whistle.
Q. Two blows on the whistle?
A. Yes, sir, and they could also see you, too.
Q. Well, I take it there was a noise around there. Could they hear that whistle?
A. Yes, sir, and they could see you, too. You see, each one of them was in sight of me.
Q. Did you give him a hand signal?
A. Yes, also.
4/18/69 Q. Gave a hand signal?
page 204 } A. Yes, sir.

Mr. Rogers: That's all.

By The Court:
Q. I understand you had a flashlight in your right hand.
A. Yes, sir.
Q. That was when you signaled traffic going west to proceed?
A. Yes, sir, towards Rocky Mount.

The Court: All right.

By Mr. Rogers: (continues examination)
Q. Let me ask you this. This accident happened a long time ago, didn't it?
A. Yes, sir.
Q. You have investigated a few since then, haven't you?
A. Sir?
Q. You have investigated a few accidents since this one occurred, haven't you?

A. Yes, sir.
Q. And I take it, it would be difficult to remember all the details of that accident, wouldn't it?
A. Yes, sir, it would be right hard.

Mr. Rogers: I understand that. Thank you, sir.

4/18/69
page 205 } By Mr. Hutcherson:
Q. Wouldn't be hard for you to remember whether you gave a signal to turn into Perdue Lane, or not, wasn't it—because that wasn't your policy—that wasn't your usual procedure?

Mr. Rogers: I object to that question.
The Court: I think we have gone far enough on that.
Mr. Rogers: Please note my exception and we are going up on it.
Mr. Hutcherson: All right.

The witness stands aside.

The Court: Well, is that all the evidence in rebuttal?
Mr. Hutcherson: That's all.
The Court: Both sides rest?
Mr. Rogers: Yes, sir.
The Court: Ladies and gentlemen, it is necessary for the Court to prepare the instructions, so you may be at ease until we get back. Now, until we return, do not let anyone discuss the case with you and do not discuss it among yourselves or permit anyone to discuss it with you.

4/18/69
page 206 } IN CHAMBERS AT 3:30 O'CLOCK, P. M.

(Out of the presence of the jury.)

Mr. Rogers: Judge, may I before we get into the instructions simply renew the defendant's motion to strike the plaintiff's evidence now at the conclusion of all the evidence, for the reasons previously assigned at the time the motion to strike was originally made, and I assume the Court is going to overrule the motion.
The Court: Yes, sir.
Mr. Rogers: And then may I note the exception?

The Court: Yes, sir.

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

The Court: I'm going to give the following instructions:

Number 1 is for the plaintiff and it is the understanding of a signal to obey a signal when received.

Number 2 for the plaintiff is the duty to observe the signal —I mean is the right-of-way of the plaintiff and his duty to keep a reasonable lookout.

Number 3 is given for the defendant—misunderstanding of a signal. I guess that's the way to put it.

Number 4 is the duty of Cundiff to keep a lookout, even though he had the right-of-way.

4/18/69 page 207 } Number 5 is contributory negligence for the defendant.

Number 6 is the burden of proof of contributory negligence for the plaintiff.

Number 7 is the requirement for a person to act with ordinary care under the circumstances, and given for the defendant.

Number 8 is no presumption from the mere happening of an accident and given for the defendant.

Number 9 is the sympathy instruction; and

Number 10 is the damage instruction for the plaintiff.

Now, gentlemen, I have refused two instructions which were offered by the defendant; first is the signal to turn, or turning instruction, D-1. The other is D-2 on unavoidable accidents.

Now, I would like to have the defendant make such objections to the plaintiff's instructions as he sees fit.

Mr. Rogers: All right. If Your Honor, please, the defendant respectfully objects to the giving of Instruction Number 1 on the grounds that there was no evidence to support the instruction; specifically, there was no evidence to support a finding or a conclusion that the defendant failed to use reasonable care to understand the signal given by the police officer.

4/18/69 page 208 } The defendant respectfully excepts to the giving of Instruction Number 2 embodying the right-of-way on these grounds: the Court first tells the jury in this instruction that, "If it believes from the evidence that the police officer controlling traffic gave a signal for the plaintiff to proceed, then under such circumstances," and so forth. And there is no, so far as I know, nothing in the evidence that suggested that the police officer did not give Cundiff a signal to proceed. As far as I know, nobody contests that, so the Court

is, in effect, telling the jury as a matter of law that the plaintiff had the right-of-way.

The Court: I think he did, if you want to put that in the record.

Mr. Rogers: And, in view of the Court's comment that the plaintiff had the right-of-way, in effect, this destroys the other instructions that are given in favor of the defendant. The defendant takes the position that under the defendant's theory of the case, if the defendant received a signal or acting in the exercise of reasonable care, believed that he received a signal to proceed to turn, then the rights and obligations of the parties were mutual, and there was no right-of-way.

The converse of Instruction Number 2 illustrates the defendant's point. If the defendant had, in fact, re-
4/18/69 ceived a signal from Deputy Amos to proceed
page 209 } to make his left turn, I doubt that the plaintiff would permit an instruction to the effect that the plaintiff had the right-of-way. I think that in this case, if you accept the defendant's theory of the case that the jury should be allowed to consider that theory and to accept it under the evidence of the case; and then there is no right-of-way, and I think the instruction, as given, is highly prejudical to the defendant because it tells the jury that the plaintiff had the right-of-way and destroys the effect of any other instructions given for the defendant.

The Court: All right, motion is overruled.

Mr. Rogers: Sir?

The Court: The motion is overruled.

Mr. Rogers: I'm just stating my exceptions, sir.

The Court: All right, you are stating your exceptions.

Mr. Rogers: I believe that's all. Should I, at this point,—

The Court: Go on and make objection to those instructions I did not give.

Mr. Rogers: If the Court, please, the defendant would respectfully except to the action of the Court in refusing Instruction D-1 and D-2. Instruction D-1 pertains
4/18/69 to the duty of a driver of a motor vehicle re-
page 210 } ceiving a signal from another driver, and it is the defendant's contention here that the evidence was to the effect that plaintiff, in the exercise of reasonable care, should have seen a left turn signal given by the defendant, Michael Marshall; that, under the circumstances, and in view of the fact that the plaintiff said he also saw a signal from the police officer for the defendant to proceed, that in the exercise of ordinary care the plaintiff was obligated to have his vehicle under control to avoid an accident resulting from a misunderstanding of the signal.

On Instruction D-2: this instruction is primarily out of the case—the citation I did not have immediately with me—but it is in 209 Virginia, which recognizes that there are instances in which unavoidable accidents occur, in which, if you accept a particular version of an accident, whether it be the plaintiff's or the defendant's, and this would have to be for the jury to determine, if they accepted the defendant's version in this case; and they could find that there was an unavoidable accident.

The Court: All right. Any from the plaintiff?

Mr. Hutcherson: We have one objection on exception, In struction Number 5, Your Honor.

Mr. Ellett: This is the contributory negligence.

4/18/69 page 211 } Mr. Hutcherson: Yes.

The Court: One of you do it.

Mr. Ellett: Right; I will do it. We object and except to the giving of Instruction Number 5 on the question of contributory negligence on behalf of the plaintiff, as there is no evidence before the jury on which to find any contributory negligence on behalf of the plaintiff. We, in lieu of this, would tender an instruction to the Court: "That the Court instructs the jury that the plaintiff, Malcolm Cundiff, was free from contributory negligence which proximately contributed to the accident as a matter of law."

The Court: I couldn't give that instruction.

Mr. Hutcherson: We realize that and suppose you mark that "refused".

Mr. Ellett: And we note an objection and exception.

The Court: The instruction just offered would be "P-1" and refused.

Mr. Hutcherson: We knew you were going to refuse it.

The Court: All right. Any other objections, gentlemen? If not, how long do you want to argue this case?

(Thereupon, at 5:30 o'clock, P. M., Court and counsel returned to the Courtroom, where the following occurred before the jury:)

4/18/69 page 212 } The Court: Ladies and gentlemen of the jury, I am sorry we have taken so long, but we couldn't help it. I want to make this observation before we proceed further: it is now 5:30, and I am at your disposal and so are the attorneys. If you feel that you can stay here and properly adjudicate this case and complete it this afternoon, we will stay here and until late hours, if necessary, and we will be willing to stay; or, if you want to come back in the morning and complete the case, we will let you do it then.

To give you some judgment as to the time that I think it would take at least an hour for the arguments to be concluded —that's just my guess. I am leaving it up to you all.

(The jury agreed to remain.)

The Court: All right, we will stay. I am at your service but I don't want to do anything that would in any way bother you. Do any of you want to call home before we start?

A Juror: I have already called.

Another Juror: I think most of us have called, Your Honor.

The Court: All right, thank you.

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Ladies and gentlemen of the jury, I am now going to give you the instructions which will guide you to consider the evidence in this case. Of course, you are the sole judges of the facts and the credibility of the witnesses. The judgment of the Court is sometimes designated as "the judge of the law", and gives you the law in the form of instructions which are to guide you in considering the evidence; they are the rules to go by. You have to have rules to go by in a law case, and these are my instructions.

I tried to give you the theory of both the plaintiff and the defendant; they should be read and considered as a whole. There are ten instructions and I am going to read them to you, but you may take them into your room for your deliberations.

(Thereupon, the Court read the instructions to the jury.)

The Court: Ladies and gentlemen of the jury, you may now give attention to the argument of counsel.

(Mr. Ellett made the opening argument to the jury in behalf of the plaintiff.)

(Mr. Davis made the opening argument to the jury in behalf of the defendant.)

(Mr. Rogers made the closing argument to the jury in behalf of the defendant.)

(Mr. Hutcherson made the closing argument to the jury in behalf of the plaintiff.)

4/18/69
page 214 } The Court: There was one exhibit you gentlemen were talking about that you were to get up.

Mr. Hutcherson: That was Dr. Tucker's bill. Did you all ever fix that?

Mr. Rogers: I think Mr. Ellett inserted, if Your Honor, please, a copy—a partial copy of it.

The Court: Well, do you all want to eat something before you go out?

Mr. Ellett: Judge, excuse me. You were asking about this bill. I just wrote on the bottom, which is a partial statement, "It is stipulated that Dr. Tucker's total bill to date was $1421.10."

(Bill referred to above was received in evidence and marked, PLAINTIFF'S EXHIBIT #15.)

The Court: Members of the jury, I want to talk to you a moment. I have written—if you find in favor of the plaintiff, Mr. Cundiff, you would use the form which I have here (indicating), and if you find that he should not recover and find in favor of Michael Lee Marshall, then you use this form (indicating), which I have placed on the bottom.

Select one of your number as foreman and, after you arrive at your verdict and you decide to use one of the verdicts, you can use one of these verdicts and then have it
4/18/69 signed by the foreman and return to the court-
page 215 } room. Take the instructions and those exhibits and also that blackboard into your room. You may now retire.

(The jury left the courtroom to deliberate over their verdict at 6:40 o'clock, P. M., and at 8:37 o'clock, P. M., the Court stated the following to the attorneys:)

The Court: Gentlemen, I thought it might be advisable to call the jury out and do you waive the call?

Mr. Rogers: Yes, sir.

Mr. Ellett: Yes, sir.

(The jury was then brought into the courtroom at 8:40 o'clock, P. M., and the following occurred:)

The Court: Ladies and gentlemen, the reason I called you out is that it is getting a little bit late. I don't want to rush you but we haven't had anything to eat.

A Juror: We haven't had either, sir.

The Court: I just wondered whether you wanted to take further time to consider your verdict or if you would like to get off awhile.

A Juror: Well, I don't know. Maybe if we went back for a few minutes and if we couldn't reach a decision, we will just come back. We would like to try a few more minutes anyway.

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The Court: All right, you may go back. I am not rushing you but I thought it was getting late and I wanted to accommodate you.

(At 8:42 o'clock, P. M., the jury retired to deliberate further over their verdict, and the jury returned to the courtroom at 8:50 o'clock, P. M.,with the following verdict:)

The Court: Waive the call, gentlemen?

Mr. Ellett: Yes, sir.

Mr. Rogers: Yes, sir.

The Court: Ladies and gentlemen of the jury, listen to your verdict: "We, the jury, find a verdict in favor of the plaintiff, Malcolm J. Cundiff, and fix his damages at $17,000.00. William M. Parcell, Foreman."

Is that your verdict, *lady* and gentlemen?

The Jury: Yes, sir.

The Court: So say you all?

The Jury: Yes, sir.

The Court: Any motion before the jury is discharged?

Mr. Rogers: If Your Honor, please, I want to make a motion but I think it can wait.

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The Court: I say, "before the jury".

Mr. Rogers: No, sir.

The Court: Thank you all very much. You are discharged from further consideration of this case and I thank you for staying here. You have worked very hard on it and I appreciate it. Please come back when I told you. Some of you will come back Monday.

(The jury then left the courtroom.)

Mr. Rogers: If Your Honor, please, the defendant respectfully moves the Court to set the verdict aside as being contrary to the law and the evidence in the case, and for errors of the Court previously assigned.

The Court: I would have to overrule it.

Mr. Rogers: All right, sir. Well, may I ask the Court to allow me to prepare an order rather than entering an order at this time?

The Court: Yes, sir. And it may be that you want to appeal. If you do,—

Mr. Rogers: Yes, sir, I would like to consider it.

* * * * *

EDITOR'S NOTE: The following Notice of Appeal and Assignments of Error were omitted at page 24 in printing this record.

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

YOU ARE HEREBY NOTIFIED that the defendant, Michael Lee Marshall, does hereby file with the Clerk of the Circuit Court of Franklin County, Virginia, that his Notice of Appeal and Assignments of Error from the final judgment order entered in this case on April 18, 1969, and the defendant announces his intention to apply to the Supreme Court of Appeals of Virginia for Writ of Error and *Supersedeas* to the said final judgment order of April 18, 1969.

The defendant assigns as error the following:

A. As to the separate trial on defendant's Special Plea of Release held on February 8, 1968:

1. The action of the trial court in denying defendant's motion made at the conclusion of plaintiff's evidence
page 2 } and renewed at the conclusion of all evidence to strike the plaintiff's evidence and to enter summary judgment in favor of the defendant;

2. The action of the trial court in failing to enter judgment upon the jury's verdict in favor of the defendant;

3. The action of the trial court in granting by its order of May 24, 1968, plaintiff's motion to set aside the jury's verdict in favor of the defendant, and directing trial on the merits;

4. The action of the trial court in denying defendant's motion made on April 18, 1969, that the jury's verdict in favor of the defendant be reinstated and final judgment entered for the defendant;

B. As to the trial on the merits held on April 18, 1969:

1. The action of the trial court in granting over the objection of the defendant Instruction No. 2 requested by the plaintiff;

2. The action of the trial court in refusing Instruction D 1 requested by defendant;

3. The action of the trial court in refusing Instruction D 2 requested by defendant;

4. The action of the trial court in denying defendant's motion that the jury's verdict in favor of the plaintiff be set aside as contrary to the law and evidence and because of errors of the court previously assigned.

Respectfully,
MICHAEL LEE MARSHALL

By Robert J. Rogers
Of Counsel

* * * * *

Filed in the Clerk's Office of the Circuit Court of Franklin County the 27 day of May 1969.

Wm. J. Walker, Jr., Clerk

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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